ELEMENTS OF MODERN COURT REFORM

RANDALL T. SHEPARD*

The story of America's courts during the last century could easily have been told by reference to two large-scale trends, one institutional and one jurisprudential. This new century features a third story, one of a very different sort.

As for courts as institutions, the early decades of the twentieth century featured the first identifiable national trend since the debates about judicial selection during the 1830s. Dean Roscoe Pound's famous speech to the annual meeting of the American Bar Association in 1906 reflected the breadth of the movement it begat: "The Causes of Popular Dissatisfaction with the Administration of Justice."[1] Pound's formula for unifying courts and building a new field called court administration became the central feature of judicial change for at least two generations.

Subsequent to this broad movement in organizational reform, Earl Warren's years at the U.S. Supreme Court launched a thirty-year jurisprudential story that featured both trend and counter-trend. The trend, of course, was the federalization of a host of rules and doctrines, largely in the criminal law, and their imposition on state courts through vehicles like the Fourteenth Amendment. One need only mention case names to evoke this movement: *Miranda v. Arizona*,[2] *Mapp v. Ohio*,[3] *Brady v. Maryland*.[4] The counter-trend that began in the 1980s and ran full force for the remainder of the century was the rise of state constitutional law litigation, given new life as the Supreme Court took a more modest approach to recognizing new federal constitutional rights.[5]

This Article argues that a third great trend has been under way in the American legal system, one characterized by court innovation. It has been driven by multiple elements of the legal profession, but features a new and unusual role by the courts themselves, especially a new role by state supreme courts and enterprises inside the judicial system where judges and court staff hold sway.

This period of court innovation features a vast collection of examples and objectives, but there follows here a recitation of some of the most evident reforms. While many of the illustrations feature Indiana stories, in each of these fields shares common ground with court reformers elsewhere.

---

* Chief Justice of Indiana, 1987-2012. A.B., 1969, Princeton University; J.D., 1972, Yale Law School; LL.M., 1995, University of Virginia School of Law.

1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906); *see also* Randall T. Shepard, *Introduction: The Hundred-Year Run of Roscoe Pound*, 82 IND. L.J. 1153 (2007).

2. 84 U.S. 436 (1966).

3. 367 U.S. 643 (1961).

4. 373 U.S. 83 (1963).

5. *See generally* Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996).

I. BETTER ATTENTION TO FAMILIES AND CHILDREN

When most Americans say they are "going to court," they do not mean that their products liability claim is about to be heard by a jury in an Article III tribunal, or even that their bankruptcy is under way in an Article I court. Rather, they mean that they were tagged for a traffic violation, or that there is some family dispute to be heard in the county courthouses that have been a ubiquitous feature of American life since Alexis de Tocqueville examined the nation during the 1830s.[6]

Still, long after American reformers created the first juvenile delinquency courts during the first decade of the twentieth century, disputes in the nature of dissolution of marriage, child custody, and abused and neglected children often tended to proceed like standard civil litigation. The modern scene reflects a very different picture, one characterized by a high level of national activity and state and local innovation. Indiana's part in this national story is a considerable one.

A. Guardian Ad Litem/Court-Appointed Special Advocates

While the government and parents long enjoyed legal representation in child custody and abuse and neglect cases, children themselves did not. Realizing that understaffed courts and public agencies meant that children entering the court and foster care systems might be leaving the frying pan and entering the fire, Judge David W. Soukup, a juvenile judge in Seattle, developed the first Court-Appointed Special Advocate (CASA) program in 1977.[7] Soukup personally recruited and trained community volunteers to speak for the interests of children who entered the child welfare system.[8]

---

6. Tocqueville was impressed by the extent to which the legal system impacted all aspects of American society. As he put it:

> There is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question. Hence the parties in their daily polemics find themselves obliged to borrow the ideas and language of the courts. Since most public men either were or are lawyers, it is only natural for them to bring their professional habits and ways of thinking to their dealing with the public's business. Jury duty makes people of all classes familiar with legal ways. In a sense, the language of the judiciary becomes the vulgar tongue. Thus the legal spirit, born in law schools and courtrooms, gradually spreads beyond their walls. It infiltrates all of society, as it were, filtering down to the lowest ranks, with the result that in the end all the people acquire some of the habits and tastes of the magistrate.
>
> . . . [I]t envelops the whole of society, worms its way into each of the constituent classes, works on society in secret, influences it constantly without its knowledge, and in the end shapes it to its own desires.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 310–11 (Arthur Goldhammer trans., The Library of America 2004) (1835).

7. *About: History of CASA*, IND. JUDICIAL BRANCH: DIVISION OF STATE CT. ADMIN., http://www.in.gov/judiciary/galcasa/2387.htm (last visited May 9, 2012).

8. *Id.*

Indiana developed its own statewide CASA Program in 1989, when the legislature created the Office of Guardian Ad Litem and Court Appointed Special Advocate Services, part of the Division of State Court Administration.[9] Now the law requires appointing either a guardian ad litem or a CASA in all abuse and neglect cases.[10] In 2009, nearly 3000 active CASA volunteers advocated for children in Indiana court proceedings.[11] Nationally, nearly 70,000 CASA volunteers represented nearly 250,000 children in 2008.[12] This court innovation has empowered caring citizens to have a remarkably positive impact on the lives of children who might otherwise have fallen through the proverbial cracks.[13]

B. Family Mediation and Family Courts

Beyond the question of representation, court reformers have been concerned with the problems that arise when one family may have multiple cases pending in different courts at the same time (say, a dissolution of marriage, a protective order, and a delinquency matter). Resolving these matters before different judges risks uninformed decision making and conflicting orders that may even make things worse.

Taking cues from national conversations about such issues, the Indiana Supreme Court and the Indiana General Assembly developed the Family Court Project in 1999.[14] The Family Court Project allows bundling cases under a one-family-one-court model, either permanently or for a limited time. Recent analysis of these techniques demonstrates significant progress in avoiding conflicting orders, avoiding relitigation, using alternative dispute resolution, and coordinating court and community services for families and children.[15]

C. Parenting-Time Guidelines

Countless facets of the courts, from the way they are structured to the

---

9. IND. CODE § 33-24-6-4 (2011); *see also* Act of May 9, 1989, Pub. L. No. 357-1989(ss), 1989 Ind. Acts 2599.

10. IND. CODE § 31-33-15-1 (2011).

11. *See About: History of CASA*, *supra* note 7.

12. *Id.*

13. *See, e.g.*, Alex Campbell, *GM Retiree Is Honored for Her Volunteer Work as an Advocate for Child in Foster Care System*, INDIANAPOLIS STAR, Oct. 16, 2011, http://www.indystar.com/article/20111016/HELP05/110160373/GM-retiree-honored-her-volunteer-work-an-advocate-child-foster-care-system.

14. *See About the Family Court Project*, IND. JUDICIAL BRANCH: DIVISION OF STATE CT. ADMIN., http://www.in.gov/judiciary/family-court/2396.htm (last visited May 15, 2012). A number of counties have taken advantage of this project to fundamentally change the way their family law cases are managed. *See, e.g.*, St. Joseph Cnty. Local R. LR71-FL00-419 (effective January 1, 2008).

15. *See generally* FRANCES G. HILL & LORETTA A. OLEKSY, VISION AND EVALUATION: THE INDIANA FAMILY COURT PROJECT (2008), *available at* http://www.in.gov/judiciary/family-court/2361.htm.

vocabulary they use, affect the quality of dispute resolution. For example, for many years it was common to speak of divorces, child custody proceedings, and visitation rights. Seeking even simple ways to mitigate the acrimony for which these disputes are famous, Indiana has been at the forefront of redefining these concepts as dissolutions of marriage and parenting time. Recognizing that children benefit from frequent, continuing, and meaningful contact with both parents, and that scheduling time is more difficult between separate households the heads of which may not be on good terms, the Indiana Supreme Court adopted Parenting Time Guidelines for resolving disputes over children and ensuring that both parents have time to be just that to their children.[16] The shift in emphasis away from the rights of adults and toward the needs of children eventually led the Indiana General Assembly to abolish the idea of "visitation."[17]

D. Domestic Violence and the Protective Order Registry

More dangerous disputes, however, demand a hard look at how courts interact with other institutions. For example, in the year ending June 30, 2009, more than fifty Hoosiers died in incidents of domestic violence, and 11,251 adults and children went to an emergency shelter to escape a dangerous home.[18] The preventable nature of many of these tragedies underscores the need for courts to ensure that their traditional ways of doing things do not hinder or frustrate law enforcement's ability to take effective action. In the old days (which might be as recent as four or five years ago), a police officer responding to a domestic violence call might encounter a dispute over what a protective order might actually require and have few reliable ways of finding out. Such problems were all the more difficult when the order issued from a court of a different locale.

Recognizing this crucial role of police officers, the Indiana Supreme Court, the Indiana Criminal Justice Institute, and the State Police created the Indiana Protective Order Registry, administered by the Judicial Technology and Automation Committee (JTAC).[19] An officer can pull up an electronic version

---

16. INDIANA PARENTING TIME GUIDELINES (2008); *see also* MICHIGAN PARENTING TIME GUIDELINE, *available at* http://courts.michigan.gov/scao/services/focb/parentingtime/FOC_Forms/pt_guidelines.pdf (noting that the Guidelines are based on the standards set forth in Michigan Compiled Laws Section 722.27a, as adopted in 1989); SOUTH DAKOTA PARENTING TIME GUIDELINES, *available at* http://www.sdjudicial.com/courtinfo/parenttimeguide.aspx (select "Parenting Time Guidelines" link). South Dakota's legislature required the South Dakota Supreme Court to "promulgate court rules establishing standard guidelines to be used statewide for minimum noncustodial parenting time." S.D. CODIFIED LAWS § 25-4A-10 (2002).

17. S*ee, e.g.*, Act of April 25, 2005, Pub. L. No. 68-2005, § 45, 2005 Ind. Acts 1582 (amending Indiana Code Section 31-17-4-1, concerning the rights of a noncustodial parent, to replace "visitation" with "parenting time").

18. *Fact Sheet: Protection Order Registry*, JTAC (Apr. 6, 2010), http://www.in.gov/judiciary/jtac/files/jtac-factsheets-por-factsheet.pdf.

19. *See generally* Incourts, Indiana's Protection Order Registry, YOU TUBE (Oct. 21, 2010), http://www.youtube.com/watch?v=3OXC8vRuoBU.

of a protective order on the laptop in his cruiser, eliminating any guesswork about whether a court has authorized action in a particular situation. A potential victim can now apply for a protective order online, and when that order issues, it is immediately transmitted electronically to all relevant jurisdictions. JTAC has started sending text messages to potential victims to alert them when an officer is about to make service of process on the potential abuser—a particularly dangerous moment for the possible victim because of the anger it might arouse.

II. STRUGGLING AGAINST LEGAL COMPLEXITY

The profession regularly acknowledges that most sources of legal information upon which our work rests grow more voluminous, more detailed, and yes, more arcane, over time. The statute books expand, the regulations proliferate, the published decisions grow, and even the number of law reviews balloons. This expansion of law sometimes seems to threaten to overwhelm even law-trained participants; it is doubly true for the clients and citizens who find themselves with a legal problem. Against this tide, blows for simplicity are hard to come by. Still, there are multiple examples of beneficial reforms in the last decade.

A. Plain-English Jury Instructions

De Tocqueville observed that jury service in America "vests each citizen with a kind of magistracy. It teaches everyone that they have duties toward society and a role in its government."[20] The U.S. Supreme Court has said that "[j]ury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people."[21]

Still, service as a juror can be a weighty burden beyond the issues of conscience and conflict to which they may be subjected. A citizen receiving a summons for jury duty must await the call to jury duty, spend time in the jury pool, waiting on a trip to court, and submit their backgrounds, beliefs, and perspectives to examination by judges and attorneys—all in front of strangers who live and work in their community. Then, if they are selected as jurors for a trial—which could run anywhere from days to several weeks, and for which they are reimbursed a pittance—they must attentively study the evidence, the arguments, and the witnesses and make a collective decision of guilt or innocence or civil recompense.

Immediately before the jury starts deliberating, of course, the judge must inform them about what law guides this process. While this sounds straightforward, it has long meant that we bombarded jurors with instructions drafted and phrased by lawyers and judges for lawyers and judges (actually, "for the appellate judges," we sometimes say).

By way of example, in explaining the difference between circumstantial and direct evidence—a distinction that arises frequently, to say the least—our pattern jury instructions once said, "Circumstantial evidence means evidence that proves

---

20. DE TOCQUEVILLE, *supra* note 6, at 316.

21. Powers v. Ohio, 499 U.S. 400, 407 (1991).

a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts."[22] Nearly impenetrable, such instructions and dozens of others covering all manner of questions, often left jurors feeling like they were trying to drink from a legal fire hose.

Some things about the burdens of jury duty we cannot change, but this was not one of them. To that end, the Indiana Judges Association and the Indiana Judicial Center embarked on rewriting Indiana's instructions in straightforward language that non-lawyers can comprehend and apply without losing the critical legal meanings of the instructions themselves. The IJA's Civil Instructions Committee toiled for three years, assisted by an English and judicial studies professor, to complete the new Indiana Model Civil Jury Instructions, drafted in plainer English.

Now, a juror learning the difference between circumstantial and direct evidence receives a short explanation, "Circumstantial evidence is indirect proof of a fact," and an illustration: "For example, direct evidence that an animal ran in the snow might be the testimony of someone who actually saw the animal run in the snow. On the other hand, circumstantial evidence that an animal ran in the snow might be the testimony of someone who only saw the animal's tracks in the snow."[23] Our profession owes jurors this kind of clarity so that they can intelligently fulfill the responsibility to which they are sworn.

B. Rules of Evidence

Confusing jurors about what law they should apply to the evidence in front of them is bad enough; confusing us lawyers and judges as to what evidence the jury may see likewise undermines the even application of justice. For 175 years, the admissibility and use of evidence in Indiana courtrooms existed only at common law. A lucky lawyer with a question about admissibility might find one appellate opinion that answered the question; an unlucky lawyer might find two such opinions, each providing conflicting answers. Then, in 1994, following a broad discussion among practitioners, scholars, and judges, we arrived at the Indiana Rules of Evidence. Twelve pages long, these rules modernized ancient common law, synthesized the Uniform Rules of Evidence and Federal Rules of Evidence, and incorporated comments and concerns from members of the legal profession.

Adopting the Rules of Evidence served multiple goals: "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[24] And it succeeded. "For the first time, the state has a single body of rules to consult for guidance on

---

22. IND. PATTERN CIVIL JURY INSTRUCTION 4.02 (1989 & Supp. 1998) (superseded effective 2010).

23. 1-300 IND. MODEL CIVIL JURY INSTRUCTIONS 305 (2011).

24. IND. R. EVID. 102.

evidentiary questions before and during litigation in all of the state's fora."[25]

C. Self-Help Projects for Unrepresented Parties

Simplifying jury instructions and evidentiary rules may not be enough when a nonlawyer walks into court to represent himself. And self-representation has become ever more common place. Particularly in times of economic uncertainty, individuals may be more inclined to pursue legal redress and yet unable to afford an attorney.[26] The practice of self-representation, however, poses a quandary for judges and court staff: when the ultimate goal of litigation is to achieve a just result, how can a court system level the playing field for a self-represented litigant and still achieve impartiality?

Modern technology has provided part of the answer. In the last decade, the Indiana judiciary's Division of State Court Administration has created an extraordinary self-help website that is both functional and user-friendly, and also ensures that pleadings and documents are correctly structured. Located at www.in.gov/judiciary/selfservice, the site went live in 2001. Since then, it has been upgraded to include videos on self-representation and alternative dispute resolution, auto-filling packets of pleadings for most civil and family law matters, links to legal research and assistance, ways to file for protection orders,[27] and assistance with mortgage foreclosures. It is a resource of genuine value that provides exceptional service for its relatively low cost.[28]

D. The Growth of Alternative Dispute Resolution

Still, a belt-and-suspenders approach never hurts. Indeed, all the efforts to simplify litigation notwithstanding, sometimes it is best avoided altogether. To that end, Indiana's formal effort at ADR started in the early 1990s, the Indiana Supreme Court adopted the Alternative Dispute Resolution Rules. These rules were the product of collaborating with the Indiana State Bar Association, particularly its section for young lawyers, and they reflect a goal "to bring some uniformity into alternative dispute resolution with the view that the interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method."[29] One might say that the goal of the ADR process is to provide litigants "a sure and expedited resolution of disputes while reducing the

---

25. Charles M. Kidd et al., *Survey of 1994 Developments in the Law of Professional Responsibility*, 28 IND. L. REV. 1013, 1013 (1995).

26. This is a particular problem in the context of family law. *See* Randall T. Shepard, *The Self-Represented Litigant: Implications for the Bench and Bar*, 48 FAM. CT. REV. 607 (2010).

27. Unlike many filings, court staffs are specifically obligated to assist the self-represented litigant in filing protection orders. *See* IND. CODE § 34-26-5-3(d)(3) (2011).

28. Indiana is hardly alone in this work. For example, Maricopa County, in Arizona, has a very well-rounded online self-service center. *See Self-Service Center*, SUPERIOR CT. OF ARIZ.: MARICOPA COUNTY, http://www.superiorcourt.maricopa.gov/superiorcourt/self-servicecenter (last visited Jan. 9, 2012).

29. IND. A.D.R. PREAMBLE (2011).

burden on the courts."[30] More plainly stated, though, it could be expressed as 'making justice for all cheaper, faster, and better.' While ADR may not be right for every dispute, it has changed the paradigm in which we attorneys and judges solve clients' problems and administer justice fairly and efficiently.[31]

In this decade, our state courts worked to make this process more accessible to people at all ends of the financial spectrum. In 2003, the General Assembly authorized ADR programs for domestic relations cases across all ninety-two counties.[32] The programs may collect a twenty dollar fee in family law matters towards a fund "to foster domestic relations alternative dispute resolution," including mediation, reconciliation, and parental counseling—with priority going to those litigants demonstrating financial need.[33] So far, twenty-seven counties are operating approved ADR programs in this manner, providing low-cost services to financially needy families across our state.

III. BUILDING A BETTER PROFESSION

Most of the early twentieth century story of the American legal profession featured a prolonged effort to upgrade the path of preparation for becoming a licensed lawyer. So it was that legal education became affiliated with universities, became solely a post-baccalaureate experience, and led to a bar examination as the gateway to a legal career. That set of arrangements became the nearly universal paradigm by the middle of the century. The twenty-first century version of this story plays out in three or four ways.

A. Valid and Reliable Tests and the International Issue

Indiana slowly marched away from its historically Jacksonian approach to regulating admission to the practice of law.[34] Under the 1851 Constitution, the doors to legal practice stood open to every person of good moral character, imposing no educational or testing requirements for bar admission. This persisted until 1931, when the Indiana Supreme Court finally gained the power to regulate admission to the bar, and started requiring applicants to pass a written exam.[35]

---

30. MBNA Am. Bank, N.A. v. Rogers, 835 N.E.2d 219, 222 (Ind. Ct. App. 2005) (quoting Photopaint Techs., LLC v. Smartlens Corp., 335 F.3d 152 (2d Cir. 2003)) (interpreting the Federal Arbitration Act).

31. Litigant satisfaction is important to the system—if citizens lack faith in the fairness of the result, they will be less likely to seek redress or respect a verdict. *See generally* Tom R. Tyler, *Citizen Discontent With Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

32. *See* IND. CODE §§ 33-23-6-1 to -4 (2011).

33. *Id.* § 33-23-6-2(d), (e).

34. *See generally* Elizabeth R. Osborn, *Indiana Courts and Lawyers, 1816–2004*, *in* THE HISTORY OF INDIANA LAW 257, 265-68 (David J. Bodenhamer & Randall T. Shepard eds., 2006).

35. *See In re* Todd, 193 N.E. 865 (Ind. 1935) (recognizing 1932 "Lawyer's Amendment" after reversing prior precedent on referendum voting rules). Indiana also required particular courses

For the next several generations, applicants endured a two-day essay test covering various facets of Indiana law.

Concerns arose over the reliability of tests and their limited and local scope amidst a practice of law nationalizing along with a nationalizing economy. There was growing worry that a traditional bar exam consisting only of a closed-book multiple-choice and essay test "does nothing to encourage law schools to teach and law students to acquire many of the fundamental lawyering skills."[36]

Finally, in 2001, the Board of Law Examiners adopted a new format for the bar exam, one comprising three sections: the Indiana Essay Test (IET), the Multistate Bar Exam (MBE), and the Multistate Performance Test (MPT). Applicants must also pass the Multistate Professional Responsibility Exam (MPRE).[37] Adopting the MBE gave access to rigorous psychometric design and grading, all guided by the National Conference of Bar Examiners, while still ensuring competence on fundamental, nationally-applicable legal theories. The MPRE provided increased emphasis on professional norms, and the MPT provides a means for evaluating "the applicant's ability to evaluate undigested facts and integrate law and facts, and then to develop and employ that information using common lawyering tools."[38]

This effort likewise facilitates movement toward what modern lawyer regulation usually calls "portability" and "internationalization" of the license and the practice.[39] That trend has not stopped at the nation's shores. Large American law firms (and indeed Indiana firms) have expanded into overseas markets,[40] and more foreign lawyers have set up shop in the United States, either in large law firms or in house at multinational corporations.[41] Indiana joined this trend by

---

be taken in law school prior to applying to sit for the bar exam. Beyond the normal first-year student courses, applicants had to take additional courses in administrative law, business organizations, criminal procedure, and tax. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 274 (1992) [hereinafter MACCRATE REPORT].

36. MACCRATE REPORT, *supra* note 35, at 278.

37. *See* Randall T. Shepard, *Building Indiana's Legal Profession*, 34 IND. L. REV. 529, 529-33 (2001) (explaining the history of some of these changes in greater depth and also recommending an Indiana version of the Minority Legal Education Resources bar review supplement).

38. MACCRATE REPORT, *supra* note 35, at 282 (quoting COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, DISCUSSION DRAFT REPORT ON ADMISSION TO THE BAR IN NEW YORK IN THE TWENTY FIRST CENTURY—A BLUEPRINT FOR REFORM 28 (Jan. 2, 1992)).

39. *See generally* Randall T. Shepard, *On Licensing Lawyers: Why Uniformity Is Good and Nationalization Is Bad*, 60 N.Y.U. ANN. SURV. AM. L. 453 (2004).

40. *See* Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093 (2000).

41. *See* Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039 (2002).

being the first state to adopt the ABA's model rule on foreign legal consultants.[42] And Indiana was an early adopter of the new Professional Rule 5.5(c) on temporary presence of American lawyers.[43]

B. Diversity in the Profession

I have described Indiana's position on court reform as "Rarely first, occasionally last, frequently early."[44] One of those times when Indiana was first? Indiana was the first state to have its own program to assist minority, low-income, or educationally disadvantaged college graduates pursuing law degrees and legal careers.[45]

This program, known as the Indiana Conference for Legal Education Opportunity, was a direct result of the Indiana General Assembly stepping up, in 1997, to fill a void created by the Congressional decision to stop financing a federal CLEO program.[46] Through this initiative, we pursue one of the ultimate objectives of our justice system: to create a system where all citizens are equal in the eyes of the law. For citizens to have confidence in the system, they must see people like themselves represented in it at all levels. Indiana CLEO is proven to accomplish this, and so much more, through a program of active recruitment, academic preparation, mentorship, financial assistance, and networking opportunities.

In 1997, twenty-five members of the first class of thirty ICLEO Fellows entered Indiana law schools, and the program has continued and flourished. There have now been 465 beginning law students certified as CLEO Fellows; ninety-five of these are still in school; of the 370 whose education has run its course, 323 have graduated from law school, a success rate of eighty-seven percent; some 172 of these are now admitted to practice in Indiana, and others are practicing in other states.[47] It should be a matter of great pride that, thanks in part to the success of the ICLEO program, the number of minority lawyers in our state has more than doubled since 1997.

Moreover, we have reached the point where those students who benefited from the ICLEO program have reached the highest levels of the legal community—in 2009, Rudolph Pyle III, a member of that inaugural 1997 class, was appointed as judge in the Madison Circuit Court—and re-elected to that

---

42. IND. ADMISSION & DISCIPLINE R. 5 (effective Jan. 1, 1994).

43. IND. PROF. CONDUCT R. 5.5(c) (amended to incorporate subsection (c) effective Jan. 1, 2005).

44. Randall T. Shepard, Chief Justice, Ind. Supreme Court, State of the Judiciary Address to Indiana General Assembly (Jan. 12, 2006), *available at* http://www.in.gov/judiciary/supreme/stjud/2006.pdf.

45. *See* IND. CODE § 33-24-13-2 (2011).

46. *See* Act of May 13, 1997, Pub. L. No. 202-1997, §§ 3, 8, 1997 Ind. Acts 2911–12, 2915 (establishing and funding Indiana's CLEO).

47. These figures are based off of a chart regarding the ICLEO program that will be published in the forthcoming 2011 Indiana Judicial Service Report.

position in 2010. He was the first Indiana CLEO graduate to be become a judge in a court of record. The first CLEO judge in any court was Eduardo Fontanez, who became judge in the East Chicago City Court in 2003. And in 2012, we added another 1997 CLEO graduate to the judiciary: Judge Kenya Jones, who recently served in the Hammond City Court.

While the journey to equal justice for all still stretches ahead of us, we can certainly measure our progress based on these illustrious milestones.

C. Mandatory Continuing Legal Education

As Indiana's bar has become more organized, its members have undertaken to ensure the quality of their work. For many years, continuing legal education was a voluntary undertaking. But as government turned out more statutory and regulatory rules at faster rates, and as malpractice liability loomed, it became apparent that modern practice required greater efforts to keep current with the changing legal landscape. This led to the proposal from the Indiana State Bar Association that the Indiana Supreme Court make ongoing legal education a mandatory part of being a lawyer.[48]

The further challenge has been to elevate the quality of CLEs.[49] To foster this end, in 2011 Indiana's Commission for CLE staged a conference entitled "Learning About Our Learners," aimed at helping Indiana-based, non-profit CLE providers and featuring experts in adult education. And to assess the state of CLE generally, representatives from Indiana attended a national symposium that assembled bar leaders, practitioners, legal educators, judges, and CLE and sought to create recommendations for improving legal education across the professional continuum.[50] This year, Indiana's commission has spearheaded a research project, in which Pennsylvania is joining and assisting, to seek answers to the question, "What is the relationship, if any, between mandatory CLE and the numbers and types of grievances and malpractice cases in Indiana (or other states)?"[51]

---

48. IND. ADMISSION & DISCIPLINE R. 29; *see also* Robert H. Staton, *The History of Mandatory Continuing Legal Education in Indiana*, 40 VAL. U. L. REV. 345 (2006).

49. In the last fiscal year alone, the Indiana Commission on Continuing Legal Education reviewed over 11,000 courses. *See also* Jack W. Lawson, *Mandatory Continuing Legal Education and the Indiana Practicing Attorney*, 40 VAL. U. L. REV. 401 (2006); Randall T. Shepard, *The "L" in "CLE" Stands for "Legal,"* 40 VAL. U. L. REV. 311 (2006).

50. This summit, held in October 2009, was headlined "Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century," and was a product of collaboration between the American Law Institute—American Bar Association Continuing Professional Education. The Executive Director for the Indiana Commission for Continuing Legal Education, Julia Orzeske, serves on the ALI-ABA Critical Issues Summit Working Group. More information about the ALI-ABA program can be found at http://www.equippingourlawyers.org (select "Summit Recommendations" for the output of the summit).

51. At least three other states are interested in joining in this project as well, which will

D. Rescuing Impaired Lawyers and their Clients

Like other professionals, lawyers experience at least our share of mental health and substance abuse issues. Such lawyers still represent clients, and owe those clients the same level of professional competence and diligence that a non-impaired lawyer must provide.[52]

This black letter principle is complicated by the significant vulnerability lawyers, law students, and judges have to alcoholism and substance abuse. Research shows that susceptibility to these problems trends higher in those individuals who show lower tolerance for frustration, greater drive for perfection, and fears of failure.[53] And studies began to show that lawyers suffer from alcoholism at a much higher rate than the general population.[54] Moreover, an impaired lawyer may not demonstrate the impairment at a given time—the condition ebbs and flows, making it harder to identify when that lawyer is capable of providing competent representation.[55]

To counter this trend, and in a collective effort to address this problem *before* it becomes a problem for clients, the legal profession has launched lawyer assistance programs. The first began in Washington State in 1975, with the ABA adopting a model program in 1995 and all fifty states now operating programs based roughly on this model.[56] Indiana's program—the Judges and Lawyers Assistance Program—was launched in 1997 through a merger of the Indiana State Bar Association's Lawyers Assistance Committee and the Indiana Supreme Court's Judicial Assistance Team, under the authority of Indiana Admissions and Discipline Rule 31.[57] Its purpose is "assisting impaired members in recovery; educating the bench and bar; and reducing the potential harm caused by impairment to the individual, the public, the profession, and the legal system."[58] The program's fifteen-member JLAP Committee consists of judges and practicing

---

largely rely upon the assets at Indiana's commission but will result in a template to process and analyze research on this topic across jurisdictions.

52. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-429 (2003) [hereinafter ABA Formal Op. 03-429] ("Obligations with Respect to Mentally Impaired Lawyer in the Firm"); *cf.* IND. PROF. CONDUCT R. 1.16(a)(2).

53. George Edward Bailey, *Impairment, the Profession and Your Law Partner*, 11 No. 1 PROF. LAW. 2, 12 (1999). Other factors at play include genetics, economics, and societal issues. *Id.*

54. *See id.*

55. ABA Formal Op. 03-429, *supra* note 52 , at 3.

56. Bailey, *supra* note 53, at 14. The ABA's Directory of Lawyer Assistance Programs provides contact information and web access to state and local programs around the country. ABA COMM'N ON LAWYER ASSISTANCE PROGRAMS, http://www.americanbar.org/groups/lawyer_assistance (select "State and Local Lawyer Assistance Programs" link) (last visited Jan. 23, 2012).

57. *See About JLAP*, IND. JUDICIAL BRANCH: JUDGES AND LAWYERS ASSISTANCE PROGRAM, http://www.in.gov/judiciary/ijlap/2361.htm (last visited May 15, 2012).

58. IND. ADMISSIONS & DISCIPLINE R. (31)(2).

attorneys and a law school representative, all of whom must have "experience with the problems of chemical dependency and/or mental health problems."[59]

To combat these problems of dependency and impairment, JLAP employs a number of case managers, counselors, and hundreds of volunteers. In 2009-2010, the agency fielded over two hundred new calls for help, and carried over two hundred active cases.[60]

Once a case is opened, JLAP services also include a monitoring program to help the individual maintain accountability. In some instances this monitoring may involve a formal agreement with JLAP, the State Board of Law Examiners, or the Disciplinary Commission; in others, it may require reporting to an employer, family member, or local judge. There is little doubt that this enterprise both sustains lawyers who would otherwise be lost and protects clients who rely on the profession.

IV. ACCESS TO JUSTICE

A decent modern court system worries about how the public learns its way through the courts and how people who need legal advice but cannot afford it might be helped.

A. Judicial Technology and Automation Committee

The modern demand for access to court information makes aggressive use of technology a compelling objective. In recognition of the growing impact of modern computer technology and innovation on the business of the judiciary, the Indiana Supreme Court established its Judicial Technology and Automation Committee (JTAC) in 1999 to provide leadership and governance in court technology. The committee has been chaired by Justice Frank Sullivan, Jr. Among JTAC's core goals are equipping every Indiana trial court with a twenty-first century case management system and connecting individual court's case management systems with each other and with users of court information.

The need for an entity like JTAC becomes clear when one considers that Indiana has over 400 trial courts, including 300 general jurisdiction courts. The Indiana Supreme Court asked JTAC to provide courts and clerks with a connected, statewide case management system (CMS). A ten-month procurement process led by three review committees led to a contract with Tyler Technologies Inc. to provide its Odyssey Case Management System to Indiana courts and clerks. After winning national awards for innovation from organizations like the Council of State Governments, JTAC is just on the verge of deploying our new twenty-first century case management system in forty percent of the state's cases.

Through extensive research, JTAC recognized that centralized, web-based software has many advantages over standalone software that must be managed and updated one locale at a time. Therefore, JTAC created a secure extranet

---

59. IND. ADMISSIONS & DISCIPLINE R. (31)(3).

60. TERRY L. HARRELL, 2009-2010 JLAP ANNUAL REPORT 2, *available at* http://www.in.gov/judiciary/ijlap/2009-10-annual-report.pdf.

website, dubbed INcite (Indiana Court Information Technology Extranet), to serve as a single environment for hosting the considerable array of web-based applications.

Among the applications INcite supports are the BMV SR16-Filing Application, the Department of Child Services Probation Program, Electronic Citation and Warning System Central Repository, Electronic Tax Warrants, the Jury Management System, the Jury Pool Export, the Marriage License E-file System, Mental Health Adjudication, Online Court Statistics Reporting, and the Protection Order Registry.[61]

Forty-four new law enforcement agencies began using JTAC's electronic citation system, bringing the total to more than 250, from the State Police to the St. Joseph County Sheriff's Department. Last year more than 1.3 million were issued using JTAC technology.

B. Pro Bono and Self-Help

Our profession's long-standing tradition is that lawyers help "the defenseless, the oppressed or those who cannot afford adequate legal assistance."[62] In pursuing this aim, Indiana has taken a novel approach by committing itself to an energetic program of "service *pro bono publico*." The central vehicles for this mission are the Indiana Pro Bono Commission and the district pro bono committees, supported by the Indiana State Bar Foundation, to help "promote equal access to justice for all Indiana residents, regardless of economic status, by creating and promoting opportunities for attorneys to provide pro bono civil legal services to persons of limited means."[63]

Most of the Commission's pro bono opportunities are financed through Indiana's Interest on Lawyer Trust Accounts (IOLTA) program.[64] In fact, since its establishment in 1998, the Commission has financed over $8 million in programs through its district committees, using IOLTA money.[65] Additional programs are run by the key contributions from the state's law schools, state and local bar associations, lawyer referral services, and numerous non-profit legal aid clinics and providers.[66] When combined with the self-help programs discussed above, the pro bono efforts of Indiana's lawyers are helping to assure access to

---

61. Incite now has over 20,000 active users and averages 240 visits per hour during a normal business day.

62. IND. ADMISSIONS & DISCIPLINE R. 22.

63. IND. PROF. CONDUCT R. 6.6.

64. *See* IND. PROF. CONDUCT R. 1.15(f). Under this program, each lawyer or firm establishes an interest-bearing trust account for their clients' funds (an IOLTA account) with an approved financial institution. All interest and dividends accrued by those funds are given to the Indiana State Bar Foundation for use, amongst other things, in assisting or establishing pro bono programs.

65. *About the Commission*, IND. JUDICIAL BRANCH: IND. PRO BONO COMMISSION, http://www.in.gov/judiciary/probono/2332.htm (last visited May 15, 2012).

66. *See Find a Legal Aid Provider*, IND. JUDICIAL BRANCH: IND. PRO BONO COMMISSION, http://www.in.gov/judiciary/probono/2343.htm (last visited May 15, 2012).

justice.

C. Courts in the Classroom and Webcasts

The profession can either hope that other institutions convey to the public adequate information about the rule of law, or undertake to do so directly. Courts in the Classroom (CITC) is the educational outreach program of the Indiana Supreme Court that seeks to do the latter. CITC's primary objective is to help "educators, students, historians, and interested citizens learn more about the history and operation of Indiana's judicial branch."[67] Besides curriculum materials, the program also offers four interactive fieldtrips for students each school year and a two-week summer teacher workshop.

The project's website provides teachers and the general public with access to a multitude of lesson plans, scripts, historical documents, archive and live links to webcasts of oral arguments, a searchable database of webcasts, and other resources to help teach about the judiciary.[68]

In addition, CITC provides multiple continuing legal education lectures each year on topics related to Indiana's legal history.

V. STEPPING OUTSIDE THE BOX, OF NECESSITY

It is no stretch to suggest that courts are finding themselves taking on new roles. The traditional and even popular view of courts is that they are reactive institutions, simply declaring the rights of parties and entering judgment accordingly when a case comes their way. Maybe in Blackstone's time, but today's environment does not afford them such luxury.

A. The Mortgage Foreclosure Crisis

The judicial response to record foreclosure filings in the present recession illustrates the more proactive approach taken by judicial leaders. To be sure, the public sector's response has featured actions by all the branches of government, but in the end it fell to the courts to put in place an effective plan for mortgage litigants.

In 2009 the Indiana General Assembly enacted new laws governing foreclosure prevention agreements on residential mortgages and entitling each borrower to a settlement conference with the lender.[69] But between July and December 2009, only 300 or so borrowers out of roughly 17,000 foreclosure matters requested a settlement conference,[70] and even when they did, the

---

67. *About the Project*, IND. JUDICIAL BRANCH: COURTS IN THE CLASSROOM, http://www.in.gov/judiciary/cite/3293.htm (last visited May 15, 2012).

68. *Id.*

69. *See* IND. CODE § 32-30-10.5 (2011); Act of May 7, 2009, Pub. L. No. 105-2009, § 20, 2009 Ind. Acts 904–11.

70. INDIANA SUPREME COURT, 2010 INDIANA JUDICIAL SERVICE REPORT 42-43 (2010) [hereinafter JUDICIAL REPORT], *available at* http://www.in.gov/judiciary/admin/2494.htm.

conference often failed because one or both parties came to the conference unprepared. Of course, the courts could have simply signed off on proper foreclosures, but each foreclosure destroys about $40,000 in economic value in the state.[71]

Instead, Indiana's courts have taken a more active role. For example, courts began sending separate notices about the availability of settlement conferences. As a result, more than forty percent of homeowners respond by requesting a conference. The Division of State Court Administration has also set up a web portal through which citizens can learn more about this process and access the resources they need.[72] The borrower must submit forms online, including a monthly budget, before the conference to help ensure that the parties can reach a settlement if one is possible. In calendar year 2012, roughly fifty percent of homeowners who go to a settlement conference leave with a revised loan, avoiding a foreclosure, and saving Indiana's economy a great deal of economic value in the process.[73] This would not be possible if courts had not taken a more proactive view of problem solving on an aggregate level.

B. Problem-Solving Courts

Another issue that has pushed the judicial system and legal community to expand their notions of traditional roles has been the friction between mandatory sentencing guidelines, prison overcrowding, and recidivism rates; between society's need to hold the guilty accountable and the need of the guilty for rehabilitative opportunities.

Traditional incarceration carries heavy costs for the individual and for the

---

71. G. THOMAS KINGSLEY ET AL., URBAN INSTITUTE, THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES: A PRIMER 20-21 (2009), *available at* http://www.urban.org/UploadedPDF/411909_impact_of_foreclosures.pdf. The report estimates the total cost of a single foreclosure at $79,443, of which $50,000 is primarily absorbed by the lender. The $40,000 total used here incorporates roughly $19,000 in cost to the local community and government, $3000 in reduced equity to surrounding homes, $7000 in loss to the homeowner, and approximately $50,000 of the loss to the lender. *See id.*; *see also The Mortgage Foreclosure Task Force and Settlement Conference Statistics*, IND. JUDICIAL BRANCH: DIVISION OF STATE CT. ADMIN., http://www.in.gov/admin/2364.htm (last visited May 15, 2012).

72. *See* IND. JUDICIAL BRANCH: SELF-SERVICE LEGAL CENTER, http://www.in.gov/judiciary/selfservice/index.htm (last visited May 15, 2012) (select "Help with Mortgage Foreclosures" link).

73. This percentage reflects those homeowners in pilot counties who both respond to the notice and attend the settlement conference. About half the borrowers who receive the notice now respond. JUDICIAL REPORT, *supra* note 70, at 44. But only eighty-nine percent of those who respond qualify for a settlement conference, and only eighty-eight percent of that group then actually request one—and at roughly one-third of the conferences, the borrower fails to appear. *Id.* Thus, when compared to the entire population of borrowers receiving the initial notice, only about twenty percent receive a revised loan. *Id.* Even so, using the measure of the Joint Economic Committee of Congress, this program saved $17.9 million during its first year of operation in only fourteen of Indiana's ninety-two counties. *Id.*

taxpayers of the incarcerating state or federal government. The value of these costs must be weighed against the effectiveness of incarceration in meeting the aims of punishment, deterrence, rehabilitation, or incapacitation.

Between 1970 and 2005, the prison population within the United States jumped by almost 700 percent, from less than 200,000 individuals to some 1.5 million,[74] and as of 2007 the prison population had ballooned to nearly 2.5 million individuals.[75] An additional 5 million or so are under some form of court-ordered probation or supervision, such that 1 in 31 Americans is under the control of a correctional system.[76]

Indiana fares worse in these studies. In 1982, only 1 out of 106 Indiana adults was under correctional control—less than 50,000 individuals.[77] By the end of 2007, that number was virtually matched by just the number of individuals incarcerated in Indiana—43,203 people, to be precise.[78] Added to this by 2007, however, was an astounding 138,256 on probation or parole.[79] The resulting math means that at the end of 2007, one in twenty-six people in Indiana lived under the control of the correctional systems.[80]

For most states, the correctional system trails only health care, educational costs, and transportation as the largest line-item in the budget.[81] Indiana's FY 2008 budget allotted $669 million for corrections—a number equal to roughly 5.3 percent of that budget.[82] Compounding this cost is a resulting consequence of an expanding prison population: drastically overcrowded prisons and the necessary costs of expansion and new construction. Federal prisons are operating at sixty percent overfill, with the average state facility not far behind.[83]

There are other costs associated with prison—those on the individual prisoner. In many states a felony conviction deprives the criminal of the opportunity to serve as a juror, disenfranchises them from the electorate by prohibiting them from voting, negatively impacts their standing in family and

---

74. PEW CTR. ON THE STATES, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-2011, at ii, 1 (2007), *available at* http://www.pewcenteronthestates.org [hereinafter PUBLIC SAFETY] (search for report title in site).

75. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009), *available at* http://www.pewcenteronthestates.org (search for report title in site).

76. *Id.*

77. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS—INDIANA (2009), *available at* http://www.pewcenteronthestates.org [hereinafter INDIANA FACT SHEET] (search for Indiana fact sheet).

78. *Id.*

79. *Id.*

80. *Id.*

81. PUBLIC SAFETY, *supra* note 74, at 25. Compounding this dilemma is that federal funds pay for much of the first three line-items, whereas prisons are almost entirely state-funded. *Id.*

82. INDIANA FACT SHEET, *supra* note 77.

83. *Too Many Laws, Too Many Prisoners*, ECONOMIST, July 22, 2012, http://www.economist.com/node/16636027.

domestic law, and bars them from gun ownership or possession.[84] "Moving on" with their lives is also hindered for most criminals: most basic employment applications require disclosure of felony convictions, and even where the conviction is not itself a disqualifier to the job, it often is to the employer.[85] Criminals with professional degrees or training may lose licenses or certification as a result of the conviction, and may never be able to recover them.

Additional burdens fall particularly hard on certain classes of prisoners and relatives—most notably women and their children. Between 1995 and 2005, the number of female prisoners in the U.S. prison systems grew by fifty-seven percent.[86] As a consequence, by the end of the twentieth century, approximately 250,000 children in America had incarcerated mothers.[87]

Often times, these children have no father or other family member willing to care for them during the incarceration, so they become wards of the state cared for by foster parents.[88] In fact, under the Adoption and Safe Families Act and related state adoption statutes, extended incarceration of a mother can result in termination of her parental rights entirely—severing the family and creating more costs for the state in terms of care and placement of the child.[89] The children themselves frequently suffer through substance abuse, post-traumatic stress, depression, homelessness, and an increased likelihood to themselves be convicted of a crime.[90]

The questions that began to be asked, then, were whether strict incarceration was often enough the most effective sanction, and what the justice system could do to break the cycles of recidivism and shattered families. The response here in Indiana, and elsewhere, has been what we call "problem-solving courts."

We call them problem-solving courts because they aim not just to conduct a trial and impose a sentence—the only two steps really available when I was a trial court judge—but also to focus on whether the particular sentence being imposed really does the best job, at the least overall expense to all involved, of preventing recidivism. To accomplish this, these courts focus on tangible case outcomes, promote reforms within the halls of the courthouse and without, actively enroll judges throughout the course of the case and subsequent treatment, encourage cooperation with non-judicial partners, and employ their personnel and representing attorneys in non-traditional functions.[91]

---

84. Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43, 49 (Timothy Lynch ed., 2009).

85. *Id.*

86. PUBLIC SAFETY, *supra* note 74, at 10. By contrast, the male population increased only thirty-four percent. *Id.*

87. Myrna S. Raeder, *A Primer on Gender-Related Issues That Affect Female Offenders*, 20 CRIM. JUST. 4, 7 (Spring 2005).

88. *See* Chieko M. Clarke, *Maternal Justice Restored: Redressing the Ramifications of Mandatory Sentencing Minimums on Women and Their Children*, 50 HOW. L.J. 263, 271 (2006).

89. *Id.*

90. *Id.* at 266, 273.

91. CTR. FOR COURT INNOVATION, PROBLEM-SOLVING COURTS: A BRIEF PRIMER 8-9 (2001),

Indiana's first such courts opened in 1996, with two drug courts. Today there are forty-nine certified drug courts, fifty-six court-administered drug and alcohol programs, veterans' courts, and delinquency projects run in conjunction with school corporations and social agencies. Probation departments have been professionalized with training and effective tools to monitor those under their charge, and new risk assessment tools instruments help identify the most effective sanction for each individual offender. In doing so, they help effectuate the goal of identifying the worst criminals—those for whom a prison cell is appropriate and necessary—and distinguishing them from the offender who would be best treated through specialized and intense community programs.

The success of these techniques is undeniable. In 2006 and 2007, the Indiana Judicial Center commissioned a study of five adult drug courts.[92] The results were promising: the five courts had completion rates of fifty to fifty-six percent, above the national average of forty-eight percent for non-court directed treatment programs.[93] Moreover, the recidivism rates in all five courts were substantially lower than those of a comparison sample of defendants who qualified for the same drug court but did not participate.[94] The study quantified the value of the savings in fewer recidivist arrests, a lightened case load, less probation supervision, and less incarceration, as totaling more than $7 million.[95] The total return on the taxpayer investment in these programs? For every one dollar invested, up to $5.37 in return.

It requires very little consideration of these numbers—compared to the norm—to understand that a problem-solving approach, though sometimes outside the traditional context of the court system, presents a better alternative than traditional model of try, sentence, incarcerate, and repeat. The development of our problem-solving court system is a step on a different path—a step in the right direction.

All of this is to say that lawyers and judges should not feel constrained by traditional roles in the face of non-traditional (or traditional) challenges. Particularly in times of economic and societal upheaval, the profession should

---

available at http://www.in.gov/judiciary/pscourts/2337.htm (select "Problem-Solving Courts: A Brief Primer" hyperlink).

92. *See* NPC RESEARCH, INDIANA DRUG COURTS: A SUMMARY OF EVALUATION FINDINGS IN FIVE ADULT PROGRAMS 1 (2007), *available at* http://www.in.gov/judiciary/pscourts/files/pscourts-eval-summary.pdf.

93. *Id.* at 3.

94. *Id.* at 4. The differences were dramatic. Recidivism rates—defined in the study as "the number, or percentage, of participants who were re-arrested at least once in the two years after program entry out of the total number of participants in the sample," *id.* at 4 n.1—for the comparison group ranged from thirty-three to forty-one percent. *Id*. at 4. The rates for graduates of the programs, however, ranged from a high of eighteen percent in one court to a low of seven percent in another. *Id.*

95. *Id.* This figure does not include additional, unquantifiable but still important ancillary cost savings, such as lowered health care fees, employment of those in the program and the corresponding tax revenue, and increased health and welfare of the offender's children and families.

feel free—and even obliged—to step in, help out, and raise up. Not all of our efforts will be successful, but as President Roosevelt so famously urged, we must remember to keep our eyes on "the triumph of high achievement," and if we fail we shall at least do so "while daring greatly."[96]

CONCLUSION

A clear lesson of our historical experience since the Industrial Revolution has been that innovation is cumulative; it compounds and proceeds faster and faster apace. Admittedly, there may be no judicial equivalent of Moore's Law, but as courts and professional organizations of judges within the judicial system adopt a more self-reflective and self-critical view of the way we promote justice among our citizens, we will surely be able to provide both a higher quantity and quality of it.

---

96. President Theodore Roosevelt, Speech at the Sorbonne in Paris, France: Citizenship in a Republic (Apr. 23, 1910). The full text of this famous excerpt is something that all members of the legal profession should take to heart:

> It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.

Id.

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2011*

MARK J. CRANDLEY**
P. JASON STEPHENSON***
JEFF PEABODY****

An era passed in 2011, as Chief Justice Randall Shepard completed his last full year on the Indiana Supreme Court. Appointed to the court in 1985 and becoming chief justice in 1987, Chief Justice Shepard's tenure spanned from a time when the Cold War was fading to when Indiana entered the modern, multi-cultural information society. Eras in U.S. Supreme Court history are often known by the then-serving chief justice, such as the Warren Court or the Rehnquist Court or, today, the Roberts Court. To apply the convention to the Indiana Supreme Court, the question posed by the chief justice's retirement is: What did the Shepard court mean to Indiana's judicial history? While only time will provide the final answer, several hallmarks of the Shepard court were evident, even in his final year on the bench.

First, from the very beginning, the Shepard court set about reviving the Indiana Constitution. The chief justice himself called for a "second wind" for the Indiana Constitution shortly after assuming his post.[1] The Indiana Constitution received paramount attention throughout the Shepard years. In 2011, it was the issue most frequently addressed by the justices. Setting aside attorney discipline cases, it was also the most visited issue in each of the prior five years. The Shepard court might well have prompted a cultural change in the Indiana Bar so that Indiana lawyers and judges now properly view constitutional law in terms of the dual state and federal system.

Second, the Shepard court saw a fundamental change in the types of cases heard by the court. The Indiana Constitution was amended in both 1988 and in

---

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to former Chief Justice Shepard. Many thanks to Kevin Betz, who initially developed this article and worked hard to bring it to fruition in years past.

** Partner, Barnes & Thornburg LLP, 2005-present; Assistant Corporation Counsel, City of Indianapolis, 2004-05; Law Clerk for Justice Frank Sullivan, Jr., Indiana Supreme Court, 2000-2001; B.A., 1995, Indiana University; J.D., 2000, Indiana University Maurer School of Law.

*** Partner, Barnes & Thornburg LLP, 1999-present; B.A., 1996, Taylor University; J.D., 1999, Indiana University Robert H. McKinney School of Law.

**** Associate, Barnes & Thornburg LLP, 2008-present; B.A., 2003, University of California, Davis; J.D., 2008, Indiana University Maurer School of Law.

1. *See* Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 575 (1989).

2000 to reduce the number of mandatory criminal direct appeals.[2] Prior to these amendments, virtually every murder case was appealed directly to the Indiana Supreme Court, and the court's docket was bogged down in numerous (and often routine) criminal appeals. The change in the court's jurisdiction gave it greater flexibility over the cases it hears. It has used that discretion to diversify the court's docket so as to hear cases that affect a broader range of Hoosiers. For instance, in 2011 only 45% of the court's opinions arose in criminal cases. The majority of the court's caseload arose in civil cases, which addressed topics as varied as family law, insurance, employment, personal injury, environmental law, tax law, and trust and estates. As the chief justice foresaw in a 1988 law journal article pressing for the jurisdictional change, the court has been able to use its discretionary jurisdiction to act more as a court of last resort so as "to advance its law-giving function in other areas of substantive law."[3]

Finally, an undeniable hallmark of the Shepard court was its ability to reach consensus. For instance, the court was unanimous in 64.8% of its cases in 2011. It was split 3-2 in only 13 of its 86 cases. This was consistent with prior years. In 2010, the court was unanimous in 72.9% of its cases and split 3-2 in only 13% of its cases. In other words, the justices of the Shepard court departed from the majority when they were compelled to do so, but division on the Shepard court was the exception, not the norm.

Table A. In his last full year on the court, Chief Justice Shepard had a phenomenally productive year, writing the most opinions with 23. That was the same number as Justice Rucker and Justice David combined and eight more than Justice Sullivan, the next highest justice. It was the second consecutive year that the chief justice authored the highest number of opinions.

The court again handed down more civil cases than criminal cases, as 55% of the court's opinions came in civil cases. In fact, in the past nine years, civil cases have outnumbered the criminal cases in every year except 2002 and 2007.[4] For the second time in three years, Justice Rucker handed down more dissenting opinions (12) than majority opinions (8).[5]

Table B-1. Justice Rucker and Justice Sullivan were the most aligned pair of justices in civil cases, as they agreed in 95.7% of all civil cases. In previous years, that pair of justices had shown some of the least amount of agreement in civil cases, as they agreed in less than 80% of civil cases in 2009 and 2008.[6] The next highest pair was Justice David and Justice Sullivan, who agreed in 93.2%

---

2. IND. CONST. art. VII, § 4.

3. Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669, 670 (1988).

4. *See* Mark J. Crandley et al., *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2010*, 44 IND. L. REV. 993, 994 (2011) [hereinafter *2010 Indiana Supreme Court Docket*].

5. *Id.* at 994-95.

6. *See id.* at 995.

of all cases.

The lowest level of agreement in civil cases was between Justice Dickson and Justice Rucker, who agreed in only 74.5% of civil cases. This marked the first time this pair of justices agreed in less than 80% of civil cases since 2005.[7] Justice Sullivan and Justice Dickson were second least aligned at 76.6%. This is consistent with prior years, as these two justices were among the least aligned in 2008-2010 with an alignment in 67.3% of civil cases in 2008.[8]

Table B-2. In criminal cases, Chief Justice Shepard and Justice David were the most aligned at 97.4%. Chief Justice Shepard and Justice Sullivan were the second most aligned at 94.9%.
Justice Rucker and Justice Dickson were the least aligned in criminal cases, as they only agreed in 71.8% of all criminal cases. The next lowest percentages also involved Justice Rucker, as he agreed with Justice David in only 79.5% of criminal cases and with Chief Justice Shepard in only 84.6% of those cases.

Table B-3. Looking at all cases, Justice David was the justice most aligned with his peers. The highest percentage of alignment on the court was between Justice David and Chief Justice Shepard at 94%. The second highest percentage was between Justice David and Justice Sullivan at 92.8%. Justice David nearly agreed with a third justice 90% of the time, as his alignment with Justice Dickson fell just short at 89.2%.

By contrast, Justice Rucker only agreed with a single other justice more than 80% of the time. As previously discussed, Justice Rucker wrote more dissents than majority opinions. It is therefore not surprising that the three lowest percentages of alignment involved Justice Rucker, as he aligned with Justice Dickson in 73.3% of all cases, Justice Sullivan in 77.9% of all cases, and Justice David in only 79.5% of all cases. No other justice agreed with any of his colleagues in less than 80% of all cases.

Table C. The percentage of unanimous opinions was slightly lower than in previous years. The court was unanimous in 64.8% of all cases in 2011. In the three previous years, the percent of opinions that were unanimous averaged about 66.1.[9] As with previous years, the number of dissents far outweighed the number of concurring opinions. Of the 32 separate opinions in 2011, all but 6 were dissents. In 2010, there were 27 dissents compared to only 2 concurring

---

7. *See* Mark J. Crandley et al., *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2005*, 39 IND. L. REV. 733, 736 (2006) (noting that in 2005, Justices Rucker and Dickson were least aligned at 75.5%).

8. Mark J. Crandley & P. Jason Stephenson, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2008*, 42 IND. L. REV. 773, 776 (2009) [hereinafter *2008 Indiana Supreme Court Docket*].

9. *See 2010 Indiana Supreme Court Docket*, *supra* note 4, at 995 (discussing past unanimity of the court).

opinions.[10] In 2009, there were 31 dissents and only 3 concurring opinions.[11] These numbers do not necessarily indicate fundamental disagreement among the justices. Dissents remain rare, as they crop up only in 28.6% of all cases. The relative absence of separate concurring opinions shows that the court strives for a true consensus and compromise from the justices that makes separate concurring opinions less useful or necessary. By contrast, the justices will deviate from the need for consensus when compelled to do so because they cannot agree with the majority opinion.

Table D. The court handed down 13 split decisions in 2011, just 15% of its total. Justice David was a key vote in 3-2 decisions in 2011, as he was in the majority in all but one of them. Justice Rucker, by contrast, joined the majority in 3-2 decisions only twice.

Table E-1. For many years, a grant of transfer in a civil case almost assuredly meant that the court would reverse the lower courts. For instance, in 2008 and 2007, the court reversed in 80 and 93.5% of civil cases where transfer had been granted.[12] While a reversal in civil cases remains more likely than not, reversals are not as automatic as they once seemed. In 2011, the court reversed in only 64.5% of civil cases where transfer was granted. In 2009 and 2010, the court reversed about 70% of the time.[13] Whether this is part of a larger trend remains to be seen.

Table E-2. After dropping for many years, the number of petitions for transfer rose sharply to 823 in 2011. This amount was at least 200 petitions more than the previous year, when only 536 petitions for transfer were filed.[14] There were only 728 and 764 petitions filed in 2009 and 2008, respectively.

It remains difficult to obtain transfer, as the court only granted transfer in 10.5% of all cases and only 7.7% of criminal cases. This is consistent with prior years. In 2010, for instance, the court granted transfer in only 11.1% of all cases and 8% of criminal cases.[15] In 2009, transfer was granted in 8.4% of all cases and only 6% of criminal cases.[16]

---

10. *Id.* at 1001 tbl.C.

11. Mark J. Crandley et al., *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2009*, 43 IND. L. REV. 541, 551 tbl.C (2010) [hereinafter *2009 Indiana Supreme Court Docket*].

12. *See 2008 Indiana Supreme Court Docket*, *supra* note 8, at 784 tbl.E-1; Mark J. Crandley et al., *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2007*, 41 IND. L. REV. 839, 849 tbl.E-1 (2008).

13. *See 2010 Indiana Supreme Court Docket*, *supra* note 4, at 996 (discussing reversals in 2009 and 2010).

14. *Id.*

15. *Id.* at 1004 tbl.E-2.

16. *2009 Indiana Supreme Court Docket*, *supra* note 11, at 554 tbl.E-2.

Table F. The Indiana Constitution remains a primary focus of the court's work, as it handed down 12 cases in 2011, which mainly addressed the Indiana Constitution. Personal injury issues also played a central role in the court's 2011 decisions, as it addressed medical malpractice issues five times, negligence issues five times and the statute of limitations three times. It was a relatively quiet year for business issues before the supreme court, as there were no cases addressing the Uniform Commercial Code, corporate law or banking law, and only a single case that fell primarily in the rubric of contract law. Similarly, after handing down three administrative law cases in 2010,[17] the court did not address the topic in 2011. These are areas to which the court may return in 2012.

17. *2010 Indiana Supreme Court Docket*, *supra* note 4, at 1005 tbl.F.

TABLE A
OPINIONS[a]

	OPINIONS OF COURT[b]			CONCURRENCES[c]			DISSENTS[d]		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	12	11	23	0	1	1	0	4	4
Dickson, J.	4	10	14	0	4	4	3	2	5
Sullivan, J.	8	8	16	0	1	1	1	4	5
David, J.	9	6	15	0	1	1	1	0	1
Rucker, J.	4	4	8	0	1	1	6	6	12
Per Curiam	2	8	10						
Total	39	47	86	0	8	8	11	16	27

[a] These are opinions and votes on opinions by each justice and in per curiam in the 2011 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to "control the assignments other than as a member of the majority." *See* Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 213 (1990). The order of discussion and voting is started by the most junior member of the court and follows in reverse seniority. *See id.* at 210.

[b] This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

[c] This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

[d] This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part, or opinions concurring in part only and differing on another issue, are counted as dissents.

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES[e]

		Shepard	Dickson	Sullivan	David	Rucker
Shepard, C.J.	O		35	39	40	36
	S		0	0	0	4
	D	---	35	39	40	40
	N		47	47	44	47
	P		79.6%	83.0%	90.9%	85.1%
Dickson, J.	O	35		36	37	32
	S	0		0	1	3
	D	35	---	36	38	35
	N	47		47	44	47
	P	79.6%		76.6%	86.4%	74.5%
Sullivan, J.	O	39	36		41	33
	S	0	0		0	0
	D	39	36	---	41	45
	N	47	47		44	47
	P	83.0%	76.6%		93.2%	95.7%
David, J.	O	40	37	41		35
	S	0	1	0		0
	D	40	38	41	---	35
	N	44	44	44		44
	P	90.9%	86.4%	93.2%		79.5%
Rucker, J.	O	36	32	33	35	
	S	4	3	0	0	
	D	40	35	45	35	---
	N	47	47	47	44	
	P	85.1%	74.5%	95.7%	79.5%	

[e] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 35 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES[f]

		Shepard	Dickson	Sullivan	David	Rucker
Shepard, C.J.	O		35	37	38	33
	S		0	0	0	0
	D	---	35	37	38	33
	N		39	39	39	39
	P		89.7%	94.9%	97.4%	84.6%
Dickson, J.	O	35		33	35	28
	S	0		0	1	0
	D	35	---	33	36	28
	N	39		39	39	39
	P	89.7%		84.6%	92.3%	71.8%
Sullivan, J.	O	37	33		36	32
	S	0	0		0	2
	D	37	33	---	36	34
	N	39	39		39	39
	P	94.9%	84.6%		92.3%	87.2%
David, J.	O	38	35	36		31
	S	0	1	0		0
	D	38	36	36	---	31
	N	39	39	39		39
	P	97.4%	92.3%	92.3%		79.5%
Rucker, J.	O	33	28	32	31	
	S	0	0	2	0	
	D	33	28	34	31	---
	N	39	39	39	39	
	P	84.6%	71.8%	87.2%	79.5%	

[f] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 35 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES[g]

		Shepard	Dickson	Sullivan	David	Rucker
Shepard, C.J.	O		70	76	78	69
	S		0	0	0	4
	D	---	70	76	78	73
	N		86	86	83	86
	P		81.4%	88.4%	94.0%	84.9%
Dickson, J.	O	70		69	72	60
	S	0		0	2	3
	D	70	---	69	74	63
	N	86		86	83	86
	P	81.4%		80.2%	89.2%	73.3%
Sullivan, J.	O	76	69		77	65
	S	0	0		0	2
	D	76	69	---	77	67
	N	86	86		83	86
	P	88.4%	80.2%		92.8%	77.9%
David, J.	O	78	72	77		66
	S	0	2	0		0
	D	78	74	77	---	66
	N	83	83	83		83
	P	94.0%	89.2%	92.8%		79.5%
Rucker, J.	O	69	60	65	66	
	S	4	3	2	0	
	D	73	63	67	66	---
	N	86	86	86	83	
	P	84.9%	73.3%	77.9%	79.5%	

[g] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 70 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2011. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE C
UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES[h]

Unanimous[i]			Unanimous with Concurrence[j]			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
28	31	59 (64.8%)	0	6	6 (6.6%)	11	15	26 (28.6%)	91

[h] This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

[i] A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result, but not in the opinion, the case is not considered unanimous.

[j] A decision is listed in this column if one or more justices concurred in the result, but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
SPLIT DECISIONS[k]

Justices Constituting the Majority	Number of Opinions[l]
1. Shepard, C.J., Dickson, J., David, J.	3
2. Shepard, C.J., Sullivan, J., David, J.	4
3. Shepard, C.J., Sullivan, J., Rucker, J.	1
4. Shepard, C.J., David, J., Rucker, J.	1
5. Dickson, J., Sullivan, J., David, J.	4
Total[m]	13

[k] This Table concerns only decisions rendered by full opinion. An opinion is counted as a split decision if two or more justices voted to decide the case in a manner different from that of the majority of the court.

[l] This column lists the number of times each group of justices constituted the majority in a split decision.

[m] The 2011 term's split decisions were:

1. Shepard, C.J., Dickson, J., David, J.: Hopper v. State, 957 N.E.2d 613 (Ind. 2011) (Shepard, C.J.); Siwinski v. Town of Ogden Dunes, 949 N.E.2d 825 (Ind. 2011) (David, J.); Sloan v. State, 947 N.E.2d 917 (Ind. 2011) (David, J.).

2. Shepard, C.J., Sullivan, J., David, J.: Lucas v. U.S. Bank, N.A., 953 N.E.2d 457 (Ind. 2011) (David, J.); State *ex rel.* Zoeller v. Aisin USA Mfg., Inc. 946 N.E.2d 1148 (Ind. 2011), *reh'g denied* (Sept. 13, 2011) (David, J.); Barnes v. State, 946 N.E.2d 572 (Ind. 2011), *reh'g granted*, 953 N.E.2d 473 (Ind. 2011) (David, J.); City of Indianapolis v. Armour, 946 N.E.2d 553 (Ind. 2011) (Sullivan, J.).

3. Shepard, C.J., Sullivan, J., Rucker, J.: Pierce v. State, 949 N.E.2d 349 (Ind. 2011) (Rucker, J.).

4. Shepard, C.J., David, J., Rucker, J.: *In re* A.B. v. State, 949 N.E.2d 1204 (Ind. 2011), *reh'g denied* (Nov. 1, 2011) (David, J.).

5. Dickson, J., Sullivan, J., David, J.: Hematology-Oncology of Ind., P.C. v. Fruits, 950 N.E.2d 294 (Ind. 2011) (Dickson, J.); Ind. Patient's Comp. Fund v. Brown, 949 N.E.2d 822 (Ind. 2011) (Dickson, J.); McCabe v. Comm'r, Ind. Dep't of Ins., 949 N.E.2d 816 (Ind. 2011) (David, J.); *In re* O'Farrell, 942 N.E.2d 799 (Ind. 2011) (per curiam).

TABLE E-1
DISPOSITION OF CASES REVIEWED BY TRANSFER AND DIRECT APPEALS[n]

	Reversed or Vacated[o]	Affirmed	Total
Civil Appeals Accepted for Transfer	20 (64.5%)	11 (35.5%)	31
Direct Civil Appeals	3 (100.0%)	0 (0.0%)	3
Criminal Appeals Accepted for Transfer	19 (54.3%)	16 (45.7%)	35
Direct Criminal Appeals	0 (0.0%)	3 (100.0%)	3
Total	42 (58.2%)	30 (41.7%)	72[p]

[n] Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56, 63 (pursuant to Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

[o] Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term "reverse" is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically "vacates" every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, "reverse" or "vacate" simply represents any action by the court that does not affirm the trial court or court of appeals's opinion.

[p] This does not include 6 attorney discipline opinions, 3 judicial discipline opinions, and 8 original actions. These opinions did not reverse, vacate, or affirm any other court's decision.

TABLE E-2
DISPOSITION OF PETITIONS TO TRANSFER TO SUPREME COURT IN 2010[q]

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil[r]	235 (83.3%)	47 (16.7%)	282
Criminal[s]	528 (92.3%)	44 (7.7%)	572
Juvenile	60 (90.9%)	6 (9.1%)	66
Total	823 (89.5%)	97 (10.5%)	920

[q] This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APP. R. 58(A).

[r] This also includes petitions to transfer in tax cases and workers' compensation cases.

[s] This also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS WITH FULL OPINIONS[t]

Original Actions	Number
• Certified Questions	3[u]
• Writs of Mandamus or Prohibition	2[v]
• Attorney Discipline	6[w]
• Judicial Discipline	3[x]
Criminal	
• Death Penalty	1[y]
• Fourth Amendment or Search and Seizure	5[z]
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	1[aa]
Real Estate or Real Property	5[bb]
Personal Property	0
Landlord-Tenant	0
Divorce or Child Support	1[cc]
Children in Need of Services (CHINS)	1[dd]
Paternity	1[ee]
Product Liability or Strict Liability	1[ff]
Negligence or Personal Injury	5[gg]
Invasion of Privacy	0
Medical Malpractice	5[hh]
Indiana Tort Claims Act	1[ii]
Statute of Limitations or Statute of Repose	3[jj]
Tax, Department of State Revenue, or State Board of Tax Commissioners	2[kk]
Contracts	1[ll]
Corporate Law or the Indiana Business Corporation Law	0
Uniform Commercial Code	0
Banking Law	0
Employment Law	2[mm]
Insurance Law	1[nn]
Environmental Law	2[oo]
Consumer Law	0
Workers' Compensation	1[pp]
Arbitration	0
Administrative Law	0
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	2[qq]
Indiana Constitution	12[rr]

[t] This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2011. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this Table.

[u] Snyder v. King, 958 N.E.2d 764 (Ind. 2011); George v. Nat'l Collegiate Athletic Ass'n, 945 N.E.2d 150 (Ind. 2011); Green v. Ford Motor Co., 942 N.E.2d 791 (Ind. 2011), *reh'g denied* (June 20, 2011).

[v] State *ex rel.* McIntosh v. Vigo Super. Ct., 946 N.E.2d 1160 (Ind. 2011); State *ex rel.* Lewis v. Vigo Super. Ct., 946 N.E.2d 581 (Ind. 2011).

[w] *In re* Newman, 958 N.E.2d 792 (Ind. 2011); *In re* Powell, 953 N.E.2d 1060 (Ind. 2011); *In re* McKinney, 948 N.E.2d 1154 (Ind. 2011); *In re* Parilman, 947 N.E.2d 915 (Ind. 2011); *In re* Rocchio, 943 N.E.2d 797 (Ind. 2011); *In re* O'Farrell, 942 N.E.2d 799 (Ind. 2011).

[x] *In re* Hughes, 947 N.E.2d 418 (Ind. 2011); *In re* Young, 943 N.E.2d 1276 (Ind. 2011).

[y] Baer v. State, 942 N.E.2d 80 (Ind. 2011).

[z] Lewis v. State, 949 N.E.2d 1243 (Ind. 2011); Garcia-Torres v. State, 949 N.E.2d 1229 (Ind. 2011); Wilkins v. State, 946 N.E.2d 1144 (Ind. 2011), *reh'g denied* (Sept. 2, 2011); Barnes v. State, 946 N.E.2d 572 (Ind.), *reh'g granted*, 953 N.E.2d 473 (Ind. 2011); Lacey v. State, 946 N.E.2d 548 (Ind. 2011), *reh'g denied* (Sept. 2, 2011).

[aa] Avery v. Avery, 953 N.E.2d 470 (Ind. 2011).

[bb] Town of Avon v. W. Cent. Conservancy Dist., 957 N.E.2d 598 (Ind. 2011); Citizens State Bank of New Castle v. Countrywide Home Loans, Inc., 949 N.E.2d 1195 (Ind. 2011); Siwinski v. Town of Ogden Dunes, 949 N.E.2d 825 (Ind. 2011); Serrano v. State, 946 N.E.2d 1139 (Ind. 2011); City of Indianapolis v. Armour, 946 N.E.2d 553 (Ind. 2011).

[cc] Best v. Best, 941 N.E.2d 499 (Ind. 2011).

[dd] *In re* A.B. v. State, 949 N.E.2d 1204 (Ind. 2011), *reh'g denied* (Nov. 1, 2011).

[ee] J.M. v. M.A., 950 N.E.2d 1191 (Ind. 2011).

[ff] Green v. Ford Motor Co., 942 N.E.2d 791 (Ind. 2011), *reh'g denied* (June 30, 2011).

[gg] Putnam County Sheriff v. Price, 954 N.E.2d 451 (Ind. 2011); Davis v. Animal Control, 948 N.E.2d 1161 (Ind. 2011); Pfenning v. Lineman, 947 N.E.2d 392 (Ind. 2011); Walker v. Pullen, 943 N.E.2d 349 (Ind. 2011); Green v. Ford Motor Co., 942 N.E.2d 791 (Ind. 2011), *reh'g denied* (June 20, 2011).

[hh] Spangler v. Bechtel, 958 N.E.2d 458 (Ind. 2011); Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182 (Ind. 2011); Hematology-Oncology of Ind., P.C. v. Fruits, 950 N.E.2d 294 (Ind. 2011); Ind. Patient's Comp. Fund v. Brown, 949 N.E.2d 822 (Ind. 2011); McCabe v. Comm'r, Ind. Dep't of Ins., 949 N.E.2d 816 (Ind. 2011).

[ii] Davis v. Animal Control, 948 N.E.2d 1161 (Ind. 2011).

[jj] Ind. Spine Grp., PC v. Pilot Travel Ctrs., 959 N.E.2d 789 (Ind. 2011); Sloan v. State, 947 N.E.2d 917 (Ind. 2011); State v. Boyle, 947 N.E.2d 912 (Ind. 2011).

[kk] State *ex rel.* Zoeller v. Aisin USA Mfg., Inc., 946 N.E.2d 1148 (Ind. 2011) Ind. Dep't of State Revenue v. Belterra Resort Ind., LLC, 942 N.E.2d 796 (Ind. 2011).

[ll] Ashby v. Bar Plan Mut. Ins. Co., 949 N.E.2d 307 (Ind. 2011), *reh'g denied* (Nov. 1, 2011).

[mm] Recker v. Review Bd. of the Ind. Dep't of Workforce Dev., 958 N.E.2d 1136 (Ind. 2011); Franklin Elec. Co. v. Unemployment Ins. Appeals of the Dep't of Workforce Dev., 953 N.E.2d 1066 (Ind. 2011).

[nn] Ashby v. Bar Plan Mut. Ins. Co., 949 N.E.2d 307 (Ind. 2011), *reh'g denied* (Nov. 1, 2011).

[oo] Town of Avon v. W. Cent. Conservancy Dist., 957 N.E.2d 598 (Ind. 2011); Killbuck Concerned Citizens Ass'n v. Madison Cnty. Bd. of Zoning Appeals, 941 N.E.2d 1037 (Ind. 2011).

[pp] Ind. Spine Group, PC v. Pilot Travel Ctrs., LLC, 959 N.E.2d 789 (Ind. 2011).

[qq] Snyder v. King, 958 N.E.2d 764 (Ind. 2011); Love v. Rehfus, 946 N.E.2d 1 (Ind. 2011), *reh'g denied* (July 26, 2011).

[rr] State v. Econ. Freedom Fund, 959 N.E.2d 794 (Ind. 2011); Snyder v. King, 958 N.E.2d 764 (Ind. 2011); Jewell v. State, 957 N.E.2d 625 (Ind. 2011); Lucas v. U.S. Bank, N.A., 953 N.E.2d 457 (Ind. 2011), *reh'g denied* (Jan. 9, 2012); *In re* A.B., 949 N.E.2d 1204 (Ind. 2011), *reh'g denied* (Nov. 1, 2011); Lemmon v. Harris, 949 N.E.2d 803 (Ind. 2011); D.M. v. State, 949 N.E.2d 327 (Ind. 2011); Sloan v. State, 947 N.E.2d

917 (Ind. 2011); Coleman v. State, 946 N.E.2d 1160 (Ind. 2011); City of Indianapolis v. Armour, 946 N.E.2d 553 (Ind.), *cert. granted*, 132 S. Ct. 576 (2011); Lacey v. State, 946 N.E.2d 548 (Ind. 2011); Killbuck Concerned Citizens Ass'n v. Madison Cnty. Bd. of Zoning Appeals, 941 N.E.2d 1037 (Ind. 2011).

SURVEY OF INDIANA ADMINISTRATIVE LAW

JOSEPH P. ROMPALA*

INTRODUCTION

The scope, diversity, and sheer volume of work performed by Indiana's administrative agencies is unquestionably massive. Established by statute, agencies occupy a unique position in the legal field performing tasks assigned to the executive and legislative branches of government while also acting as quasi-judicial entities. As the reach and volume of work performed by administrative agencies has grown, so too has the body of law governing those agencies.

While the basic principles governing agency law are generally well settled, like any area of law there are always new ideas, new approaches, and new issues to be addressed. Accordingly, many disputes arise between litigants as to whether an agency decision is properly before a court for review, and if it is, the type of review the court can conduct. The purpose of this Article, then, is to review some of the opinions issued by the State's appellate courts while sitting in review of agency actions and to highlight how courts have addressed similar questions—sometimes in like fashion, and sometimes in conflict with each other.

I. STANDARD OF REVIEW

A. Deference to Agency Actions

For the most part, the decisions of administrative agencies are subject to judicial review by Indiana's courts.[1] Nevertheless, many aspects of judicial review are controlled either by statute or common law requirements. This includes restrictions on who may seek review, what a court may review, and whether an agency action is subject to review.[2]

Although AOPA does not govern judicial review for all of Indiana's administrative agencies, the statute largely embodies the basic legal principles that govern the standard of review courts apply in reviewing all administrative decisions. Under AOPA, a court may grant a party relief only when an agency action is:

---

* Associate, Lewis & Kappes, P.C. B.A., *summa cum laude*, 2001, Cornell College; J.D., 2004, University of Notre Dame Law School.

1. The Indiana Supreme Court has acknowledged the existence of a constitutional right to judicial review of agency decisions. Ind. Dep't of Highways v. Dixon, 541 N.E.2d 877, 880 (Ind. 1989) (citing State *ex rel.* State Bd. of Tax Comm'rs v. Marion Superior Court, 392 N.E.2d 1161 (Ind. 1979)). While the Indiana Administrative Orders and Procedures Act (AOPA) is not applicable to all state agencies, even among those agencies which are regulated under AOPA, some agency decisions are not necessarily subject to review. IND. CODE § 4-21.5-2-5 (2011).

2. *See generally* IND. CODE §§ 4-21.5-5-1 to -16 (2011) (setting out statutory requirements concerning what persons may seek review, parties which have standing, the scope of review courts may employ, and enumerating the other requirements and procedures necessary to obtain judicial review of agency actions).

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.[3]

These enumerated reasons for overturning agency actions set forth the standard of review courts are to apply in reviewing agency decisions and are well established.[4] However, in reviewing agency actions under the individual bases for relief, portions of an agency's decision are subject to greater or lesser deference from courts. Accordingly, cases often arise that question the amount of deference that a court should apply.

One such case is *Harris v. United Water Services, Inc.*[5] There, the Indiana Court of Appeals addressed the appropriate standard to be applied to the decision of the Worker's Compensation Board to dismiss a claim brought by Harris seeking worker's compensation and "occupational disease" claims.[6]

Harris brought the claims after developing several serious health issues he asserted arose from his employment with United Water Services ("United Water"), a company that processes waste water.[7] United Water moved to dismiss Harris's claim on the grounds that "all of Harris'[s] medical conditions stemmed solely" from a single incident in 2005 when he had been splashed in the face with waste water, and that, as the statute of limitations had run, the Worker's Compensation Board lacked subject matter jurisdiction to hear the matter.[8] Harris disagreed, contending that his ailments arose from a broader pattern of exposure to waste water due, in part, to United Water's failure to provide appropriate equipment.[9] The Worker's Compensation Board ultimately sided with United Water, finding that Harris had admitted that his injury occurred in 2005, and that the statute of limitations ran in December 2007—roughly half a year before Harris filed his claim.[10]

Harris and United Water disagreed over the appropriate standard of review to be applied to the Worker's Compensation Board's decision to dismiss the case. Harris argued in favor of a de novo standard, consistent with that applied by appellate courts reviewing trial courts' rulings on motions to dismiss under Trial Rule 12(B)(1) based on a paper record.[11] United Water, on the other hand, argued that a more deferential standard of review applied to decisions of the Worker's

---

3. *Id.* § 4-21.5-5-14(d).

4. *See, e.g.*, Dept of Fin. Inst. of Ind. v. Beneficial Fin. Co. of Madison, 426 N.E.2d 711, 713 (Ind. Ct. App. 1981).

5. 946 N.E.2d 35 (Ind. Ct. App. 2011).

6. *Id*. at 38-40.

7. *Id*. at 36-37.

8. *Id*. at 37.

9. *Id*.

10. *Id*.

11. *Id.* at 38.

Compensation Board.[12]

The Indiana Court of Appeals noted that neither party cited a case involving a ruling by an administrative agency on a motion to dismiss, and further noted that its own "independent research revealed that we have not consistently applied a single standard of review in this context."[13] The court therefore turned to the decision of the Indiana Supreme Court in *Northern Indiana Public Service Co. v. United States Steel Corp.*[14] In that case, the Indiana Supreme Court explained that while appellate courts would review a trial court's order on summary judgment under a de novo standard because it "faces the same issues that were before the trial court and analyzes them the same way," it would not do so when reviewing an agency decision because "review of an agency order does not involve the same analysis on appeal."[15] Rather, as executive branch institutions that are "empowered with delegated duties," the decision of an administrative agency "deserves a higher level of deference than a summary judgment order by a trial court falling squarely within the judicial branch."[16]

Analogizing the situation before it to that in *NIPSCO*, the court of appeals concluded that although the Worker's Compensation Board had ruled on a paper record, it was still appropriate to afford the Board's decision greater deference than it would a similar decision by a trial court.[17] Interestingly, although the court of appeals applied a more deferential standard of review, it still found that the Worker's Compensation Board had erred in dismissing the case because it erroneously concluded that Harris had admitted in a deposition that his injuries stemmed from a single incident of exposure in 2005.[18] After reviewing the record, the court of appeals determined the Board's conclusion was "not supported by the evidence" due to the numerous statements Harris made concerning his frequent exposure to waste water.[19] The *Harris* court thus reversed and remanded the case.[20]

While the Indiana Court of Appeals in *Harris* concluded that a deferential standard of review was appropriate, the court reached the opposite conclusion in *Office of Trustee of Wayne Township v. Brooks*.[21] In that case, the Township Trustee appealed a decision imposing a preliminary injunction requiring the Trustee to continue providing poor relief assistance to Brooks.[22] The Trustee argued that the trial court erred in issuing the injunction because it applied the wrong standard when reviewing the Trustee's decision to terminate assistance to

---

12. *Id*. at 38-39.
13. *Id*. at 39.
14. 907 N.E.2d 1012 (Ind. 2009).
15. *Id*. at 1018.
16. *Id*.
17. *Harris*, 946 N.E.2d at 39-40.
18. *Id.* at 44.
19. *Id*. at 43-44.
20. *Id*. at 44.
21. 940 N.E.2d 334 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 206 (Ind. 2011).
22. *Id*. at 335.

Brooks. Specifically, the Trustee argued that the trial court should have reviewed the decision solely for an abuse of discretion rather than de novo.[23]

The court of appeals, however, pointed to its decision in *State ex rel. Van Buskirk v. Wayne Township, Marion County*,[24] holding that under the applicable statute, trial courts review decisions concerning poor relief as an "original cause" where "the factual findings of the board are not given the weight or accorded the presumption of validity which is usually given administrative factual findings."[25] The court also referred to a line of similar decisions by the Indiana Supreme Court and concluded that the trial court acted properly in "try[ing] the case for itself and render[ing] a final judgment."[26] In doing so, the court of appeals rejected a portion of its prior decision in *Parrish v. Pike Township Trustee's Office*,[27] which applied the more deferential standard of review generally applicable to administrative agencies, to the extent that *Parrish* would sanction applying a standard different than that established by the Indiana General Assembly.[28]

B. Statutory Interpretation

In the course of their duties, administrative agencies are often called upon to interpret statutes as they apply those statutes to various disputes before them. This section compares how courts during the survey period treated several instances where challenges were made to an agency's interpretation of a statute.

One such case is *Indiana Association of Beverage Retailers, Inc. v. Indiana Alcohol and Tobacco Commission*.[29] In that case, the Indiana Court of Appeals was asked to resolve whether the Indiana Alcohol and Tobacco Commission (IATC), the agency charged with regulating the sale of alcohol within the State, was issuing a larger number of beer and liquor permits than is allowed under statute.[30] Specifically, the Indiana Association of Beverage Retailers (IABR) claimed that IATC was issuing permits in excess of those allowed by Indiana Code sections 7.1-3-22-4 and 7.1-3-22-5.[31] The dispute arose because, under Indiana law, IATC may issue to "dealers" a number of different types of permits for the off-premises sale of alcohol, particularly a "beer dealers permit" to a drug store, grocery store, or "package liquor store" and a "liquor dealers permit" to a drug store or "package liquor store."[32] Indiana Code sections 7.1-3-22-4 and 7.1-

---

23. *Id*. at 336.

24. 418 N.E.2d 234 (Ind. Ct. App. 1981).

25. *Brooks*, 940 N.E.2d at 335 (quoting *Van Buskirk*, 418 N.E.2d at 239-40).

26. *Id*. at 337 (quoting Pastrick v. Geneva Twp. of Jennings Cnty., 474 N.E.2d 1018, 1021 (Ind. Ct. App. 1985).

27. 742 N.E.2d 515 (Ind. Ct. App. 2001).

28. *Brooks*, 940 N.E.2d at 337 n.3.

29. 945 N.E.2d 187 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 645 (Ind. 2011).

30. *Id*. at 190-93.

31. *Id*. at 192-93.

32. *Id*. at 191 (citing IND. CODE §§ 7.1-3-5, -10 (2011)).

3-22-5 set quotas for the number of beer dealer, liquor dealer, and package liquor store dealer permits.[33]

IABR sought a declaratory judgment and preliminary injunction against IATC, arguing that the manner in which IATC issued permits was contrary to statute.[34] IATC argued that it had issued permits based on a "longstanding interpretation" of title 7.1 so that "beer dealer permits" were counted against the beer dealer quotas in Indiana Code section 7.1-3-22-4; "liquor dealer permits" were counted only against the liquor dealer quotas, but not the beer dealer quotas; and "package liquor permits" were counted only against the quotas established in Indiana Code section 7.1-3-22-5.[35] Based on interpretation of the relevant code sections, and the evidence presented, the trial court denied the motion for preliminary injunction, and IABR appealed.[36]

On appeal, the Indiana Court of Appeals noted that the an agency's interpretation of a statute it is tasked with enforcing is entitled to "great weight."[37] The court further noted that "[d]eference to an agency's interpretation of a statute becomes a consideration when a statute is ambiguous and susceptible of more than one reasonable interpretation."[38] The court then explained that when

> a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency. If a court determines that an agency's interpretation is reasonable, it should terminate its analysis and not address the reasonableness of the other party's proposed interpretation.[39]

After reviewing title 7.1, article 3, the court of appeals concluded that the article was "ambiguous regarding the number of permits [IATC] may issue to dealers."[40] Specifically, the court found that the relevant statutes were silent as to how the types of permits issued by the IATC were to be counted against the quotas.[41] The court then concluded that it could not say that IATC's "interpretation was unreasonable" as in reading the statutes as a whole, "the legislature's intent may be construed as limiting the number of permittees rather than the number of total permits issued."[42] Finding that IATC's interpretation was reasonable, the court concluded that "we cannot say that the manner in which it issues dealer's permits violates Title 7.1," and therefore affirmed the denial of

---

33. *See id.*
34. *Id*. at 192.
35. *Id*. at 193-94.
36. *See id.* at 194-96.
37. *Id*. at 198.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id.* at 198-99.
42. *Id*. at 199.

the preliminary injunction.[43]

In *R.M. v. Second Injury Fund*,[44] the court of appeals reached the conclusion that the administrative agency erred in its interpretation of a statute it was charged with enforcing.[45] In 1999, R.M. was injured in a workplace accident in which his arms were pulled into a conveyor belt.[46] Under the terms of an agreement with his employer, the employer agreed to continue to pay R.M. his statutory worker's compensation benefits and did so first through its worker's compensation insurer and then itself until both the insurer and the employer became insolvent.[47] R.M. then sought entry into the Second Injury Fund, which is meant, in part, to "provide monetary benefits to employees who are permanently and totally disabled and have received the maximum compensation they are entitled to under the Worker's Compensation Act."[48]

Although the Worker's Compensation Board concluded that R.M. was entitled to receive benefits through the Second Injury Fund, it also concluded that those benefits would not start to be paid until the "501st week after the date of [R.M.'s] workplace injury."[49] R.M. sought judicial review, claiming that he had exhausted his benefits under the Worker's Compensation Act within 264 weeks of his accident "because at that time, both Employer and Employer's worker's compensation insurance provider had gone out of business."[50] Effectively, the court of appeals was asked to decide whether Indiana Code section 22-3-3-13 was ambiguous as to when an injured employee could begin receiving benefits through the Second Injury Fund.

The court of appeals concluded that the statute was ambiguous, and that because R.M. had effectively exhausted his available worker's compensation benefits (that is, as his employer and employer's insurer could no longer make payments), he was entitled to begin receiving payments from the Second Injury Fund effective the 265th week after his accident.[51] The court reached this conclusion reasoning that "[a]ny other interpretation would result in the unjust and absurd result" of allowing R.M. to go without benefits he was unquestionably entitled to for a period of 236 weeks.[52]

Interestingly, in reaching this conclusion, the court did not expressly apply the same standard of review as the court of appeals did in *Indiana Association of Beverage Retailers*. Rather, the court cited a more general standard that did not

---

43. *Id.* at 200. The court of appeals did, however, note that it would not apply the doctrine of "legislative acquiescence" to IATC's interpretation, on the grounds that there had been "no previous *judicial* interpretation of [s]ection 4 by our appellate courts." *Id*. at 200 n.7.

44. 943 N.E.2d 811 (Ind. Ct. App. 2011).

45. *Id.* at 816.

46. *Id*. at 813.

47. *Id*.

48. *Id*. at 813-14.

49. *Id*. at 814.

50. *Id*. at 815.

51. *Id.* at 816.

52. *Id*.

consider deference to the administrative agency's interpretation of the statute it is charged with enforcing.[53] The court did, however, note earlier that in reviewing decisions of the Worker's Compensation Board, the "interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself."[54] In light of the overall purpose of the Worker's Compensation Act, the conclusion that took into account that a statutory interpretation would lead to an "unjust and absurd result" fits within the general rubric of the amount of deference owed to administrative agency's interpretation of a statute it enforces.

Both *Indiana Association of Beverage Retailers* and *R.M*. addressed the amount of deference owed to an agency's interpretation of a statute it is charged with enforcing. A portion of the court of appeals decision in *United States Steel Corp. v. Northern Indiana Public Service Co.*[55] addresses a threshold question, whether the statute is one the agency is charged with enforcing.

Specifically, the court examined the level of deference owed to the Indiana Utility Regulatory Commission's (IURC) conclusion that U. S. Steel was acting as a "public utility" within the meaning of Indiana Code sections 8-1-2-1 and 8-1-2-87.5.[56] As the court noted "at the outset," an issue arose between the parties over "the level of deference owed to the [IURC's] conclusions that U. S. Steel has acted as a public utility."[57] U. S. Steel and ArcelorMittal argued that the statutes limited the "scope of the [IURC's] jurisdiction" and therefore were subject to de novo review, while NIPSCO argued that the IURC's ruling was entitled to greater deference because the IURC possesses the "jurisdiction to determine an entity is a public utility" and was acting within that jurisdiction in rendering its decision.[58]

The court of appeals ultimately disagreed with NIPSCO's position. The court agreed that it is "well-settled" that the IURC has the "authority to make a preliminary determination of an entity's status as a public utility and to compel parties to appear before it for the purpose of making such a determination."[59] The court, however, compared the situation to a trial court's determination that it has subject matter jurisdiction over a case, which the court noted "does not clothe it with the authority to decide the merits of a case where subject matter is

---

53. *Id*.

54. *Id*. at 815 (quoting E. Alliance Ins. Grp. v. Howell, 929 N.E.2d 922, 926 (Ind. Ct. App. 2010) (internal citations omitted)).

55. 951 N.E.2d 542 (Ind. Ct. App. 2011), *reh'g denied*, *trans. denied*, 963 N.E.2d 1119 (Ind. 2012). The author discloses that his law firm, Lewis & Kappes, P.C., represented U. S. Steel and ArcelorMittal Indiana Harbor, Inc., in the matter throughout the course of proceedings, and that he was personally involved in drafting the appellate briefs before the Indiana Court of Appeals and Indiana Supreme Court and appeared before both in the matter.

56. *Id.* at 551-52.

57. *Id.* at 551.

58. *Id*.

59. *Id*.

lacking."[60] Likewise, the court reasoned, the IURC's "authority to make a threshold determination of an entity's public utility status does not give the [IURC] jurisdiction to regulate that entity if it does not qualify, *ab initio*, as a public utility."[61]

Accordingly, the court concluded that the "statutory definitions of 'public utility' set forth in the Public Service Commission Act are not statutes the [IURC] is charged with enforcing," but rather establish the boundaries of the IURC's regulatory jurisdiction.[62] This led the court to apply a de novo standard in reviewing the IURC's conclusions regarding U. S. Steel's status as a public utility.[63]

C. Evidence and the Adequacy of Agency Findings

A common issue arising in judicial review of agency decisions is whether the agency's decision is supported by substantial evidence. During the survey period, a number of judicial decisions examined situations where an agency's decision was unsupported by the evidence, or whether the findings made by the agency were sufficiently adequate to render a conclusion on that point.

One example is *T.W. v. Review Board of the Indiana Department of Workforce Development*.[64] In that case, T.W. appealed a decision of the Department of Workforce Development, ordering him to repay unemployment benefits and assessing a penalty against him.[65] The basis of the Department's decision was that during the time he was collecting unemployment, T.W. had represented that he was not working, despite the fact that, in March 2010, he became a member of a construction staffing company, known as PLS, and was working as a sales manager for the company "fifty to sixty hours a week."[66] Despite the hours he worked, T.W. did not receive any income.[67] The Department concluded that T.W. failed to disclose his self-employment, a material fact as required by Indiana Code section 22-4-13-1, and thus he was not eligible for benefits.

The specific statutory provision at issue in *T.W.* provides, in relevant part, that if a person knowingly "fails to disclose amounts earned" while receiving unemployment or "fails to disclose or has falsified any fact" that would "disqualify the individual for benefits," the individual forfeits their benefits.[68] The question for the court became for the court whether "T.W. failed to disclose

60. *Id*.
61. *Id*. at 551-52.
62. *Id.* at 552.
63. *Id*.
64. 952 N.E.2d 312 (Ind. Ct. App. 2011).
65. *Id*. at 313-14.
66. *Id*.
67. *Id*. at 314.
68. IND. CODE § 22-4-13-1.1(a) (2011).

or falsified any fact that would disqualify him from receiving benefits."[69] In addressing this question, the court considered relevant Indiana decisions which had concluded that while a person has a "duty to disclose the self-employment earnings so that the Division could determine if it affected" the claimed benefits, "not all self-employment renders a claimant ineligible for benefits."[70]

Because it was undisputed that T.W. was not receiving income from his employment, the court concluded that his failure to report his relationship with PLS did not automatically disqualify him from receiving benefits.[71] Further, the court examined the claim by the Department that T.W. was ineligible because he was unable to work due to "working significant hours for PLS."[72] The court of appeals disagreed.[73] In doing so, it noted testimony by T.W. that despite working for PLS he continued to look for other employment, "remained available to accept other employment", and had reached an agreement with PLS that would allow him to accept other job offers.[74]

Despite the arguments offered by the Department, the court concluded that "no statutory or evidentiary basis" existed to support the finding that "T.W.'s failure to disclose his relationship with PLS would disqualify him from receiving benefits" as the "mere failure to disclose the relationship is insufficient to support the denial of benefits."[75]

In *R.D. v. Review Board of the Indiana Department of Workforce Development*,[76] a split panel of the Indiana Court of Appeals considered the Department's decision concerning payment for retraining benefits. In that case, R.D. lost his job as a machinist and sought to obtain a degree in graphic arts.[77] To assist in paying for the retraining at the Art Institute of Indianapolis, he applied for funding under the Trade Act of 1974, but the Department denied his request.[78] In part, this decision was based on the Department's conclusion that the Art Institute's program was "substantially similar" to a program offered by Ivy Tech which, cost approximately $40,000 less than the Art Institute's program.[79]

During his administrative hearing, R.D. provided undisputed testimony establishing the disparity between the two programs. Specifically, R.D. provided evidence that upon graduation from the Art Institute, he would be trained in both print and web design and could expect to earn a starting salary similar to the

---

69. *T.W.*, 952 N.E.2d at 315.

70. *Id*. at 315-16.

71. *Id*. at 316-17.

72. *Id.* at 317.

73. *Id.*

74. *Id*.

75. *Id*.

76. 941 N.E.2d 1063 (Ind. Ct. App. 2010), *reh'g denied*, 2011 Ind. App. LEXIS 287 (Feb. 14, 2011).

77. *Id*. at 1064.

78. *Id*.

79. *Id*.

salary he earned while working as a machinist, roughly $25 per hour.[80] In contrast, evidence was presented that the Ivy Tech program would take longer to complete,[81] would train him only in print or web design, and would qualify him for a wage of only about $9.00 per hour, about thirty-six percent of what he was previously earning.[82] R.D. provided further evidence that while the Art Institute provided placement services for its graduates and published a seventy-eight percent placement rate, Ivy Tech offered no placement assistance.

In reviewing the Department's decision, the court noted that its review of the Department's "findings is subject to a 'substantial evidence' standard of review" in which "we neither reweigh the evidence nor assess witness credibility, and we consider only the evidence most favorable" to the Department's ruling.[83] After examining the relevant statutory and administrative provisions that control decisions under the Trade Act, the court stated that, in the instant case, the Department "made its determination based on the comparative costs of the programs at issue."[84] The court concluded that this required the Department to have first found that the two programs were "'substantially similar in quality, content and results' before it could approve programming based solely on cost."[85]

In considering whether the Department erred in finding that the programs were "substantially similar," the court reviewed the comparative cost of the programs, their length, the training provided, the expected salary following graduation, and the expectation of job placement of each program.[86] Following this examination of the record, the court concluded that even reviewing only the evidence most favorable to the Department, there was "no substantial evidence in the record" that would support a finding of "substantial similarity."[87]

The court of appeals reached a similar conclusion in *Koewler v. Review Board of the Indiana Department of Workforce Development*.[88] In that case, Koewler was fired after eating two hotdogs the day after his employer's Fourth of July picnic.[89] According to the employer, Koewler stole the hotdogs after a manager directed that they be saved for reuse at a later event.[90] When Koewler

---

80. *Id*. at 1065.

81. *Id*. Exactly how much longer the program would take was an issue of some debate. The Art Institute program runs a standard eighteen months, while the Ivy Tech program runs two years. However, because the Ivy Tech program does not allow persons to train in both print and web design programs at the same time, it could, arguably, take as long as four years to obtain the same level of training. *Id*. at 1065, 1068.

82. *Id*. at 1065.

83. *Id.* at 1066 (quoting Quakenbush v. Review Bd. of Ind. Dep't of Workforce Dev., 891 N.E.2d 1051, 1054 (Ind. Ct. App. 2008)).

84. *Id*. at 1068.

85. *Id*. (citation omitted).

86. *Id.* at 1068-69.

87. *Id*. at 1068.

88. 951 N.E.2d 272 (Ind. Ct. App. 2011).

89. *Id*. at 274.

90. *Id*.

applied for unemployment benefits, the Department denied his claim, concluding that he had been fired for "just cause" by breaching a "duty in connection with work which is reasonably owed an employer by an employee."[91] Specifically, the Department concluded that by taking the hotdogs, Koewler had been fired for theft.[92]

In reviewing the record, however, the court concluded that the testimony offered during the administrative hearing did not provide support for this conclusion.[93] In doing so, the court emphasized that to commit theft a party must act "knowingly or intentionally" in exerting "unauthorized control over property of another person."[94] As the court pointed out, based on the testimony of the manager, there was no evidence to suggest that Koewler was aware that the food was to be saved for a later picnic, only that it was to be cleaned up and stored.[95] Accordingly, he was unaware that the hotdogs were, in fact, "off-limits."[96]

The court of appeals emphasized that in addition to the lack of support, no "finding of fact was made as to whether Koewler knew his reaching into the refrigerator and consuming two hotdogs was unauthorized."[97] On those grounds, the court concluded that the "determination of ultimate fact that Koewler was terminated for just cause as a hotdog thief is not reasonable," and therefore, in the absence of evidentiary support, the Department's denial of Koewler's unemployment claim was contrary to law.[98]

The above cases illustrate situations when a record existed to allow a court to conduct judicial review of an administrative decision. In *Westville Correctional Facility v. Finney*,[99] the court of appeals was confronted by absence of a record. Finney was employed as an instructor at Westville, but was terminated after attempting to bring his cell phone into the facility on two separate occasions.[100] Finney appealed Westville's termination to the Indiana State Employee's Appeal Commission, which found that Westville had causation to Finney's employment.[101] Finney ultimately sought judicial review of the decision, and the trial court, after noting the absence of an adequate agency record, concluded that "the agency action was unsupported by substantial evidence."[102]

The court of appeals determined that the trial court had not erred in reaching

---

91. *Id*. at 275-76.
92. *Id*. at 276.
93. *Id.*
94. *Id*. (quoting IND. CODE § 35-43-4-2 (2011)).
95. *Id.* at 276-77.
96. *Id*. at 277.
97. *Id*.
98. *Id*.
99. 953 N.E.2d 1116 (Ind. Ct. App. 2011).
100. *Id*. at 1117.
101. *Id*. at 1118.
102. *Id*.

this conclusion.[103] Rather, the court noted that it was "clear from the record before us that the agency's action was without evidentiary foundation, let alone *substantial* evidence as required by Indiana Code section 4-21.5.14(d)(5)."[104] The court of appeals explained that judicial review of the agency decision was "made difficult, if not virtually impossible, by the woeful deficiencies of the tape recordings of the testimony of various witnesses so that the attempts to transcribe the proceedings from those tapes were unavailing."[105] As the court detailed, the transcripts prepared from the recordings were replete with references to testimony being "inaudible" and portions of tapes being either blank or filled with static.[106]

The court of appeals described this as "an intolerable failure to preserve evidence" and refused to allow a new hearing or obtain a certified statement of evidence, as Westville had contended that the "transcript provided 'substantial evidence' to support" the agency's decision.[107] The court affirmed the decision of the trial court that the agency record, as presented for judicial review, could not provide support for the evidentiary findings of the agency.[108]

In *Pack v. Indiana Family and Social Services Administration*,[109] the court of appeals addressed the close connections among the sufficiency of the evidence, agency findings, and judicial review and helped to underscore the importance of an agency's compliance with proper procedure to enable judicial review. The court in *Pack* was confronted with an arguably sufficient record, but an agency determination that lacked adequate findings to enable review. The facts are relatively straightforward. Pack sought Medicaid benefits based on various physical and psychiatric ailments.[110] The Family and Social Services Administration (FSSA) initially denied her claim, finding that her ailments did not "substantially impair her ability to perform labor services, or to engage in a useful occupation."[111] This decision was affirmed by an FSSA Administrative Law Judge (ALJ), and finally the agency.[112] Following an unsuccessful attempt at judicial review before the trial court, Pack appealed to the court of appeals.[113]

In addressing the matter, the court of appeals started with a discussion of the "purposes, functions, and proper form of findings of fact and conclusions of law in an administrative context." The court explained it sometimes finds itself confronted with "orders that are defective because the agency's decision lacks support in the record, that do not adequately articulate a basis for the agency's decision, that recite the contents of evidence . . . without making proper findings

---

103. *Id*.
104. *Id*. at 1118-19.
105. *Id*. at 1119.
106. *Id.*
107. *Id*.
108. *Id*.
109. 935 N.E.2d 1218 (Ind. Ct. App. 2010).
110. *Id*. at 1220.
111. *Id*. at 1220-21.
112. *Id*. at 1221.
113. *Id*.

of basic fact, or that simply fail to adequately or rationally apply law to found facts."[114] The court explained that the failure to produce a proper order implicates serious due process concerns and undermines judicial review of "whether or not the agency's ultimate decision is correct."[115]

As the Indiana Court of Appeals noted, under AOPA an administrative order must include "findings of basic facts, specify the reasons for the decision, and identify the evidence and applicable statutes, regulations, rules and policies that support the decision."[116] The court went on, stating that a "finding of fact must indicate, not what someone said is true, but *what is determined to be true*, for that is the trier of fact's duty."[117] The court explained that these "basic findings in turn must form the basis for the agency's order" such that "an agency's decision must demonstrate a logical connection among the findings of basic fact, the law applied, and the inferences made therefrom in arriving at an ultimate finding."[118] The court cautioned that when an agency's order fails to conform to these basic criteria, it is "defective and must be reversed."[119]

Pack argued that the agency erred by "failing to give proper consideration to the evidence provided" and that the decision was not supported by substantial evidence. The court of appeals found error "on slightly different grounds, namely that the ALJ's decision [was] defective for failing to consider the totality of the evidence, and [was] defective as well in its presentation and engagement with the findings of basic fact when applying the law to reach a finding of ultimate fact."[120]

In examining the FSSA's conclusions, the court took particular issue with the ALJ's "engagement with Pack's psychiatric conditions."[121] Although the court concluded that the ALJ's findings that Pack was diagnosed with a panic disorder and suffered (or did not suffer) various problems related to that diagnosis, it also found that the ALJ did not apply the statutory factors concerning functional limitation to Pack's diagnosis, "let alone the other [psychological] diagnosis in the record."[122] Put more succinctly, the court found that the FSSA's order simply "note[d] the panic disorder diagnosis but applie[d] the law only to Pack's physical complaints."[123] This left the Indiana Court of Appeals "without confidence that [the ALJ] weighed Pack's psychiatric evidence or applied the law to that evidence in reaching a decision."[124] As such, the court held the decision was reversible as

---

114. *Id*. at 1221-22.

115. *Id*. at 1222.

116. *Id.*

117. *Id*. at 1223 (quoting Moore v. Ind. Family & Soc. Servs. Admin., 682 N.E.2d 545, 547 (Ind. Ct. App. 1997) (emphasis added)).

118. *Id*.

119. *Id*. at 1224.

120. *Id*. at 1226.

121. *Id.* at 1226-27.

122. *Id*.

123. *Id*. at 1227.

124. *Id*.

it was made "without observance of procedure required by law" and remanded the matter to the FSSA "not because the ALJ's decision is unsupported by substantial evidence, but because the ALJ's decision is sufficiently defective in its findings of fact to make this matter largely unreviewable by this court on the question of substantial evidence."[125]

D. Arbitrary and Capricious

One basis for reversing the decision of an administrative agency is that the agency's decision is arbitrary and capricious. The decision of the Indiana Supreme Court in *Indiana High School Athletic Association, Inc. v. Watson*[126] illustrates just how high meeting that bar can be. In that case, the Indiana Supreme Court was confronted with assessing whether the Indiana High School Athletic Association's (IHSAA) decision that a student-athlete had transferred schools for "primarily athletic reasons" was subject to reversal.[127]

The court began its analysis by noting that "Indiana courts have reviewed the IHSAA's regulation of student-athletes in a manner analogous to the review of administrative agencies;" they "do not review IHSAA decisions *de novo* and do not substitute their judgment for the association's."[128] Rather, courts are to apply "an arbitrary and capricious standard [when] review[ing] IHSAA decisions."[129] Under that standard, a decision is "arbitrary and capricious 'only where it is willful and unreasonable without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion.'"[130] The court went on to state that if the "IHSAA's findings of fact are supported by substantial evidence, we will not find them to be arbitrary and capricious."[131] The court explained that "[e]vidence meets this standard when it is more than a scintilla; that is, reasonable minds might accept it as adequate to support the conclusion."[132]

The Indiana Supreme Court then concluded that the record, read in the light most favorable to the IHSAA, indicated that its conclusions were supported by substantial evidence.[133] In reaching this conclusion, the court noted that the trial court erred in "repeatedly favoring" the testimony of certain witnesses while "pointing out that the IHSAA's version of events heavily relied on hearsay."[134] The court rejected this as a basis for reversing the IHSAA's determination as the decision to lend greater credibility to a particular statement was within the

---

125. *Id*. at 1227-28.
126. 938 N.E.2d 672 (Ind. 2010).
127. *Id*. at 673.
128. *Id*. at 680.
129. *Id*.
130. *Id*. (citing IHSAA v. Carlberg, 694 N.E.2d 222, 232 (Ind. 1997)).
131. *Id.*
132. *Id.* at 680-81.
133. *Id*. at 681.
134. *Id*.

discretion of the IHSAA.[135] Ultimately, the Indiana Supreme Court found that the trial court had, in effect, reweighed the evidence rather than applying an arbitrary and capricious standard.[136] Although the court did not determine that review of conflicting evidence was erroneous, it cautioned that "[w]hile courts must consider whether contradictory evidence completely invalidates evidence supporting" the agency's determinations, courts "must not find the existence of contradictory evidence allowing for a reasonable debate to constitute a lack of substantial evidence."[137] Accordingly, the court noted that simply because facts "could lead a reasonable person to disagree with [the] conclusions," it "does not make them arbitrary or capricious."[138]

II. OBTAINING JUDICIAL REVIEW

A. Exhaustion of Administrative Remedies

Just as a number of statutory and common law requirements govern the standard and scope of judicial review, numerous requirements exist that restrict access to judicial review of administrative agencies. A number of cases during the survey period addressed whether a party had properly complied with, or was required to comply with, these requirements in order to obtain judicial review.

One issue that frequently arises is whether a party seeking judicial review has exhausted their administrative remedies. Frequently, as in the case of *Outboard Boating Club of Evansville v. Indiana State Department of Health*,[139] the question presented for the court sitting in review is whether a party was required to fulfill that requirement at all. In that case, the Outboard Boating Club and another private club (collectively, "Clubs") filed a declaratory judgment action seeking a determination that the Indiana State Department of Health (ISDH) did not possess jurisdiction to regulate their facilities as "campgrounds."[140] ISDH filed a motion to dismiss for lack of subject matter jurisdiction based, in part, on the grounds that the Clubs failed to exhaust their administrative remedies.[141] The trial court granted the motion, and the Clubs appealed, arguing that they were not required to exhaust their administrative remedies.[142]

The Indiana Court of Appeals began its analysis by noting that as a general proposition, when a party has to exhaust administrative remedies prior to seeking judicial review, the court does not have subject matter jurisdiction until the

---

135. *Id*.

136. *Id.* at 682.

137. *Id*.

138. *Id*.

139. 952 N.E.2d 340 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 1834 (Oct. 19, 2011), *trans. denied*, 963 N.E.2d 1123 (Ind. 2012).

140. *Id*. at 342.

141. *Id*.

142. *Id*. at 342-43.

agency issues a final order.[143] The court acknowledged that there are exceptions to this general rule, including "where an action is brought upon the theory that the agency lacks the jurisdiction to act in a particular area" because such "issues turns on statutory construction, [and] whether an agency possesses jurisdiction over a matter is a question of law for the courts."[144]

In addressing the specific question before it, the court of appeals, however, found that the statute the Clubs were challenging did not fall within this category of cases that are exempt from compliance with the exhaustion requirement.[145] Instead, "there [was] no abstract question of law presented regarding the ISDH's general authority to regulate Indiana campgrounds."[146] Rather, the issue raised by the Clubs was whether the "their facilities are outside the ISDH's regulatory jurisdiction because they do not fall within the regulatory definition of campgrounds."[147] This, the court reasoned, was "precisely the type of fact sensitive issue [that prior decisions] concluded should be resolved in the first instance by administrative agencies."[148]

The court also addressed the Clubs' contention that they were not required to exhaust their administrative remedies as retroactive application of the regulatory scheme would be unconstitutional.[149] The court rejected this argument because determining whether the campgrounds operated by the Clubs pre-dated the regulatory scheme was a factual issue, as was whether changes had occurred to the campgrounds after the promulgation of the regulations that would be subject to regulation.[150] Further, the court noted that while a challenge to the constitutionality of a statute or regulation may be grounds to avoid the exhaustion requirement, "exhaustion of administrative remedies may still be required because administrative action may resolve the case on other grounds without confronting broader legal issues."[151] The ISDH could dispose of "the matter without confronting broader legal issues" by simply determining that the Clubs facilities did not meet the regulatory definition of campground.[152] Therefore, the Indiana Court of Appeals determined that the Clubs were required to exhaust their administrative remedies, and because they did not do so, the trial court properly dismissed the case for lack of subject matter jurisdiction.[153]

---

143. *Id*. at 343.

144. *Id.* at 344.

145. *Id*. at 345.

146. *Id*.

147. *Id*. at 346.

148. *Id*. at 345.

149. *Id.* at 346.

150. *Id*.

151. *Id.* (quoting Ind. Dep't of Envtl. Mgmt. v. Twin Eagle LLC, 798 N.E.2d 839, 844 (Ind. 2003)).

152. *Id*. at 347.

153. *Id*.

B. Timely Filing

Another requirement to obtain judicial review under the AOPA is the timely filing of a verified petition for such review. In *St. Joseph Hospital v. Cain*,[154] the court of appeals addressed whether a timely filed, but unverified, petition satisfied these statutory requirements. In that case, Cain was terminated from his position with St. Joseph Hospital.[155] Following his dismissal, he filed a claim with the Ft. Wayne Metropolitan Human Rights Commission (HRC), alleging the hospital had discriminated against him on the basis of race.[156] The HRC ultimately approved a determination in favor of Cain and awarded him damages.[157]

The hospital filed a timely, but unverified, petition for judicial review with the trial court.[158] Just under a month later, however, the hospital filed an amended, and verified, petition.[159] The trial court then granted HRC's motion to dismiss the petition for lack of subject matter jurisdiction based on the hospital's failure to file a timely, verified petition for review.[160]

Interestingly, unlike *Outboard Boat Club*, the court in *Cain* did not treat the failure to comply with the statutory requirement as an issue of subject matter jurisdiction. Rather, the court of appeals began its analysis by considering whether the alleged filing of an unverified petition was an issue of subject matter jurisdiction or merely a procedural error.[161] Although the court acknowledged that prior decisions had treated the filing of an unverified petition as a jurisdictional issue, it concluded that the hospital's error did not implicate the trial court's subject matter jurisdiction.[162] Rather, quoting *Packard v. Shoopman*,[163] the court concluded that the timely filing of the petition did not "affect the subject matter jurisdiction of the [t]ax [court]," but was "a procedural rather than jurisdictional error" as it "relates to neither the merits of the controversy nor the competence of the court to resolve it."[164] The court of appeals reasoned that because the "trial court had jurisdiction over the general class of actions at issue here[,] petitions for judicial review of agency actions," it had subject matter jurisdiction over the petition for review.[165]

Concluding that the timely filing of a verified petition was a procedural issue, the court of appeals then examined whether "an unverified petition for judicial

---

154. 937 N.E.2d 903 (Ind. Ct. App. 2010), *reh'g denied*, 2011 Ind. App. LEXIS 23 (Jan. 14, 2011).

155. *Id*. at 904.

156. *Id*.

157. *Id*.

158. *Id*.

159. *Id.*

160. *Id*. at 904-05.

161. *Id*. at 905-06.

162. *Id*.

163. 852 N.E.2d 927 (Ind. 2006).

164. *Cain*, 937 N.E.2d at 906 (quoting *Packard*, 852 N.E.2d at 931-32).

165. *Id.*

review may be amended and whether the amendment relates back to the date of the filing of the original petition."[166] In addressing this question, the court readily acknowledged that "AOPA clearly requires that a petition for judicial review 'must be verified.'"[167] The court noted, though, that Trial Rule 15 allows for the amendment of pleadings with relation back to the date of the original pleading.[168] The court then stated that the interplay between court rules and AOPA was such that the "General Assembly [did not intend] to preclude a court promulgated rule from providing time in addition to that afforded by AOPA."[169] The Indiana Court of Appeals thus concluded that Trial Rule 15 did not "actually conflict with the verification requirement" in AOPA, and that the statutory requirement was not intended to "preclude a court promulgated rule from allowing a petition to be amended and to relate back to the date of the filing of the original petition."[170] Thus, the court concluded that the trial court did have subject matter jurisdiction and should have considered the hospital's motion to amend the pleading on the merits.[171]

III. DOES JUDICIAL REVIEW EXIST?—ABSENCE OF CLEAR STATUTORY MANDATE

Although most decisions by administrative agencies are subject to some form of judicial review, several cases during the survey period considered whether a party had access to judicial review at all because there was no clear statutory provision authorizing such review.

For example, in *Save Our School: Elmhurst High School v. Fort Wayne Community Schools*,[172] the Indiana Court of Appeals considered whether an association was entitled to judicial review of a decision by the Fort Wayne Community Schools (FWCS) to close a public high school. Specifically, Save Our School argued that it was entitled to judicial review on the basis that FWCS issued an administrative decision when it closed the high school.[173] The court of appeals rejected this contention, finding that FWCS is "not an 'agency' whose decisions fall under AOPA" as it is a political subdivision.[174]

Instead, the court of appeals compared the situation to cases in which the Indiana Supreme Court and the Indiana Court of Appeals had previously determined that the General Assembly's exclusion of an entity or an entity's particular actions from AOPA's scope indicated a legislative intent to exclude the

166. *Id*. at 907.

167. *Id*. at 908 (quoting IND. CODE § 4-21.5-5-7 (2011)).

168. *Id*.

169. *Id*. at 909 (quoting Wayne Cnty. Prop. Tax Assessment Bd. of Appeals v. United Ancient Order of Druids – Grove No. 29, 847 N.E.2d 924, 928 (Ind. 2006)).

170. *Id*.

171. *Id*.

172. 951 N.E.2d 244 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011).

173. *Id*. at 249.

174. *Id.* at 250 (citing IND. CODE §§ 4-21.5-1-3, -12 (2011)).

agency's action from judicial review.[175] Relying on this reasoning, the court rejected Save Our School's "contention that there is any 'common law' right to review the actions of a school corporation such as FWCS" because the school district was both excluded from AOPA and any other statutory provision existed "that would allow its suit to proceed against FWCS."[176] It is interesting to note that the court of appeals did not categorically deny a suit based on a "common law" right to judicial review from proceeding, noting only that "Indiana courts generally do not recognize a non-statutory, 'common law' right to judicial review of governmental decision-making."[177]

In fact, the court of appeals in *Board of Commissioners of Allen County v. Northeastern Indiana Building Trades Council*[178] specifically found that "the lack of a statutory provision for judicial review is not dispositive."[179] In that case, the Indiana Court of Appeals considered whether a trial court had subject matter jurisdiction to review a common wage determination made by county commissioners pursuant to Indiana Code sections 5-16-7 to -6.[180] There, in contrast to the decision in *Save Our School*, the court noted that the Indiana Supreme Court has

> stated, in regard to administrative action by local government for which the legislature has not provided a right of judicial review, Indiana courts will still "review the proceedings to determine whether procedural requirements have been followed and if there is any substantial evidence to support the finding an order of such a board."[181]

The court also noted that a "consistent line of cases" had reviewed decisions of wage committees using basic principles of administrative law.[182]

The court of appeals further determined that judicial review was not prohibited simply because the statute calls a common wage determination by county commissioners "final."[183] As the court recognized, "in the context of administrative law, 'final' administrative action is a prerequisite, not an

---

175. *Id*. (citing Blanck v. Ind. Dep't of Corr., 829 N.E.2d 505 (Ind. 2005) (finding that prisoner had no independent right of judicial review for prison disciplinary actions); Hayes v. Trs. of Ind. Univ., 902 N.E.2d 303 (Ind. Ct. App. 2009) (holding that an employee had no common law right to judicial review of Indiana University's termination of her employment)).

176. *Id*.

177. *Id*.

178. 954 N.E.2d 937 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011). The author wishes to disclose that his law firm, Lewis & Kappes, P.C., filed an amicus brief on behalf of the Indiana Building Contractors Alliance in support of the NIBTC, and that he personally participated in the preparation of that brief.

179. *Id.* at 943.

180. *Id.* at 939.

181. *Id*. (quoting Mann v. Terre Haute, 163 N.E.2d 577, 579-80 (Ind. 1960)).

182. *Id*. at 943-44 (collecting cases).

183. *Id*. at 944.

impediment, to judicial review."[184] The court thus concluded that the language applied to prevent reconsideration of a common wage determination made by county commissioners by the common wage committee and was not meant to "unambiguously foreclose judicial review of the completed administrative process."[185]

Like the decisions in *Save Our School* and *Northeastern Indiana Building Trades Council*, the Indiana Supreme Court addressed the appropriateness of judicial review of an agency action in the absence of a specific statutory authorization in *In re A.B.*[186]

In that case, the Indiana Supreme Court was confronted with whether a decision by the Department of Child Services (DCS) to refuse payment for certain child placement decisions by juvenile courts is subject to appellate judicial review. The case involved the placement of A.B. in an out-of-state facility.[187] In the placement proceeding, the probation department recommended the out-of-state facility in Arizona, but the DCS proposed several in-state facilities.[188] Ultimately, the trial court modified the placement, sending A.B. to the out-of-state facility against the recommendation of the DCS, which refused to pay for the placement. Accordingly, the trial court found several statutes concerning the placement of children to be unconstitutional, including Indiana Code section 31-40-1-2(f), which governs the DCS' responsibility to pay for placement of children in out-of-state facilities.[189]

The Indiana Supreme Court found each of the statutes to be constitutional, but then considered whether Indiana Code section 31-40-1-2(f) immunizes DCS decisions refusing to pay for child placement in out-of-state facilities from all judicial review.[190] The court agreed that the statutory provision effectively precluded expedited review under Appellate Rule 14.1 and that "a disapproving decision by the DCS Director cannot be overruled by the juvenile court at which it is directed."[191] The court refused, however, to conclude that the provision "is immune from any judicial review whatsoever."[192]

After determining that DCS decisions made under Indiana Code section 31-40-1-2(f) were subject to some form of review, the court asked how, in the absence of a specific statutory provision to guide such review, "should we

---

184. *Id*.

185. *Id*.

186. 949 N.E.2d 1204, 1215 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 994 (Nov. 1, 2011).

187. *Id*. at 1208.

188. *Id*. at 1208-11.

189. *Id*. at 1210-11, 1220. The statute provides that "[t]he department is not responsible for payment of any costs or expenses for housing or services provided to or for the benefit of a child placed by a juvenile court in a home or facility located outside Indiana, if the placement is not recommended or approved the director of the department or the director's designee." IND. CODE § 31-40-1-2(f) (2011).

190. *A.B.*, 949 N.E.2d at 1215.

191. *Id*.

192. *Id*.

proceed to assure that our review of the DCS Director's decision here is guided by principled and clear standards?"[193] In answering that question, the court ultimately settled upon the standards set forth in AOPA which it noted not only apply to determinations made by the DCS, but also "creates minimum procedural rights and imposes minimum procedural duties" in general administrative proceedings.[194] The court did not consider it "necessary" to hold that decisions made under section 31-40-1-2(f) were subject to AOPA provided that the standards established in Indiana Code section 4-21.5-5-14 were applied in appellate review of such decisions.[195]

In concluding that judicial review of DCS decisions was appropriate, the court, however, limited the scope of review solely to whether the DCS's refusal to pay for out-of-state placement was arbitrary and capricious.[196] In doing so, the court noted long standing decisions holding that judicial review of administrative actions, "even if there is no statute authorizing an appeal" for arbitrary and capricious decisions, is appropriate, and that adequate due process required the opportunity for judicial review of an agency decision.[197] As the court further stated, "the law is well settled 'that all discretionary acts of public officials, which directly and substantially affect the lives and property of the public are subject to judicial review where the action of such official is . . . arbitrary or capricious' . . . ."[198] The Indiana Supreme Court thus placed decisions by the DCS concerning the out-of-state placement of children into a highly restricted form of judicial review, but it nevertheless recognized that such review was necessary to protect the rights and interests of children from otherwise unjustified decisions.

IV. DUE PROCESS CONCERNS IN ADMINISTRATIVE PROCEEDINGS

As the decision in *A.B.* makes clear, due process requires access to judicial review of administrative decisions.[199] To the extent that the decisions of administrative agencies affect the rights of those appearing before them, the agency must also provide due process to those parties. This requires, at a minimum, notice and an opportunity to be heard. As more and more administrative decisions are resolved without in-person hearings, a common question arises as to whether and when a party is denied due process during a telephonic hearing. This was an issue frequently addressed by the State's

193. *Id*.

194. *Id.* at 1215-17.

195. *Id*. at 1217.

196. *See id*. at 1220 ("If DCS wants to disapprove and thereby not pay for out-of-state placement pursuant to statute, such decision is subject to appellate review, but only upon an arbitrary and capricious showing" and "[a]ny party may take an appeal to the [Indiana] Court of Appeals, which will review the decision under the arbitrary and capricious standard as discussed above.").

197. *Id*. at 1217-18.

198. *Id*. at 1218 (quoting State *ex rel.* Smitherman v. Davis, 151 N.E.2d 495, 498 (Ind. 1958)).

199. *See id.* at 1220.

appellate courts in the survey period and resolved in somewhat divergent ways by different panels.

In *S.S. v. Review Board of the Indiana Department of Workforce Development*,[200] the Indiana Court of Appeals considered whether an applicant for unemployment benefits was denied due process because she was not given a reasonable opportunity to participate in a telephonic hearing. After an initial determination that she was terminated for just cause and was therefore ineligible for unemployment benefits, S.S. appealed the decision.[201] Following the Department's procedures, the ALJ sent notice of the appeal hearing and directed S.S. to provide "ONE" telephone number at which she could be reached.[202] The notice also provided that it was her responsibility to ensure her availability during the time of her hearing, which included making sure she was aware of the difference in time zones between Indianapolis and her location during the scheduled hearing.[203]

Although S.S. provided a telephone number, the ALJ was unable to reach her during the scheduled hearing time and subsequently dismissed her appeal.[204] Later on in the day of her hearing, S.S. faxed a letter to the ALJ explaining that she did not answer the phone because of having "mixed up" the Eastern and Central time zones and that she was attending a food stamp hearing in a federal building at the time of her unemployment hearing.[205] S.S. also filed a request for reinstatement of her appeal, which was denied, and she subsequently sought judicial review.[206]

The court of appeals concluded that S.S. was not denied due process with respect to her initial appeal to the ALJ because she had been provided notice of the hearing and was given an opportunity to participate.[207] The court compared the case to *Wolf Lake Pub, Inc. v. Review Board of the Indiana Department of Workforce Development*,[208] in which a party had "received actual notice of a telephone hearing but was unable to participate due to its representatives' poor cell phone reception which could have been anticipated and prevented."[209] Similarly, the court concluded S.S. received notice and could have taken steps to reschedule the hearing or make other arrangements, but failed to do so.[210]

Of perhaps greater interest is how the court addressed S.S.'s claim that the Department erred by denying her request to reinstate her appeal. As the court

---

200. 941 N.E.2d 550 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 493 (Mar. 24, 2011).

201. *Id*. at 552-53.

202. *Id.* at 553.

203. *Id*.

204. *Id*.

205. *Id*.

206. *Id*.

207. *Id*. at 555.

208. 930 N.E.2d 1138 (Ind. Ct. App. 2010).

209. *S.S.*, 941 N.E.2d at 555.

210. *Id*.

noted, the regulations governing the appeal process expired in January 2009 and have not been readopted, nor have new rules been promulgated.[211] The court recognized that this presented serious concerns as "[l]ack of such promulgation may deprive parties of notice of their procedural rights in [Department] proceedings, particularly because the [Department] is not subject" to AOPA.[212]

Nevertheless, the court did not consider this an impediment to judicial review as it considered the "dispositive issue on which our decision rests is whether S.S. showed good cause to support her reinstatement."[213] This, the court reasoned, was an issue of the Department's "application of a standard inherent in any administrative process to the extent an agency inherently needs some good reason for setting aside its previous action."[214] The court then noted that the "finding that S.S. did not show good cause for reinstatement of her appeal is a finding of ultimate fact, which this court reviews only for reasonableness, not de novo."[215] Stating that S.S. did not "point to any circumstance outside her control" that caused her to miss the appeal, the court concluded that the Department "reasonably found she failed to show good cause for reinstating her appeal."[216]

In *Lush v. Review Board of the Indiana Department of Workforce Development*,[217] the Indiana Court of Appeals reached the opposite conclusion. Like S.S., Lush was terminated from his employment and denied unemployment benefits after an initial determination was made that he was released for good cause.[218] Lush also appealed to an ALJ and received a notice advising him of the date and time of the hearing, also requiring him to provide a telephone number at which he could be reached.[219] Lush did so, but at the time of the hearing, the ALJ was unable to reach Lush, noting on the docket that the first telephone number was "invalid" and the second "to a union hall where no one named [Lush] was located."[220] The ALJ dismissed the case, and Lush sought reinstatement, informing the ALJ that he was at the union hall at the time of the hearing, but that the "hall said you never called."[221] The request for reinstatement was denied, and the decision was ultimately affirmed by the full Board.[222]

Unlike the court in *S.S.*, the court in *Lush* treated the issue under an abuse of discretion standard, noting that "conclusions as to ultimate facts involve the inference or deduction based on the findings of basic fact" and are "typically

---

211. *Id*. at 556.

212. *Id*. at 557.

213. *Id*.

214. *Id*.

215. *Id.*

216. *Id*. at 558.

217. 944 N.E.2d 492 (Ind. Ct. App. 2011), *reh'g denied*, 211 Ind. App. LEXIS 603 (Apr. 8, 2011), *trans. denied*, 962 N.E.2d 645 (Ind. 2011).

218. *Id*. at 493.

219. *Id*.

220. *Id*. at 494.

221. *Id*.

222. *Id.* at 494-95.

reviewed to ensure that the Board's inference is 'reasonable' or 'reasonable in light of [the Board's] findings.'"[223] Thus, the court declined to address the issue as one of "due process" and instead focused on whether the Department's decision to refuse to reinstate the appeal was reasonable in light of the "equitable considerations underlying the Act and its humanitarian purposes."[224] In so doing, the court of appeals concluded from the facts that the ALJ abused its discretion when it dismissed the appeal and that the decision to uphold the dismissal was "greatly out of proportion to the minimal costs of rescheduling a second telephonic hearing between Lush and the ALJ."[225] Therefore, with a final note that the purpose of the unemployment statutes is not "to be a vehicle by which the Board may find procedural grounds to deny coverage," the court reversed and remanded to reach a decision on the merits.[226]

V. CONFIDENTIALITY CONCERNS

During the survey period an interesting debate arose in the Indiana Court of Appeals concerning the use of litigants' names in appellate opinions reviewing decisions of the Department of Workforce Development. The debate arises, in part, because the Department of Workforce Development is to keep information concerning unemployment benefits confidential pursuant to Indiana Code section 24-4-19-6.[227] Indiana Administrative Rule 9(G)(1)(b)(xviii) further requires that "[a]ll records of the Department of Workforce Development as declared confidential" by Indiana Code section 22-4-19-6 are to be excluded from public access.[228]

In *Moore v. Review Board of the Indiana Department of Workforce Development*[229] the Indiana Court of Appeals addressed a motion filed by the Department to publish the names of parties in cases involving the Department.[230] This request was made because it had become allegedly "difficult to administer the high volume of cases in the appellate process where the names of the individuals and employing units are not disclosed."[231] In addressing that motion, the court noted that although Administrative Rule 9(G)(1)(b)(xviii) had been amended effective as of January 1, 2010, a number of decisions had been issued using the full names of the litigants, and apparently no consistent practice had emerged.[232] The court further stated that there was likely to be some

---

223. *Id.* at 495 (quoting in part McClain v. Ind. Dep't of Workforce Dev., 693 N.E.2d 1314, 1317-18 (Ind. 1998)).

224. *Id.* at 496.

225. *Id*.

226. *Id*.

227. IND. CODE § 22-4-19-6 (2011).

228. IND. ADMIN. R. (9)(G)(1)(b)(xviii).

229. 951 N.E.2d 301 (Ind. Ct. App. 2011).

230. *Id.* at 302-03.

231. *Id*. at 304.

232. *Id*. at 305.

administrative burden in tracking cases in which only initials are used.[233] Ultimately, the court concluded that while Indiana Code section 22-4-19-6 kept the records of the Department confidential, Administrative Rule 9(G)(4)(d) and Indiana Code section 22-4-19-6(b) (which provides an exception to the general rule of confidentiality based on a court order) combined to make it appropriate to "use the full names of parties in routine appeals from the Review Board" presumably to ease the administrative burden.[234]

The contrary view was expressed in *S.S. LLC v. Review Board of the Indiana Department of Workforce Development*.[235] There, in a concurring opinion, Judge Crone took issue with the analysis laid out in *Moore*, noting that Administrative Rule 9(G)(1)(b)(xviii) not only applies to the court, but that it was added in response to a specific request by the court to treat filings in cases involving the Department confidentially, and that the Indiana Supreme Court's Records Management Committee had recently declined to amend the rule to allow the use of parties' names.[236] The concurrence also disputed whether the administrative burden imposed by using initials was truly substantial, whether an "opinion" was the same as an "order" under section 22-4-19-6(b), and whether using names "in unemployment cases is 'essential to the resolution of litigation or appropriate to further the establishment of precedent or the development of the law'" as provided for in Administrative Rule 9(G)(4)(d).[237] The concurring opinion also questioned whether it was appropriate for "a single panel of this [c]ourt [to issue] a ruling on a motion in a single case that will affect the privacy rights of unemployment litigants in future cases."[238]

As the reader is likely aware, there does not appear to be overwhelming consensus as to the use of names or initials in appellate decisions involving judicial review of decisions by the Department of Workforce Development. Given the privacy issues at stake, as well as the issues of judicial compliance with the Administrative Rules and statutes, how this matter is ultimately resolved will be of some interest.

CONCLUSION

As the Indiana Court of Appeals noted in *Pack*, "thousands of administrative orders issue each year from our state agencies."[239] Of that number, this Article represents only a selection of those reviewed by courts. The selection offers some insight into the diversity of the issues handled not only by those courts, but

---

233. *Id*. (noting that a search of the court's docket revealed "over 100 cases" with the Review Board as a litigant and "thirty-four cases" which used the same initials assigned to the case).

234. *Id*. at 305-06.

235. 953 N.E.2d 597, 604 (Ind. Ct. App. 2011).

236. *Id*. at 604-07 (Crone, J., concurring).

237. *Id*. at 607.

238. *Id*.

239. Pack v. Ind. Family & Soc. Servs. Admin., 935 N.E.2d 1218, 1221-22 (Ind. Ct. App. 2010).

also by the administrative agencies themselves. While general principles of administrative law may be largely well established, Hoosier judges and attorneys cannot sit on their laurels. The sheer volume and complexity of the issues addressed by the State's administrative agencies has always demanded new and innovative approaches and will always continue to do so.

DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: RULE AMENDMENTS, REMARKABLE CASE LAW, AND COURT GUIDANCE FOR APPELLATE PRACTITIONERS

BRYAN H. BABB*
ONI HARTON**

INTRODUCTION

In 2000, the Indiana Supreme Court adopted the Indiana Rules of Appellate Procedure ("Appellate Rules"). The Indiana Supreme Court, the Indiana Court of Appeals, and the Indiana Tax Court (collectively "appellate courts") apply, interpret, and update the Appellate Rules through appellate decisions and amendment orders. This Article tracks the developments in appellate procedure between October 1, 2010, and September 30, 2011. Specifically, this Article summarizes the rule amendments, examines court opinions affecting appellate procedure, and synthesizes case law in order to provide guidance to practitioners so that they may improve their appellate practice.

I. RULE AMENDMENTS

The Indiana Supreme Court issued its Appellate Rule amendments on September 20, 2011.[1] The court substantively amended Appellate Rules 2, 9, 10, 11, 14, 14.1, 15, 16, 23, 24, 25, 46, 62, and 63.[2] The court also made changes to Forms 9-1, 9-2, 14.1-1, 15-1, 16-1, and 16-2 in accordance with the rule changes.[3] These amendments took effect on January 1, 2012 and may be categorized as notice of appeal, trial court clerk or administrative agency service of documents, expedited appeal, appearances, general provisions, and supreme court proceedings.

A. Notice of Appeal

Some of the more substantive rule amendments relate to the notice of appeal, found in Appellate Rules 9, 14, and 15. In terms of initiating an appeal,

---

* Partner, Bose McKinney & Evans LLP. B.S., 1989, United States Military Academy; M.S.B.A., 1994, Boston University; J.D., *cum laude*, 1999, Indiana University Maurer School of Law; Law Clerk to Justice Frank Sullivan, Jr. of the Indiana Supreme Court (1999-2000).

** Associate, Bose McKinney & Evans LLP. B.A., 2002, University of North Carolina at Chapel Hill; J.D., *magna cum laude*, 2008, Indiana University Robert H. McKinney School of Law; Law Clerk to Justice Frank Sullivan, Jr. of the Indiana Supreme Court (2008-2010). The authors greatly appreciate the research, analysis, and drafting assistance provided by Matthew R. Springer, third-year law student at Thomas M. Cooley Law School.

1. *See* Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1101-MS-17 (Ind. Sept. 20, 2011), *available at* http://www.in.gov/judiciary/files/rule-amends-2011-order-amend-2011-appellate.pdf [hereinafter Sept. 20, 2011 Appellate Rules Order].

2. *Id.* at 1.

3. *Id.*

Appellate Rule 9 made significant changes to the filing of the notice of appeal and the content that must be included in such notice. Appellate Rule 9(A) changes the filing of the notice of appeal from the trial court clerk to the clerk of the appellate courts.[4] As for the content in the notice of appeal, Appellate Rule 9 previously provided fairly generalized content requirements. The new rule provides for additional content requirements, along with the previous content requirements.[5] The following are the comprehensive headings of the additional content requirements: party information, trial information, public access information, appellate alternative dispute resolution information, attachments, certification, and certificate of filing and service.[6] Each of these headings includes subsections detailing the court's requirements.[7] As for Appellate Rule 9(F)(3) regarding "designation of appealed order or judgment," the new amended rule adds four additional requirements: date and title of the judgment or order, date on which any motion to correct error was denied, the basis for appellate jurisdiction, and designation of court where appeal is taken.[8]

Acknowledging that the amendment concerning the notice of appeal constitutes a major procedural change that may be missed by attorneys, Appellate Rule 9(A)(5) allows a two-year grace period, until January 1, 2014, for appellants who mistakenly file the notice of appeal with the trial court clerk or the administrative agency, instead of the clerk of the appellate courts.[9]

Another major amendment to the Appellate Rules in Rule 15 abolishes the appellant's case summary.[10] Previously, Appellate Rule 15 governed the appellant's case summary and outlined who must file, date due, content, and attachments.[11] The information formerly required in the appellant's case summary must now be included in the notice of appeal.[12] As a result of the abolishment, Appellate Rule 2(B), the definition of "Appellant's Case Summary," was deleted.[13]

Yet another noteworthy change regarding the notice of appeal is found in Appellant Rule 14(B)(3). This rule mandates that the notice of appeal be filed with the appellate court clerk and served on the trial court clerk rather than the other way around.[14] The form requirements have changed as well pursuant to

---

4. *Id.* at 1-2.

5. *See id.* at 3-6; *see also* IND. APP. R. 9(F).

6. IND. APP. R. 9(F).

7. *Id.*

8. IND. APP. R. 9(F)(3).

9. IND. APP. R. 9(A)(5) ("Effective until January 1, 2014, if an appellant timely files the Notice of Appeal with the trial court clerk or the Administrative Agency, instead of the Clerk as required by App. R. 9(A)(1), the Notice of Appeal will be deemed timely filed and the appeal will not be forfeited.").

10. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 14-17.

11. *Id.*

12. IND. APP. R. 9(F).

13. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 1.

14. IND. APP. R. 14(B)(3). The prior rule required the appellant to file a notice of appeal with

Rule 14(C)(5), which states "[t]he Notice of Appeal shall be in the form prescribed by Rule 9, and served in accordance with Rule 9(F)(10)."[15]

B. Trial Court Clerk or Administrative Agency: Service of Documents

A few Appellate Rules were amended to change to whom, and how, the trial court clerk or the administrative agency should serve certain documents. Appellate practitioners would be well-advised to take note of these amended rules in order to comply with the Appellate Rules. Appellate Rule 10 requires service of notice on the parties to be consistent with Appellate Rule 24 with regards to the following documents: notice of completion of clerk's record, notice of completion of transcript, and extension of time to complete clerk's records.[16]

Appellate Rule 24, the rule pertaining to service of documents, outlines what parties should be contemporaneously served, contingent on the type of document being filed and the date of filing.[17] Three distinct categories give guidance for what should be contemporaneously served: notice of appeal, documents filed in the thirty-day period following the filing of notice of appeal, and all other documents tendered to the clerk for filing.[18]

For criminal appeals, an additional rule was added, Appellate Rule 24(A)(4).[19] This rule states, "in criminal appeals only, any [a]ppendix or [s]upplemental [a]ppendix need not be served on the Attorney General."[20]

As for the certificate of service, Appellate Rule 24(D) formerly required any attorney or unrepresented party to provide specific content in the certificate of service when tendering a document to the clerk for filing.[21] With the amendment, the filing content requirement is mandatory for anyone (not just attorneys or unrepresented parties).[22] The certificate of service must be placed at the end of the document.[23] An exception for the clerk to allow documents to be filed without a certificate of service no longer applies.[24]

C. Expedited Appeal

Pursuant to the amendments to Appellate Rule 14.1(B) regarding notice of expedited appeal, additional parties are required to be served notice.[25] Appellate Rule 14.1(B) requires the Department of Child Services (DCS) to provide notice

---

the trial court clerk. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 11.

15. IND. APP. R. 14(C)(5).
16. IND. APP. R. 10(C)-(E).
17. IND. APP. R. 24(A)(1)-(3).
18. *Id.*
19. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 22.
20. IND. APP. R. 24(A)(4).
21. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 23.
22. IND. APP. R. 24(D).
23. IND. APP. R. 24(D)(2).
24. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 23.
25. *See id.* at 13-14.

to the clerk of the trial court and the court reporter (if a transcript, or any portion of a transcript, is requested) on the same day it files the notice of expedited appeal.[26] It is important to note that this rule amendment eliminates the requirement for the DCS to give notice to the trial court clerk.[27] All content that is part of the notice of expedited appeal must comply with the new amended Appellate Rule 9(F).[28]

D. Appearances

The new rule regarding appearances, Appellate Rule 16, though similar to the old rule, differs in three regards. First, the new rule expressly states that "filing . . . a [n]otice of [a]ppeal pursuant to Rule 9 or [n]otice of [e]xpedited [a]ppeal pursuant to Rule 14.1 satisfies the requirement to file an appearance."[29] The old rule required initiating parties to file an appellant's case summary; this is no longer applicable.[30] Second, the amended rule provides that "[p]arties shall promptly advise the [c]lerk of any change in the information previously supplied under this Rule and Rule 9."[31] Third, the new rule adds an entirely new section Rule 16(H) entitled "Appearances in Certain Interlocutory Appeals."[32] This section states: "In the case of an [i]nterlocutory [a]ppeal under Rules 14(B)(2) or 14(C), a party shall file an appearance setting forth the information required by Rule 16(B) at the time the motion requesting the [c]ourt on [a]ppeal to accept jurisdiction over the interlocutory appeal is filed."[33]

E. General Provisions

Some amendments to the Appellate Rules changed procedural aspects of the appellate process. Whether they allow court reporters to use their discretion for timeliness of filing a transcript, or dictate the number of copies of each record that must be filed, several amendments are worth mentioning.

Appellate Rule 11, pertaining to duties of the court reporter, allows court reporters to use their discretion when "the court reporter believes the transcript cannot be filed within the time period prescribed by this rule, then the court reporter shall move . . . for an extension of time to file the [t]ranscript pursuant to Rule 35(A)."[34] With respect to motions to compel, the court reporter who fails to file the transcript on time must "affirmatively state that service [as required] under Rule 24(A)(1) was properly made and that the appellant has complied with

---

26. IND. APP. R. 14.1(B).
27. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 13.
28. IND. APP. R. 14.1(B)(3).
29. IND. APP. R. 16(A).
30. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 18.
31. IND. APP. R. 16(E).
32. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 19.
33. IND. APP. R. 16(H).
34. IND. APP. R. 11(C).

the agreement for payment made in accordance with Rule 9(H)."[35]

Appellate Rule 23, which discusses filing, requires the original and one copy of any appearance and notice of appeal to be filed.[36] The amended rule also eliminates all appellant's case summary requirements.[37] Additionally, Appellate Rule 25, which deals with computation of time, specifies the allowance of an automatic extension of time from three days to three calendar days from the date of deposit in the mail or with the carrier to file any response.[38]

F. Supreme Court Proceedings

Appellate Rule 62, regarding appeals pertaining to waiver of parental consent for abortion, and Appellate Rule 63, which discusses the review of tax court decisions, both contain minor changes. These rule amendments eliminate any reference to the appellant's case summary within each rule.[39]

II. CASE LAW INTERPRETING THE APPELLATE RULES

Decisions authored by the court of appeals provide most case law interpreting the Appellate Rules, as its volume presents it with more opportunities to construe the rules and refine appellate procedure. The supreme court and tax court also, on occasion, have the opportunity to construe and apply the Appellate Rules.

A. Calculation of Days

Parties must be concerned with the content and procedural requirements when filing a motion. In this regard, counting days represents but one area a practitioner must pay close attention to at the outset of the appellate process.

In *Bir v. Bir*,[40] the appellee served the appellant with the appellee's response to appellant's motion for emergency transfer on December 10, 2010.[41] Then, appellant attempted to file a "Verified Motion for Leave to File Verified Reply in Support of Appellant's Motion for Emergency Transfer" ("motion for leave") on December 21, 2010.[42] The appellant attached a "Verified Reply in Support of Appellant's Motion for Emergency Transfer."[43] The clerk refused to file the appellant's motion for leave because it was deemed untimely filed.[44] The next day, December 22, the appellant filed a motion entitled, "Unopposed Verified Request to File Belated Document," explaining appellant's belief that appellant

---

35. IND. APP. R. 11(D).
36. IND. APP. R. 23.
37. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 19.
38. IND. APP. R. 25(C).
39. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 26-27.
40. 939 N.E.2d 1096 (Ind.), *trans. denied*, 962 N.E.2d 641 (Ind. 2011).
41. *Id.* at 1097.
42. *Id.*
43. *Id.*
44. *Id.*

thought that Appellate Rules 25(C) and 34(D) would make December 22, 2010, the deadline for appellant's motion for leave.[45]

The Indiana Supreme Court clarified how Appellate Rules 25(B) and 25(C) work together with Appellate Rule 34(D) to determine the due date for seeking leave to file a reply.[46]

> [W]hen a response to a motion is served by mail, three calendar days are immediately added to the service date per appellate Rule 25(C) . . . . The five non-business days expressed in Rule 34(D) are then counted from that third calendar day if it is a business day, or are counted from the next business day if the third day of the "additional three days" falls on a "non-business day."[47]

Applying these rules to the situation presented in *Bir*, the appellee's response was served on the Appellant by mail on Friday, December 10, 2010. The court held that Rule 25(C) added three calendar days from December 10 to appellant's motion for leave time period, which made Monday, December 13, 2010, the start date for determining the deadline stated in Rule 34(D).[48] Following Rule 34(D), "five non-business days were then counted from Monday, December 13th (i.e., Tuesday, Wednesday, Thursday, Friday, and Monday), making Monday, December 20, 2010, the deadline for [a]ppellant's [m]otion for [l]eave."[49] As a result, the court granted appellant's "Unopposed Verified Request to File Belated Document."[50]

B. Authorization of Davis/Hatton Procedure

The use of the *Davis/Hatton* procedure[51] within Appellate Rule 37 is a valuable tool when a defendant needs to develop an evidentiary record in an effort to support a claim of ineffective assistance of trial counsel. In *Peaver v. State*,[52] the trial court found Peaver guilty of child exploitation. Peaver filed a timely notice of appeal but subsequently moved for leave to pursue post-conviction relief and to suspend or stay his direct appeal using the *Davis/Hatton* procedure.[53] The court of appeals dismissed Peaver's appeal and remanded to the

---

45. *Id.*

46. *Id.*

47. *Id.* (citing IND. APP. R. 25(B) (providing that "[w]hen the time allowed is less than seven . . . days, all non-business days shall be excluded from the computation")).

48. *Id.* at 1098.

49. *Id.*

50. *Id.*

51. *See* Taylor v. State, 929 N.E.2d 912, 917 n.1 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 825 (Ind. 2010) ("The *Davis/Hatton* procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court." (internal citations omitted)).

52. 937 N.E.2d 896 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1212 (Ind. 2011).

53. *Id.* at 898.

trial court for post-conviction proceedings.[54] Peaver filed a petition, alleging he was denied the effective assistance of trial counsel.[55] The post-conviction court denied this petition.[56]

Peaver asserted three separate grounds to support his claim that he was denied effective assistance of trial counsel; however, Peaver only included one claim in his petition for post-conviction relief.[57] Accordingly, the state asserted that the two remaining grounds omitted from his petition for post conviction verdict should be waived.[58] Peaver argued "he is entitled to allege separate grounds for his ineffective assistance of counsel ('IAC') claim in the context of his direct appeal, which is now reinstated pursuant to the *Davis/Hatton* procedure."[59]

In its decision, the court addressed the *Davis/Hatton* procedure, authorized by Appellate Rule 37.[60] The *Davis/Hatton* procedure "is encouraged 'to develop an evidentiary record for issues that with reasonable diligence could not have been discovered before the time for filing a motion to correct error or a notice of appeal has passed.'"[61] Historically, the Indiana Supreme Court has held that IAC claims can only be alleged in one proceeding.[62] The court denied Peaver's attempt to utilize the *Davis/Hatton* procedure to simultaneously appeal the denial of his petition for post-conviction relief claiming IAC on one theory and asserting IAC on another theory in his direct appeal.[63] The court noted that "the defendant must decide the forum for adjudication of the issue—direct appeal or collateral review. The specific contentions supporting the claim, however, may not be divided between the two proceedings."[64]

C. Importance of Citations in the Argument

The argument portion of a brief must contain very specific content, but regardless of the amount of effort a party puts into the brief, it could all be futile if a party neglects to add appropriate citations to applicable legal authority. In *New v. Estate of New*,[65] Martha (the decedent) had died on September 7, 2006.[66] Martha's will named two of her children, Claudine and Robert, as co-representatives of her estate ("Estate").[67] After several disagreements between

---

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* (citing Allen v. State, 749 N.E.2d 1158, 1171 (Ind. 2001)).
59. *Id.*
60. *Id.* at 899.
61. *Id.* (quoting Schlabach v. State, 842 N.E.2d 411, 418 (Ind. Ct. App. 2006).
62. *Id.*
63. *Id.*
64. *Id.* (quoting Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998) (emphasis omitted)).
65. 938 N.E.2d 758 (Ind. Ct. App. 2010), *trans. denied*, 962 N.E.2d 641 (Ind. 2011).
66. *Id.* at 760.
67. *Id.*

the siblings, Claudine petitioned the probate court to remove Robert as co-representative for the Estate, leaving Claudine as the sole personal representative.[68] On September 4, 2009, the court approved the Estate's third amended final accounting. On October 7, 2009, Robert filed a combined motion to correct error pursuant to Rule 59, motion for relief from judgment pursuant to Rule 60, and a motion for reconsideration of the court's September 4, 2009 order.[69] The court denied the motion and the appeal ensued.[70]

The Estate moved to dismiss the appeal.[71] The Estate also moved to assess attorney fees for procedural bad faith for violating Appellate Rule 46(A).[72] Appellate Rule 46(A) provides the standard for the appellant's briefs submitted to the court.[73]

The court explained that the purpose of Rule 46(A) is to "relieve courts of the burden of searching the record and stating a party's case for [them]."[74] If the issue is "advanced without citation to authorities or the record, that issue is waived when the appellant's failure in this regard impedes our review."[75] The court concluded that Robert and James did not comply with Rule 46(A)(8)(a), attributable to their flagrant failure to make citations and failure to cite legal authority.[76] The court found that the defects in the brief were substantial, and such noncompliance with Rule 46(A)(8) constituted procedural bad faith, which entitled the non-offending party to appellate attorney fees per Appellate Rule 66(E).[77]

D. Procedural and Substantive Bad Faith Claims

A claimant who brings a bad faith claim may be subject to penalties, such as paying the other party's attorneys' fees. Bad faith claims may be divided into areas: procedural bad faith claims and substantive bad faith claims. Each type of claim has its own set of factors, which must be present to effectively characterize a claim as bad faith.

In *Kelley v. Med-1 Solutions, LLC*,[78] Med-1 accused the debtors of bringing a bad faith motion. Med-1 requested appellate attorney fees pursuant to Appellate

---

68. *Id.* at 761.

69. *Id.*

70. *Id.*

71. *Id.* at 762.

72. *Id.*

73. *Id.* ("The argument must contain the contentions of the appellant on the issues presented supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the [a]ppendix or parts of the [r]ecord on [a]ppeal relied on, in accordance with Rule 22." (quoting IND. APP. R. 46(A)).

74. *Id.* (quoting Vandenburgh v. Vandenburgh, 916 N.E.2d 723, 729 (Ind. Ct. App. 2009)).

75. *Id.*

76. *Id.*

77. *Id.* at 765.

78. 952 N.E.2d 817 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1121 (Ind. 2012).

Rule 66(E).[79] Appellate Rule 66(E) allows the court to assess damages when an appeal, petition, motion, or response is frivolous or brought in bad faith.[80] The court of appeals discussed the appropriateness of awarding attorneys' fees under Rule 66(E), and stated that the rule is "limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. . . . we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal."[81]

The bad faith referenced in Rule 66(E) may either be substantive or procedural, and Med-1 accused the debtors of both.[82] Procedural bad faith entails the blatant neglect for the form and content requirements of the Appellate Rules.[83] Additionally, the omission and misstatement of relevant facts in the record, and filing "briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court" constitute procedural bad faith.[84]

On the other hand, a claimant bringing a substantive bad faith claim must show "that the appellant's contentions and argument are utterly devoid of all plausibility."[85] Accordingly, "[s]ubstantive bad faith implies the conscious doing of wrong because of dishonest purpose or moral obliquity."[86] The court concluded that the debtors did not commit procedural bad faith because their acts were not flagrant or significant enough to warrant attorney fees.[87] The debtors did not commit substantive bad faith because the court reasoned that the arguments were not "utterly devoid of all plausibility."[88] Therefore, attorney fees were not awarded to Med-1 for a bad faith motion.[89]

In *Chaney v. Clarian Health Partners, Inc.*,[90] Chaney filed a purported class action complaint against Clarian.[91] Chaney, the only named member of the proposed class, negotiated a settlement with Clarian. Clarian moved to dismiss the case with prejudice for lack of a class representative, which the trial court granted.[92] The attorney on behalf of Chaney and the class ("Class Attorney") appealed the trial court's dismissal, specifically, the imposition of Trial Rule 37

---

79. *Id.* at 831.

80. *Id.*

81. *Id.* (quoting Poulard v. Laporte Cnty. Election Bd., 922 N.E.2d 734, 737 (Ind. Ct. App. 2010)).

82. *Id.*

83. *Id.*

84. *Id.* (quoting Harness v. Schmitt, 924 N.E.2d 162, 168 (Ind. Ct. App. 2010)).

85. *Id.* (quoting *Harness*, 924 N.E.2d at 168).

86. *Id.* (quoting *Harness*, 924 N.E.2d at 168 (internal quotation omitted)).

87. *Id.*

88. *Id.* (citation omitted).

89. *Id.*

90. 954 N.E.2d 1063 (Ind. Ct. App. 2011), *modified on reh'g*, 2012 WL 966172 (Ind. Ct. App. 2012).

91. *Id.* at 1065.

92. *Id.*

sanctions against him.[93] The court of appeals affirmed the imposition of Trial Rule 37 sanctions against the Class Attorney.[94] Clarian then filed a motion for appellate fees and costs under Appellate Rules 66(E) and 67.[95] Appellate Rule 67 states, "[w]hen a judgment or order is affirmed in whole, the appellee shall recover costs. When a judgment has been reversed in whole, the appellant shall recover costs in the [c]ourt on [a]ppeal and in the trial court or [a]dministrative [a]gency as provided by law."[96]

The court first considered the Class Attorney's appeal against the Trial Rule 37 sanction.[97] The motion failed to include any statement concerning reasonable efforts to reach an agreement with Clarian about discovery.[98] The motion also failed to state the trial court's order staying any discovery of that nature.[99] The Class Attorney "ignored the plain context of Clarian's correspondence asking for an extension of time to respond to discovery that was not subject to the stay."[100] The Class Attorney refused to acknowledge the stay, and persisted in the theory on appeal, and in his petition to transfer, that Clarian had agreed to provide the requested discovery.[101] The court concluded that he had pursued the motion to compel in bad faith.[102] Consequently, regarding the Class Attorney's appeal on the Trial Rule 37 sanction, the court reasoned that Clarian was entitled to attorneys' fees under Appellate Rule 66(E) and costs under Appellate Rule 67.[103]

Next, the court considered Clarian's request for fees and costs "on the grounds that [the Class Attorney] did not cite any law in support of his position that the trial court had abused its discretion when it did not allow him discovery regarding additional potential class members."[104] The Class Attorney argued that he could not cite Indiana law directly to support his argument on appeal because the questions presented were matters of first impression.[105] The Class Attorney cited three cases in his petition for transfer and at oral argument that he claimed supported his legal position.[106] Though the court agreed with the Class Attorney's general premise that federal class action cases based on Federal Rule 23 could support his argument, the Class Attorney failed to provide the court with a single case under Federal Rule 23.[107] Independent research, however, revealed

---

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1066 (quoting IND. APP. R. 67(C)).
97. *Id.*
98. *Id.* at 1067.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1070.
104. *Id.* at 1067.
105. *Id.*
106. *Id.*
107. *Id.* at 1067-68.

a number of Indiana and federal cases involving class action lawsuits applying Federal Rule 23.[108] None of the cases the Class Attorney cited were applicable to his legal position, and two of the cases provided no analysis at all.[109]

The court went on to analyze the cases the Class Attorney cited and found that they failed to provide a basis for either the new construction of class action law he had requested, or an extension of the law to that end.[110] The court concluded that the Class Attorney's arguments and filings were "utterly devoid of all plausibility and, therefore, were pursued in bad faith."[111] Consequently, the court held that Clarian was entitled to fees and costs under Appellate Rules 66(E) and 67.[112]

E. Issues not Raised at Trial Cannot Be Raised on Interlocutory Appeal

In *Curtis v. State*,[113] the trial court granted Curtis's interlocutory appeal.[114] Curtis argued on interlocutory appeal "that the delay in bringing him to trial violates his right to a speedy trial as guaranteed by the United States and Indiana Constitutions."[115] The State countered Curtis's argument by asserting that Curtis forfeited his constitutional speedy-trial claims because the claims were raised for the first time on appeal.[116]

Appellate Rule 14(B) states, "[a]ny issues that were properly raised in the trial court in ruling on the trial court's [certified interlocutory] order are available on interlocutory appeal."[117] Conversely, issues not properly raised in the trial court are unavailable on interlocutory appeal.[118] Curtis's motion with the trial court did not include language to suggest that he was raising a constitutional speedy-trial claim.[119] Because Curtis failed to properly raise the speedy-trial issue in the trial court, Curtis was prohibited from arguing that issue in the interlocutory appeal.[120] The court explained that,

---

108. *Id.* at 1068.

109. *See id.*

110. *Id.* at 1068-69.

111. *Id.* at 1070.

112. *Id.* Clarian's request for both attorney fees and costs was supported by the foregoing facts: (1) the Class Attorney failed to use the appropriate standard of review in the discovery matter that was appealed; (2) the Class Attorney failed to cite supportive law to his arguments on appeal; and (3) the Class Attorney failed to cite law supporting his argument in his petition to transfer. *See id.* at 1066.

113. 948 N.E.2d 1143 (Ind. 2011).

114. *Id.* at 1146.

115. *Id.* at 1147.

116. *Id.*

117. *Id.* (second alteration in original) (quoting Harbour v. Arelco, Inc., 678 N.E.2d 381, 386 (Ind. 1997)).

118. *Id.*

119. *Id.*

120. *Id.*

> specific questions of law presented by the order must have been, in the first place, properly raised by Curtis before the trial court. And the trial court must have considered those issues in ruling on its interlocutory order. . . . To hold otherwise would allow a party to circumvent the well-established rule that issues must be raised before the trial court or are unavailable on appeal.[121]

F. Appellant's Burden to Show Reversible Error

Appellate Rule 66(A) pertains to the relief available on appeal for harmless error:

> No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.[122]

Thus, the appellant bears the burden of proving that the alleged error merits reversal.

In *Gibson v. Bojrab*,[123] Dr. Bojrab performed a procedure on Gibson. As a result of the procedure, Gibson suffered injuries.[124] Gibson filed a complaint, alleging that Dr. Bojrab was negligent during the procedure.[125] The primary issue at the jury trial was the admissibility of a panel's decision concerning another patient of Dr. Bojrab.[126] In the case involving the other patient, the panel found that Dr. Bojrab failed to meet the standard of care when he performed the same procedure he performed on Gibson.[127]

Dr. Bojrab wanted to exclude testimony by Dr. Beatty, one of the members of the panel that found that Dr. Bojrab failed to meet the standard of care when he performed the identical procedure on another patient. It was anticipated that Dr. Beatty would testify on Gibson's behalf.[128] The trial court decided that Dr. Beatty's testimony describing Dr. Bojrab's previous failure to meet his standard of care was inadmissible.[129] Gibson filed a motion to reconsider the admissibility of the evidence relating to the other procedure.[130] The trial court granted

---

121. *Id.* at 1148 (citing Pigg v. State, 929 N.E.2d 799, 803 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010)).

122. IND. APP. R. 66(A).

123. 950 N.E.2d 347 (Ind. Ct. App. 2011).

124. *Id.* at 349.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

Gibson's motion to reconsider stating, "If Dr. Bojrab testifies as to the standard of care, he will be testifying as an expert. As such, he can be impeached with prior claims of malpractice."[131] After Dr. Bojrab testified, the trial court ruled that he had testified without opening doors to impeachment.

Gibson appealed, contending that,

> the trial court deprived her of the opportunity to demonstrate why Dr. Bojrab's methods and abilities were not fool-proof. . . . [and that] evidence of Dr. Bojrab's prior breach of the standard of care in performing a nearly identical procedure could have shaped the juror's minds, calling into question everything Dr. Bojrab detailed at trial.[132]

The court explained that "[t]o determine whether an evidentiary error requires reversal, we assess the probable impact upon the trier of fact."[133]

The court of appeals reviewed the record and concluded that Gibson was now asserting that the trial court denied her the opportunity to broadly question Dr. Bojrab regarding the other medical malpractice action.[134] But, the court reasoned, the scope of the impeachment evidence that the trial court would have permitted was significantly narrower than Gibson contended.[135] Gibson failed to provide the court with a complete transcript evaluating the possible effect the exclusion of the impeachment evidence had on the jury; therefore, Gibson failed to establish error requiring reversal.[136]

G. Parties on Appeal

In *American Family Home Insurance Co. v. Bonta*,[137] Bonta crashed his motorcycle into Morales's car.[138] As a result of the accident, Bonta filed two complaints: one against Morales for her negligence and the second against American, as Bonta's provider for uninsured motorist coverage. American answered Bonta's complaint, and a three day jury trial ensued. The jury returned a verdict finding Bonta fifty-five percent at fault in the accident. The jury verdict was taken under advisement pending any motions that would be filed.[139] Ten days before the trial court's advisement entry, Bonta filed a motion for judgment

---

131. *Id.*

132. *Id.* at 352.

133. *Id.* at 351-52 (quoting Linton v. Davis, 887 N.E.2d 960, 965 (Ind. Ct. App. 2008)).

134. *Id.* at 352.

135. *See id.*

136. *Id.* The court noted, "it is a cardinal rule of appellate review that the appellant bears the burden of showing reversible error by the record, as all presumptions are in favor of the trial court's judgment." *Id.* (quoting Marion-Adams Sch. Corp. v. Boone, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006)).

137. 948 N.E.2d 361 (Ind. Ct. App. 2011).

138. *Id.* at 363.

139. *Id.*

on the evidence.[140] American filed a response to this motion. The trial court found that though it could not enter a judgment in favor of Bonta, it could find that the jury's verdict was against the weight of the evidence.[141] The trial court ordered a new trial. American appealed and Bonta cross-appealed.[142]

On cross-appeal, Bonta challenged American's standing to appeal the trial court's order.[143] Specifically, Bonta contended that "American's anonymous participation at trial does not allow it to 'step into Morales'[s] shoes' and initiate an appeal where Morales herself did not file an appeal."[144] Bonta argued that American was not a proper party to appeal in the case.[145] The trial court explained that a judgment secured by an insured motorist against an uninsured motorist will bind the insurer on both liability and damages, as long as the insurer received notice of the underlying litigation.[146] Therefore, the insurer may defend the action against the insured and intervene if not named as a defendant.[147] Within the framework of the uninsured motorist coverage claim, the insurer can stand in the shoes of the uninsured motorist during litigation.[148] Additionally, Appellate Rule 17(A) states that "[a] party of record in the trial court or [a]dministrative [a]gency shall be a party on appeal."[149]

The court concluded that American filed its answer to Bonta's motion and participated during the trial.[150] American was bound by the jury verdict since Morales was an uninsured motorist and American was Bonta's insurance provider; therefore, American had standing to bring an appeal contesting the trial court's decision to grant Bonta a new trial.[151]

H. Notice of "Intent" to Appeal Is Not "Functionally Equivalent" to a Notice of Appeal

The Appellate Rules governing the notice of appeal contain substantive guidelines as well as equally important procedural guidelines. The appellate courts have stressed the importance of following the specific measures outlined in the Appellate Rules, which helps explain why filing a notice of "intent" to appeal will not be considered an acceptable substitute for a notice of appeal.

In *In re D.L.*,[152] the trial court issued two separate parental termination orders

---

140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 363-64 (citation omitted).
145. *Id.* at 364.
146. *Id.* (citing Wineinger v. Ellis, 855 N.E.2d 614, 621 (Ind. Ct. App. 2006)).
147. *Id.* (citing *Wineinger*, 855 N.E.2d at 621).
148. *Id.* (citing *Wineinger*, 855 N.E.2d at 621).
149. *Id.* (quoting IND. APP. R. 17(A)).
150. *Id.*
151. *Id.*
152. 952 N.E.2d 209 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 646 (Ind. 2011).

against the parents of six children.[153] The trial court issued the first on August 20, 2010 (terminating parental rights to the five youngest children), and the other on August 23, 2010 (terminating parental rights to the oldest child). On August 30, 2010, the mother filed a notice of intent to appeal with the trial court. The notice generally advised the trial court that she wished to appeal the decision and requested the appointment of counsel for her appeal process.[154] On August 31, 2010, the father filed an identical notice. Then, on September 23, 2010, counsel for the mother and father filed a notice of appeal with respect to all six cause numbers.[155] The parents subsequently filed a motion requesting permission to file a belated notice of appeal with the trial court.[156] The trial court found it lacked the authority to grant such relief, and filed a notice to the appellate court of untimely notice of appeal.[157] The court of appeals held that the parents had forfeited their right to appeal because their notice of appeal was untimely filed pursuant to Appellate Rule 9(A)(1).[158] Failure to file within the thirty-day time limit will result in forfeiture of a right to appeal.[159]

The parents argued that their notices of intent to appeal were "functionally equivalent" to the required notice of appeal and, therefore, should have been considered timely filed.[160] But the court rejected this argument.[161] The court reasoned that

> the [n]otices of [i]ntent to [a]ppeal filed by [p]arents in this case do not fulfill the purpose of the notice of appeal requirement—to serve as a mechanism to alert the trial court and the parties of the initiation of an appeal and to trigger action by the trial court clerk and court reporter, setting in motion the filing deadlines imposed by the Appellate Rules.[162]

The last termination order was issued on August 23, 2010, and thirty days from that date would be September 22, 2010 (the last day to timely file).[163] The parents' notice of appeal was filed on September 23, 2010, a day after the thirty

---

153. *Id.* at 211.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 213. At the relevant time in question for this case, Appellate Procedure Rule 9(A)(1) provided: "A party initiates an appeal by filing a [n]otice of [a]ppeal with the trial court clerk . . . within thirty (30) days after the entry of a [f]inal [j]udgment is noted in the [c]hronological [c]ase [s]ummary." *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 1. As previously discussed, the Rule amendments make significant changes to the filing requirements for the notice of appeal, which took effect on January 1, 2012.

159. *In re D.L.*, 952 N.E.2d at 212 (citing Bohlander v. Bohlander, 875 N.E.2d 299, 301 (Ind. Ct. App. 2007)).

160. *Id.*

161. *Id.* at 213.

162. *Id.*

163. *Id.*

day filing requirement; therefore, the parents forfeited their right to appeal.[164]

III. INDIANA SUPREME COURT

A. Case Data from the Indiana Supreme Court

In total, during the 2011 fiscal year,[165] the supreme court disposed of 1037 cases and issued 156 majority opinions and published dispositive orders.[166] The supreme court "accepted jurisdiction and issued opinions in approximately 8.7% of all transfer cases (11.3% in civil cases and 7.2% in criminal cases)."[167] The Indiana Supreme Court denied review of the remaining 91.3% resulting in the appellate court decision becoming final.[168]

This year, the case makeup was similar to that of the previous fiscal year, with the number of attorney discipline cases remaining high, totaling 40% of the majority opinions and published dispositive orders.[169] Approximately 27% of this year's opinions were criminal cases; 24% were civil; 3% were original actions; 1% were certified questions; 1% were tax; and the remainder of the cases consisted of judicial discipline cases, Indiana Board of Law Examiners cases, and rehearings.[170] The court heard oral argument in seventy-seven cases; with thirty-two coming from criminal cases, forty-two coming from civil cases, and three from certified questions.[171]

B. Chief Justice Shepard's Retirement from the Indiana Supreme Court

On December 7, 2011, Chief Justice Randall T. Shepard announced that he would leave the bench in March 2012 after a quarter century as leader of Indiana's judiciary.[172] Chief Justice Shepard served as the 99th justice of the Indiana Supreme Court and the longest serving state court chief justice in the United States.[173] During his career, Chief Justice Shepard authored nearly 900 civil and criminal opinions and wrote sixty-eight law review articles.[174] Additionally, he developed many practical solutions, improving the way the

---

164. *Id.* Because the court recognized the constitutional dimensions of a termination case, the court reviewed the record for clear error, despite the untimely notice of appeal. *See id.* at 214.

165. The supreme court's 2011 fiscal year ran from July 1, 2010 through June 30, 2011. *See* IND. SUPREME COURT, 2010-2011 ANNUAL REPORT 3 (2011), *available at* http://www.in.gov/judiciary/supreme/files/1011report.pdf.

166. *Id.* at 48-49.

167. *Id.* at 4.

168. *Id.*

169. *Id.* at 49.

170. *Id.*

171. *Id.* at 50.

172. Press Release, Ind. Supreme Court, Chief Justice Shepard Will Retire from Supreme Court (Dec. 7, 2011), *available at* http://www.in.gov/judiciary/press/2011/1207.html.

173. *Id.*

174. *Id.*

courts do business.[175] One particularly noteworthy reform early in his career gave the supreme court discretion over the cases it hears.[176] Prior to such reforms, the supreme court devoted most of its time to criminal appeals.[177] These reforms allowed for a more balanced caseload, where the court hears both civil and criminal appeals, and has adequate time to conduct research and analysis.[178] Chief Justice Shepard's contributions to the judiciary of Indiana cannot be overstated. He will be missed.

CONCLUSION

This year marked another opportunity for the Indiana appellate courts to shape Indiana's appellate procedure practice. In the decade since the supreme court adopted the Appellate Rules, the decisions of the appellate courts and the Appellate Rule amendments have improved our judicial system for the bench, bar, and citizens of Indiana.

175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*

RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

MICHAEL A. DORELLI*
JUSTIN T. WALTON**

During the survey period,[1] Indiana courts rendered a number of significant decisions impacting businesses, as well as their owners, officers, directors and shareholders. These developments of interest to business litigators and corporate transactional lawyers, as well as business owners and in-house counsel, are discussed herein.

I. INDIANA BUSINESS LAW SURVEY COMMISSION STUDY ON REVISED UNIFORM LIMITED LIABILITY ACT AND UNIFORM LIMITED PARTNERSHIP ACT

The Indiana legislature recently directed the Indiana Business Law Survey Commission (the "Commission")[2] to conduct a study regarding the "desirability of enacting": (1) the Uniform Limited Partnership Act; and (2) the Revised Uniform Limited Liability Company Act.[3] In response to this mandate, the Commission submitted the results of its study on October 20, 2011.[4]

Regarding the Uniform Limited Partnership Act, the Commission recommended as follows: "It would be desirable to update Indiana's limited partnership act . . . to better reflect the modern world of LLCs and LLPs, using 2001 ULPA as a starting point; however, a number of important variations would need to be made."[5] The Commission recommended an "update [of] Indiana's LLC Act and [Indiana's] LLP provisions and then export resulting policy

---

* Partner, Hoover Hull LLP, Indianapolis, Indiana. B.S., 1994, Indiana University—Bloomington; J.D., 1998, *magna cum laude*, Indiana University Robert H. McKinney School of Law. The views expressed herein are solely those of the authors.

** Associate, Hoover Hull LLP, Indianapolis, Indiana. B.A., 2004, Ohio Northern University; J.D., 2010, *cum laude*, Indiana University Robert H. McKinney School of Law.

1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period: October 1, 2010, through September 30, 2011.

2. The Commission was established by Indiana Code section 23-1-54-3

> for the purpose of considering recommendations to the general assembly, from time to time, concerning amendments to . . . any . . . corporation, limited liability company, or partnership laws, or new or additional legislation affecting corporations, limited liability companies, partnerships, or other business entities (domestic or foreign) authorized to do business or doing business in Indiana.

IND. CODE § 23-1-54-3(a) (2011). The Commission currently consists of thirteen members who are appointed by the Indiana governor, who "serve without compensation and without reimbursement for expenses." *Id.* § 23-1-54-3(b).

3. 2011 Ind. Acts 350.

4. INDIANA BUSINESS LAW SURVEY COMMISSION, FINAL REPORT TO THE LEGISLATIVE COUNSEL OF THE INDIANA GENERAL ASSEMBLY (2011), *available at* http://www.in.gov/legislative/igareports/agency/reports/SECST03.pdf.

5. *Id.* at 4.

changes, if any, to the Indiana LP Act, along with general updating (utilizing 2001 ULPA as a basis) so that there is appropriate consistency among the laws governing other 'pass-through' business entities."[6]

Regarding the Revised Limited Liability Company Act, the Commission recommended as follows: "Consider favorable provisions and concepts from RULLCA for 'importation' into the Indiana LLC Act."[7]

II. SECURITIES REGULATION AND LITIGATION

The Indiana Uniform Securities Act (IUSA) prohibits the sale of a "security" unless the security is either registered with the Indiana Secretary of State or it is exempt from registration.[8] "Security" is defined in the IUSA through a list of investment vehicles that may constitute securities, including, among numerous other instruments, an "investment contract."[9]

In *West v. State*,[10] the Indiana Court of Appeals held that the IUSA's predecessor statute, which also prohibited the sale of an unregistered security, was not "unconstitutionally vague" due to its failure to statutorily define "investment contract."[11] In *West*, Christopher West (West) was "charged with and convicted of" violating Indiana Code section 23-2-1 by offering to sell an unregistered "security"—specifically, an "investment contract."[12] West convinced Anthony and Taura Wiggins[13] to invest $10,000 into West's partnership, which owned an apartment complex.[14] West, who was not a broker,

---

6. *Id.* at 8.

7. *Id.*

8. IND. CODE § 23-19 (2011).

9. *Id.* § 23-19-1-2(28).

10. 942 N.E.2d 862 (Ind. Ct. App. 2011).

11. *Id.* at 866. The statutes applicable to West's crimes were repealed and recodified in 2008 "as the Indiana Uniform Securities Act at Indiana Code section 23–19–1 *et seq*." *Id.* at 863 n.1. The IUSA's definition of "security" also includes "investment contract," but provides further that the term "security"

> includes as an "investment contract" an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors.

IND. CODE § 23-19-1-2(28)(D) (2011). The predecessor to the current IUSA "exclusively governs all actions or proceedings that are pending on June 30, 2008, or may be instituted on the basis of conduct occurring before July 1, 2008." *Id.* § 23-19-1-0.2.

12. *West*, 942 N.E.2d at 865.

13. After learning that Wiggins was diagnosed with terminal lung cancer, West, who had previously sold Wiggins a life insurance policy with Farm Bureau Insurance, suggested that Wiggins cash out the policy before Wiggins's death and when he delivered the check, West asked for a $90,000 investment. *Id.* at 864.

14. *Id.*

provided that the Wiggins "would be repaid with interest from the apartment rent money."[15] Taura contacted the police after a post-dated check from West was refused for insufficient funds.[16] After an investigation, West was ultimately convicted of violating Indiana's securities statute.[17]

West appealed his conviction, arguing, as he did to the trial court on a motion to dismiss, that the statute was "unconstitutionally void for vagueness."[18] Specifically, West argued "that Indiana Code section 23-2-1-1(k), which defines security, is unconstitutionally vague as applied because the term 'investment contract' is undefined."[19]

The court recognized that Indiana Code section 23-2-1-1(k) defined "security" to include an "investment contract," but the court noted the statute did not define "investment contract."[20] Despite the lack of a statutory definition, the court recognized that several common law tests have been established "to determine whether an instrument is an investment contract."[21] Specifically, the court explained that Indiana follows the test established in *S.E.C. v. W.J. Howey Co.*,[22] as interpreted by *American Fletcher Mortgage Co. v. U.S. Steel Credit Corp.*,[23] to determine "whether a transaction is an investment contract."[24] The *Howey* test provides that "an investment contract arises whenever a person (1) invests money (2) in a common enterprise (3) premised upon a reasonable expectation of profits (4) to be derived from the entrepreneurial or managerial efforts of others."[25]

The court applied the *Howey* test to the facts in West's case.[26] The court in *West* reasoned:

> Although an individual of ordinary intelligence may not generally understand whether a particular instrument or document falls under the definition of a security, that lack of comprehension does not render the statu[t]e void for vagueness in this case because the jury was given sufficient information to determine whether the investment contract was a security.[27]

Therefore, according to the court in *West*, the statute was not void for vagueness

---

15. *Id.*
16. *Id.*
17. *Id.* at 864-65.
18. *Id.* at 865.
19. *Id.* at 866.
20. *Id.*
21. *Id.* (citing Szpunar v. State, 783 N.E.2d 1213, 1220 (Ind. Ct. App. 2003)).
22. 328 U.S. 293, 298-99 (1946).
23. 635 F.2d 1247, 1253 (7th Cir. 1980).
24. *West*, 942 N.E.2d at 866 (citing Manns v. Skolnik, 666 N.E.2d 1236, 1243 (Ind. Ct. App. 1996)).
25. *Id.* (citing *American Fletcher*, 635 F.2d at 1253).
26. *Id.*
27. *Id.* (citing Szpunar v. State, 783 N.E.2d 1213, 1220 (Ind. Ct. App. 2003)).

as to the definition of an "investment contract" as a "security."[28]

III. PARTNERSHIP

A. Creation of a Partnership

In *Life v. F.C. Tucker Co.*, the court held that a real estate company was a not a builder's "unnamed partner," and as such, did not share a duty or contractual liability to the homeowners.[29] When Ben and Elaine Life (the Lifes) were looking for a home builder, they were referred by Home Link, a F.C. Tucker entity, to Maintenance One pursuant to a marketing agreement between Home Link and Maintenance One.[30] After entering into a construction "contract with 'M-One, LLC' for the purchase and construction of a house," a dispute arose between the parties, "and the Lifes filed suit against Maintenance One, as well as F.C. Tucker and Home Link as unnamed partners, alleging breach of the construction contract and negligent construction of their home."[31]

F.C. Tucker filed a motion for summary judgment, and after the Lifes responded, F.C. Tucker moved to strike the Lifes' "Untimely Response to Motion for Summary Judgment."[32] The trial court found in favor of F.C. Tucker, denied the Lifes' response to F.C. Tucker's motion for summary judgment, and granted F.C. Tucker's motion for summary judgment.[33]

On appeal, the Lifes argued that even though F.C. Tucker was not a party to the Lifes' contract with Maintenance One, it nonetheless owed the Lifes a duty of care in constructing their home because F.C. Tucker was "an unnamed partner with Maintenance One."[34] The court agreed with the plaintiff's premise that "if [F.C.] Tucker [wa]s a partner with Maintenance One, it may be liable for breach of contract and negligence in pursuit of that partnership."[35] As such, the court looked to whether F.C. Tucker was in a partnership with Maintenance One.[36] The court first looked to Indiana Code section 23-4-1-6(1), which defines a parntership as "an association of two or more persons to carry on as co-owners of a business for profit."[37] According to the court, "[t]he two requirements of a partnership are: (1) a voluntary contract of association for the purpose of sharing profits and losses which may arise from the use of capital, labor, or skill in a common enterprise; and (2) an intention on the part of the parties to form a

28. *Id.*
29. Life v. F.C. Tucker Co., 948 N.E.2d 346, 351, 352-53 (Ind. Ct. App. 2011).
30. *Id.* at 349.
31. *Id.* (citation omitted).
32. *Id.*
33. *Id.*
34. *Id.* at 351.
35. *Id.*
36. *Id.*
37. *Id.* (citing IND. CODE § 23-4-1-6(1) (2011)).

partnership."[38] At issue in *Life* was whether Home Link and Maintenance One agreed to share returns and profits.[39] The court noted that "receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner of the business,"[40] while "'[t]he sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.'"[41]

The court, in looking at the agreement between Home Link and Maintenance One, concluded that the parties had agreed to only share returns, but it would not share profits.[42] Specifically, the court pointed to language in the agreement, which provided that Maintenance One would "pay a transaction fee 'equal to 5% of the *total gross bill (before taxes)* for all services rendered to customers of [Home Link].'"[43] This provision did not mention the "sharing in Maintenance One's losses, and on its face it appears that [F.C.] Tucker receives its fee regardless of whether Maintenance One profits from constructing homes. This arrangement for a share of the total gross bill falls short of 'co-ownership' or a 'community of profits' exhibited in a partnership."[44]

After finding no profit sharing relationship between F.C. Tucker and Maintenance One the court moved to the second element of partnership creation—the intent element.[45] According to the court, Indiana has long recognized that:

> [t]he intent, the existence of which is deemed essential, is an intent to do those things which constitute a partnership. Hence, if such an intent exists, the parties will be partners, notwithstanding that they proposed to avoid the liability attaching to partners or (have) even expressly stipulated in their agreement that they were not to become partners. It is the substance, and not the name of the arrangement between the[m], which determines their legal relation towards each other, and if, from a consideration of all the facts and circumstances, it appears that the parties intended, between themselves, that there should be a community of interest of both the property and profits of a common business or venture, the law treats it as their intention to become partners, in the absence of other controlling facts.[46]

In determining the intent of the parties, the court again looked to the agreement

---

38. *Id.* at 352 (citing Weinig v. Weinig, 674 N.E.2d 991, 995 (Ind. Ct. App. 1996)).

39. *Id.*

40. *Id.* (citing IND. CODE § 23-4-1-7(4) (2011); Monon Corp. v. Townsend, 678 N.E.2d 807, 810 (Ind. Ct. App. 1997)). The court also provided that share of profits is not evidence that a person is a partner when the money is wages or other specifically enumerated payments. *Id.*

41. *Id.* (alteration in original) (quoting IND. CODE § 23-4-1-7 (2011)).

42. *Id.*

43. *Id.* (alteration in original) (internal quotation marks omitted).

44. *Id.* (quoting Kamm & Schellinger Co. v. Likes, 179 N.E. 23, 25 (Ind. Ct. App. 1931)).

45. *Id.*

46. *Id*. (alteration in original) (quoting Bacon v. Christian, 111 N.E. 628, 630 (Ind. 1916)).

between Home Link and Maintenance One, which specifically provided that "no partnership is formed by the agreement."[47] The court then looked outside of the partnership renunciation clause "because [courts] look to the substance of the relationship, not how the parties describe it."[48] However, because the Lifes failed to timely respond to F.C. Tucker's for summary judgment they failed to "properly offer[] any evidence to rebut [F.C.] Tucker's evidence.[49] The court concluded that "given the lack of profit sharing and lack of evidence of intent to form a partnership, the trial court could have properly concluded Maintenance One and Home Link were not partners."[50]

B. Partnership Property

In *Fisher v. Giddens*,[51] the Indiana Court of Appeals reversed the trial court and concluded that when a limited partner bought an annuity in the name of the limited partnership and then had it put in his own name for tax purposes, the annuity remained partnership property despite the name change.[52] Robert Fisher (Robert) and his wife formed the Fisher Family Limited Partnership as general partners with Carol Foland, Arthur Fite, John Fisher, and Janice Giddens as limited partners.[53] After Robert passed away there was a dispute regarding the ownership of an annuity, which was purchased and titled in the name of the limited partnership and later re-titled in Robert's name due to negative tax consequences.[54] The probate court determined that the refund check for the annuity premium in the amount of $527,829.30, was "in the decedent's name at the date of death and should be distributed in his estate."[55]

The estate of former limited partner John Fisher (John's Estate) appealed the decision.[56] On appeal, John's Estate argued that the probate court's determination "that the refund of the annuity premium" was the property of Robert's Estate was an error because the annuity refund was partnership property.[57]

The court began with a discussion of the Indiana Revised Uniform Limited Partnership Act (IRULPA).[58] The court first noted that while the IRULPA "does not contain a definition of the term 'partnership property,'" the term is defined within the Indiana Uniform Partnership Act (IUPA).[59] Indiana Code section 23-

---

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id*. at 352-53.
51. 935 N.E.2d 308 (Ind. Ct. App. 2010), *trans. denied* (Apr. 14, 2011).
52. *Id.* at 308-09.
53. *Id.* at 309.
54. *Id.*
55. *Id.* (internal quotation marks omitted).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

16-12-3[60] makes the IUPA applicable to IRULPA.[61] Therefore, the court looked to the IUPA's definition of "partnership property":

> (1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.
>
> (2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.
>
> (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.
>
> (4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.[62]

In applying the statutory definition, the court concluded that the titling the annuity in the name of the limited partnership, the annuity became partnership property.[63]

For further support that the annuity was partnership property, the court cited the limited partnership agreement, which provided that the general partner had the authority to "[t]o place record title to, or the right to use, Partnership assets in the name of a General Partner or the name of a nominee for any purpose convenient or beneficial to the Partnership."[64] Accordingly, Robert had the authority to re-title the annuity to avoid certain "tax consequences," which was "beneficial to the limited partnership."[65] Thus, re-titling the annuity "did not change the character of the property. Even upon re-titling, the annuity remained partnership property."[66] Additionally, the limited partnership agreement provided that once the annuity became partnership property, "no partner could have direct ownership of it."[67] Thus, even though "Robert re-titled the annuity in his name . . . , the annuity continued to be partnership property."[68]

Robert's estate relied on Section 4.4(d) of the Limited Partnership Agreement, which gave the General Partner the authority "[t]o sell, transfer, assign, convey, lease, exchange, or otherwise dispose of any or all of the assets

---

60. The court noted, "'In any case not provided for in this article, the provisions of IC 23-4-1 govern.'" *Id.* (quoting IND. CODE § 23-16-12-3 (2011)).

61. *Id.*

62. *Id.* at 309-10 (quoting IND. CODE § 23-4-1-8 (2011)).

63. *Id*. at 310 (citing IND. CODE § 23-4-1-8(1)).

64. *Id*.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

of the Partnership."[69] However, the court rejected this argument because of Section 4.4(d)'s limiting phrase "in order to pursue the Partnership's purposes."[70] The court concluded "that taking the annuity (i.e., partnership property) from the partnership and turning possession of it over to a single partner" could not be in the pursuit of a partnership purpose.[71] Moreover, the court noted that re-titling the annuity in Robert's name could "be a breach of [his] fiduciary duty."[72] Specifically, the court noted that such action would violate Indiana Code section 23-4-1-21,[73] which provides:

> (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.[74]

Therefore, the court "reverse[d] the order of the probate court and ordere[d] the annuity premium refund to be deposited with the Fisher Family Limited Partnership."[75]

IV. AGENCY

A. Establishing an Agency Relationship

In *Demming v. Underwood*,[76] the court reversed summary judgment in favor of the defendants, finding that genuine issues of material fact existed as to whether the real estate agent had entered into an actual agency relationship with an investor.[77] Sheree Demming (Demming), a real estate investor, retained the services of Cheryl Underwood (Underwood), a real estate agent, to buy and sell several properties between 2002 and 2007.[78] Demming renovated and leased or sold properties in Bloomington, Indiana, and sought to obtain two properties near Indiana University's campus.[79] During the course of this relationship, Underwood, on behalf and at he request of Demming, contacted the real estate agent managing the properties in this "target zone" every four to five months to

---

69. *Id.*

70. *Id.*

71. *Id.* at 311.

72. *Id.*

73. The court noted that this section was applicable to limited partnerships pursuant to Indiana Code section 23-16-12-3. *Id.*

74. *Id.* (quoting IND. CODE § 23-4-1-21 (2011)).

75. *Id.*

76. 943 N.E.2d 878 (Ind. Ct. App. 2011).

77. *Id.* at 882-83.

78. *Id.* at 882.

79. *Id.*

see if the owner would be interested in selling.[80] In 2007, Underwood learned that the owner "was willing to entertain" offers, and instead of sharing this information with Demming, Underwood submitted an offer and purchased the property.[81]

After learning that Underwood bought the property for her own business, Demming filed suit claiming Underwood had breached her fiduciary duty and also asserted constructive fraud.[82] The trial court granted summary judgment for Underwood on all of the claims, concluding "that there were no genuine issues of material fact and that no agency relationship existed between Demming and Underwood."[83]

The court first addressed whether there was an issue of material fact regarding "whether Underwood owed Demming a fiduciary duty under the common law of agency."[84] Following previous decisions, the court explained that "'[a]gency is a relationship resulting from the manifestation of consent by one party to another that the latter will act as an agent for the former.'"[85] The court described the elements required for an agency relationship:

> To establish an actual agency relationship, three elements must be shown: (1) manifestation of consent by the principal, (2) acceptance of authority by the agent, and (3) control exerted by the principal over the agent. These elements may be proven by circumstantial evidence, and there is no requirement that the agent's authority to act be in writing. Whether an agency relationship exists is generally a question of fact, but if the evidence is undisputed, summary judgment may be appropriate.[86]

The trial court determined that there was no common law agency relationship as a matter of law "because Underwood never agreed to act as Demming's agent."[87] However, the court of appeals indicated that the plan developed by Underwood and Demming to acquire the properties, along with Underwood's numerous attempts to contact the property manager on behalf of Demming, "supports an inference that Underwood agreed to act as Demming's agent for the purpose of acquiring the properties."[88] Such an inference, according to the court, created a genuine issue of material fact, precluding entry of summary judgment.[89]

The court also concluded that the trial court erred in finding "that no agency relationship was established . . . because Demming did not exert sufficient control

---

80. *Id.*

81. *Id.* at 883.

82. *Id.*

83. *Id.*

84. *Id.* at 883-84.

85. *Id*. at 884 (citing Meridian Sec. Ins. Co. v. Hoffman Adjustment Co., 933 N.E.2d 7, 12 (Ind. Ct. App. 2010) (quoting Smith v. Brown, 778 N.E.2d 490, 495 (Ind. Ct. App. 2002))).

86. *Id.* (citations omitted).

87. *Id.*

88. *Id.*

89. *Id.*

over Underwood regarding the method or terms on which [the] inquires were made."[90] In addressing the control element of agency, the court explained "it was [not] necessary for Demming to specify the precise method by which Underwood was to [perform the task of contacting the manager and realtor for the property]; rather, it was enough that Demming instructed Underwood to [undertake the task]."[91] The court provided that while it is necessary for the principal to have control over the agent "with respect to the details of the work,"[92] "complete control over every aspect of the agent's activities" is not necessary.[93] Therefore, the court reasoned that dictating the strategy by which Underwood was to accomplish the desired result was enough to "create a genuine issue of material fact regarding whether Demming exercised sufficient control over Underwood's activities to support the existence of an agency relationship."[94]

After finding a material issue of fact regarding the existence of an agency relationship between Demming and Underwood, the court concluded that there was also a material issue of fact regarding whether Underwood breached her fiduciary duty.[95] Specifically, the court noted:

> [W]hen we consider the evidence in the light most favorable to Demming, we conclude that Underwood was acting as Demming's agent for the purpose of purchasing the Properties. Underwood clearly would have breached the fiduciary duties arising out of that relationship by purchasing the Properties for herself without informing Demming that [the owner] was entertaining offers.[96]

The court of appeals reversed and remanded the case to the trial court.[97]

B. Apparent Authority

In *Guideone Insurance Co. v. U.S. Water Systems, Inc.*,[98] the court held that a homeowner had apparent authority to act as the other homeowner's agent.[99] Michael Schafstall and Andrew Alexander, homeowners, purchased a reverse

---

90. *Id.* (internal quotation marks omitted).

91. *Id.* at 885.

92. *Id.* (quoting Turner v. Bd. of Aviation Comm'rs, 743 N.E.2d 1153, 1163 (Ind. Ct. App. 2001)).

93. *Id.* (citing Policy Mgmt. Sys. Corp., v. Ind. Dep't of State Revenue, 720 N.E.2d 20, 24 Ind. T.C. 1999)).

94. *Id.*

95. *Id.* at 885-86.

96. *Id.* at 887 (citing Bopp v. Brames, 713 N.E.2d 866, 871 (Ind. Ct. App. 1999)). The court also addressed whether an agency relationship existed under Indiana's real estate agency statutes. *Id.* at 888.

97. *Id*. at 896.

98. 950 N.E.2d 1236 (Ind. Ct. App. 2011).

99. *Id.* at 1241-42.

osmosis drinking water filtration system (water system) from a Lowe's store.[100] Prior to the purchase, Schafstall and Alexander obtained information regarding an installation warranty, and when Schafstall purchased the system, he signed an addendum to the sales contract setting forth "detailed warranty terms."[101] Lowe's engaged U.S. Water to install the water filtration system for Schafstall and Alexander, and half of a day after the installation, Schafstall and Alexander found water flowing from the water system onto their kitchen floor.[102] The leak caused $115,000 in water damage to the home.[103]

The parties filed various motions for summary and partial summary judgment, and "[t]he trial court determined that U.S. Water was liable to Guideone in the amount [of] $.01 and dismissed U.S. Water from the case."[104] The trial court concluded that Lowe's was liable only for "the value of the water system and its installation," or $320 and $.01, respectively.[105] Guideone appealed, arguing that Alexander was not bound by the warranty language in the contract between Lowe's and Schafstall.[106]

The court first stated the general rule of agency that "a principal will be bound by a contract entered into by the principal's agent on his behalf only if the agent had authority to bind him."[107] Generally, an agent will have actual or apparent authority to enter into a contract on his principal's behalf.[108]

> Actual authority exists when the principal has, by words or conduct, authorized the agent to enter into a contract for the principal. Apparent authority, on the other hand, exists where the actions of the principal give the contracting party the reasonable impression that the agent is authorized to enter into an agreement on behalf of the principal.[109]

The court explained that Alexander was "intimately involved in the purchase of

---

100. *Id.* at 1239.

101. *Id.* at 1240. The warranty agreement at issue provided that Lowe's warned the installation of services would be performed in a workmanlike manner and that the customer agreed that its sole and exclusive remedy is for the reinstallation of the item. *Id*.

102. *Id.*

103. *Id.* Schafstall and Alexander turned the damage into their homeowners insurance, Guideone, which compensated them "for the damage pursuant to the terms of their homeowner's insurance contract." *Id.* Guideone then brought a lawsuit against Lowe's and U.S. Water to recover the $115,000 it paid to Schafstall and Alexander. *Id.*

104. *Id.* at 1241. U.S. Water filed a motion to dismiss, contending "that the economic loss doctrine precluded Guideone from recovering from U.S. Water." *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (citing Gallant Ins. Co. v. Isaac, 751 N.E.2d 672, 675 (Ind. 2001)).

108. *Id.*

109. *Id.* (internal citations omitted). The court noted that questions regarding an agency relationship and an agent's authority are generally questions of fact. *Id.* (citing Johnson v. Blankenship, 679 N.E.2d 505, 507 (Ind. Ct. App.), *trans. granted and summarily affirmed,* 688 N.E.2d 1250 (Ind. 1997)).

the water system."[110] Alexander discussed the purchase of the water system with the salesperson and was "present when Schafstall completed the purchase [of the system] and signed the warranty contract."[111] Moreover, the court noted that "'an agent's authority may arise by implication and may be shown by circumstantial evidence.'"[112] Therefore, the court concluded that "[t]he actions of Schafstall and Alexander could reasonably give Lowe's the impression that Schafstall was authorized to enter into the warranty contract on behalf of Alexander."[113]

Lowe's also argued that even if Schafstall did not act as Alexander's agent, Alexander ratified the purchase and bound him to the warranty contract.[114] The court explained that "ratification may be express, where the principal explicitly approves the contract, or implied, where the principal does not object to the contract and accepts the contract's benefits."[115] Further, the court relied on *Heritage Development of Indiana, Inc. v. Opportunity Options, Inc.*, for a more developed explanation of the concept of ratification:

> Ratification means the adoption of that which was done for and in the name of another without authority. It is in the nature of a cure for [lack of] authorization. When ratification takes place, the act stands as an authorized one, and makes the whole act, transaction, or contract good from the beginning. Ratification is a question of fact, and ordinarily may be inferred from the conduct of the parties. The acts, words, silence, dealings, and knowledge of the principal, as well as many other facts and circumstances, may be shown as evidence tending to warrant the inference or finding of the ultimate fact of ratification. . . . Knowledge, like other facts, need not be proved by any particular kind or class of evidence, and may be inferred from facts and circumstances.[116]

The court recognized that Guideone's complaint and summary judgment motion and briefing provided that Schafstall and Alexander purchased the water system together, and the defendants owed the insureds a duty.[117] Based on this evidence, and testimony presented before the trial court, the court "conclude[d] that, in the very least, Alexander ratified the contract and thus is bound by its terms."[118]

---

110. *Id.* at 1242.

111. *Id.*

112. *Id.* (quoting Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc., 773 N.E.2d 881, 888 (Ind. Ct. App. 2002)).

113. *Id.*

114. *Id.* Lowe's based this argument on theory that Alexander, as a principal, may "be bound by a contract entered into by [Schafstall, Alexander's agent,] on his behalf regardless of the agent's lack of authority if the principal subsequently ratifies the contract as one to which he is bound." *Id.* (citing *Heritage Dev. of Ind., Inc.*, 773 N.E.2d at 889).

115. *Id.*

116. *Id.* at 1242 (alterations in original) (citing *Heritage Dev. of Ind., Inc.*, 773 N.E.2d at 889-90 (quotation marks omitted)).

117. *Id.*

118. *Id.* at 1243.

V. NON-COMPETITION COVENANTS

In *Coates v. Heat Wagons, Inc.*,[119] Steven Coates, a former sales manager and minority shareholder of Heat Wagons, Inc. (Heat Wagons), appealed the preliminary injunction entered against him, which prohibited him from operating a competing side business.[120] Coates worked for his father's portable heater business and related companies, including Heat Wagons, Manufacturers Products, Inc. (MPI), and Portable Heater Parts (PHP).[121] After Coates's father died, all the shares of MPI and Heat Wagon, including Coates's shares, were sold,[122] and the new owners retained Coates as an employee, requiring him to sign an employment agreement, which included a non-competition agreement.[123] After Coates learned of the pending sale of Heat Wagons and MPI, he began to operate a new company, Second Source—operating under the name S&S Supply (S&S).[124] Coates hid his continued involvement in S&S, which often sold parts to MPI.[125] It was not until after the new owners terminated Coates that they discovered his ownership of S&S.[126] After this discovery, "MPI filed a complaint seeking to enjoin Coates from continued operation of [S&S]."[127] After the trial court entered an Order Granting Preliminary Injunction against Coates, Coates appealed.[128]

The court upheld the injunction and affirmed the trial court's ruling in all respects except with regard to use of a website.[129] The court first considered Coates's argument "that MPI [did] not face a risk of irreparable harm."[130] The court described irreparable harm as:

---

119. 942 N.E.2d 905 (Ind. Ct. App. 2011).

120. *Id.* at 909.

121. *Id.* at 910.

122. *Id.*

123. *Id.*

124. *Id.* at 911.

125. *Id.* Coates used various methods to keep his involvement with S&S a secret, including using a friend's mailing address for S&S's checking account and swapping manufacturer's packing slips with S&S packing slips. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 912, 920-21. To obtain a preliminary injunction, the moving party has the burden of showing the following:

> (1) its remedies at law are inadequate and that irreparable harm will occur during the pendency of the action as a result; (2) it has at least a reasonable likelihood of success on the merits by establishing a prima facie case; (3) the threatened harm it faces outweighs the potential harm the injunction would pose to the non-moving party; and (4) the public interest would not be disserved by granting the injunction.

Id. at 911-12 (citing Zimmer, Inc. v. Davis, 922 N.E.2d 68, 71 (Ind. Ct. App. 2010)).

130. *Id.* at 912.

> [T]hat harm which cannot be compensated for through damages upon resolution of the underlying action. Mere economic injury is not enough to support injunctive relief. The trial court should only award injunctive relief where a legal remedy will be inadequate because it provides incomplete relief or relief that is inefficient to the ends of justice and its prompt administration.[131]

The court specifically reviewed its 2002 decision in *Robert's Hair Designers, Inc. v. Pearson*[132] regarding "the proper use of a preliminary injunction" against former employees.[133] The court explained that in *Robert's Hair Designers*, "the salon's inability to quantify its loss was 'irrelevant' because the loss of goodwill and future revenue when its employees departed, taking the salon's customers with them, 'would warrant a finding of irreparable harm.'"[134]

The court found that Coates's continued involvement in the sale of heater parts after his termination by MPI could constitute irreparable harm due to:

> Coates's knowledge of the portable heater market, his knowledge of vendors, and his recognition by both vendors and customers. Moreover, Coates's competition poses a significant potential of future harm to MPI because each party would be in competition with the other for a limited supply of DESA parts as a result of that company's 2008 closing. Coates's competition with PHP holds a potentially unique risk of harm because of how well informed Coates was on DESA products as a result of his work for PHP.[135]

As such, the court could not "say that the trial court's order [was] clearly erroneous on the question of irreparable harm or lack of adequate remedy at law."[136]

Next, the court addressed MPI's reasonable likelihood of success on the merits by first considering whether MPI had a legitimate interest that was subject to protection.[137] The court began its analysis by stating that "Indiana courts strongly disfavor as restraints of trade covenants not to compete in employment contracts."[138] Moreover, in order for such covenants to be enforceable:

> [T]he provisions of a covenant not to compete must be reasonable, which is a question of law. To be reasonable, an agreement containing such a covenant must protect legitimate interests of the employer, and the restrictions established by the agreement must be reasonable in scope as

131. *Id.* (citations and internal quotation marks omitted).

132. 780 N.E.2d 858, 865 (Ind. Ct. App. 2002).

133. *Coates*, 942 N.E.2d at 912.

134. *Id.* (quoting *Robert's Hair Designers, Inc.*, 780 N.E.2d at 865).

135. *Id.*

136. *Id.* at 913.

137. *Id.*

138. *Id.* (citing Central Ind. Podiatry v. Krueger, 882 N.E.2d 723, 728-29 (Ind. 2008)).

to time, activity, and geographic area.[139]

In addressing legitimate protectable interests under Indiana law, the court explained:

> A legitimate protectable interest is an advantage possessed by an employer, the use of which by the employee after the end of the employment relationship would make it "unfair to allow the employee to compete with the former employer." This court has held that goodwill, including "secret or confidential information such as the names and address of customers and the advantage acquired through representative contact," is a legitimate protectable interest. Also subject to protection as goodwill is the competitive advantage gained for an employer through personal contacts between employee and customer when the products offered by competitors are similar. The "general skills" acquired in working for an employer, however, may be transferred unless this occurs "under circumstances where their use [is] adverse to his employer and would result in irreparable injury."[140]

In applying these factors, the court concluded that it could not say "that the trial court's findings and conclusions were clearly erroneous."[141] The facts demonstrated "that Coates had retained his knowledge of the business and used that knowledge to acquire/retain customers that he had prior transactions with through PHP."[142] In addition, the court pointed to "[t]he nature of the heater parts market in which PHP operates" to support its finding that IMP had a protectable interest.[143] As the court found that Coates's familiarity with the heater market and the specific needs of PHP's customers was not based on "general skill or knowledge—it [was] specific to how PHP operates."[144]

Next, the court examined the scope of the non-compete clause's restriction.[145] The court rejected Coates's argument that the restriction was void because its scope was unreasonable as to the geography and types of activity the covenant prohibited.[146] Moreover, the court found that in an instance where a provision may have been unreasonable the trial court properly used the blue pencil doctrine to strike that such a provision.[147]

The reasonableness of a covenant's geographic constraints "depends upon the

---

139. *Id.* (citing *Cent. Ind. Podiatry*, 882 N.E.2d at 729).

140. *Id.* at 913-14 (alteration in original) (citations omitted).

141. *Id.* at 914.

142. *Id.* (internal quotation marks omitted).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 914-15.

147. *Id.* at 915. In Indiana, a court may strike an unreasonable provision from those which are reasonable if the unreasonable provision is divisible. *Id*. (citing Dicen v. New Sesco, Inc., 839 N.E.2d 684, 687 (Ind. 2005)).

employer's interest served by those restrictions."[148] MPI, whose business spans a majority of the nation, must "protect[] its interests in each state in which it conducts business in the heater and heater parts market."[149] Therefore, the court found the trial court's determination that the scope of the non-compete permissibly included all the states in which Coates had contact with customers or vendors was not clearly erroneous.[150]

The court then considered the scope of the restriction on Coates's activities.[151] The reasonableness of restricting an employee's activities in a non-compete agreement "is determined by the relationship between the interest the employer seeks to protect and the activities circumscribed by the provisions of the covenant."[152] As such, a court will find these provisions "invalid if they prohibit competition with portions of a business with which an employee had no association or activities that are seemingly harmless in relation to the protected interest."[153]

Coates argued that his covenant was unreasonable because it was overbroad to include Heat Wagon in the meaning of Employer "because Heat Wagon deals with large construction heaters instead of portable heater."[154] However, based on the evidence, the court determined that it could be concluded that Coates worked for both MPI and Heat Wagons.[155]

Judge Kirsch dissented, stating "Covenants not to compete in employment contracts are in restraint of trade and have long been disfavored in the law."[156] Judge Kirsch believed Coates's covenant was unreasonable in terms of the scope of both activity and geographic area.[157] With respect to geographic scope, Judge Kirsch found the geographic scope of the restriction, which "applied to all the states in which [MPI had] done business, was without regard to whether" Coates

---

148. *Id.* (quoting Cent. Ind. Podiatry v. Krueger, 882 N.E.2d 723, 730 (Ind. 2008)).

149. *Id.*

150. *Id.* at 916. Specifically, the court provided that the trial court did not err "in its use of the blue pencil doctrine to restrict the scope of the Order to the nineteen states in which Coates had customer contact." *Id.* at 915. The covenant not to compete at issue "referred to a specific exhibit listing individual states, each of which could be stricken without resulting in the absence of any limitation of the geographical scope of the covenant." *Id.* Further, the court noted that the list of the individual states was "not at all like the 'catch all' language in [other cases] which . . . sought to limit all activity by the restricted employee throughout the entirety of the United States without regard to the extent of the employer's interest with respect to the employee." *Id.* at 916.

151. *Id.*

152. *Id.*

153. *Id.* (citing MacGill v. Reid, 850 N.E.2d 926, 930-31 (Ind. Ct. App. 2006) (quoting Seach v. Richards, Dieterle Co., 439 N.E.2d 208, 214 (Ind. Ct. App. 1982)).

154. *Id.*

155. *Id.* at 917.

156. *Id.* at 921 (citing Donahue v. Permacel Tape Corp., 127 N.E.2d 235, 237, 239 (Ind. 1955)).

157. *Id.*

actually conducted activities in those states.[158] Judge Kirsch also disagreed with the trial court's "re-writing of a contract as a matter of policy."[159] Specifically, Judge Kirsch noted that "[h]ere, as a result of re-writing the employer's contract by the trial court, a contract that is unreasonable in its scope and unenforceable as over-broad becomes enforceable against the employee."[160]

VI. BUSINESS TORTS

A. Corporate Opportunity Doctrine

In *DiMaggio v. Rosario*,[161] the court of appeals held that even if non-fiduciary liability for usurpation of corporate opportunity was a recognized cause of action, the plaintiff failed to state a claim when he did not allege that defendant acted "knowingly or intentionally in usurping the corporate opportunity."[162]

Victor J. DiMaggio III (DiMaggio) and his business partner, Elias Rosario (Rosario), started and were shareholders in a real estate company, Galleria Realty Corporation (Galleria).[163] Several years later, Rosario formed LLE, a limited liability real estate company in an adjacent county.[164] DiMaggio filed a complaint against Rosario and the other members of LLE (the Appellees), "alleging, among other things, that the Appellees usurped a corporate opportunity from Galleria, which caused damages to DiMaggio."[165] The Appellees filed, and the trial court granted, a motion to dismiss DiMaggio's complaint for failing to state a claim upon which relief could be granted.[166]

DiMaggio appealed the trial court's ruling, arguing that "a cognizable claim was asserted against the dismissed [Appellees]," specifically, as Indiana courts have recognized, "that non-fiduciaries can be held liable for usurping a corporate opportunity."[167]

Indiana courts have recognized that shareholders in a closely-held corporation, similar to a partnership, have a fiduciary duty to each other.[168] The court stated:

> Consequently, shareholders in a close corporation stand in a fiduciary

---

158. *Id.* at 922.

159. *Id.*

160. *Id.*

161. 950 N.E.2d 1272 (Ind. Ct. App. 2011).

162. *Id.* at 1276.

163. *Id.* at 1273.

164. *Id.* at 1273-74.

165. *Id.* at 1274.

166. *Id*.

167. *Id.* (internal quotation marks omitted) (citing McLinden v. Coco, 765 N.E.2d 606, 615 (Ind. Ct. App. 2002) ("A shareholder's fiduciary duty requires that he 'not appropriate to his own use a business opportunity that in equity and fairness belongs to the corporation.'")).

168. *Id.* (citing *McLinden*, 765 N.E.2d at 615 (quoting Melrose v. Capitol City Motor Lodge, Inc., 705 N.E.2d 985, 991 (Ind. 1998))).

> relationship to each other, and as such, must deal fairly, honestly, and openly with the corporation and with their fellow shareholders. Moreover, shareholders may not act out of avarice, expediency, or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation. A shareholder's fiduciary duty requires that he not appropriate to his own use a business opportunity that in equity and fairness belongs to the corporation.[169]

However, not having such a relationship with the Appellees, DiMaggio sought to infer a non-fiduciary cause of action for usurping a corporate opportunity based on the court's decision in *Dreyer & Reinbold, Inc. v. AutoXchange.com., Inc.*[170] The court disagreed with DiMaggio's assertion that the appellate court's silence on an issue not before the court—specifically, whether Indiana law allowed a claim to proceed against a non-fiduciary for usurping a corporate opportunity—did not "support[] an inference that [the court] tacitly" approved of such a claim.[171]

Without express guidance from Indiana courts, DiMaggio pointed to outside jurisdictions in an attempt to persuade the court that non-fiduciaries can be liable for usurping a corporate opportunity.[172] The court provided that several jurisdictions have found that "a person who knowingly joins with or aids and abets a fiduciary in an enterprise constituting a breach of the fiduciary relationship becomes jointly and severally liable with the fiduciary for any damages accruing from such breach."[173]

---

169. *Id.* at 1275 (citations omitted).

170. *Id.* (citing Dreyer & Reinbold, Inc. v. AutoXchange.com, Inc., 771 N.E.2d 764, 767-69 (Ind. Ct. App. 2002)). In *Dreyer & Reinbold*, the plaintiff, AutoXchange, filed a suit against Dreyer, claiming "that Dreyer had conspired with a shareholder of AutoXchange to usurp AutoXchange's corporate opportunity." *Id.* (citing *Dreyer & Reinbold*, 771 N.E.2d at 766). Defendant's Trial Rule 12(B)(6) motion to dismiss for failure to state a claim was denied by the trial court, no appeal was filed, and the court of appeals did not address the issue when the case came to the court of appeals for issues unrelated to the motion to dismiss. *Id.* (citing *Dreyer & Reinbold*, 771 N.E.2d at 766).

171. *Id.*

172. *Id.* The court agreed that such decisions may be informative, noting that "'where no Indiana cases adequately address the issues involved in a case, decisions of other jurisdictions may be instructive.'" *Id.* (quoting Blakley Corp. v. EFCO Corp., 853 N.E.2d 998, 1004 (Ind. Ct. App. 2006)).

173. *Id.* at 1275-76 (citing Steelvest, Inc. v. Scansteel Serv. Ctr., 807 S.W.2d 476, 485 (Ky. 1991) (alteration in original) ("[A] person who knowingly joins with or aids and abets a fiduciary in an enterprise constituting a breach of the fiduciary relationship becomes jointly and severally liable with the fiduciary for any profits that may accrue."); BBF, Inc. v. Germanium Power Devices Corp., 430 N.E.2d 1221, 1224 (Mass. App. Ct. 1982) (holding the "trial court was justified in concluding that third-party defendant who did not owe fiduciary duty to company could still be jointly and severally liable when non-fiduciary knowingly participated with fiduciary in appropriating corporate opportunity of company"); Raines v. Toney, 313 S.W.2d 802, 810 (Ark.

However, without making a determination as to whether Indiana should recognize such a claim, the court affirmed the trial court's motion to dismiss for failure to state a claim.[174] According to the court, even if such a claim were recognized, the plaintiff failed to allege that the non-fiduciaries acted knowingly when joining or aiding a fiduciary in a breach of the fiduciary relationship.[175] Instead DiMaggio alleged only that Appellees "actively participated with Rosario in usurping Galleria's corporate opportunity thereby causing damages to DiMaggio."[176] The court noted that "[a]ll of the cases from other jurisdictions cited by DiMaggio require that the non-fiduciary must act knowingly when he or she joins a fiduciary in an enterprise constituting a breach of fiduciary duty."[177] As such, the court decided to "save for another day the decision as to whether Indiana should adopt such a cause of action" and affirmed the trial court's decision to grant the Appellees' motion to dismiss.[178]

B. Breach of Employee's Fiduciary Duty of Loyalty

In *SJS Refractory Co. v. Empire Refractory Sales, Inc.*,[179] an employer brought a breach of fiduciary duty claim against a former employee who planned to work for a competitor.[180] Larry Snell (Snell) owned a refractory services company, Empire Refractory Sales, Inc. (Empire) that produced, sold, installed, and serviced refractory materials.[181] Snell hired Bill Sale (Sale), a sales representative, and as part of his employment contract Sale signed a non-compete agreement.[182] Over time, as Snell began to be less involved in the day-to-day operation of Empire, Sale became more involved, and he hired two friends, Patrick Johnson (Johnson) and Patrick Salwolke (Salwolke), as sales representatives.[183] Although Snell required all full-time sales representatives to sign non-compete agreements, Sale failed to require Johnson and Salwolke to

---

1958) (alteration in original) ("[O]ne who knowingly aids, encourages, or cooperates with a fiduciary in the breach of his duty becomes equally liable with such fiduciary."); L.A. Young Spring & Wire Corp. v. Falls, 11 N.W.2d 329, 343 (Mich. 1943) ("One who knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise.")).

174. *Id.* at 1276.

175. *Id.*

176. *Id.* (citations omitted).

177. *Id.*

178. *Id.*

179. 952 N.E.2d 758 (Ind. Ct. App. 2011).

180. *Id.* at 763-64.

181. *Id.* at 762.

182. *Id.* The non-compete agreement provided that Sale would not engage in any business in competition with Empire within a 150-mile radius during the period of the contract and for two years after its termination. *Id.*

183. *Id.*

sign such agreements.[184]

Sale and Snell were unable to reach an agreement for Sale to purchase Empire from Snell, and when Sale was financially unable to purchase Empire, Johnson and Salwolke began planning and preparing to launch a competing company, SJS Refractory Co., LLC (SJS).[185] Further, Johnson and Salwolke began soliciting Empire's customers[186] and diverting work to SJS.[187] Moreover, "Johnson went to Empire and removed customer forms, tools, equipment, and works-in-progress, all of which he took to SJS."[188]

As a result of this conduct, Empire filed a lawsuit against SJS, Johnson, Salwolke, and Sale, alleging, among other things "that Salwolke, Johnson, and Sale breached their fiduciary duty to Empire."[189] In October 2009, more than one year after the conclusion of a nine-day bench trial, the trial court entered a forty-eight-page judgment" in favor of Empire.[190] SJS, Johnson, and Salwolke appealed.[191]

The court began its analysis by recognizing that under Indiana law, "[a]n employee owes his employer a fiduciary duty of loyalty."[192] In addressing situations in which an employee competes with employer, the court provided:

> To that end, an employee who plans to leave his current job and go into competition with his current employer must walk a fine line. Prior to his termination, an employee must refrain from actively and directly competing with his employer for customers and employees and must continue to exert his best efforts on behalf of his employer. An employee may make arrangements to compete with his employer, such as investments or the purchase of a rival corporation or equipment. However, the employee cannot properly use confidential information specific to his employer's business before the employee leaves his employ. These rules balance the concern for the integrity of the

---

184. *Id.*

185. *Id.* at 762-63. These planning activities included using Empire's facility and tools to build hot gunning nozzles for SJS, contacting a bank for a line of credit, using Empire e-mail account to find and secure a space to lease for SJS. *Id.* at 763. After SJS' Articles of Incorporation became effective, Salwolke and Johnson offered six Empire employ accepted. *Id.*

186. *Id.* To illustrate, in February 2006, Johnson met with representatives from companies that had been long-time been customers of Empire. *Id.* Johnson used his Empire expense account to take these representatives out for dinner to procure business for SJS. *Id.*

187. *Id.* Johnson received a call from an Empire customer for a bid, and Johnson told the customer that SJS could complete the job for him the following week. *Id.*

188. *Id.* at 764. While some items were returned the following week, SJS did not return $53,275.28, the value of the worth of equipment and inventory. *Id.*

189. *Id.*

190. *Id*.

191. *Id.* at 766.

192. *Id.* at 768 (citing Kopka, Landau & Pinkus v. Hansen, 874 N.E.2d 1065, 1070 (Ind. Ct. App. 2007)).

> employment relationship against the privilege of employees to prepare to compete against their employers without fear of breaching their fiduciary duty of loyalty.[193]

The court recognized that in situations where an employee breaches his or her fiduciary duty by planning to compete with his or her current employer, the remedy is to require "the agent to disgorge all compensation received during the period of employment in which the agent was also breaching his fiduciary duty."[194]

According to the trial court, "Johnson began breaching his fiduciary duty on January 1, 2006, and . . . Salwolke began breaching his fiduciary duty on January 13, 2006."[195] The court of appeals found no error in the trial court's order of disgorgement of Johnson's and Salwolke's salaries and benefits beginning on those dates.[196]

C. Tortious Interference with Contract

In *Murat Temple Ass'n v. Live Nation Worldwide, Inc.*,[197] the court of appeals held that Live Nation did not breach its contract with Murat Temple Association (MTA) by entering into a naming rights agreement with Old National Bank, which precluded MTA's claim of tortious interference with a contractual relationship.[198] MTA entered into a lease with Murat Centre, L.P., for the Murat Theatre Building, and under the lease, Live Nation was a successor in interest to Murat Centre, L.P.[199] After learning that Live Nation was planning to sell the naming rights to the Murat Shrine Center, MTA informed Live Nation that any name change was subject to MTA's approval.[200] Without obtaining MTA's approval, "Live Nation announced that it had entered into a naming rights

---

193. *Id.* (citations omitted) (citing *Kopka*, 874 N.E.2d at 1070-71). The court also cited to the *Restatement (Third) of Agency*:

> In retrospect it may prove difficult to assess the propriety of a former agent's conduct because many actions may be proper or improper, depending on the intention with which the agent acted and the surrounding circumstances. For that reason it may be difficult to draw a clean distinction between actions prior to termination of an agency relationship that constitute mere preparation for competition, which do not contravene an employee's or other agent's duty to the principal, and actions that constitute competition.

Id. (citing RESTATEMENT (THIRD) OF AGENCY § 8.04 cmt. c (2006)).

194. *Id.* (citing Wenzel v. Hopper & Galliher, 830 N.E.2d 996, 1001 (Ind. Ct. App. 2005)).

195. *Id.* at 769.

196. *Id.* The court affirmed in part, reversed in part, and remanded the case to the trial court for a determination of the fair rental value of the converted property. *Id.* at 771.

197. 953 N.E.2d 1125 (Ind. Ct. App. 2011).

198. *Id.* at 1132 (citing Gatto v. St. Richard Sch., Inc., 774 N.E.2d 914, 922 (Ind. Ct. App. 2002)).

199. *Id.* at 1127.

200. *Id.*

agreement with Old National."[201]

Subsequently, MTA filed a complaint against Live Nation and Old National, asserting tortious interference with both a business relationship and a contractual relationship.[202] MTA appealed the trial court order granting the defendants' motions to dismiss.[203]

Initially, the court addressed MTA's claim that Old National had tortiously interfered with a business relationship.[204] The court noted that it has "consistently held that an action for intentional inference with a business relationship arises where there is no contract underlying the relationship."[205] The court found that the relationship between MTA and Live Nation was governed by a contract; therefore, the trial court properly dismissed MTA's claim for tortious interference with a business relationship.[206]

The court then explained that a claim for tortious interference with contract requires that a plaintiff "allege 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 breach of the contract, 4) the absence of justification, and 5) damages resulting from the defendant's wrongful inducement of the breach."[207] The issue of intentional inducement of breach of contract was the dispositive issue before the court because the court already concluded "that Live Nation did not breach the [l]ease by entering into a naming rights agreement with Old National."[208] Therefore, "MTA's claim for tortious interference with a contractual relationship must fail, and the trial court did not err by dismissing this claim."[209]

D. Tortious Interference with Employment Contract

In *Haegert v. McMullan*,[210] a former university professor, John Haegert (Haegert), brought a lawsuit against his supervisor, alleging tortious breach of employment contract after he was terminated for alleged sexual harassment.[211]

---

201. *Id.*

202. *Id.* at 1128.

203. *Id.*

204. *Id.* at 1132.

205. *Id.* (citing Levee v. Beeching, 729 N.E.2d 215, 220 (Ind. Ct. App. 2000)).

206. *Id.*

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

208. *Id.* The court noted that the plain language of the lease granted Live Nation the "authority to sell naming rights to the Leased Premises and to post appropriate signs and advertising." *Id.* at 1131.

209. *Id.* (citing Gatto v. St. Richard Sch., Inc., 774 N.E.2d 914, 922 (Ind. Ct. App. 2002) ("determining that the plaintiff's claim for tortious interference with a contractual relationship could not succeed because the plaintiff had failed to establish the existence of a breach of contract")).

210. 953 N.E.2d 1223 (Ind. Ct. App. 2011).

211. *Id.* at 1228-29.

Haegert joined the faculty at the University of Evansville (the University) in 1979, was tenured in 1982, and became a full English professor in 1992.[212] The University promoted Margaret McMullan (McMullan) to the chair of the English Department in 2002.[213] After an interaction between McMullan and Haegert, McMullan filed a formal complaint of harassment against Haegert with the University.[214] As a result of McMullan's complaint, Haegert's employment with the university was terminated.[215]

After his termination was upheld by the Faculty Appeals Committee, Haegert filed a complaint against McMullan, alleging, in part, "tortious breach of Haegert's employment contract;" the trial court granted summary judgment in McMullan's favor.[216]

The court provided that "'Indiana has long recognized that intentional interference with a contract is an actionable tort, and includes an intentional, *unjustified interference by third parties* with an employment contract.'"[217] The court enumerated the elements for tortious interference with an employment contract: "(1) that a valid and enforceable contract exists; (2) the defendant's knowledge of the existence of the contract; (3) defendant's intentional inducement of breach of the contract; (4) the absence of justification; and (5) damages resulting from defendant's wrongful inducement of the breach."[218]

The court noted that it has previously cited to the *Restatement (Second) of Torts* sections 766 and 766A to aid the court in analyzing the claim of tortious interference with an employment contract.[219] The court noted that the *Levee v. Beeching*[220] decision provided:

> Comment. b to § 766 provides that "there is a general duty not to interfere intentionally with another's reasonable business *expectancies* of trade with third persons." (Emphasis added). Comment. a to § 766A indicates that liability will attach where one intentionally interferes with a plaintiff's performance of his own contract, "either by preventing that performance or making it more expensive *or burdensome.*" (Emphasis added). Thus, where a third party's conduct substantially and materially impairs the execution of an employment contract, frustrating an

212. *Id.* at 1226.

213. *Id.*

214. *Id.* at 1228.

215. *Id.* at 1228-29.

216. *Id.* at 1229.

217. *Id.* at 1233 (quoting Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1234 (Ind. 1994) (citing Bochnowski v. Peoples Fed. Sav. & Loan, 571 N.E.2d 282, 284 (Ind. 1991)) ("This cause of action recognizes the public policy that contract rights are property, which are entitled to enforcement and protection from, under proper circumstances, those who tortiously interfere with rights.").

218. *Id.* (citing *Winkler*, 638 N.E.2d at 1235).

219. *Id.* at 1234.

220. 729 N.E.2d 215 (Ind. Ct. App. 2000).

> employee's expectations under her contract and making performance of her contractual duties more burdensome, the inducement of breach element of a claim for tortious interference with a contractual relationship is satisfied.[221]

In addition, the court explained that "[i]n claims involving officers or directors of a corporation alleging tortious interference with the corporation's contracts, liability will not be found where the directors and officers are acting as agents of the corporation when acting in the scope of their official capacity."[222] McMullan reclaimed on this defense, arguing that she could not tortiously interfere with the contract because she was not a third party to the contract, i.e, she was acting within the scope of her employment as an agent of University.[223] While noting that "[i]t would not be a stretch" to find that McMullan could not be liable for the actions done in the scope of her employment, the court "[a]ssum[ed] without deciding that McMullan [was] a third party."[224]

Rather than deciding whether McMullan was a third party, the court addressed whether McMullan's conduct was "justified."[225] The court looked to the *Restatement* for factors to help determine whether McMullan acted with justification, specifically:

> (a) the nature of the defendant's conduct; (b) the defendant's motive; (c) the interests of the plaintiff with which the defendant's conduct interferes; (d) the interests sought to be advanced by the defendant; (e) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff; (f) the proximity or remoteness of the defendant's conduct to the interference; and (g) the relations between the parties.[226]

Moreover, the court noted that "the central question to be answered is whether the defendant's conduct has been fair and reasonable under the circumstances."[227] Further, "[t]he absence of justification is established by showing 'that the interferer acted intentionally, without a legitimate business purpose, and the breach is malicious and exclusively directed to the injury and damage of another.'"[228] Conversely, if the defendant can demonstrate "[t]he existence of a

---

221. *Haegert*, 953 N.E.2d at 1234 (citing *Levee*, 729 N.E.2d at 222).

222. *Id.* (citing Trail v. Boys & Girls Clubs of Nw. Ind., 845 N.E.2d 130, 138-39 (Ind. 2006)).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* (quoting Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1235 (Ind. 1994) (citing RESTATEMENT (SECOND) OF TORTS § 767 (1977))).

227. *Id.* (citing Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp., 759 N.E.2d 239, 252 (Ind. Ct. App. 2001)).

228. *Id.* at 1234-35 (Bilimoria Computer Sys., LLC v. America Online, Inc., 829 N.E.2d 150, 156-57 (Ind. Ct. App. 2005)).

legitimate reason for the defendant's actions."[229]

In looking at the materials designated to the trial court, the court of appeals concluded that it could infer "from the facts and circumstances . . . that McMullan's actions that were at issue were justified."[230] McMullan's conduct was consistent with her past practices and the University's policy involving sexual harassment complaints.[231] The court also noted that "McMullan consistently stated that she wanted to stop Haegert's pattern of harassing students and faculty of the University."[232] As such, the court upheld the trial court order granting summary judgment in favor of McMullan regarding Haegert's claim of tortious interference with an employment contract.[233]

VII. CONTRACT PERFORMANCE AND BREACH

A. Definiteness of Terms—Enforceability of Letter of Intent

In *Block v. Magura*,[234] the court held that a letter of intent contained sufficiently definite terms to constitute an enforceable contract.[235] The letter of intent between Dr. Mark Magura (Magura) and Dr. Dennis Block (Block) provided that it was "to set forth the terms and conditions of the acquisition by [Magura], of the total ownership interest of [Block] in CRH & B Partnership."[236] The letter of intent also provided that Block would sell his 35% ownership interest in the partnership for $600,000.[237] The letter stated that if any of the other partners exercised their right of first refusal, as provided in the partnership agreement, the letter would "be deemed void."[238] Magura failed to prepare a formal written agreement to confirm the purchase, as demanded by Block, nor did he take any steps to otherwise complete the purchase.[239] Block filed suit on the purported "contract," and the trial court granted Magura's motion for summary judgment, finding that "the letter of intent at issue in this cause does not contain sufficient language to make it enforceable as a contract."[240]

The parties disputed whether the letter of intent created an enforceable contract.[241] Initially, the court of appeals cited *Conwell v. Gray Loan Outdoor Marketing Group, Inc.*, an Indiana Supreme Court opinion, describing the

---

229. *Id.* at 1235.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. 949 N.E.2d 1261 (Ind. Ct. App. 2011).
235. *Id.* at 1262.
236. *Id.* at 1263.
237. *Id.*
238. *Id.* at 1263-64 ("None of the other partners exercised their right of first refusal.").
239. *Id.* at 1264.
240. *Id*. (internal quotation marks omitted).
241. *Id.* at 1264-65.

common law requirements for an enforceable contract:

> To be valid and enforceable, a contract must be reasonably definite and certain. All that is required to render a contract enforceable is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom; absolute certainty in all terms is not required. Only essential terms need be included to render a contract enforceable. Thus, where any essential element is omitted from a contract, or is left obscure or undefined, so as to leave the intention of the parties uncertain as to any substantial term of the contract, the contract may not be specifically enforced. A court will not find that a contract is so uncertain as to preclude specific enforcement where a reasonable and logical interpretation will render the contract valid.[242]

Even though the letter of intent identified the item to be purchased, the purchaser, the purchase price, and the asset's condition, Magura argued that the letter of intent nonetheless lacked "sufficiently definite and certain terms to create an enforceable contract," because the letter was "silen[t] regarding such matters as when the sale was to occur and close, how the ownership interest was to be transferred, how the purchase price was to be paid, and whether the purchase price was subject to financing."[243]

The court addressed Magura's arguments and concluded that the letter of intent contained sufficiently definite terms.[244] First, the court noted that the "when" of the purchase was "incorporated from the Partnership Agreement which the Letter of Intent specifically referenced."[245] According to the court, the partnership agreement governed the timing of the sale and provided for a 135-day period to close.[246] Similarly, the court pointed to the partnership agreement in rejecting the argument that "the absence of a number of terms relating to business affairs of the Partnership" created insufficient or uncertain terms.[247] The court provided that even if the letter of intent did not contain all of the terms, the letter of intent could still be an enforceable contract.[248] Therefore, the court found that

---

242. *Id.* at 1265 (citing Conwell v. Gray Loan Outdoor Mktg. Grp., Inc., 906 N.E.2d 805, 813 (Ind. 2009)).

243. *Id.*

244. *Id.* at 1266.

245. *Id.* at 1265. The court noted that the legal obligation to abide by the partnership agreement was part of the letter as "'all applicable law in force at the time an agreement is made impliedly forms a part of the agreement.'" *Id.* (quoting Johnson v. Sprague, 614 N.E.2d 585, 589 (Ind. Ct. App. 1993)).

246. *Id.*

247. *Id*. at 1265-66.

248. *Id.* at 1266 (citing Illiana Surgery & Med. Ctr., LLC v. STG Funding, Inc., 824 N.E.2d 388, 398-99 (Ind. Ct. App. 2005) (finding the agreement was enforceable even through it did not include "the manner of payment"); *Johnson*, 614 N.E.2d at 590 (concluding that the "writing[] created an enforceable contract" even through it did not include nonessential, but customary, real estate terms)).

the letter was sufficient and enforceable where it specified "the Partnership interest to be purchased, by and from whom, the purchase price, the condition of the asset, and the timing of the sale. These are all of the essential terms for an enforceable contract."[249]

The court then addressed whether the letter of intent demonstrated the parties' intent to be bound or, rather, whether the letter was merely an "agreement to agree."[250] The court explained that "[i]t is well settled that 'a mere agreement to agree at some future time is not enforceable.' 'Nevertheless, parties may make an enforceable contract which obligates them to execute a subsequent final written agreement.'"[251] As such, the court would "consider the parties' 'intent to be bound' as a question separate from but related to the definiteness of terms."[252]

The court distinguished the terms of the parties' letter of intent from the letter at issue in *Equimart Ltd. v. Epperly*,[253] which provided that "the parties would '*attempt*, in good faith, *to negotiate* a definitive purchase agreement' for the sale of stock."[254] Further, "'consummation of the transaction . . . will be subject to the execution of delivery of a Final Agreement in a form reasonably satisfactory to the parties and their respective counsel.'"[255]

Conversely, the letter of intent in *Magura* contained language indicating that the parties did not have a mere "agreement to agree."[256] Specifically, the court noted that the letter stated that "the subsequent formal agreement 'will' incorporate 'the terms of this Letter of Intent,' not these and other terms."[257] Moreover, the court noted that the letter "states the parties presently 'are willing to complete' the purchase and uses the terms '[o]ffer made' and 'accepted' to denote the consequence of the parties' signatures."[258] This language, taken as a whole, "indicates the parties' intent to be bound."[259] Additionally, the court noted in a footnote that the parties' subjective understanding regarding the intent to be bound "is insufficient to create a genuine issue of fact because intent to be bound is measured objectively, by the parties' words and conduct, not their subjective state of mind."[260] Therefore, the court found that the letter of intent was an enforceable contract.[261] However, the court remanded the case to the trial court

---

249. *Id.*

250. *Id.* (quoting Equimart Ltd. v. Epperly, 545 N.E.2d 595, 598 (Ind. Ct. App. 1989)).

251. *Id.* (quoting Wolvos v. Meyer, 668 N.E.2d 671, 674 (Ind. 1996)).

252. *Id*. (quoting *Wolvos*, 668 N.E.2d at 675).

253. *Id.* (citing *Equimart Ltd.*, 545 N.E.2d at 598).

254. *Id.* (citing *Equimart Ltd.*, 545 N.E.2d at 598).

255. *Id.* (quoting *Equimart Ltd.*, 545 N.E.2d at 598).

256. *Id.* at 1266-67.

257. *Id.* at 1267 (citation omitted).

258. *Id.* (alteration in original) (citation omitted).

259. *Id.*

260. *Id.* at 1267 n.2 (citing Real Estate Support Servs., Inc. v. Nauman, 644 N.E.2d 907, 910 (Ind. Ct. App. 1994)).

261. *Id.* at 1268.

for a determination of damages, as material issues of fact remained.[262]

B. Condition Precedent

In *Anderson Property Management, LLC v. H. Anthony Miller, Jr., LLC*,[263] the court held that a presumption on which an agreement was based was a condition precedent that burdened both parties such that the vendor's unilateral wavier did not render the agreement enforceable.[264] H. Anthony Miller, Jr. LLC (Miller) and Anderson Property Management, LLC (Anderson) entered into an agreement where Anderson would purchase a portion of Miller's property and Miller was required to separate a single building the straddled the property, line into two independent structures.[265] Miller hired a surveyor to perform a land survey to mark the boundaries of the portion of the land that Anderson was purchasing.[266] After the survey was complete Miller began the demolition of a portion of the building.[267] However, before Miller could complete the project, the parties clashed over the extent of the demolition, and "Miller filed a complaint requesting a declaration of the parties' rights and obligations under the Sale Agreement and its easements."[268]

The parties were able to successfully mediate their dispute, and as part of the settlement agreement, a second survey was conducted which "revealed that Anderson's building, in some places, encroached as much as 7.3 feet onto Miller's property."[269] Due to the scope of the encroachment, Anderson considered the agreement unenforceable.[270] As a result, Miller filed a motion with the court to enforce the agreement.[271] The court entered an order which provided, in pertinent part, that the settlement agreement set forth a condition precedent, but Anderson waived this condition precedent, therefore, the agreement was enforceable.[272]

The court looked to general principles of contract law to interpret the parties' settlement agreement.[273] The court explained:

> The interpretation and construction of a contract is a function for the courts. If the contract language is unambiguous and the intent of the

---

262. *Id*.

263. 943 N.E.2d 1286 (Ind. Ct. App. 2011).

264. *Id.* at 1292.

265. *Id.* at 1287-88.

266. *Id.* at 1288.

267. *Id.*

268. *Id.*

269. *Id.* at 1289.

270. *Id.*

271. *Id.*

272. *Id.* at 1289-90.

273. *Id.* at 1291. Specifically, the court noted that "courts have held that '[s]ettlement agreements are governed by the same general principles of contract law as any other agreement.'" *Id.* (quoting Fackler v. Powell, 891 N.E.2d 1091, 1095 (Ind. Ct. App. 2008)).

> parties is discernible from the written contract, the court is to give effect to the terms of the contract. A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation; however, the terms of a contract are not ambiguous merely because the parties disagree as to their interpretation. When the contract terms are clear and unambiguous, the terms are conclusive and we do not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions.[274]

Anderson argued that the contract contained a condition precedent, specifically pointing to the following language in the settlement agreement:

> The parties presume that existing building of Defendant [Anderson], except 3 encroachment, is located on Defendant's property as verified by survey (1/2 to each party of cost).
>
> The parties agree, contingent on above: . . . .[275]

In addressing whether this language constituted a condition precedent, the court explained that "a condition precedent is a condition that must be performed before the agreement of the parties becomes a binding contract or that must be fulfilled before the duty to perform a specific obligation arises."[276] The court found that the plain meaning of the settlement agreement provided for a condition precedent.[277]

The court of appeals then addressed the trial court's conclusion that Miller, who according to the trial court was burdened by the condition, was able to unilaterally waive the condition.[278] Regarding the waiver of a condition in a contract, the court provided:

> Ordinarily, a party can waive any contractual right provided for his or her benefit. A condition in a contract may be waived by the conduct of the party. Once a condition has been waived, and such waiver has been acted upon, the failure to perform the condition cannot be asserted as a breach of contract.[279]

However, the language of the contract at issue in the present case provided that the "presumption was that of both *parties*."[280] According to the court, "[b]ecause the condition precedent ran to the benefit of both parties, both parties must agree to waive it."[281] Therefore, the court of appeals concluded that the trial

---

274. *Id.* (quoting *Fackler*, 891 N.E.2d at 1095-96).

275. *Id.*

276. *Id.* (internal quotation marks omitted) (quoting McGraw v. Marchioli, 812 N.E.2d 1154, 1157 (Ind. Ct. App. 2004)).

277. *Id.*

278. *Id.*

279. *Id.* (quoting Salcedo v. Toepp, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998)).

280. *Id.* at 1292.

281. *Id.*

court erred when it found that Miller was able to unilaterally waive the condition precedent.[282]

D. Mutual Mistake

In *Tracy v. Morell*,[283] the court held that the sale of a tractor with an altered identification number was subject to rescission on the grounds of mutual mistake and violation of public policy.[284] James Tracy (Tracy) purchased a used tractor from Steve Morell (Morell) in 2002.[285] As part of the purchase, Tracy signed a promissory note, but he stopped making payments in June 2003.[286] Around that same time period, Morell was criminally charged with receiving stolen property, including farm equipment.[287] During the police investigation, it was discovered that the tractor's identification number had been altered, but the police were unable to prove that the tractor was stolen.[288] After Morell pled guilty to receiving stolen property, Tracy filed suit, alleging fraud in "that Morell knowingly misrepresented that he owned the tractor," and Morell filed a counterclaim for the unpaid balance of the promissory note on which Tracy had defaulted.[289] Following a bench trial, the trial court dismissed Tracy's complaint with prejudice for failing to meet his burden of proof and found Tracy liable for the unpaid balance of the promissory note.[290]

On appeal, the court found that the promissory note was not an enforceable contract.[291] First, the court concluded that mutual assent, which is a prerequisite to the creation of a contract, was lacking.[292] Further, the court explained:

> Where both parties share a common assumption about a vital fact upon which they based their bargain, and that assumption is false, the transaction may be avoided if because of the mistake a quite different exchange of values occurs from the exchange of values contemplated by the parties. There is no contract, because the minds of the parties have in fact never met.[293]

The court analogized the case to the "landmark" decision in *Sherwood v.*

---

282. *Id.*

283. 948 N.E.2d 855 (Ind. Ct. App. 2011).

284. *Id.* at 858.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 858-59.

289. *Id.* at 859.

290. *Id.* at 860, 862.

291. *Id.* at 864.

292. *Id.*

293. *Id.* (internal citations omitted) (citing Wilkin v. 1st Source Bank, 548 N.E.2d 170, 172 (Ind. Ct. App. 1990)).

Walker,[294] finding that "the undisputed evidence shows that the sale was based upon a common, mistaken assumption about a vital fact regarding 'the very nature of the thing.'"[295] The court reasoned that both parties were mistaken about the tractor's value as they were both unaware that the tractor's identification number had been altered.[296] According to the court, "[t]he essential terms, including both the sale and the sale price, were based on a mutual mistake about a vital fact that Morell had good title and lawful authority to sell the tractor to Tracy free and clear."[297] Further, "[t]here was a mutual mistake of fact between them that went to the heart of the bargain, to the substance of the whole contract, and, as such, there was no contract, as a matter of law."[298]

The court also concluded that public policy prohibited the enforcement of the agreement.[299] The court stated that it "cannot be called upon to enforce contracts that violate the law or that violate public policy. While certain agreements are prohibited outright by statute and thus void, others may be found void on public policy grounds."[300] Here, the court explained, the transactions involved the sale of altered property, which is a crime under Indiana law.[301] Although Morell's prosecution did not involve the tractor, the court did not find any lawful purpose for destroying the tractor's identification number.[302] As such, the court:

> decline[d] to adopt a rule that someone may sell altered property with impunity and then claim ignorance as a complete defense in a civil action arising from the sale. Such a rule would violate public policy because in the sale of personal property, unless otherwise agreed, the seller's ownership free and clear of liens and encumbrances is presumed.[303]

According to the *Tracy* court, "the law should not permit a seller to transfer property with an altered identification number without being held accountable for it."[304]

---

294. 33 N.W. 919 (Mich. 1887). In *Sherwood*, both the seller and purchaser of a cow wrongfully believed that the cow was barren and would not breed and agreed on a price due to this mistaken belief. *Tracy*, 948 N.E.2d at 864 (citing *Sherwood*, 33 N.W. at 923). The court concluded that due to the mistake of the parties the transaction was voidable noting the mistake "'was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. . . . She was not a barren cow, and, if this fact had been known, there would have been no contract.'" *Id.* (alteration in original) (quoting *Sherwood*, 33 N.W. at 923).

295. *Tracy*, 948 N.E.2d at 864 (quoting *Sherwood*, 33 N.W. at 923).

296. *Id.*

297. *Id.* at 865.

298. *Id.*

299. *Id.*

300. *Id.* (citing Straub v. B.M.T., 645 N.E.2d 597, 599 (Ind. 1994)).

301. *Id.* (citing IND. CODE § 35-43-4-2.3 (2011)).

302. *Id.*

303. *Id.*

304. *Id.*

Holding that the contract should be rescinded based on the mutual mistake of the parties and public policy, the court explained that it must "adjust the equities and return the parties to the status quo ante."[305] In order to return the parties to the status quo ante, the court held that Morell was "the owner and is entitled to possession of the tractor, subject to any impoundment and storage charges, that the promissory note is null and void, and that Tracy is entitled to recover the amount he has paid on the promissory note."[306]

E. Unjust Enrichment

In *Coppolillo v. Cort*,[307] the court of appeals, as a matter of first impression, addressed whether the existence of an express agreement precluded an investor's claim in equity for unjust enrichment where the agreement did not cover the investor's equitable claim.[308] Antony Cort (Cort) was a shareholder in Zuncor, Inc., which owned Zuni's Restaurant.[309] Cort's mother had an ownership interest in the real property on which the restaurant was located.[310] Steven Coppolillo (Coppolillo), who was also the chef, agreed "to purchase Cort's one-fourth ownership share of Zuncor" for $50,000 up front, plus twenty-five monthly payments of $2000.[311] During that time period, Cort was negotiating to sell the real property.[312] The new owner of the property provided the restaurant with only a three-month lease, and without a new location, the restaurant closed, and Coppolillo lost his investment.[313] As a result, Coppolillo brought suit against Cort, alleging, among other things, unjust enrichment.[314]

In addressing Coppolillo's appeal regarding his claim of unjust enrichment, the court in *Cort* explained:

> Unjust enrichment is also referred to as quantum meruit, contract implied-in-law, constructive contract, or quasi-contract. Unjust enrichment permits recovery where the circumstances are such that under the law of natural and immutable justice there should be a recovery. To prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust.[315]

---

305. *Id.* at 866 (citing Smith v. Brown, 778 N.E.2d 490, 497 (Ind. Ct. App. 2002)).
306. *Id.*
307. 947 N.E.2d 994 (Ind. Ct. App. 2011).
308. *Id.* at 999.
309. *Id.* at 996.
310. *Id.*
311. *Id.*
312. *Id.* 996-97.
313. *Id.* at 997.
314. *Id.*
315. *Id.* (citations and internal quotation marks omitted).

However, because Coppolillo's claim was based on the sale agreement, Cort argued that "Coppolillo's remedy, if any, against him must be sought under the contract rather than in equity."[316] The court agreed that when the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law.[317] Further, the court explained, "[t]he existence of an express contract precludes a claim for unjust enrichment because: (1) a contract provides a remedy at law; and (2) as a remnant of chancery procedure, a plaintiff may not pursue an equitable remedy when there is a remedy at law."[318]

The court then addressed the "exceptions to this general rule."[319] Specifically, the court explained that "[a]lthough not previously addressed in Indiana, several other jurisdictions have determined that when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice."[320]

The court applied this new exception and concluded that the express terms of the parties' contract did not fully address Coppolillo's claim.[321] Specifically, the court reasoned that "the Agreement is not a contract for services and does not fully encompass the parties' payment arrangements."[322] Therefore, the court concluded "that the parties' contract [did] not preclude Coppolillo's claim in equity against Cort for unjust enrichment."[323]

---

316. *Id.*

317. *Id.* at 998 (citing Zoeller v. E. Chi. Second Century, Inc., 904 N.E.2d 213, 221 (Ind. 2009)).

318. *Id.* (citing King v. Terry, 805 N.E.2d 397, 400 (Ind. Ct. App. 2004)).

319. *Id.*

320. *Id.* Specifically, the court cited *Town of New Hartford v. Connecticut Resource Recovery Authority*, 970 A.2d 592, 612 (Conn. 2009), and *Porter v. Hu*, 169 P.3d 994, 1007 (Haw. Ct. App. 2007) ("endorsing the principle that equitable restitution is appropriate where an express contract does not fully address an injustice" (internal quotation marks omitted)); *see also* Klein v. Arkoma Prod. Co., 73 F.3d 779, 786 (8th Cir.1996) (applying Arkansas law). The court stated that "the existence of a contract, in and of itself, does not preclude equitable relief which is not inconsistent with the contract." Rent-A-PC, Inc. v. Rental Mgmt., Inc., 901 A.2d 720, 723 (Conn. Ct. App. 2006).

321. *Cort*, 947 N.E.2d at 999.

322. *Id.* at 998. On the substance of Coppolillo's unjust enrichment claim, the court found that material issues of fact existed, precluding summary judgment. *Id*. at 998-99.

323. *Id.* at 999.

RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

DANIEL K. BURKE*
AMANDA L.B. MULROONY**

During the survey period,[1] the Indiana Supreme Court and the Indiana Court of Appeals rendered several decisions addressing principles of state procedural law and provided helpful interpretations of the Indiana Rules of Trial Procedure.

I. INDIANA SUPREME COURT DECISIONS

A. Subject Matter Jurisdiction

In *State ex rel. Zoeller v. Aisin USA Manufacturing, Inc.*,[2] the Indiana Supreme Court held that a trial court did not lack subject matter jurisdiction over the State's action to recover an erroneously issued tax refund from a corporate taxpayer.[3] The State brought an action based on claims of unjust enrichment, theft, statutory treble damages and constructive trust to recover more than one million dollars that was mistakenly issued as a refund check to Aisin USA Manufacturing, Inc. ("Aisin") due to several accounting and clerical errors within the Indiana Department of Revenue.[4] The trial court granted, and the court of appeals affirmed, Aisin's motion to dismiss pursuant to Indiana Trial Rule 12(B)(1) for lack of subject matter jurisdiction, finding that the matter fell within the exclusive jurisdiction of the Indiana Tax Court.

The Indiana Supreme Court determined that this case was not one that "arises under"[5] Indiana tax law and therefore it was not an original tax appeal over which the Indiana Tax Court had exclusive jurisdiction.[6] Affirming its prior interpretation of the term "arises under" as contained in Indiana Code section 33-26-3-1, the court stated that "a case arises under Indiana tax law if an Indiana tax statute creates the right of action or if the case principally involves the collection of a tax or defenses to the collection of a tax."[7] The court found that this case did not "principally" involve the collection of a tax or defenses to the collection of

---

* Partner, Hoover Hull LLP, Indianapolis, Indiana. B.S., 1994, Indiana University—Bloomington; J.D., 1999, *cum laude*, Southern Methodist Dedman University School of Law. The views expressed herein are solely those of the authors.

** Associate, Hoover Hull LLP, Indianapolis, Indiana. B.A., 2004, *cum laude*, DePauw University, Greencastle, Indiana; J.D., 2011, *summa cum laude*, Indiana University Robert H. McKinney School of Law.

1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—from October 1, 2010, through September 30, 2011—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.

2. 946 N.E.2d 1148 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 789 (Sept. 13, 2011).

3. *Id.* at 1159.

4. *Id.* at 1150-51.

5. *See* IND. CODE § 33-26-3-1 (2011).

6. *Zoeller*, 946 N.E.2d at 1159.

7. *Id.* at 1154 (citing State v. Sproles, 672 N.E.2d 1353, 1357 (Ind. 1996)).

a tax[8]: none of the State's clerical or accounting errors were due to a misunderstanding of tax law; Aisin did not owe this money to the State due to outstanding tax liability, but rather because it was unjustly enriched by the refund; and "determining whether and to what extent mistakes were made ha[d] nothing to do with Indiana tax law."[9] Additionally, the court reasoned that the legislative purpose for the Indiana Tax Court's existence—ensuring the uniform interpretation and application of Indiana tax law—"would *not* be served by the [t]ax [c]ourt exercising jurisdiction over a case devoid of any tax-law issues."[10] The court concluded that the Jackson Superior Court had subject matter jurisdiction and remanded for proceedings on the merits of the State's claims.[11]

B. Service

In *Joslyn v. State*,[12] the supreme court held that a defendant's admission that he had notice of a protective order was sufficient to support convictions of stalking and invasion of privacy, despite the defendant's arguments that the protective order was not properly served under the Indiana Rules of Trial Procedure.[13] Stephanie Livingston obtained an ex parte protective order under the Indiana Civil Protective Order Act against Richard Joslyn.[14] Joslyn was served with a copy of the protective order by a sheriff's deputy who left a copy attached to the door of Joslyn's residence. The return of service, though, did not indicate whether a copy was also mailed to his last address as required under Indiana Trial Rule 4.1.[15] After Josyln violated the protective order and was convicted of stalking and invasion of privacy, he challenged the sufficiency of evidence to support his convictions based on improper service of the protective order.[16]

Granting transfer "to address the service of protective orders," the court held that Joslyn's testimony admitting receipt of the protective order was sufficient to sustain his convictions.[17] Affirming the reasoning of the appellate court, the court stated:

> [T]he purpose of the Indiana Civil Protection Order Act is to promote the protection and safety of all victims of domestic violence and prevent future incidents. It would run contrary to this purpose if we were to

---

8. Whether the State's right of action was created by a tax statute was not at issue. *Id.*

9. *Id.* at 1155.

10. *Id.* at 1156.

11. *Id.* at 1159. Justice Rucker authored a dissent in which Justice Dickson concurred. *Id.* (Rucker, J., dissenting). Justice Rucker opined that this matter was one for the Tax Court, and that the State attempted to "end-run" a missed statute of limitations deadline applicable to a tax proceeding by filing the present action in the superior court. *Id.*

12. 942 N.E.2d 809 (Ind. 2011).

13. *Id.* at 812-14.

14. *Id.* at 810.

15. *Id.* (citing IND. TRIAL R. 4.1).

16. *Id.* at 812.

17. *Id.* at 811-12.

> embrace Joslyn's contention that a defendant does not violate the criminal code because of some defect in civil process even where the court had in fact issued a protective order and the defendant in fact knew it had done so.[18]

In *In re Adoption of L.D.*,[19] the supreme court remanded the denial of a mother's motion to set aside paternal grandparents' petition for adoption, finding that notice and service of process by publication was insufficient to confer personal jurisdiction over the mother because the grandparents failed to perform a "diligent search" as required by the Due Process Clause.[20] After the mother gave birth to a baby ("Child") while not married and incarcerated, a court appointed N.E. (who later adopted the Child, and therefore became the adoptive grandmother of Child) to be Child's guardian.[21] After an initial failed attempt at adoption, and various changes to the Child's custody and visitation arrangements, the Child's paternal grandparents filed a new petition to adopt Child. The paternal grandparents did not give notice to N.E., and filed an affidavit stating they did not have the mother's address or telephone number. The affidavit went on to say that they had attempted to obtain such from the Indiana Department of Correction and the Marion County Jail, and had learned that the mother was no longer incarcerated and had not contacted Child for two years.[22] Paternal grandparents filed "proof of service" of the adoption petition through publication.[23]

While the paternal grandparents attended the adoption hearing, they left Child in the care of N.E., but did not tell N.E. of the adoption petition or that they were attending a hearing to adopt Child. After the hearing, the paternal grandparents informed N.E. of the adoption, and within two weeks, the mother and N.E. asked the court to vacate the adoption and declare it void due to a lack of notice under Indiana Trial Rule 60(B).[24] At a hearing on the issue, the paternal grandmother testified that she had asked N.E. if she knew how to contact the [m]other, and N.E. said "no, not really,"[25] but N.E. testified that she did not remember such a conversation and that she had been able to contact the Child's mother.[26] The trial court denied the motion to set aside the adoption decree, and the court of appeals affirmed, finding that the mother had been adequately served.[27]

Although both Indiana's adoption statute and Indiana Trial Rule 4.13(A) allow for notice or service of process by publication "'if the . . . address of the

---

18. *Id.* at 812.
19. 938 N.E.2d 666 (Ind. 2010).
20. *Id.* at 671.
21. *Id.* at 667-68.
22. *Id.* at 668.
23. *Id.*
24. *Id.*
25. *Id.* at 669.
26. *Id.* at 669 n.2.
27. *Id.* at 669.

person is not known,'"[28] a "diligent search" is required under the Due Process Clause and Rule 4.13(A) before attempting notice by publication.[29] After discussing several federal and Indiana opinions regarding the satisfaction of "diligence," the court concluded that, under the facts of the present case, the paternal grandparents failed to conduct the diligent search required by the Due Process Clause. The court focused its reasoning on the paternal grandparents' failure to discuss the adoption with N.E.:

> [The Paternal Grandparents] made only the most obtuse and ambiguous attempt to ask N.E. about [the m]other's whereabouts. They affirmatively concealed from N.E. the very fact that they were filing an adoption petition even though the most minimal diligence to find [the m]other would have involved N.E. One need look no further than the fact that N.E. and [the m]other filed their motion in court less than two weeks after [the p]aternal [g]randparents told N.E. that the adoption had been granted to see how little effort would have been required for Paternal Grandparents to find [the m]other had they involved N.E.[30]

The court remanded the case to the trial court and directed it to grant the mother's Trial Rule 60(B) motion to vacate the adoption decree.[31]

C. Pleadings

In *Avery v. Avery*,[32] the supreme court held that defendants to a will contest action were required to file an answer or other responsive pleading in accordance with Indiana Trial Rule 7, and affirmed the trial court's grant of default judgment in favor of the plaintiff because of defendants' failure to answer.[33] After Mary Avery passed away, her daughter, Trina Avery, opened an estate and was appointed personal representative.[34] After two of Mary's sons filed a petition to remove Trina as personal representative and the probate court's admission of a will naming one of the sons as personal representative, Trina filed a separate action to dispute the validity the will.[35] Notice was provided to the defendants, including the Avery sons, via summons instructing defendants that "[a]n answer or other appropriate response in writing to the Complaint must be filed . . . or a judgment by default may be rendered against you for the relief demanded by Plaintiff."[36] After the defendants failed to answer or otherwise respond to the

---

28. *Id.* (quoting IND. CODE § 31-19-4.5-2(2) (2011) and citing IND. TRIAL R. 4.13(A)).
29. *Id.*
30. *Id.* at 671.
31. *Id.*
32. 953 N.E.2d 470 (Ind. 2011).
33. *Id.* at 472.
34. *Id.* at 470.
35. *Id.* at 470-71.
36. *Id.* at 471.

summons, the trial court entered a judgment by default against all defendants.[37]

The court rejected the defendants' contention that they were not required to file an answer because a will contest action is a "statutorily created cause of action" that must be brought within certain statutory provisions, which do not explicitly require an answer.[38] While the court acknowledged that some Indiana opinions authored prior to the 1970 adoption of the Indiana Rules of Trial Procedure held that an answer in a will contest was not necessary,[39] the court cited the "inclusive breadth"[40] of Trial Rule 1[41] and post-Rules case law (finding that the Trial Rules "take precedence over any conflicting statutes"[42] and specifically applying the Trial Rules to will contest actions)[43] to determine that a timely filing of an answer was required.[44] Failure to do so subjected the defendants to a default judgment, as contemplated under Trial Rule 55(A).[45]

D. Right to a Jury Trial

In *Lucas v. U.S. Bank, N.A.*,[46] the Indiana Supreme Court reversed the court of appeals determination that mortgagors were entitled to a jury trial on their legal claims asserted in response to a mortgage foreclosure action,[47] affirming the trial court's denial of the jury trial request.[48] The court drew from its prior teaching in *Songer v. Civitas Bank*[49] to formulate a "multi-pronged inquiry" as to whether a suit is "essentially equitable," thus drawing legal claims into equity and away from a jury.[50]

After U.S. Bank brought a mortgage foreclosure action against the Lucases,

---

37. *Id.*

38. *Id.* at 472.

39. *Id.* at 471 (quoting State *ex rel.* Brosman v. Whitley Circuit Court, 198 N.E.2d 3, 5 (Ind. 1964)).

40. *Id.* at 472 (citing Robinson v. Estate of Hardin, 587 N.E.2d 683, 685 (Ind. 1992)).

41. Indiana Trial Rule 1 states, in part, that "[e]xcept as otherwise provided, these rules govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin." IND. TRIAL R. 1.

42. *Avery*, 953 N.E.2d at 472 (citing State *ex rel.* Gaston v. Gibson Circuit Court, 462 N.E.2d 1049, 1051 (Ind. 1984); *In re* Little Walnut Creek Conservancy Dist., 419 N.E.2d 170, 171 (Ind. Ct. App. 1981), *reh'g denied*; Augustine v. First Fed. Sav. & Loan Ass'n of Gary, 384 N.E.2d 1018, 1020 (Ind. 1979)).

43. *Id.* (quoting Robinson v. Estate of Hardin, 587 N.E.2d 683, 685 (Ind. 1992)).

44. *Id.*

45. *Id.*

46. 953 N.E.2d 457 (Ind. 2011), *reh'g denied*, 2012 Ind. LEXIS 6 (Jan. 9, 2012).

47. The court of appeal's opinion and rationale was discussed in last year's survey article. *See* Daniel K. Burke, *Recent Developments in Indiana Civil Procedure*, 44 IND. L. REV. 1087, 1105-06 (2011).

48. *Lucas*, 953 N.E.2d at 467.

49. 771 N.E.2d 61 (Ind. 2002).

50. *Lucas*, 953 N.E.2d at 465-66.

the Lucases responded by asserting various affirmative defenses, counterclaims, and a third-party complaint against the loan servicer.[51] The Lucases pled statutory and common law claims against the bank and loan servicer, claiming they were entitled to various forms of relief, including monetary damages, and demanded a jury trial "on all issues deemed so triable."[52]

The court cited *Songer* to explain:

> [A] court should look at the "essential features of a suit." If the lawsuit as a whole is equitable and the legal causes of action are not "distinct or severable," then there is no right to a jury trial because equity subsumes the legal causes of action. On the other hand, if a multi-count complaint contains plainly equitable causes of action and sufficiently distinct, severable, and purely legal causes of action, then the legal claims require a trial by jury.[53]

According to the supreme court, the court of appeals interpreted *Songer* to "require courts to engage in a case-by-case analysis of the various claims and not to use bright-line rules based on specific causes of action."[54] The court of appeals found that the Lucases' affirmative defense alleging that U.S. Bank failed to produce the original promissory note and properly executed assignments as proof of its security interest was "'so intertwined with a foreclosure action' that it was also a matter of equity."[55] However, on the other defenses, counterclaims, and third party claims, the court of appeals found they were "grounded in federal and state statutory law and state common law, and were all legal causes of action . . . request[ing mostly] money damages, a legal remedy."[56] The court of appeals also reasoned that the nature of these claims was different from the foreclosure action because the Lucases' claims were grounded partly in "consumer protection statutes designed to provide meaningful disclosure of information and to protect borrowers from abusive, unfair debt collection practices."[57] The court of appeals thus instructed the trial court to grant the Lucases' motion for a jury trial as to these legal claims.

The supreme court found *Songer* to require trial courts to

> engage in a multi-pronged inquiry to determine whether a suit is essentially equitable. . . . [W]e formulate that inquiry as follows: If equitable and legal causes of action or defenses are present in the same lawsuit, the court must examine several factors of each joined claim—its substance and character, the rights and interests involved, and the relief

---

51. *Id.* at 459.

52. *Id.*

53. *Id.* at 460-61 (citations omitted).

54. *Id.* at 463 (citing Lucas v. U.S. Bank, N.A., 932 N.E.2d 239, 244 (Ind. Ct. App. 2010), *rev'd* 953 N.E.2d 457).

55. *Id.* at 463-64 (quoting *Lucas*, 932 N.E.2d at 244).

56. *Id.* at 464 (citing *Lucas*, 932 N.E.2d at 244).

57. *Id.* (citing *Lucas*, 932 N.E.2d at 244-45).

> requested. After that examination, the trial court must decide whether core questions presented in any of the joined legal claims significantly overlap with the subject matter that invokes the equitable jurisdiction of the court. If so, equity subsumes those particular legal claims to obtain more final and effectual relief for the parties despite the presence of peripheral questions of a legal nature. Conversely, the unrelated legal claims are entitled to a trial by jury.[58]

Applying this inquiry to the present case, the court found that the bank's foreclosure complaint invoked the equitable jurisdiction of the trial court, and that all of the Lucases' legal claims were "subsumed into equity."[59] The court reasoned that when "looking at the cause *as a whole*"[60] and comparing the core issues presented by the Lucases' legal defenses and claims[61] with the core issues presented by the foreclosure action,[62] it was clear that they were "closely intertwined with one another,"[63] so that equity took jurisdiction over the "essential features" of the suit, thus requiring denial of the Lucases' jury trial request.[64]

E. Judgment on the Evidence/Affirmance of General Verdict

In *TRW Vehicle Safety Systems, Inc. v. Moore*,[65] the Indiana Supreme Court determined that TRW's motion for judgment on the evidence should have been

---

58. *Id.* at 465-66.

59. *Id.* at 466.

60. *Id.*

61. The court summarized the factual contentions underlying the Lucases' legal claims as follows:

> (1) U.S. Bank or Litton misled the Lucases on the terms of the loan documents and the handling of the Lucases' monthly payments; (2) U.S. Bank or Litton failed to properly account for and apply the Lucases' monthly payments to pay property taxes and insurance; (3) as a result of incorrectly calculating the Lucases' debt and misapplying the monthly payments, U.S. Bank or Litton declared the Lucases in default when in fact the Lucases were current and not liable for foreclosure; and (4) because the Lucases were current in their payments, U.S. Bank or Litton have wronged the Lucases by demanding payments the Lucases did not owe and by filing the present lawsuit when the Lucases were not in default.

Id.

62. The Court summarized the issues from the foreclosure action as:

> (1) the terms of the parties' agreement and the payments due under those terms; (2) the amount of the Lucases' payments; (3) the application of those payments; and (4) whether the Lucases failed to pay as agreed so that U.S. Bank could rightfully take steps to collect the debt the Lucases owed.

Id.

63. *Id.*

64. *Id.* at 467.

65. 936 N.E.2d 201 (Ind. 2010).

granted, vacating the judgment and five percent allocation of fault to TRW.[66] In affirming the verdict against co-defendant Ford, the court rejected Ford's contention that reversal with retrial was required if the court found any one, but not all, of plaintiff's liability theories to be based on insufficient evidence.[67]

Daniel Moore's estate brought a wrongful death action against Ford and seatbelt manufacturer TRW after Moore died from injuries sustained in a car accident in which he was ejected through the sunroof of his Ford Explorer, despite wearing his seatbelt, following a tire failure.[68] The jury found total damages to be $25,000,000 and allocated thirty-three percent fault to Moore, thirty-one percent fault to Ford, thirty-one percent fault to nonparty Goodyear Tire and Rubber Company, and five percent fault to TRW.[69]

The court determined that TRW's motion for judgment on the evidence should have been granted pursuant to Trial Rule 50(A) due to insufficient evidence. The court restated its previously-articulated standards when reviewing a motion for judgment on the evidence, examining the "evidence and the reasonable inferences drawn most favorable to the non-moving party,"[70] reversing "only when 'there is no substantial evidence supporting an essential issue in the case,'"[71] and requiring that the "evidence must support without conflict only one inference which is in favor of the defendant" to overturn a trial court's denial of a motion for judgment on the evidence.[72]

In this case, the plaintiff's theory of liability against TRW was seatbelt design negligence.[73] However, Ford contracted with TRW to manufacture seatbelts according to Ford's specifications, and because "there [was] no evidence that TRW was authorized under its contract . . . to substitute and supply . . . an alternative seatbelt design,"[74] the evidence was "insufficient to establish that TRW . . . failed to exercise reasonable care under the circumstances in designing the seatbelt assembly involved in the incident."[75] As to TRW, the "mere availability of an alternative seatbelt design [did] not establish negligent design by a defendant that lacks the authority to incorporate it into the assembled vehicle."[76]

The court also determined that, because there was insufficient evidence for a jury to reach a product liability verdict as to Goodyear had it been a named party, there was insufficient evidence to support its allocation of fault as a

---

66. *Id.* at 228.
67. *Id.* at 211.
68. *Id.* at 207.
69. *Id.*
70. *Id.* at 214 (quoting Kirchoff v. Selby, 703 N.E.2d 644, 648 (Ind. 1998)).
71. *Id.* (quoting *Kirchoff*, 703 N.E.2d at 648)).
72. *Id.* (quoting Ross v. Lowe, 619 N.E.2d 911, 914 (Ind. 1993)).
73. *Id.* at 215.
74. *Id.* at 216.
75. *Id.*
76. *Id.*

nonparty.[77]

In affirming the verdict against Ford, the court addressed and rejected Ford's argument that a finding of insufficient evidence to support *any*, but not *all*, of the plaintiff's theories of liability against Ford would require reversal with retrial because Ford was denied directed verdicts.[78] Ford cited a line of previous Indiana cases from when "code pleading" governed procedure to argue that appellate courts must "presume the general verdict was based on the bad theory . . . unless it affirmatively appears that the verdict rests upon the [good theory]."[79] While the court found Ford's request to modify Indiana's rule favoring affirmance of a general verdict "immaterial"[80] because both of the liability theories presented to the jury (seatbelt system design and sunroof defective design) were each supported by sufficient evidence, the court expressly declined to consider deviation from Indiana law recognizing that a general verdict will be affirmed where there is "any evidence" to support it.[81]

F. Motion to Correct Error

In *Walker v. Pullen*,[82] the supreme court held that the findings made by the trial court in granting a new trial to correct an error in prior proceedings were insufficiently general and failed to state whether the verdict was against the weight of the evidence or clearly erroneous.[83]

David Pullen won a jury verdict against Debra Walker following a car accident but sought a new trial, claiming that the amount of damages awarded to him was against the weight of the evidence.[84] Pullen sought total damages of $25,019.50, but the jury awarded him $10,070.00, indicating that this amount represented his physical therapy and initial medical assessment expenses.[85] In his motion to correct error, Pullen argued that the jury award did not fully reflect his physical therapy expenses and initial medical assessment.[86] In a three-paragraph ruling granting Pullen's motion, the trial court determined that:

---

77. *Id.* at 226. While it could be "reasonably inferred that the rollover event was precipitated by the failure of a Goodyear tire," there was "no evidence establishing whether it resulted from a tire defect attributable to Goodyear or from normal wear and tear, underinflation, a slow leak, a road hazard or puncture, or any other cause." *Id.*

78. *Id.* at 211.

79. *Id.* (citation omitted) (alterations in original).

80. *Id.*

81. *See id.* (citing PSI Energy, Inc. v. Roberts, 829 N.E.2d 943, 950 (Ind. 2005); Epperly v. Johnson, 734 N.E.2d 1066, 1070 (Ind. Ct. App. 2000); Tipmont Rural Elec. Membership Corp. v. Fischer, 697 N.E.2d 83, 86 (Ind. Ct. App. 1998), *aff'd*, 716 N.E.2d 357 (Ind. 1999); Picadilly, Inc. v. Colvin, 519 N.E.2d 1217, 1221 (Ind. 1988)).

82. 943 N.E.2d 349 (Ind. 2011).

83. *Id.* at 352.

84. *Id.* at 351.

85. *Id.*

86. *Id.*

> The undisputed medical testimony in this case established that Plaintiff's medical bills . . . were for appropriate treatment of injuries suffered [as a result of Defendant's negligence]. . . . Those medical bills totaled $12,250.00. The jury's verdict was less than those medical bills. . . . There was also undisputed medical testimony that Plaintiff endured pain and suffering for a minimum of five months. The jury's verdict obviously contained no award for that, however minimal.[87]

Admonishing courts to tread "[c]arefully as the [t]hirteenth [j]uror,"[88] the court cited the language of Trial Rule 59(J) requiring "special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted" and determination as to whether the verdict was "against the weight of the evidence or . . . clearly erroneous as contrary to or not supported by the evidence."[89] The court affirmed its requirement of strict compliance with Trial Rule 59(J), reasoning that "[s]pecific findings are necessary to temper the use of the 'extraordinary and extreme' power to overturn a jury's verdict by assuring that the decision is based on a complete analysis of the law and facts."[90]

In reversing the finding of the trial and appellate court and directing that the jury verdict be reinstated,[91] the court cited the trial court's failure to state whether the verdict was "against the weight of the evidence or clearly erroneous."[92] The court briefly discussed potential reasoning for the jury awarding its determined amount,[93] and found that the trial court's statement that the evidence was "undisputed" as to damages was not a "sufficient special finding to justify supplanting the jury's verdict," nor did the findings suggest "that this was an unjust result."[94]

G. Review of Court's Findings and Judgment

In *In re I.A.*,[95] a father appealed the trial court's decision to terminate his parental rights.[96] The supreme court found that, when implementing the "clearly erroneous" standard of review set forth in Trial Rule 52(A) to determine whether to set aside a trial court's findings or judgment, the "clear and convincing" standard mandated by statute for parental termination proceedings should be used to determine whether the evidence supported the findings, and whether the

---

87. *Id.*

88. *Id.* at 352.

89. *Id.* (quoting IND. TRIAL R. 59(J)).

90. *Id.* (quoting Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 358 N.E.2d 974, 978 (Ind. 1976)).

91. *Id.* at 351.

92. *Id.* at 352.

93. *Id.* at 353.

94. *Id.*

95. 934 N.E.2d 1127 (Ind. 2010).

96. *Id.* at 1132.

findings supported the judgment. This harmonized the statutory burden of proof for termination proceedings with the language of Rule 52(A).[97] Thus, the court held that "to determine whether a judgment terminating parental rights is clearly erroneous, we review the trial court's judgment to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment."[98]

The trial court terminated the parental rights of both the child's mother and father, but only the father appealed.[99] The court determined that, with regard to the father, the Perry County Department of Child Services (DCS) failed to demonstrate by clear and convincing evidence that there was: (1) "a reasonable probability that the reasons for placement outside the home of the parents [would] not be remedied;" or (2) a reasonable probability that continuing the father-child relationship threatened the emotional or physical well-being of the child, as was required in order to terminate a parental relationship involving a child in need of services.[100] In this case, the child was initially removed from the mother's home and placed in foster care due to lack of supervision, but the father did not reside with the mother at that time. Neither the trial court's order nor the record indicated what led DCS to place the child in foster care, rather than with the father.[101] The trial court based its determination that the continuation of the parent-child relationship posed a threat to the child's well-being on a case manager's belief that there was a lack of bonding between the father and child, but the case manager did not testify specifically that continuation of the parent-child relationship *with respect to the father* posed a threat.[102] The court suggested that state's wardship of the child continue until the father had "a chance to prove himself a fit parent for his child,"[103] and concluded that "[t]he involuntary termination of parental rights is the most extreme sanction a court can impose on a parent . . . intended as a last resort, available only when all other reasonable efforts have failed."[104]

II. INDIANA COURT OF APPEALS DECISIONS

A. Service and Sufficiency of Process

In *Guy v. Commissioner, Indiana Bureau of Motor Vehicles*,[105] the court of appeals found that the trial court lacked personal jurisdiction over a plaintiff's petition for an order to renew his driver's license, where the plaintiff served the

97. *Id.*
98. *Id.*
99. *Id.* at 1132 n.4.
100. *Id.* at 1135-36; *see also* IND. CODE § 31-35-2-4(b)(2) (2011).
101. *In re L.A.*, 934 N.E.2d at 1134.
102. *Id.* at 1135-36.
103. *Id.* at 1136.
104. *Id.* (citations omitted).
105. 937 N.E.2d 822 (Ind. Ct. App. 2010).

Commissioner of the Bureau of Motor Vehicles but failed to serve the Attorney General as required by Indiana Trial Rule 4.6(A)(3) and the Indiana Administrative Orders and Procedures Act.[106]

The appellate court distinguished prior case law, *Evans v. State*,[107] where a plaintiff served the Governor and the Attorney General with a summons but failed to serve the head of the Indiana Family and Social Services Administration (FSSA) with the suit.[108] In that case, the court of appeals relied on Indiana Trial Rule 4.15(F) to cure the defective service made to the Governor as opposed to the secretary of the FSSA.[109] The *Guy* court distinguished *Evans* and found it not controlling: "Because there was no attempt at serving the [a]ttorney [g]eneral, Trial Rule 4.15(F) cannot be used in this case to cure any defective service to the [a]ttorney [g]eneral."[110] The court concluded that Guy's service of process was ineffective and that the trial court lacked personal jurisdiction over the BMV Commissioner such that it could not enter any order in the case, requiring the appellate court to vacate the lower court's denial of Guy's petition.[111]

In *Cotton v. Cotton*,[112] the court of appeals held that a summons served on a wife in a dissolution action was insufficient to satisfy due process because it did not contain a statement that if the wife failed to appear or otherwise respond, a decree could be entered without notice.[113] After Mr. Cotton filed his petition to dissolve the marriage, his wife was served with a summons that stated:

> You have been sued by the Petitioner in the Kosciusko Circuit Court . . . . The nature of the lawsuit and the demand made against you are stated in the Petition for Dissolution of Marriage which is served on you with this Summons.
>
> You *may personally appear* in this action or your attorney may appear for you. *You must appear before the Court if directed to do so pursuant to a Notice, an Order of the Court, or a Subpoena*. You *may file a response* to the Petition prior to submission of the Petition at final hearing which may be tried or heard after the expiration of sixty (60) days from the date of filing of the Petition for Dissolution of Marriage or from the date of the publication of the first Notice to a non-resident.[114]

Mrs. Cotton did not appear personally or by counsel and did not respond to the petition because she believed that the two were attempting reconciliation and

---

106. *Id.* at 823.

107. 908 N.E.2d 1254 (Ind. Ct. App. 2009).

108. *Guy*, 937 N.E.2d at 824-25 (citing *Evans*, 908 N.E.2d at 1256).

109. *Id.* at 825 (citing *Evans*, 908 N.E.2d at 1258-59).

110. *Id.*

111. *Id.* at 826.

112. 942 N.E.2d 161 (Ind. Ct. App. 2011).

113. *Id.* at 163.

114. *Id.* at 164-65. The court also noted that the summons was typewritten and prepared by Mr. Cotton's attorney, not a form provided by the clerk. *Id.* at 165.

that her husband was not seeking a dissolution.[115] Because she never appeared, she was not notified of the final hearing, which her husband attended and resulted in the court entering a dissolution decree.[116]

In response to Mrs. Cotton's appeal challenging the sufficiency of process,[117] the court determined that due process requires that, "at a minimum, a respondent in a dissolution proceeding be notified of the risk of default for failure to appear or otherwise respond."[118] The court explained that the language of Trial Rule4 (C)(5)—providing that a summons "shall contain . . . [t]he time within which these rules require the person being served to respond, and a clear statement that in case of his failure to do so, judgment by default may be rendered against him for the relief demanded in the complaint"[119]—did not "squarely address" the circumstances of this case because responsive pleadings are not required in marriage dissolution proceedings.[120] However, "the command of Trial Rule 4(C)(5), grounded in due process, is that the respondent in a dissolution proceeding must be given notice in a 'clear statement' of the risk of default for failure to appear or otherwise respond because that risk is present regardless of whether a response is required."[121] Without a statement of the consequences for failing to appear or otherwise respond, the summons "did not satisfy due process or comply with the intent of Trial rule 4(C)(5)."[122] The court also rejected Mr. Cotton's argument that the savings provision of Trial Rule 4.15(F) made the summons sufficient to obtain personal jurisdiction over his wife.[123] The court reversed the dissolution court's entry of the dissolution decree.[124]

B. Pleadings

In *Quimby v. Becovic Management Group, Inc.*,[125] the court of appeals determined it was proper to dismiss a complaint seeking relief under the Indiana Wage Payment Statute where the plaintiff had already assigned her claim under

---

115. *Id.* at 163.

116. *Id.*

117. The court paused to note the "not often addressed" distinction between a challenge of insufficient process and insufficient service of process: "[a] claim of insufficiency of process 'challenges the content of a summons; [insufficiency of service of process] challenges the manner or method of service.'" *Id.* at 164 (second alteration in original) (quoting Heise v. Olympus Optical Co., 111 F.R.D. 1, 5 (N.D. Ind. 1986)).

118. *Id.* at 165.

119. IND. TRIAL R. 4(C)(5).

120. *Cotton*, 942 N.E.2d at 165.

121. *Id.*

122. *Id.* at 166.

123. *Id.*

124. *Id.*

125. 946 N.E.2d 30 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 938 (May 18, 2011), *trans. denied*, 962 N.E.2d 1199 (Ind. 2012).

the Indiana Wage Claim Statute to the Indiana Department of Labor.[126]

After voluntarily leaving her employment with the defendant, plaintiff Quimby initially, and improperly, sought relief for allegedly unpaid wages under the Indiana Wage Claim Statute by submitting and assigning her claim to the Indiana Department of Labor.[127] She then filed suit seeking relief under the Indiana Wage Payment Statute.[128] Drawing from the two statutes and prior case law, the court explained that Quimby should have initially pursued her claim pursuant to the Wage Payment Statute rather than assign her claim to the Indiana Department of Labor because she voluntarily left her employment with defendant.[129] However, she effectively assigned her claim to the Department of Labor and therefore was no longer the real party in interest.[130] Because she was no longer the real party in interest, and the Department of Labor had not ratified, substituted, or joined in her action, dismissal for failure to state a claim pursuant to Trial Rule 12(B)(6) was warranted.[131]

C. Statute of Limitations

In *Holmes v. Celadon Trucking Services of Indiana, Inc.*,[132] the court of appeals reversed and remanded the trial court's determination that a cause of action for wrongful termination and conversion was time-barred, finding that the action was commenced within the statutorily allotted time pursuant to Indiana Trial Rules 3 and 5(F).[133]

In this case, it was undisputed that the statutorily allotted time period for the plaintiff to bring his claims against his former employer expired on May 11, 2009.[134] The plaintiff, by counsel, mailed his complaint, filing fee, and appropriate copies of the complaint and summons via certified mail on April 24, 2009, which served to commence the action pursuant to Indiana Trial Rules 3 and 5(F).[135] The court rejected Celadon's argument that "this court should instead rely on the Chronological Case Summary prepared by the . . . Clerk's office, which indicate[d] that the documents were received and filed by the Clerk's Office on May 12, 2009" in order to conclude that the documents were not timely

---

126. *Id.* at 34.

127. *Id.* at 32.

128. *Id.*

129. *Id.* at 33-34 (discussing the Indiana Wage Payment and the Indiana Wage Claim Statute).

130. *Id.* at 34.

131. *Id.* at 33-34.

132. 936 N.E.2d 1254 (Ind. Ct. App. 2010).

133. *Id.* at 1257-58.

134. *Id.* at 1257.

135. *Id.* at 1255. "A civil action is commenced by filing with the court a complaint . . . , by payment of the prescribed filing fee . . . , and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary." IND. TRIAL R. 3. Indiana Trial Rule 5(F) states that filing by certified mail "shall be complete upon mailing." IND. TRIAL R. 5(F).

filed.[136] The court also rejected Celadon's argument that the action was commenced outside the statute of limitations because the trial court did not receive plaintiff's counsel's appearance until May 12, 2009.[137] Although Trial Rule 3.1 and Marion County Local Rule 49-TR5-205(E) require that an appearance be filed by the initiating party "[a]t the time an action is commenced,"[138] as Celadon argued, the court concluded that Celadon

> failed to point to any authority which provides that an action is not commenced for the purposes of the statute of limitations until *both* Trial Rules 3 and 3.1 are satisfied, and we find none. While there may be some consequences for failing to timely file an appearance, nothing in the rules suggests that the delayed filing of an appearance has any impact on the commencement of the action for statute of limitations purposes.[139]

In *Raisor v. Jimmie's Raceway Pub, Inc.*,[140] the court of appeals held, as a matter of apparent first impression, that the 120-day time limit on the notice period for the relation back doctrine when amending a complaint to substitute a plaintiff operated *in addition to* the statute of limitations on a claim.[141]

On March 17, 2008, Raisor was allegedly assaulted at Fireman's Raceway Pub by another patron. One year later, Raisor and his wife sent a letter to the pub informing it that they had hired an attorney, and received a response from the pub's insurer denying coverage, listing the insured as FQC Group, Inc. ("FQC"), and instructing them to send future communication to FQC.[142] The Raisors filed their original complaint against the patron and FQC on October 20, 2009, sending a summons via certified mail to FQC based on their corporate office address listed with the Secretary of State.[143] However, the offices registered with the Secretary of State had been vacant since August 2008.[144] After the summons was returned to sender, the Raisors again attempted service via alias summons obtained through the court on December 16, 2009 and served by copy service on December 21, 2009. A courier attached the summons to the door of the vacated office.[145] On February 25, 2010, the Raisors sent a certified letter advising FQC they intended to seek a default judgment, and the mail carrier noticed the addressee included "FQC d/b/a Fireman's Raceway Pub."[146] Realizing that Fireman's was located two blocks away, the carrier delivered the letter to Fireman's and it was given to the president of Jimmie's Raceway Pub, the true

---

136. *Id.* at 1257.
137. *Id.*
138. IND. TRIAL R. 3.1; *see also* MARION COUNTY LOCAL RULE 49-TR5-205(E) (2012).
139. *Holmes*, 936 N.E.2d at 1257 (emphasis added).
140. 946 N.E.2d 72 (Ind. Ct. App. 2011).
141. *Id.* at 80.
142. *Id.* at 74.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

owner of Fireman's.[147]

On March 1, 2010, Fireman's president obtained a copy of the summons and complaint and sent a copy to FQC's president, who was not aware of the suit.[148] On March 3, 2010, FQC requested an enlargement of time to respond to the complaint, neither denying doing business as Fireman's nor mentioning Jimmie's.[149] On March 26, 2010, FQC sought dismissal because it was not the owner of Fireman's and identified Jimmie's as the entity doing business as Fireman's.[150] The Raisors filed an amended complaint substituting Jimmie's in place of FQC on April 28, 2010.[151] The trial court granted Jimmie's motion for summary judgment after Jimmie's argued that the action was "barred by the two-year statute of limitations for personal injury actions and that the amended complaint could not relate back to the original filing date because Jimmie's received notice of the action after the expiration of the 120-day period allowed under Indiana Trial Rule 15(C)."[152]

This appeal caused the court to examine how statutes of limitations work together with Indiana Trial Rule 15(C). Pursuant to Rule 15(C),

> [w]here no more than 120 days have elapsed since the filing of the original complaint and (1) where the claim arises out of the same conduct; (2) the substituted defendant has notice such that he is not prejudiced by the amendment; and (3) the substituted defendant knows or should know that but for the misidentification, the action should have been brought against him, then the amended complaint relates back to the date of the original complaint.[153]

Here, the Raisors did not officially substitute the true pub owner as defendant until more than 120 days after the complaint was filed and forty-two days after the statute of limitations expired.[154] However, Jimmie's found out that the Raisors had mistakenly named another party in the time period between the 120-day amendment expiration and the expiration of the statute of limitations.[155]

The court reasoned that the practical effect of Rule 15(C) is to provide a plaintiff who waits to file a complaint until the last day within the statute of limitations an additional 120 days following the expiration of the statute of limitations to substitute a party, so that had the Raisors waited until March 17, 2010—the day the statute of limitations expired—to file their complaint, they would have had until July 15, 2010 to substitute a party defendant.[156] The court

147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 75.
152. *Id.*
153. *Id.* at 76 (citing IND. TRIAL R. 15(C)).
154. *Id.*
155. *Id.* at 77.
156. *Id.* at 78.

decided that the fact that the Raisors filed their original complaint earlier within the statute of limitations "should not work to penalize them"[157] and that "where the statute of limitations is still running, the 120-day limit found in Trial Rule 15(C) cannot be permitted to operate prematurely to bar the claim."[158]

The court drew the conclusion that "where, before the statute of limitations expires, a substituted defendant gains knowledge of a lawsuit clearly intended to be filed against it . . . the 120-day limitation to the relation back doctrine cannot operate to shorten the time period in which a plaintiff who utilizes the entire limitations period would be afforded to file an amended complaint."[159] The court stressed that this conclusion was contingent on the fact that the notice requirements of Rule 15(C) were otherwise met within the statute of limitations.[160] "Thus, because the statute of limitations had not expired when Jimmie's discovered the Raisors' misidentification of the pub owner defendant, Jimmie's was not prejudiced by the trial court's action in granting the Raisors leave to file their amended complaint,"[161] and the trial court erred when it granted summary judgment in favor of Jimmie's.[162]

D. Discovery

In *In re Beck's Superior Hybrids, Inc.*,[163] the court of appeals held that Monsanto's use of Indiana Trial Rule 28(E) to compel compliance with a subpoena duces tecum was preempted by the Federal Arbitration Act, which requires an arbitration panel to petition the United States district court in which the panel sits to compel a nonparty to appear before it or produce documents.[164]

Monsanto initiated arbitration against Pioneer Hi-Bred International and its parent company, E.I. Dupont de Nemours & Company (collectively, "DuPont"), relating to corn and soybean license agreements which required arbitration in New York City, subject to the Federal Arbitration Act.[165] At Monsanto's request, the arbitration panel issued a subpoena duces tecum to Beck's Superior Hybrids, Inc. ("Beck's"), ordering Beck's to appear at a hearing in Indiana before one of the arbitration panel members, and to produce business records relating to Monsanto's claim. After Beck's counsel informed Monsanto that it would not comply, Monsanto utilized Indiana Trial Rule 28(E)[166] to file a petition to assist

---

157. *Id.*

158. *Id.* at 79.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 80.

163. 940 N.E.2d 352 (Ind. Ct. App. 2011).

164. *Id.* at 368.

165. *Id.* at 354.

166. Indiana Trial Rule 28(E) provides, in part, that "[a] court of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things, allow inspections and copies and permit physical and mental

and obtain an order from the Hamilton County Superior Court requiring Beck's to comply and attend the hearing before one of the New York arbitrators in Atlanta, Indiana.[167]

Beck's argued, and the court of appeals agreed, that Section 7 of the Federal Arbitration Act preempts Indiana Trial Rule 28(E).[168] Section 7 of the Federal Arbitration Act states, in part, that:

> The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . [*I*]*f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators* . . . .[169]

The court looked to federal case law to determine that an arbitration party seeking nonparty discovery via subpoena is limited to section 7 as the vehicle to enforce the subpoena and "must do so according to its plain text."[170] The court determined that the plain terms of Section 7 "requires the enforcement of an arbitration panel's nonparty subpoena to be brought in the federal forum" and that the "limited federal jurisdiction for enforcement is a reflection of Congress' desire to keep arbitration simple and efficient, 'to protect non-parties from having to participate in an arbitration to a greater extent than they would . . . in a court of law,' and not to burden state courts with incidental enforcement procedures."[171]

The court acknowledged that in this instance, where the district court of New York lacked jurisdiction over non-party Beck's, the FAA created a "gap in enforceability."[172] However, the court determined, based on federal case law, that such "'gaps' were an intentional policy choice by Congress," that "Monsanto may not use an Indiana trial rule to circumvent the jurisdictional and territorial limitations intended by Congress," and that "the trial rule must yield to the federal statute."[173] Monsanto's attempt to use Trial Rule 28(E) where a federal forum was unavailable frustrated Congress' intent "to limit these petitions to the federal courts,"[174] and the court concluded that the trial court' judgment for Monsanto on its petition to assist was in error, reversing and remanding with instructions to

---

examinations for use in a proceeding in a tribunal outside this state." IND. TRIAL R. 28(E).

167. *Beck's Superior Hybrids, Inc.*, 940 N.E.2d at 354.

168. *Id.* at 361.

169. *Id.* at 358 (quoting 9 U.S.C. § 7 (2006)).

170. *Id.* at 359 (quoting Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 218 (2d Cir. 2008)).

171. *Id.* at 362-63.

172. *Id.* at 368.

173. *Id.*

174. *Id.* at 363.

dismiss the petition.[175]

E. Class Action Certification

In *Farno v. Ansure Mortuaries of Indiana, LLC*,[176] the court of appeals held that the trial court did not err in making its class certification ruling based on the factual and procedural posture of the case at the time, and that the trial court did not abuse its discretion when it denied class certification on superiority grounds pursuant to Indiana Trial Rule 23 based on other lawsuits involving different claims and parties, and the pending sale of the defendant cemetery.[177]

Angela Farno sought class certification of her suit against Ansure Mortuaries of Indiana, its former owner, Memory Gardens Management Corp., and other entities regarding alleged misappropriation of millions of dollars from statutorily-mandated cemetery trust accounts.[178] Prior to the filing of this complaint, as a result of an action by the Indiana Securities Commissioner alleging violations of the Indiana Securities Act, a receiver had been appointed to take control of the assets and operations of Ansure and Memory Gardens and to organize and account for the trust fund assets at issue.[179] Following Farno's complaint, the receiver filed a complaint asserting claims against many of the same parties as did Farno's, reciting many of the same facts, asserting many similar claims, and seeking reimbursement of the funds to the trust.[180] Prior to the ruling on class certification, the trial court dismissed certain claims relating to perpetual care cemetery services asserted by another representative plaintiff, leaving Farno as the only named plaintiff.[181]

The trial court denied Farno's motion for class certification, finding that this class action was "not superior to other available methods for the fair and efficient adjudication of the issues in controversy"[182] under Indiana Trial Rule 23(B)(3) based on the receiver's actions and proceedings "already ongoing to resolve or remediate the damage done to the Ansure Trusts."[183]

On appeal, the court first addressed and disregarded Farno's contention that the trial court improperly considered the merits of the class action claims when determining that the class action was not superior. Citing federal case law, the court stated that "'[i]t is a settled question that some inquiry into the merits at the class certification stage is not only permissible but appropriate to the extent that the merits overlap the Rule 23 criteria.'"[184]

---

175. *Id.* at 368.
176. 953 N.E.2d 1253 (Ind. Ct. App. 2011).
177. *Id.* at 1255.
178. *See id.* at 1255-58.
179. *Id.* at 1257.
180. *Id.* at 1260-61.
181. *Id.* at 1263.
182. *Id.* at 1267.
183. *Id.*
184. *Id.* at 1270 (quoting *In re* New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d

Farno also argued that the trial court should not have considered the Indiana Securities Commissioner's or the receiver's actions in its superiority analysis on the grounds that "[n]o Indiana court has ever before held that actions brought by other parties are superior to a class action to adjudicate the controversy between class members and defendants, much less other actions relating to different claims, different damages, different defendants."[185] However, the court cited and quoted at length a Ninth Circuit opinion, *Kamm v. California City Development Co.*,[186] as the leading case supporting the proposition that actions brought by third parties—such as an Attorney General or State Commissioner—are superior to a class action suit.[187]

The court also affirmed that a court is not limited to the four factors enumerated in Trial Rule 23(B)(3) when determining the issue of superiority and that it was not error for the trial court to consider non-judicial methods, such as the pending receivership sale of the cemeteries, when addressing the issue of superiority.[188]

Concluding that the trial court did not abuse its discretion in denying the class certification on superiority grounds, the court surmised:

> Farno's stated purpose for requesting class certification was to "resolv[e] the customers' claims to restore the pre-need trust funds and to ensure that customers' pre-paid burial services and merchandise will be provided when they pass away." However, the Securities Commissioner's Action, the Receiver's Action, and the pending sale of the cemeteries were all geared toward restoring both the pre-need trust funds *and* the perpetual care trust funds, which would in turn ensure both that the customers' pre-paid burial services and merchandise will be provided when they pass away *and* that their burial sites will be cared for in perpetuity. As such, these alternative methods were clearly better suited for "handling the total controversy," in the words of the Federal Rules Advisory Committee.[189]

F. Voluntary Dismissal

In *Goldberg v. Farno*,[190] a companion case to *Farno v. Ansure Mortuaries of Indiana, LLC*, the court affirmed the trial court's preliminary approval of a settlement agreement reached between Farno and various defendants, over objection from defendant Goldberg.[191] While Farno sought an interlocutory

---

6, 24 (1st Cir. 2008)).

185. *Id.* at 1271.

186. 509 F.2d 205 (9th Cir. 1975).

187. *Farno*, 953 N.E.2d at 1272-74.

188. *Id.* at 1275.

189. *Id.* at 1275-76 (citation omitted).

190. 953 N.E.2d 1244 (Ind. Ct. App. 2011).

191. *Goldberg*, 953 N.E.2d at 1246.

appeal of the trial court's denial of class action certification,[192] she reached a settlement agreement with various defendants, and the trial court entered an order granting preliminary approval of the settlement and certifying the plaintiff class for settlement purposes.[193] Goldberg, who was alleged to have issued worthless debentures to the cemetery trust accounts at issue in order to conceal the alleged misappropriation of funds, did not participate in, and objected to, the settlement.[194]

The court adopted the "plain legal prejudice" standard applicable to Federal Rule of Civil Procedure 41(A)(2) to Indiana Trial Rule 41(A)(2) for determining "whether a non-settling defendant, such as Goldberg, has standing to challenge a partial settlement to which it is not a party, whether in 'a class action or simply ordinary litigation.'"[195] The court agreed with Farno that "Goldberg has failed to establish plain legal prejudice in this case. It is undisputed that the class settlement did not interfere with Goldberg's contractual rights or his 'ability to seek contribution or indemnification,' nor did it strip him of 'a legal claim or cause of action.'"[196] Finding that Goldberg did not have standing to challenge the trial court's ruling, the court affirmed the order approving the proposed partial settlement.[197]

G. Failure to Prosecute

In *Indiana Department of Natural Resources v. Ritz*,[198] the court of appeals determined that the trial court abused its discretion in dismissing a case for failure to prosecute pursuant to Indiana Trial Rule 41(E), reasoning that "the desirability of deciding this case on the merits is of particular import because of the alleged public interest in the disputed property,"[199] and the minimal prejudice in the delay of prosecution supported the reversal and remand.[200]

This dispute involved certain real estate of which both the Indiana Department of Natural Resources (DNR) and the Ritzes claimed ownership, and the DNR sought to develop as part of its park system.[201] As explained by the court of appeals, "[t]he procedural history of this case is rather complicated," and involved different causes of action: one of which was filed in 1991, dismissed

---

192. *See supra* Part II.E.

193. *Goldberg*, 953 N.E.2d at 1246. The settlement parties stipulated that the "superiority" requirement of Trial Rule 23(B)(3), at issue in *Farno v. Ansure Mortuaries of Indiana, LLC*, was met. *Id.*

194. *Id.*

195. *Id.* at 1252-53 (quoting Agretti v. ANR Freight Sys., Inc., 982 F.2d 242, 247 (7th Cir. 1992).

196. *Id.* at 1253 (quoting *Agretti*, 982 F.2d at 247).

197. *Id.*

198. 945 N.E.2d 209 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011).

199. *Id.* at 211.

200. *Id.*

201. *Id.*

pursuant to Rule 41(E) in 1998, and reinstated in 2010; the other was filed in 2009, and dismissed on statute of limitations grounds and due to the (reinstated) pending case in another court.[202] After the 1991 case was (again) dismissed under Rule 41(E) for failure to prosecute, the court of appeals consolidated the two cases, addressing whether the trial court abused its discretion for dismissing for failure to prosecute.[203]

The court cited several factors considered when determining whether a trial court abused its discretion in dismissing an action for failure to prosecute:

> (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part.[204]

The court further explained that the "weight any particular factor has in a particular case depends on the facts of that case."[205] In this case, the court focused on the desirability of deciding the case on the merits, finding it significant that the disputed property in this suit was being claimed on behalf of the public, as "a natural sanctuary for all Indiana citizens," which "underscore[d] and elevate[d] the desirability of deciding the validity of the parties' ownership claims."[206] Additionally, the court focused on the lack of prejudice on the part of the defendants, and reasoned that in this case, the defendants "actually may have received some value" in the delay, as it enabled them to exercise exclusive control over the property at issue.[207]

H. Summary Judgment

In *Farley v. Hammond Sanitary District*,[208] the court of appeals affirmed the trial court's decision to strike one statement of opinion within an expert's

---

202. *Id.* at 211-12.

203. *Id.* at 213-14.

204. *Id.* at 215 (quoting Olson v. Alick's Drugs, Inc., 863 N.E.2d 314, 319-20 (Ind. Ct. App. 2007); Lee v. Pugh, 811 N.E.2d 881, 885 (Ind. Ct. App. 2004)).

205. *Id.*

206. *Id.*

207. *Id.* at 218.

208. 956 N.E.2d 76 (Ind. Ct. App. 2011), *reh'g denied*, *trans. denied*, 967 N.E.2d 1034 (Ind. 2012).

affidavit that was "permeated with a legal conclusion,"[209] but found that the lower court abused its discretion by excluding an expert's statement that was based on his experience, education and a review of evidence.[210]

Homeowners sued the Hammond Sanitary District after heavy rain caused a sewage backup into their basements.[211] The plaintiffs submitted an expert witness affidavit from a professional engineer in opposition to HSD's amended motion for summary judgment. The expert's first statement of opinion was that "HSD failed to properly clean its sewers resulting in accumulated obstructions . . . reducing sewer water carrying capacity, thereby causing these sewer water backups to all plaintiffs."[212] Within this opinion, the expert made repeated assertions regarding HSD's "duty" to clean the sewers.[213] The court found this statement of opinion to be "permeated with a legal conclusion" regarding the existence of a duty, and that it was not error for the trial court to strike this statement.[214]

However, the court of appeals determined it was error for the trial court to strike another statement of opinion by the same expert, in which he stated that "HSD failed to properly clean its non-scouring sewers and keep these sewers free of accumulated debris, thereby . . . causing these sewage backups."[215] The court found that this statement was based on his experience, education, and a review of the evidence, including maps of the sewer lines and evaluation of the sewer flow velocity.[216] Thus, the court abused its discretion by striking this statement of opinion.[217]

In *Booher v. Sheeram, LLC*,[218] the court of appeals held that the trial court did not have discretion to accept an untimely filed designation of evidence where opposing counsel agreed to an extension, but the attorney failed to file a formal request with the trial court for an extension of time.[219] After the defendant in this suit filed a motion for summary judgment, the plaintiffs filed, and the trial court granted, two separate extensions of time to file their answer to the motion.[220] Approximately two weeks prior to the extended deadline, plaintiffs' counsel requested, and received, a verbal three-week extension from defendant's counsel.[221] Plaintiffs' counsel failed to file a formal request with the trial court,

---

209. *Id.* at 80.

210. *Id.* at 80-81.

211. *Id.* at 78-79.

212. *Id.* at 80.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 80-81.

217. *Id.* at 81.

218. 937 N.E.2d 392 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 87 (Jan. 18, 2011), *trans. denied*, 950 N.E.2d 1212 (Ind. 2011).

219. *Id.* at 392-93.

220. *Id.* at 393.

221. *Id.*

and filed plaintiffs' material designation of facts in opposition to the summary judgment and an expert affidavit three weeks after the court-approved extension.[222] On defendant's motion, the court struck the late-filed documents and granted summary judgment in defendant's favor.[223]

Citing the Indiana Supreme Court's "bright line rule" for Trial Rule 56(I) summary judgment response extensions, the court of appeals affirmed that "the trial court was without discretion to accept the late-filed documents" where the plaintiffs failed to file an extension request,[224] even if the defendant had not objected to the late filing.[225] Although the court encouraged "collegiality among members of the legal profession and endeavor to promote cooperation and conflict resolution outside the walls of the courthouse, in certain circumstances parties must still seek formal relief directly from the trial court."[226] The court also recognized the "extraordinarily difficult circumstances" which caused the attorney to seek the informal extension: an expert who was out of the country and unable to finish his report, and the attorney's preparation to undergo a major surgery.[227] However, the court deemed its "proverbial hands . . . tied" regardless of the circumstances.[228]

In *Christmas v. Kindred Nursing Centers Ltd. Partnership*,[229] the court of appeals determined that a plaintiff failed to preserve his right to a summary judgment hearing pursuant to Trial Rule 56(C) where the court notified plaintiff's counsel that the previously-scheduled hearing was cancelled, and the plaintiff did nothing between that time and the trial court's ruling.[230] The trial court had set a hearing for defendant's motion before plaintiff's response was due and plaintiff did not request a hearing "because such a request would have been redundant."[231] The court of appeals found that "it was not a redundant act for [plaintiff] to request a hearing because without the request the trial court is always free to do what the trial court did in the present case—determine the efficacy of the summary judgment motion without a hearing."[232] The court also reasoned that plaintiff's redundancy argument was "further weakened by his failure to do anything after he learned that the trial court intended to rule on the filings."[233]

---

222. *Id.*
223. *Id.* at 394.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 395.
228. *Id.*
229. 952 N.E.2d 872 (Ind. Ct. App. 2011).
230. *Id.* at 877.
231. *Id.*
232. *Id.*
233. *Id.*

I. Judgment Involving Multiple Parties

In *Forman v. Penn*,[234] the court dismissed the appeal before it because it had not been certified for interlocutory appeal, nor had it been authorized as an appeal from a final judgment pursuant to Trial Rule 54(B) by inclusion of the "magic language" contained in that rule.[235]

After teenager Phillip Forman was hospitalized from overdosing on methadone belonging to his friend's mother, he sued his friend (Bradley), the mother (Lisa), and the owner of the home (Penn) where he had ingested the methadone, alleging negligent supervision and negligence in caring for him after he could not be wakened.[236] The homeowner gave notice of Forman's claim to his home insurer, Western Reserve. Western Reserve intervened, seeking a declaratory judgment that it had no duty to provide a defense to Forman's complaint.[237] The trial court granted Western Reserve's motion for summary judgment, declaring that there was no coverage under the policy and no duty to defend.[238] Penn and Bradley treated the trial court's ruling as a final judgment by filing a motion to correct error. Western Reserve replied to that motion by citing Rule 59.[239] Penn and Bradley then appealed the grant of summary judgment to Western Reserve after forty-five days elapsed after their motion and the trial court failed to make a ruling on their motion.[240]

The Indiana Court of Appeals dismissed the appeal because it did not result from an order appealable as of right pursuant to Indiana Appellate Rule 14(A), nor had there been a request that the trial court certify its ruling for discretionary interlocutory appeal pursuant to appellate rules.[241] The court cited the "bright line" rule of past Indiana precedent enforcing strict compliance with Trial Rule 54(B), permitting appeals from order disposing of less than all claims in a lawsuit "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[242] Even though the issue of Western Reserve's obligation to provide a defense were "at least in part distinct from the issues presented in the underlying lawsuit,"[243] case law addressing and rejecting the "'separate branch' doctrine . . . that permitted appeals of orders disposing of portions of lawsuits deemed sufficiently independent of the remaining issues"[244] and the "interest of certainty as to whether an appeal lies or

234. 938 N.E.2d 287 (Ind. Ct. App. 2010), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).
235. *Id.* at 288-90.
236. *Id.* at 288-89.
237. *Id.*
238. *Id.* at 289.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 289-90 (quoting IND. TRIAL R. 54(B)).
243. *Id.* at 290.
244. *Id.*

not,"[245] required the court to dismiss the appeal and affirm the rule that necessary "magic language" of Trial Rule 54(B) was required in the judge's order disposing of the claims as to one of the parties.[246]

J. Motion to Set Aside Default Judgment

In *Allstate Insurance Co. v. Love*,[247] the court of appeals held that an insured's attorney's failure to notify the insurer's counsel of a lawsuit before moving for default judgment did not constitute "misconduct" pursuant to Trial Rule 60(B)(3).[248] Love filed a complaint against his insurer, Allstate, asserting underinsured motorist benefits after he was injured by another driver in a car accident.[249] Prior to filing this suit, Love's attorney, Pierce, had been in regular communication with different Allstate claim representatives during the resolution of the claims between Love and the other driver.[250] Allstate never advised Pierce that it had retained defense counsel for the claim.[251] After Love and Allstate disagreed as to coverage regarding a lift chair to make Love's van accessible to him, Pierce received a call from Dietrick, informing him that Allstate had contacted Love regarding the issue. Dietrick then followed up by emailing Pierce case law regarding the issue of coverage as to the van lift chair.[252]

Pierce ultimately filed a complaint against Allstate on behalf of Love alleging breach of contract for failure to pay uninsured motorist benefits and obtained a $225,000 default judgment against Allstate.[253] When Pierce filed the complaint, he sent a filed marked courtesy copy to the claim representative he had most recent interactions with, and this claim representative forwarded the complaint to Allstate's Central Processing Unit in Ohio in order for defense counsel to be assigned to the case.[254] Dietrick ultimately appeared on behalf of Allstate after the court had entered default judgment.[255]

To the trial court and on appeal from the trial court's denial, Allstate argued that Pierce's failure to provide a notice of default judgment to Dietrick constituted "misconduct" under Trial Rule 60(B)(3),[256] which provides that a default judgment may be set aside for "fraud . . . , misrepresentation, or other misconduct of an adverse party."[257] The appellate court reviewed and discussed Indiana

---

245. *Id.*
246. *Id.*
247. 944 N.E.2d 47 (Ind. Ct. App. 2011).
248. *Id.* at 52.
249. *Id.* at 50.
250. *Id.* at 49.
251. *Id.*
252. *Id.*
253. *Id.* at 50.
254. *Id.*
255. *Id.*
256. *Id.*
257. IND. TRIAL R. 60(B)(3).

Supreme Court precedent relied on by Allstate. In *Smith v. Johnston*,[258] the court looked to the Rules of Professional Conduct and determined that attorney misconduct under these Rules could serve as "misconduct" for purposes of Trial Rule 60(B)(3).[259] In *Smith*, the court determined that "'a default judgment obtained without communication to the defaulted party's attorney must be set aside where it is clear that the party obtaining the default knew of the attorney's representation of the defaulted party in that matter.'"[260]

The court of appeals distinguished *Smith* from the facts in this case to find that Pierce did not commit misconduct subject to relief under Rule 60(B)(3).[261] In *Smith*, the plaintiff's counsel "clearly knew" that the defense counsel represented the defendant doctor, as the two attorneys had worked together through the medical review panel proceedings prior to the civil suit, and the plaintiff's counsel had continued to communicate with the doctor's counsel after those proceedings.[262] Pierce, in contrast, "had no specific knowledge that Dietrick represented Allstate throughout the entire claim" and Dietrick's "involvement in the case was limited to the issue of payment of a lift chair for Love's van."[263] The interaction between Pierce and Dietrick was limited to one conversation and email exchange.[264] The court concluded that "because Pierce had no clear knowledge that Dietrick represented Allstate throughout the whole claim and because Allstate did not clearly advise Pierce that Allstate retained Dietrick for this claim, Pierce had no duty to provide notice to Dietrick before seeking a default judgment."[265]

K. Jury Instructions

In *Johnson v. Wait*,[266] the court of appeals noted that the trial court did not follow the proper procedure for hearing objections to jury trial instructions as set forth within Trial Rule 51(C), but found that there was no reversible error because the parties agreed to the procedure used by the court.[267] At trial, the court heard the objections after the jury had been instructed and retired to deliberate.[268] Citing prior case law interpreting Trial Rule 51(C), the court explained that the purpose of the rule governing jury instruction objections "is to guarantee counsel the opportunity to make objections which will afford the trial court the

---

258. 711 N.E.2d 1259 (Ind. 1999).

259. *Allstate*, 944 N.E.2d at 50 (citing *Smith*, 711 N.E.2d at 1263-64).

260. *Id.* (quoting *Smith*, 711 N.E.2d at 1262).

261. *Id.* at 52.

262. *Id.* at 51 (citing *Smith*, 711 N.E.2d at 1261).

263. *Id.*

264. *Id.*

265. *Id.* at 52.

266. 947 N.E.2d 951 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 1202 (June 23, 2011), *trans. denied*, 962 N.E.2d 652 (Ind. 2011).

267. *Id.* at 957.

268. *Id.*

opportunity to correct any instructions before giving it to the jury if it is erroneous."[269] The court cautioned against the court's practice as being "not the preferred procedure" but did not find reversible error due to the parties' acquiescence.[270]

The court also found that a jury instruction addressing contributory negligence was an incorrect and incomplete statement of the law by failing to inform that the defendants had the burden of proving all the elements, but found that the argument was waived as the defendants failed to raise this argument to the trial court.[271] The court declined to extend the "fundamental error" doctrine as argued by the defendants to avoid waiver of their argument.[272] The court explained that "'[t]he fundamental error doctrine is extremely narrow and applie[d] only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.'"[273] The court rejected the defendants' argument, concluding that the defendants "failed to show that the fundamental error doctrine should be extended to [civil] cases that do not involve liberty interests or parental rights."[274]

L. Local Court Rules

In *Baca v. RPM, Inc.*,[275] the court of appeals determined that a local court policy requiring indigent litigants to perform community service in exchange for filing a claim was an unenforceable "standing order" under Trial Rule 81, which governs the adoption of local court rules.[276] Tippecanoe Superior Court 4 had "implemented a practice of requiring indigent persons to perform community service in lieu of filing fees,"[277] notwithstanding Indiana Code section 33-37-3-2, allowing a person to bring a civil action after filing a sworn statement of indigency.[278] Upon challenge by an indigent civil litigant whose claim was permitted to be filed but hearing was held in abeyance until community service was performed, the court of appeals found that the court had not followed the procedure for local rules adoption as set forth in Trial Rule 81.[279] Specifically, the court found that the "practice" of the court was essentially a standing order, expressly prohibited in Rule 81(A): "Courts shall not use standing orders (that

---

269. *Id.* (quoting Nelson v. Metcalf, 435 N.E.2d 39, 41 (Ind. Ct. App. 1982)).

270. *Id.*

271. *Id.* at 958.

272. *Id.* at 959.

273. *Id.* (quoting Lehman v. State, 926 N.E.2d 35, 38 (Ind. Ct. App. 2010), *reh'g denied*, 2010 Ind. App. LEXIS 1093 (June 16, 2010), *trans. denied*, 940 N.E.2d 824 (Ind. 2010)).

274. *Id.*

275. 941 N.E.2d 547 (Ind. Ct. App. 2011).

276. *Id.* at 548.

277. *Id.* at 549.

278. *Id.*

279. *Id.* at 550 (quoting IND. TRIAL R. 81(A)).

is, generic orders not entered in the individual case) to regulate local court or administrative district practice."[280]

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

By order dated September 20, 2011, the Indiana Supreme Court amended Indiana Rules of Trial Procedure 3.1, 53.1, 59 and 81.1. The court amended Rule 3.1(A) and (B) by inserting "the attorney representing" and "or the party, if not represented by an attorney" regarding initiating and responding party appearances.[281] The court amended Rule 3.1(C) by inserting "the attorney representing" and "or the intervening party or parties, if not represented by an attorney" regarding intervening party appearances.[282] The court deleted from 3.1(E): "In a motion for leave to withdraw appearance, an attorney shall certify the last known address and telephone number of the party, subject to the confidentiality provisions of Sections (A)(8) and (D) above, before the court may grant such a motion."[283] The court added Rule 3.1(H), which states:

> An attorney representing a party may file a motion to withdraw representation of the party upon a showing that the attorney has sent written notice of intent to withdraw to the party at least ten (10) days before filing a motion to withdraw representation, and either:
>
> (1) the terms and conditions of the attorney's agreement with the party regarding the scope of the representation have been satisfied, or
> (2) withdrawal is required by Professional Conduct Rule 1.16(a), or is otherwise permitted by Professional Conduct Rule 1.16(b).
>
> An attorney filing a motion to withdraw from representation shall certify the last known address and telephone number of the party, subject to the confidentiality provisions of Sections (A)(8) and (D) above, and shall attach to the motion a copy of the notice of intent to withdraw that was sent to the party.
> A motion for withdrawal of representation shall be granted by the court unless the court specifically finds that withdrawal is not reasonable or consistent with the efficient administration of justice.[284]

Rule 3.1(I) now states:

> If an attorney seeks to represent a party in a proceeding before the court on a temporary basis or a basis that is limited in scope, the attorney shall file a notice of temporary or limited representation. The notice shall contain the information set out in Section (A)(1) and (2) above and a

---

280. *Id.*
281. IND. TRIAL R. 3.1(A), (B).
282. IND. TRIAL R. 3.1(C).
283. IND. TRIAL R. 3.1(E).
284. IND. TRIAL R. 3.1(H).

> description of the temporary or limited status, including the date the temporary status ends or the scope of the limited representation. The court shall not be required to act on the temporary or limited representation. At the completion of the temporary or limited representation, the attorney shall file a notice of completion of representation with the clerk of the court.[285]

The court amended Rule 53.1(E) to state:

> Upon the filing by an interested party of a praecipe specifically designating the motion or decision delayed, the Clerk of the court shall enter the date and time of the filing in the Clerk's praecipe book, record the filing in the Chronological Case Summary under the cause, and promptly forward the praecipe and a copy of the Chronological Case Summary to the Executive Director of the Division of State Court Administration (Executive Director). The Executive Director shall determine whether or not a ruling has been delayed beyond the time limitation set forth under Trial Rule 53.1 or 53.2.
>
> (1) If the Executive Director determines that the ruling or decision has not been delayed, the Executive Director shall provide notice of the determination in writing to the Clerk of the court where the case is pending and the submission of the cause shall not be withdrawn. The Clerk of the court where the case in pending shall notify, in writing, the judge and all parties of record in the proceeding and record the determination in the Chronological Case Summary under the cause.
>
> (2) If the Executive Director determines that a ruling or decision has been delayed beyond the time limitation set forth under Trial Rule 53.1 or 53.2, the Executive Director shall give written notice of the determination to the judge, the Clerk of the trial court, and the Clerk of the Supreme Court of Indiana that the submission of the case has been withdrawn from the judge. The withdrawal is effective as of the time of the filing of the praecipe. The Clerk of the trial court shall record this determination in the Chronological Case Summary under the cause and provide notice to all parties in the case. The Executive Director shall submit the case to the Supreme Court of Indiana for appointment of a special judge or such other action deemed appropriate by the Supreme Court.[286]

The court removed "in the trial court" from Trial Rule 59(G) so that it states:

> If a motion to correct error is denied, the party who prevailed on that motion may, in the appellate brief and without having filed a statement in opposition to the motion to correct error in the trial court, defend

285. IND. TRIAL R. 3.1(I).

286. IND. TRIAL R. 53.1(E).

against the motion to correct error on any ground and may first assert grounds for relief therein, including grounds falling within sections (A)(1) and (2) of this rule. In addition, if a Notice of Appeal rather than a motion to correct error is filed by a party, the opposing party may raise any grounds as cross-errors and also may raise any reasons to affirm the judgment directly in the appellate brief, including those grounds for which a motion to correct error is required when directly appealing a judgment under Sections (A)(1) and (2) of this rule.[287]

The court created Trial Rule 81.1, "Procedures for Cases Involving Family or Household Members":

A. Definitions.
(1) An individual is a "family or household member" of another person if the individual:
(a) is or was a spouse of the other person;
(b) is or was living as if a spouse or a domestic partner of the other person, this determination to be based upon:
(i) the duration of the relationship;
(ii) the frequency of contact;
(iii) the financial interdependence;
(iv) whether the two (2) individuals are or previously were raising children together;
(v) whether the two (2) individuals are or previously have engaged in tasks directed toward maintaining a common household; and,
(vi) such other factors as the court may consider relevant.
(c) has a child in common with the other person;
(d) is related by blood or adoption to the other person;
(e) has or previously had an established legal relationship:
(i) as a guardian of the other person;
(ii) as a ward of the other person;
(iii) as a custodian of the other person;
(iv) as a foster parent of the other person; or,
(v) in a capacity with respect to the other person similar to those listed in clauses (i) through (v).
(2) "Family Procedures" entails coordination of proceedings and processes, and information sharing among cases in a court or courts involving family or household members.

B. Type of Cases. Courts using Family Procedures for a case may exercise jurisdiction over other cases involving the same family or a household member of the family. An individual case to which Family Procedures is being applied may maintain its separate integrity and

287. IND. TRIAL R. 59(G).

separate docket number, but may be given a common case number if multiple cases are being heard before one judge. Subject to applicable rules and statutes, the individual cases may all be transferred to one judge or may remain in the separate courts in which they were originally filed.

C. Notice. A court intending to use Family Procedures for a case must enter an order notifying all parties of the court's intention and, within thirty (30) days after a case is selected, the court shall provide each party with a list of all cases that have been selected to be heard using Family Procedures.

D. Designation by Court of Intent to Use Family Procedures and Change of Judge for Cause. Within fifteen (15) days after notice is sent that a case has been selected to be heard using Family Procedures, a party may object for cause to the designation or selection of a party's case.

> Once notice is sent to the parties that a case has been selected to be heard using Family Procedures, no motion for change of venue from the judge may be granted except to the extent permitted by Indiana Trial Rule 76. A motion for change of venue from the judge in any matter being heard in a court using Family Procedures, or any future cases joined in the court after the initial selection of cases, shall be granted only for cause. If a special judge is appointed, all current and future cases in the court proceeding may be assigned to the special judge.

E. Concurrent Hearings. A court using Family Procedures may, in the court's discretion, set concurrent hearings on related cases, take evidence on the related cases at these hearings, and rule on the admissibility of evidence for each case separately as needed to adequately preserve the record for appeal.

F. Judicial Notice. Indiana Evidence Rule 201 shall govern the taking of judicial notice in courts using Family Procedures.

G. Court Records Excluded from Public Access. In a court using Family Procedures, each party shall have access to all records in cases joined under this Rule, with the exception of court records excluded from public access pursuant to Administrative Rule 9. A party may seek access to such confidential records from another case joined under this Rule by written petition based on relevancy and need. Records excluded from public access shall retain their confidential status and the court using Family Procedures shall direct that confidential records not be included in the public record of the proceedings.[288]

---

288. IND. TRIAL R. 81.1.

INDIANA CONSTITUTIONAL DEVELOPMENTS: DEBTORS, PLACEMENTS, AND THE CASTLE DOCTRINE

JON LARAMORE*

There was no single blockbuster Indiana constitutional decision during the survey period, but Indiana's appellate courts made significant new law in the areas of debtors' rights and separation of powers.[1] The Indiana Supreme Court also received attention for a decision that declined to enforce (and to constitutionalize) what became known as the "castle doctrine," allowing individuals to forcibly keep police out of their dwellings.[2] The courts also incrementally advanced development of Indiana's unique constitutional jurisprudence governing search and seizure, "multiple punishments" double jeopardy, the state *ex post facto* clause, and in other areas.[3]

I. DEBTORS' RIGHTS—ARTICLE 1, SECTION 22

The obscure debtors' protections in article 1, section 22 were the basis for two important decisions during the survey period. That provision states that "[t]he privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale, for the payment of any debt or liability hereafter contracted: and there shall be no imprisonment for debt, except in case of fraud."[4] As required by this statute, the Indiana General Assembly has enacted statutes exempting certain income from seizure (such as garnishment) for debt.[5]

The Indiana Supreme Court applied this provision in *Branham v. Varble*,[6] in which a trial court ordered two debtors who were unrepresented by counsel to make payments on judgments against them despite the fact that they had no non-exempt income.[7] When the unrepresented judgment debtors failed to pay, the trial court ordered a $50 payment although the defendants' income was only $100 in earned income and disability benefits that were exempt from garnishment.[8] The court also ordered the non-disabled judgment debtor to apply for five jobs per week and submit proof of the applications to the plaintiffs' attorney.[9]

---

* Leader, Appellate Litigation Group, Faegre Baker Daniels LLP, Indianapolis, Indiana. Member, American Academy of Appellate Lawyers. Former chief counsel to Governors Frank O'Bannon and Joseph E. Kernan.

1. *See infra* Parts I & II.
2. *See infra* Part III.
3. *See infra* Parts VII, X-XI.
4. IND. CONST. art. 1, § 22.
5. *See, e.g.*, IND. CODE § 24-4.5-5-105 (2011).
6. 952 N.E.2d 744 (Ind. 2011). The Indiana Supreme Court decided a second case between the same parties on the same day. Branham v. Varble, 953 N.E.2d 95 (Ind. 2011). The second case applied the same legal principles and is not discussed separately in this Article.
7. *Branham*, 952 N.E.2d at 745. The judgment debtors obtained counsel on appeal.
8. *Id.* at 746.
9. *Id.*

The court unanimously reversed almost the entire order.[10] The court's analysis showed that the judgment debtors had no non-exempt income from which an order to make payment could be made—but the unrepresented judgment debtors did not raise that issue before the trial court, an omission that ordinarily would waive the issue for appeal.[11] The Indiana Supreme Court did not find waiver in this case, which arose from a small claims proceeding where parties often are unrepresented.[12] "The facts of this case suggest why holding unrepresented litigants to account on appeal for affirmatively pleading particular exemptions may often prove too harsh."[13] The court reviewed the evidence showing the judgment debtors' lack of income and noted that "Mr. Branham testified that after paying all their modest expenses there is no money left over at the end of the month."[14] The court also reviewed the evidence proving that the judgment debtors had no non-exempt income.[15]

The court stated that the small claims judge had the duty to determine that the judgment debtors had sufficient income that was subject to garnishment or otherwise not exempt.[16] The court emphasized that

> a judicial officer hearing small claims is not charged with identifying and applying the entire gamut of exemptions. [But t]he two involved here—the general wage exemption and the SSI exemption—are the stuff of everyday life in collections work. We cannot say on appeal that they are lost through failure of formal pleading.[17]

The court also reversed the order requiring one of the judgment debtors to apply for five jobs per week and report his applications to the plaintiffs' counsel.[18] The court found no basis in statutory or other law for such an order.[19] The court affirmed only the portion of the trial court's order scheduling further proceedings.[20]

This decision represents a significant step in furthering protections for debtors—requiring small claims judges to ensure that their orders to make payments do not run afoul of at least the basis exemption laws enacted under article 1, section 22. Written by Chief Justice Shepard for a unanimous court, the decision represents another effort by the Indiana Supreme Court to supervise the lower courts and ensure that they are acting fairly and providing basic

---

10. *Id.* at 749.
11. *Id.* at 747-48.
12. *Id.* at 747.
13. *Id.*
14. *Id.*
15. *Id.* at 747-48.
16. *Id.* at 748.
17. *Id.*
18. *Id.* at 749.
19. *Id.*
20. *Id.*

constitutional protections.[21]

The Indiana Court of Appeals also applied the debtors' exemptions in *Carter v. Grace Whitney Properties*,[22] which it decided before *Branham*. As in *Branham*, the defendant owed a debt to the plaintiff, and the plaintiff went to small claims court to obtain payment.[23] The small claims court made a "personal order of garnishment" against Carter, the judgment debtor.[24] That order required Carter to pay a certain portion of her wages each pay period to satisfy the judgment, and it made no reference to the exemptions enacted pursuant to article 1, section 22.[25] When Carter failed to pay, the creditor sought a contempt remedy, and Carter was ordered to jail for thirty days for contempt despite telling the court she was disabled and had no money.[26]

The court of appeals reversed.[27] It ruled that contempt was not a proper remedy for failure to pay in this case, where Carter testified that she was disabled and had no money to pay the judgment.[28] It held that article 1, section 22 provides that money judgments are not enforceable by contempt (except child support) and that the trial court's order that Carter be jailed for contempt violated this constitutional provision.[29] The court did find some basis for the "personal order of garnishment," but held that no such order could be applied in the circumstances of this case.[30] Noting the creditor's abusive use of court process to require Carter to come to court multiple times despite her lack of resources to pay the judgment, the court of appeals also ruled that the creditor could not require Carter to return to court unless the creditor had evidence that Carter's circumstances had changed.[31]

Taken together, these cases send a strong message that the protections the framers created in article 1, section 22 remain vital in the current era. In both cases, the appellate courts did not hesitate to instruct small claims courts—which handle hundreds of thousands of debt collection cases annually,[32] often involving debtors without lawyers—to follow the law and to apply legislatively created provisions that protect debtors, even when the debtors are not fully aware of those provisions.

---

21. *See, e.g.*, Litchfield v. State, 824 N.E.2d 356 (Ind. 2005) (instructing courts on applying article 1, section 11); Collins v. Day, 644 N.E.2d 72 (Ind. 1994) (instructing courts on applying article 1, section 23).

22. 939 N.E.2d 630 (Ind. Ct. App. 2010).

23. *Id.* at 632.

24. *Id.*

25. *Id.* at 633.

26. *Id.*

27. *Id.* at 638.

28. *Id.* at 635.

29. *Id.* at 635-36.

30. *Id.* at 636-37.

31. *Id.* at 637.

32. 2010 small claim caseload statistics may be found at www.in.gov/judiciary/admin/files/courtmgmt-stats-2010-v1-trialcourts-filed_county.pdf.

II. SEPARATION OF POWERS: *A.B. V. STATE*

The Indiana Supreme Court addressed significant separation of powers issues arising from legislation restructuring the way in which foster care is financed and administered. The case, *A.B. v. State*,[33] arose from the St. Joseph County Juvenile Court.[34] The juvenile court determined that A.B. had committed an offense that would have been a crime if committed by an adult and placed him in secure detention because he escaped from a prior placement.[35] The court's probation department recommended that A.B. be placed in a program at Canyon State Academy in Arizona.[36] The probation department stated that the placement would allow A.B. to complete his education and acquire skills useful in the job market and that A.B.'s family could videoconference with him and be flown to Arizona to visit him at no expense to the family.[37] Canyon State reported a success rate of eighty-eight percent.[38]

The Indiana Department of Child Services (DCS) objected to the placement and recommended instead four placements in Indiana, all of which were more expensive than Canyon State.[39] DCS did not present evidence at the placement hearing.[40] A.B.'s family supported the Canyon State placement.[41] DCS believed the great distance would hinder reunification between A.B. and his family, but the probation department's goal was for A.B. (who was almost eighteen years old) to live independently.[42]

While DCS generally is responsible for paying for placements of juveniles such as A.B., under statutory amendments enacted in 2009 DCS does not have to pay "if the placement is not recommended or approved by the director [of DCS] or the director's designee."[43] Therefore, because DCS objected to A.B.'s Canyon State placement, the statute said that DCS did not have to pay, and the responsibility for payment fell on the county.[44]

The juvenile court approved A.B.'s placement at Canyon State and, in the same order, found that the statutes relieving DCS from paying for the placement were unconstitutional violations of separation of powers. The juvenile court ruled

---

33. 949 N.E.2d 1204 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 994 (Nov. 1, 2011).

34. *Id.* at 1208. By statute, the St. Joseph County Probate Court is the juvenile court for St. Joseph County. IND. CODE § 33-31-1-10 (2011), *repealed by* Ind. Pub. L. No. 201-2011, § 115. For simplicity's sake, this Article refers to it as the juvenile court.

35. *A.B.*, 949 N.E.2d at 1208.

36. *Id.*

37. *Id.* at 1209.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1210.

42. *Id.*

43. *Id.* at 1212 (quoting IND. CODE § 31-40-1-2(f) (2011)).

44. *Id.*

that the statutes unconstitutionally infringed upon the judicial power to make decisions concerning placement of children within their jurisdiction, including out-of-state placements.[45]

Because the juvenile court found statutes unconstitutional, the appeal went directly to the Indiana Supreme Court.[46] In summary, the court's opinion holds that the relevant statutes do not violate separation of powers principles because they do not restrict a judge's authority to place a juvenile in the most appropriate setting—they only dictate the financial consequences, that is, which level of government pays for that placement.[47] "[T]he statutes in question do not limit a judge's power to place a child where the judge determines is in the child's best interest. Rather, the statutes deal with how the state, through DCS, funds each child's placement."[48] The court elaborated, however, that the cost-shifting mechanism in the statutes "comes dangerously close to stifling the inherent empowerment our juvenile courts have always enjoyed in making decision in the best interest of juveniles."[49] "To the extent that DCS can veto a juvenile court's out of state placement determination by withholding funds, DCS is moving very close to usurping the judiciary's authority when it comes to dealing with the lives of children."[50] Despite this critical language, the court found no separation of powers violation in the statutes at issue.[51]

The court went further, however, when it reviewed the juvenile court's decision specific to A.B. The court rejected DCS's argument that "the 2009 amendment gives it absolute 'control over when the state will pay for out-of-state placements.'"[52] The court concluded that the statute precludes the juvenile court from overruling DCS's decision but does not insulate DCS's decision from all appellate review.[53] The Indiana Constitution gives plenary appellate review to the Indiana Supreme Court, it stated, and it determined that it would give appropriate deference to the DCS director's decision if appellate courts reviewed DCS's decisions to disapprove placements using the well-known standard of review for administrative decisions in the Administrative Orders and Procedures Act (AOPA).[54] The court did not rule that the entire AOPA procedure applies to DCS's decisions on placements, only that the standard of review in AOPA is appropriate to review DCS's decisions.[55] That standard allows judicial relief when it is determined that an administrative decision is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to

45. *Id.* at 1210-11.
46. IND. APP. R. 4(A)(1)(b).
47. *A.B.*, 949 N.E.2d at 1212.
48. *Id.* at 1212-13.
49. *Id.* at 1213.
50. *Id.*
51. *Id.* at 1213-14.
52. *Id.* at 1215 (citation omitted).
53. *Id.*
54. *Id.* at 1215-17.
55. *Id.* at 1216-17.

constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence."[56]

The Indiana Supreme Court then went on to rule that DCS's decision vetoing the Canyon State placement was arbitrary and capricious.[57] The supreme court reviewed the juvenile court's findings that Canyon State was the least expensive program; that it provided a warranty and after-care that no DCS-recommended program provided; that it had an eighty-eight percent success rate (higher than the DCS-recommended placements); and that the child's parent, the child's custodian, the child's probation officer, and the child's attorney all approved of the Canyon State placement.[58] The supreme court concluded that DCS's decision was arbitrary and capricious because Canyon State was the most cost-effective placement and that DCS's apparent rationale—keeping A.B. in Indiana—was not critical to the plan created for A.B. by the court's probation department.[59]

Additionally, the supreme court concluded that DCS's arbitrary and capricious conduct could not be the basis for shifting placement costs away from DCS to the county: "DCS cannot be the final arbitrator of all placement decisions. Because we conclude that DCS's failure to approve [Canyon State] was arbitrary and capricious, we agree with the trial court's determination that DCS is responsible for the payment."[60] While the statute makes no provision for shifting costs back to DCS if its disapproval is reversed on appeal, the supreme court made it clear that requiring DCS to pay despite its disapproval would be the consequence of a DCS decision that is reversed on appellate review.[61]

All five justices concurred in the court's opinion.[62] Justices Dickson and Sullivan filed dueling concurrences on how the single-subject requirement in article 4, section 19 should be applied.[63] The court ruled that there was no single-subject violation when the [g]eneral [a]ssembly included the provision giving the DCS director authority to veto foster placements, finding that the provision involved the same subject matter as the state budget, where it was included.[64]

Justice Dickson wrote to "emphasize that the [c]ourt's *de novo* application of Indiana's Single-Subject Clause reflects the purposes and intentions of its framers and ratifiers."[65] He traced the history of the original constitutional language in the debates of the 1850 constitutional convention, described early cases applying

---

56. *Id.* at 1217 (quoting IND. CODE § 4-21.5-5-14 (2011)).
57. *Id.* at 1219.
58. *Id.*
59. *Id.*
60. *Id.* at 1220.
61. *Id.*
62. *Id.* at 1220-21.
63. *Id.* at 1221 (Dickson, J., concurring); *id.* at 1225 (Sullivan, J., concurring in part).
64. *Id.* at 1211-12 (majority opinion).
65. *Id.* at 1221 (Dickson, J., concurring).

the provision, and addressed the 1974 amendment to the provision.[66] He described prior cases in which "this [c]ourt may have appeared reluctant to enforce Section 19's limitations on the exercise of power by the legislature," but advocated strong enforcement of the section, noting that "prior cases reflecting the possible lack of vigorous enforcement of Section 19 does not preclude this [c]ourt from discharging our constitutional responsibilities to uphold and enforce the Indiana Constitution, especially in light of the reaffirmation of the single-subject requirement in 1974 by Indiana's General Assembly and Hoosier voters."[67] He advocated a *de novo* approach to single subject matter analysis, determining not whether the legislative judgment was reasonable but rather whether the subject matters are in fact properly connected.[68]

Justice Sullivan, perhaps the justice most deferential to the legislative branch, wrote in opposition to Justice Dickson's concurrence. He advocated a "deferential standard of reasonableness" when applying article 4, section 19, stating that standard had been in place for 145 years.[69] Because this "reasonableness" test had been in place so long, he wrote, the voters in 1974 believed they were ratifying it when they approved the amended language for article 4, section 19.[70] He also argued that the "reasonableness" standard of review was in keeping with theories of judicial review prevalent when the original language was enacted and that it was in keeping with the standards the court applied in other instances of judicial review of legislative actions.[71]

III. *BARNES V. STATE*: THE "CASTLE DOCTRINE"

The Indiana Supreme Court case that received the most publicity during the survey period was *Barnes v. State*,[72] which implicated search and seizure under article 1, section 11. Mary Barnes called 911 to report domestic violence by her husband, Richard Barnes.[73] Police responded, found Richard in the parking lot of their apartment building, and began questioning him.[74] Richard told officers they were not needed, raising his voice in a manner prompting warnings from officers.[75] Mary joined Richard and the officers in the parking lot, then retreated into the apartment.[76] When officers sought to enter the apartment to question Mary, Richard physically blocked their way and slammed one officer into a

66. *Id.* at 1221-23.
67. *Id.* at 1224.
68. *Id.* at 1225.
69. *Id.* at 1226 (Sullivan, J., concurring in part).
70. *Id.* at 1227.
71. *Id.* at 1228-29.
72. 946 N.E.2d 572, *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011).
73. *Id.* at 574.
74. *Id.*
75. *Id.*
76. *Id.*

wall.[77] In the ensuing struggle, Richard was shot with a taser, and his adverse reaction required hospitalization.[78]

Richard was convicted of battery on a police officer, resisting law enforcement, and disorderly conduct.[79] On appeal, he challenged the trial court's refusal to instruct the jury as follows: "When an arrest is attempted by means of a forceful and unlawful entry into a citizen's home, such entry represents the use of excessive force, and cannot be considered peaceable. Therefore, a citizen has the right to reasonably resist the unlawful entry."[80]

The Indiana Supreme Court ruled that the trial court's refusal to give the instruction was correct and that "public policy disfavors" recognizing a common law right to forcibly resist unlawful police entry into one's home.[81] The court noted that most states have abandoned this doctrine, and it cited several policy reasons supporting its decision.[82] First, because there are several exceptions to the warrant requirement, it is difficult for a citizen to know when police entry is unlawful.[83] Second, because of upgrades to police equipment and armament, the likelihood of violence and injury (or worse) arising from forcible resistance is high.[84] Third, citizens have other remedies for unlawful police entry including civil litigation, police disciplinary proceedings, and the exclusionary rule.[85]

Justices Rucker and Dickson dissented.[86] Neither disagreed with the outcome in this case (that police had a right to enter Barnes's home to prevent potential harm to Mary Barnes), but both objected to the broad language of the majority opinion.[87] Justice Dickson stated that "the wholesale abrogation of the historic right of a person to reasonably resist unlawful police entry into his dwelling is unwarranted and unnecessarily broad";[88] he favored "a more narrow approach" deeming resistance unreasonable when it would interfere with investigating a report of domestic violence.[89] Justice Rucker deemed the majority's erosion of Fourth Amendment rights "breathtaking," stating that this case could have been properly addressed without the broad language in the majority opinion.[90]

The court's statement that "[w]e believe however that a right to resist an unlawful police entry into a home is against public policy and is incompatible

---

77. *Id.*

78. *Id.*

79. *Id.* at 574-75.

80. *Id.* at 575 n.1.

81. *Id.* at 575.

82. *See id.* at 576.

83. *Id.*

84. *Id.* at 575-76 (citing Model Penal Code and Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 330 (1942)).

85. *Id.* at 576.

86. *Id.* at 579 (Dickson, J., dissenting); *id.* (Rucker, J., dissenting).

87. *Id.* (Dickson, J., dissenting).

88. *Id.*

89. *Id.*

90. *Id.* at 580 (Rucker, J., dissenting).

with modern Fourth Amendment jurisprudence" drew public outcry, including legislative attention.[91] Both parties sought rehearing: Barnes to change the outcome; the State to tone down the court's broad statements rejecting the so-called "castle doctrine."[92]

In the court's rehearing opinion, it did not alter its decision but elaborated on the original opinion. The court noted that no one—including Richard Barnes—argued that police were acting unlawfully when they tried to enter his residence to investigate Mary Barnes's safety.[93] The court bolstered its earlier decision by citing Indiana Code section 35-42-2-1(a)(1)(B), which makes it a misdemeanor to commit battery on a law enforcement officer while the officer is engaged in executing his official duties.[94]

The court adopted argument by the Attorney General, who argued that, while a citizen has a right to reasonably resist unlawful entry, that right "does not include battery or other violent acts against law enforcement."[95] The court also adopted the Attorney General's assertion that encounters between law enforcement officers and suspected criminals must be judged on their individual facts and maintained its position "that the Castle Doctrine is not a defense to the crime of battery or other violent acts on a police officer."[96] The court explicitly left open the door for the General Assembly to create additional statutory defenses that would apply in cases like this one.[97]

This case appears in a review of state constitutional law because of what it did not do. It did not adopt the prior decisions of the Indiana Court of Appeals that gave additional vitality to the Castle Doctrine. Indeed, the Indiana Supreme Court did not address it as a constitutional matter. As Justice David wrote in the rehearing opinion: "the ruling is statutory and not constitutional."[98] The supreme court ruled that there is no special right to resist police action that applies to an individual's home. Rather, balancing various factors, the court ruled that a citizen may not forcibly resist law enforcement efforts to enter the citizen's home, no matter whether the law enforcement actions are well-founded in law.

---

91. *Id.* at 576 (majority opinion); *see also* Maureen Hayden, *Lawmakers Ponder Specifics of Right to Resist Police Entry Bill*, TERRE HAUTE TRIB. STAR, Nov. 10, 2011, http://tribstar.com/indiana_news/x811209097/Lawmakers-ponder-specifics-of-right-to-resist-police-entry-bill.

92. Barnes v. State, 953 N.E.2d 473, 474 (Ind. 2011).

93. *Id.*

94. *Id.* (citing IND. CODE § 35-42-2-1 (2011)).

95. *Id.*

96. *Id.*

97. *Id.* at 474-75. Justice Rucker again dissented, arguing that the court should more fully explore the tension between Indiana Code section 35-42-2-1(a)(1)(B), which makes it a crime to commit battery on a law enforcement officer engaged in his official duties, and Indiana Code section 35-41-3-2(b), which allows a person to use reasonable force if the person reasonably believes that the force is necessary to prevent or terminate another person's unlawful entry of or attack on the person's dwelling. *Id.* at 475 (Rucker, J., dissenting).

98. *Id.* (majority opinion).

IV. EDUCATION—ARTICLE 7

In *Save Our School: Elmhurst High School v. Fort Wayne Community Schools*,[99] a group of parents sought court intervention to enjoin the budget-driven closure of a high school. The parents' group argued that if the school closed, their children would be required to attend schools that provided inferior educations.[100] The court of appeals rejected the parents' argument based on the education clause in the Indiana Constitution.[101] The court's decision was based on the Indiana Supreme Court's recent decision in *Bonner ex rel. Bonner v. Daniels*.[102] That decision held that the Indiana Constitution does not impose an affirmative duty to achieve any particular standard of educational quality.[103] In other words, the Indiana Constitution does not guarantee an excellent or even a good education, so the parents in this case have no claim against the school board based on their assertion that their children would receive an inferior education at the schools to which they would be transferred.[104] The court also rejected the parents' claim under the Equal Privileges and Immunities Clause, article 1, section 23, because their children had no constitutional right to an adequate public education; the supreme court had rejected a similar article 1, section 23 argument in *Bonner*.[105]

V. PREFERENCE TO RELIGIOUS SOCIETIES—ARTICLE 1, SECTION 4

A criminal defendant sought to invalidate a provision enhancing penalties for burglary when the offense was committed against a church in *Burke v. State*.[106] A provision of the Indiana Code enhances burglary from a Class C felony to a Class B felony when the structure burgled is used for religious worship.[107] Burke argued that the statute violated the federal Establishment Clause and article 1, section 4 of the Indiana Constitution, which states that "[n]o preference shall be given, by law, to any creed, religious society, or mode of worship."[108] The court

---

99. 951 N.E.2d 244 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011).

100. *Id.* at 246.

101. *Id.* at 247. Article 8, section 1 states: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."

102. 907 N.E.2d 516 (Ind. 2009).

103. *Id.* at 522.

104. *Save Our Schools*, 951 N.E.2d at 248-49.

105. *Id.* at 249. Judge Riley concurred in the result but would have based the decision entirely on mootness, since the school at issue was already closed and the students assigned to other schools by the time the court of appeals made its decision. *Id.* at 251-52 (Riley, J., concurring).

106. 943 N.E.2d 870 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1207 (Ind. 2011).

107. *See* IND. CODE § 35-43-2-1(1)(B)(ii) (2011).

108. *Burke*, 943 N.E.2d at 871-72 (citing IND. CONST. art. 1, § 4).

of appeals' opinion includes a lengthy Establishment Clause analysis, which concludes that there is no violation.[109]

With regard to the Indiana Constitution, the court applied a different analysis, looking at whether the penalty-enhancing statute placed a material burden on Burke's right to be free of governmental preference for religion.[110] "The [statutory] provision will amount to a material burden upon a core constitutional value '[i]f the right, as impaired, would no longer serve the purpose for which it was designed.'"[111] The court concluded that the penalty enhancement did not demonstrate a preference for a particular religion or religion in general and, "[t]o the extent that the provision may benefit structures used for religious worship in the form of added protection, such benefit is too slight to frustrate [a]rticle 1, [s]ection 4's core constitutional value."[112] The court affirmed Burke's conviction and sentence.[113]

VI. DUE COURSE OF LAW—ARTICLE 1, SECTION 12

In *Baird v. Lake Santee Regional Waste and Water District*,[114] the plaintiff Baird argued that foreclosure on her property for failure to pay sewer connection fees violated several statutory and constitutional provisions, including the due course of law provisions of article 1, section 12.[115] For health reasons, the regional waste and water district required Baird and her neighbors to discontinue the use of septic systems and to connect to sewers.[116] When Baird refused to make the change, the district assessed various penalties provided by law, and when she did not pay the penalties, the district foreclosed on her property.[117] The court rejected Baird's argument that the district's ordinances violated article 1, section 12's requirement that legislation be rationally related to a legitimate legislative goal.[118] The court found that the district's goal and the methods it chose to reach those goals, including the penalties for failure to comply, were related to public health, safety and welfare.[119] The court also rejected a federal due process challenge.[120]

Workman v. O'Bryan[121] is another case in the line of cases applying article

---

109. *Id.* at 872-76.

110. *Id.* at 877.

111. *Id.* (second alteration in original) (citation omitted).

112. *Id.* at 878.

113. *Id.*

114. 945 N.E.2d 711 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 546 (Mar. 23, 2011).

115. *Id.* at 713.

116. *Id.*

117. *Id.* at 713-14.

118. *Id.* at 716-17.

119. *Id.* at 717.

120. *Id.* at 715-16.

121. 944 N.E.2d 61 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 641 (Ind. 2011).

1, section 12, to the medical malpractice statute of limitations.[122] Indiana's two-year medical malpractice statute of limitations is occurrence-based, but the Indiana Supreme Court has ruled that in situations when a plaintiff could not reasonably have discovered the malpractice in time to sue within the statutory period, the limitations period may be tolled by article 1, section 12, which states that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."[123] Plaintiff O'Bryan was diagnosed with neurogenic bladder and reduced kidney function, and she alleged that Dr. Workman should have diagnosed and treated the condition some three years before it was finally diagnosed, and if he had she would have avoided kidney damage.[124]

The court of appeals concluded that she should have known of the potential malpractice by December 2006 at the earliest, and the statute of limitations expired January 28, 2007.[125] Thus, she was required to file her malpractice complaint by January 28, 2007 unless it was not reasonably possible to do so.[126] The court concluded that it was not reasonably possible for her to file by that date because she did not have time after being diagnosed with renal failure in December 2006 to put together all the necessary facts and inferences to bring her claim by the deadline.[127] She was therefore required to file within a reasonable time of discovering the potential malpractice.[128] She did so on December 12, 2007, more than ten months after the statute of limitations ran and almost a year after she learned the information that should have triggered her investigation.[129] The court ruled that it could not say, as a matter of law, that she waited unreasonably long to file the complaint, although the timeliness of her filing could be an issue of fact at trial.[130]

VII. EX POST FACTO CLAUSE—ARTICLE 1, SECTION 24

The Indiana Supreme Court's decision in *Lemmon v. Harris*[131] is another in a series of cases applying the Ex Post Facto Clause to the oft-amended sexually violent predator statute.[132] Harris pled guilty to child molesting in 1999, before the sexually violent predator statute was on the books, and he was ultimately

---

122. *See, e.g.*, Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692 (Ind. 2000); Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999).

123. IND. CONST. art. 1, § 12; *Workman*, 944 N.E.2d at 65.

124. *Workman*, 944 N.E.2d at 63-64.

125. *Id.* at 65-66.

126. *Id.* at 67.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 67-68.

131. 949 N.E.2d 803 (Ind. 2011).

132. The supreme court's decision contains a lengthy summary of the statutory amendments. *Id.* at 806-07.

released from custody and parole in 2008.[133] When he was released, the Department of Correction notified him that he had to register as a sexually violent predator.[134] He sought declaratory relief in the form of an order that he was not required to register for his entire lifetime, but only for the ten years following his incarceration.[135] The State argued that Harris was required by a 2007 amendment to register as a sexually violent predator for the rest of his life.[136] Harris contended that the statute in effect at the time of his conviction did not require that registration and that the Department was not empowered to change his status.[137]

The supreme court concluded that the 2007 amendment changed the law so that the sexually violent predator determination was no longer made by a court, but rather took effect by operation of law, and the amendment explicitly applied to all persons released from custody after 1994 (including Harris).[138] The court then ruled that this statutory designation system did not run afoul of the Ex Post Facto Clause.[139] It applied the "intents-effects" test it adopted in *Wallace v. State*,[140] and ruled, after examining the multiple elements of the test, that the 2007 amendment was civil and regulatory in nature.[141] Because it was civil and regulatory, not punitive, the amendment was not barred by the Ex Post Facto Clause.[142] The court also analyzed the claim that the 2007 statute was unconstitutional because the designation of sexually violent predator status by operation of law violated separation of powers by changing Harris's sentence.[143] The court found no constitutional violation, concluding that the statute simply added another consequence to Harris's offense and neither reopened his judgment of conviction nor diminished the trial court's sentencing authority.[144]

Justice Dickson dissented, arguing that Harris's reclassification violated the Ex Post Facto Clause.[145]

VIII. BAIL—ARTICLE 1, SECTION 16

The Indiana Court of Appeals applied the bail language in article 1, section 16, in *Sneed v. State*,[146] a methamphetamine prosecution. The trial court set bail

---

133. *Id.* at 804.
134. *Id.* at 805.
135. *Id.*
136. *Id.* at 807-08.
137. *Id.* at 808.
138. *Id.*
139. *Id.* at 809-10.
140. 905 N.E.2d 371 (Ind. 2009).
141. *Lemmon*, 949 N.E.2d at 810-13.
142. *Id.* at 813.
143. *Id.* at 813-14.
144. *Id.* at 814-15.
145. *Id.* at 816 (Dickson, J., dissenting).
146. 946 N.E.2d 1255 (Ind. Ct. App. 2011).

at $12,500 for each of two offenses, cash only, after the defendant told the court she had no income other than child support and no assets.[147] She filed a motion to reduce bail, stating that she had no funds to purchase a bond.[148] She had ties to the community, including three daughters at home.[149] The trial court denied her motion to reduce bail or allow her to post a ten percent cash bond or surety.[150]

The court of appeals pointed out that article 1, section 16, forbids excessive bail.[151] The court reviewed the factors in Indiana Code section 35-33-8-4 that trial courts are to weigh in setting bail.[152] It stated that the defendant has the burden to show that bail is excessive, but a defendant need not show changed circumstances to obtain reduced bail.[153] The court stated that several of the statutory factors, including her ties to the community, her appearance at court hearings connected to prior prosecutions, and her lack of funds, weighed in favor of reduced bail.[154] The court noted, however, that she faced lengthy imprisonment if convicted, weighing against low bail.[155] The court of appeals concluded that the facts justified the $25,000 total bail set for Sneed but that by denying her the option of surety bond the trial court effectively condemned her to imprisonment before trial because of her lack of funds.[156] The court found that the trial court abused its discretion when it denied the option of a surety bond and remanded for further proceedings.[157]

IX. RIGHT TO COUNSEL—ARTICLE 1, SECTION 13

One of the stranger cases of the year involved attorney David Schalk, who represented a defendant on a Class A felony methamphetamine dealing charge.[158] Schalk learned the identity of a confidential informant against his client and believed that confidential informant was continuing to sell drugs.[159] To challenge the informant's credibility, Schalk set up a transaction to buy a large quantity of marijuana from the informant so that the informant's continued drug selling could be used as impeachment.[160] Soon after the transaction was completed, Schalk petitioned the trial court to take custody of the marijuana (which, it turned out,

147. *Id.* at 1256.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 1257.
152. *Id.*
153. *Id.*
154. *Id.* at 1258.
155. *Id.* at 1258-59.
156. *Id.* at 1260.
157. *Id.* at 1260-61.
158. Schalk v. State, 943 N.E.2d 427, 428 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).
159. *Id.*
160. *Id.* at 428-29.

was all smoked by the individuals Schalk induced to take purchase the marijuana).[161] Because Schalk's petition included verified statements that he arranged the marijuana purchase, police charged Schalk with conspiracy to possess marijuana, and he was ultimately convicted of attempted possession of marijuana.[162]

Schalk's argument on appeal was that his actions were not illegal because he was acting in his capacity as an attorney, providing a defense to his client.[163] The court of appeals rejected this argument, holding that Schalk enjoyed no special status allowing him to break the law.[164] The court ruled that the constitutional right to counsel does not permit an attorney to engage in conduct that is otherwise unlawful and affirmed his conviction.[165]

The court of appeals also applied the right to counsel in *Belmares-Bautista v. State*,[166] a case involving waiver of the right to counsel by an individual who spoke Spanish rather than English.[167] Belmares-Bautista was convicted of possessing a counterfeit government-issued identification, in this case a Mexican driver's license.[168] Belmares-Bautista signed a Spanish-language waiver of counsel form and represented himself at trial, where he acted through an interpreter.[169] No English translation of the waiver appeared in the appellate record, and Belmares-Bautista contended that the record therefore did not show that his waiver was knowing and voluntary.[170] The court of appeals disagreed, noting that Belmares-Bautista did not argue that the translated waiver form was inaccurate in any way.[171] The court of appeals therefore affirmed the conviction, noting that it would address the waiver issue only if there was an argument that the forms were insufficient, that a defendant was coerced into signing them, or that a defendant lacked the capacity to read or understand them.[172]

X. SEARCH AND SEIZURE—ARTICLE 1, SECTION 11

The Indiana Supreme Court decided several other search cases. In *Garcia-Torres v. State*,[173] the court strongly implied that the Indiana Constitution did not

---

161. *Id.* at 429.

162. *Id.*

163. *Id.* at 430-31.

164. *Id.* at 431.

165. *Id.* at 431-32. The court did not engage in any different right-to-counsel analysis under article 1, section 13, than under the Sixth Amendment.

166. 938 N.E.2d 1229 (Ind. Ct. App. 2010). Retired Indiana Supreme Court Justice Theodore Boehm wrote the opinion in his capacity as a senior judge on the court of appeals. *Id.* at 1229.

167. *Id.* at 1230.

168. *Id.* at 1229-30.

169. *Id.* at 1230.

170. *Id.*

171. *Id.*

172. *Id.* at 1230-31.

173. 949 N.E.2d 1229 (Ind. 2011).

mandate a warrant before police could obtain a cheek swab to test DNA.[174] Relying primarily on federal precedent, the court analogized the cheek swab to fingerprinting, which does not require a separate probable cause determination.[175] But in this case both sides assumed probable cause was necessary, and the court therefore analyzed the State's theory that Garcia-Torres validly consented to the cheek swab, negating the need for a separate probable cause determination.[176] The court additionally analyzed whether Garcia-Torres was entitled to a warning under *Pirtle v. State*, Indiana's rule that the state constitution requires police to inform an individual in custody that the individual is entitled to consult with counsel before giving consent to any search.[177] The court declined to apply *Pirtle* because it found the cheek swab "minimally intrusive," involving only slight inconvenience for a few seconds and no discomfort.[178] Justice Rucker dissented on the *Pirtle* issue.[179] *Garcia-Torres* is the latest in a line of cases eroding *Pirtle*'s reach.[180]

The supreme court also blessed a search over state constitutional objections in *State v. Hobbs*,[181] involving use of a drug-sniffing dog. Hobbs was arrested for an unrelated crime, and police used the dog on his car.[182] The dog indicated that illegal narcotics were in the car, and police searched it without Hobbs's consent, finding marijuana and paraphernalia.[183] Applying the automobile exception, the court found no Fourth Amendment violation.[184] Under the Indiana Constitution, the court looked to the reasonableness of law enforcement conduct, including the degree to which the search disrupted the subject's normal activities and the facts and observations supporting police need for the search.[185] The court concluded that the search worked almost no disruption on Hobbs, who already was under arrest for a different crime, and that the drug-sniffing dog gave police plenty of

---

174. *See id.* at 1235.

175. *Id.*

176. *Id.* at 1236-37.

177. *Id.* at 1238-39 (analyzing Pirtle v. State, 323 N.E.2d 634 (Ind. 1975)).

178. *Id.* at 1238.

179. *Id.* at 1239-42 (Rucker, J., dissenting).

180. *See* Datzek v. State, 838 N.E.2d 1149, 1158-60 (Ind. Ct. App. 2006); Schmidt v. State, 816 N.E.2d 925, 942-44 (Ind. Ct. App. 2004); Ackerman v. State, 774 N.E.2d 970, 979-82 (Ind. Ct. App. 2002). The Indiana Court of Appeals followed the logic of *Garcia-Torres* in *Cohee v. State*, 945 N.E.2d 748 (Ind. Ct. App.), *reh'g denied*, 2011 Ind. App. LEXIS 1616 (Aug. 17, 2011), *trans. denied*, 962 N.E.2d 652 (Ind. 2011), finding no violation of the Indiana Constitution when a suspect was not given the *Pirtle* advisement before being asked to consent to a blood draw to show blood alcohol content. *Cohee*, 945 N.E.2d at 752-53.

181. 933 N.E.2d 1281 (Ind. 2010).

182. *Id.* at 1284.

183. *Id.*

184. *Id.* at 1286-87. Justice Sullivan, joined by Justice Rucker, dissented on the automobile exception point. *Id.* at 1287 (Sullivan, J., dissenting).

185. *Id.* at 1287. These criteria originate in *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005).

reason to suspect the presence of unlawful drugs in the car.[186] The search was therefore valid under the Indiana Constitution, the court ruled.[187]

The supreme court ruled in *Lacey v. State*[188] that police do not have to obtain a "no-knock" warrant before entering a premises without knocking and announcing their presence, even when they know ahead of time of the facts that are likely to require a "no-knock" entry.[189] In this case, police obtained a warrant (but not a "no-knock" warrant) based on reports by persons arrested for drug possession that they had purchased from Lacey, observation of the premises revealing many persons stopping there briefly, and a search of trash from the premises showing drug residue. Police knew in advance that Lacey was likely to be armed and had previously resisted arrest, but they did not obtain a "no-knock" warrant.[190] The supreme court nevertheless found no error in denying the motion to suppress the evidence seized under the warrant, concluding that whether to enter without knocking and announcing had to be left to police on the scene who could judge the exigencies of the particular situation.[191] This approach also places the risk on police—if they lack proper reason for a "no-knock" entry, they risk losing the fruits of their search to a motion to suppress.[192] The court therefore wrote that "the better police practice is to minimize legal uncertainty by seeking such advance approval when supported by facts known when the warrant is sought."[193]

The Indiana Court of Appeals made new law under article 1, section 11 in *Trotter v. State*,[194] in which police investigated a report of shots being fired in a rural area. Officers found two men sitting around a fire at a farmhouse who had apparently been drinking alcohol and shooting a firearm.[195] Police also looked for a third man inside a nearby structure attached to a dwelling, and they did so with no warrant and (the court found) no exigent circumstance.[196] Police found the third man pointing a rifle at them, and they arrested him for pointing a firearm and criminal recklessness.[197] The court of appeals suppressed the evidence found in the search, concluding that it was unreasonable under the Indiana Constitution because it was a significant intrusion into a residence with little, if any, police need to do so (since there was no ongoing disturbance and police found no

---

186. *Hobbs*, 933 N.E.2d at 1287.

187. *Id.*

188. 946 N.E.2d 548 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 745 (Sept. 2, 2011).

189. *Id.* at 548.

190. *Id.* at 549; *see also* Lacey v. State, 931 N.E.2d 378 (Ind. Ct. App. 2010), *summarily aff'd*, 946 N.E.2d 548.

191. *Lacey*, 946 N.E.2d at 552.

192. *Id.*

193. *Id.* at 548.

194. 933 N.E.2d 572 (Ind. Ct. App. 2010).

195. *Id.* at 577.

196. *Id.* at 577-78.

197. *Id.* at 578.

evidence of a crime).[198]

The new law in this case addresses the doctrine of attenuation, which allows admission of evidence that is sufficiently attenuated from the police misconduct that invalidated the search.[199] The court of appeals ruled that the doctrine of attenuation is purely a creature of the Fourth Amendment and "has no application under the Indiana Constitution."[200] In this case, the court held, because the police acted contrary to Trotter's constitutional rights, the evidence had to be suppressed notwithstanding any attenuation from unlawful police conduct.[201]

The court ruled similarly in *State v. Foster*,[202] excluding drugs found in a search that occurred after police misrepresented their reasons for entering the dwelling (they lied that they were investigating a "911 hang-up") and searched without a warrant (although they probably had sufficient evidence to get one).[203] The court ruled that the search was unreasonable under the Indiana Constitution because, although police had ample reason to believe there was unlawful activity, the degree of intrusion was high and police had no need to enter immediately without obtaining a warrant.[204]

In another case involving police deception, *Godby v. State*,[205] the court of appeals excluded the results of a search that turned up evidence of methamphetamine-related offenses. The suspect's wife gave police consent to search a garage only after they told her, falsely, that they believed there was a methamphetamine lab in the garage and that it could be dangerous.[206] They did not seek, and she did not provide, consent to search a locked box in the garage, and it was in that locked box that the incriminating evidence was found.[207] The court recognized that the suspect had excluded his wife from the locked box by locking it and not providing her with a key, and it noted that the locked box contained several items "that a man might wish to hide from his wife."[208] The court found the search of the locked box invalid under the Fourth Amendment and unreasonable under article 1, section 11.[209] Applying the *Litchfield* factors, the court found the degree of intrusion high and law enforcement need to immediately open the box, rather than get a warrant, to be minimal.[210]

The court of appeals also found searches valid under the Indiana Constitution

---

198. *Id.* at 580-81.
199. *Id.* at 581.
200. *Id.* at 582-83.
201. *Id.*
202. 950 N.E.2d 760 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 644 (Ind. 2011).
203. *Id.* at 761.
204. *Id.* at 762-63.
205. 949 N.E.2d 416 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 642 (Ind. 2011).
206. *Id.* at 418.
207. *Id.* at 419.
208. *Id.* at 421 (citation omitted).
209. *Id.*
210. *Id.* at 421-22.

in many cases. For example, in *Saffold v. State*[211] the court found no violation when a suspect who had been removed from a car was patted down a second time after officers found ammunition in his car but detected no weapon on the first pat-down.[212] Additionally, in *Chiszar v. State*,[213] the court found no violation in a search that found child pornography after the suspect had consented to the search.[214]

XI. DOUBLE JEOPARDY—ARTICLE 1, SECTION 14

During the survey period, Indiana's courts have continued to apply Indiana's unique, constitutionally based rules governing multiple punishments, where a defendant claims that a single act is being punished more than once. Indiana's test for double jeopardy involves two steps. The first step, which is identical to the federal test, examines whether an individual has been convicted for a crime as to which the elements are the same as another crime for which the individual has been convicted (and if the elements are the same, there is a violation).[215] The second step, unique to Indiana, examines whether an individual has been convicted of a crime using exactly the same evidence that was used to convict the individual of another crime.[216]

The Indiana Supreme Court applied this doctrine in *Nicoson v. State*,[217] addressing a conviction for confinement while armed with a deadly weapon, with an additional five years added to the sentence based on a statute authorizing the additional term where the perpetrator used a firearm while committing the offense.[218] The defendant argued that the additional sentence violated Indiana's double jeopardy restriction because it constituted an enhancement based on an act that was an element of the crime.[219] The class of felony was enhanced to Class B because a deadly weapon was used, and the use of a firearm permitted the additional five-year term of incarceration.[220]

The court found no double jeopardy violation.[221] It reiterated that questions of sentence enhancements are primarily statutory and not constitutional, and that the general rule about double enhancements applied only when the legislature has not given explicit contrary direction.[222] In this case, the Indiana General Assembly explicitly allowed not only the enhanced class of felony for use of a

---

211. 938 N.E.2d 837 (Ind. Ct. App. 2010).
212. *Id.* at 839-41.
213. 936 N.E.2d 816 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1212 (Ind. 2011).
214. *Id.* at 831.
215. *See* Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).
216. *Id.* at 48-49.
217. 938 N.E.2d 660 (Ind. 2010).
218. *Id.* at 661.
219. *Id.* at 662.
220. *Id.*; *see also* IND. CODE §§ 35-42-3-3, 35-50-2-11 (2011).
221. *Nicoson*, 938 N.E.2d at 662.
222. *Id.* at 663-64.

firearm but also the additional term of years when a firearm is used.[223] The court spent several paragraphs analyzing the statutory language and concluded that what Nicoson complained of as a "double enhancement" was intended by the legislature.[224] The court noted that the Class B enhancement was available when the perpetrator merely possessed a deadly weapon, and the five-year additional sentence was predicated on *use* of the firearm.[225]

Justice Rucker dissented, joined by Justice Sullivan.[226] They agreed that this particular case is not governed by the constitutional double jeopardy analysis, but rather by "a series of rules of statutory construction and common law that are often described as double jeopardy."[227] They argued that this case fell within the prohibition against multiple enhancements for the same behavior.[228] That is, the same evidence that proved Nicoson was armed with a deadly weapon also proved that he used a firearm, so the double enhancement was also prohibited.[229]

The Indiana Court of Appeals decided several double jeopardy cases during the survey period. The one attracting the most notice was likely *Kendrick v. State*,[230] in which the court vacated convictions for feticide using double jeopardy analysis.[231] Kendrick perpetrated a bank robbery during which he shot a visibly pregnant teller.[232] The teller was seriously injured, and her twins had to be delivered; neither survived more than a few hours.[233] Kendrick was convicted of attempted murder and two counts of feticide, among other crimes.[234] The court of appeals ruled that the feticide convictions had to be vacated under the "same evidence" rule because they were proved using precisely the same evidence used to prove the attempted murder.[235] The court remanded for resentencing,

---

223. *Id.*

224. *Id.*

225. *Id.* at 665. The Indiana Court of Appeals generally followed *Nicoson*'s analysis in *Cooper v. State*, 940 N.E.2d 1210 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 397 (Feb. 21, 2011), *trans. denied*, 950 N.E.2d 1208 (Ind. 2011), rejecting a double jeopardy claim by another defendant who received the five-year sentencing enhancement for use of a firearm. *Id.* at 1217. Unlike *Nicoson*, in *Cooper* there was no other enhancement based on the weapon used. *Id.* at 1211. Cooper's claim was simply that the five-year enhancement was proved with the same evidence used to prove the underlying crime. *Id.* at 1214.

226. *Nicoson*, 938 N.E.2d at 666 (Rucker, J., dissenting).

227. *Id.* (quoting Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002)).

228. *Id.*

229. *Id.*

230. 947 N.E.2d 509 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 1370 (July 26, 2011), *trans. denied*, 962 N.E.2d 649 (Ind. 2011), *cert. denied*, 132 S. Ct. 1752 (2012).

231. *Id.* at 519.

232. *Id.* at 512-13.

233. *Id.* at 513.

234. *Id.*

235. *Id.* at 514. The court noted that the analysis would have been entirely different had the fetuses been viable. *Id.* at 514 n.7. Because there would then have been three separate victims, there would have been no double jeopardy violation. *Id.* But because the fetuses were not viable,

specifically noting that the trial court could consider the victim's pregnancy and its termination as aggravators.[236]

The court of appeals also applied Indiana's double jeopardy analysis to nonpayment of child support. In *Porter v. State*,[237] the defendant was convicted of two counts of Class C felony nonsupport based on failure to pay a total of more than $54,000 in child support owed to his two children.[238] He was given a ten-year executed sentence.[239] The felony conviction was enhanced to Class C based on the size of the arrearage.[240] Porter argued a double jeopardy violation because he had been convicted a few years earlier of the same crime, and at that time his arrearage was $35,000—an amount included in the $54,000 arrearage charged in the later offenses.[241] By using the same arrearage twice, the court found, "the State proceeded against Porter twice for the same criminal transgression."[242] The court adopted in part the State's harmless error argument, which was that it proved an additional arrearage of $20,000 that accrued since the prior conviction.[243] But it ruled that common law double jeopardy principles precluded using the same $20,000 arrearage to enhance both convictions.[244] The $20,000 arrearage the State proved also did not satisfy the statutory requirement for the enhancement—that a $15,000 arrearage be proved for *one child* to justify the enhancement.[245] A $20,000 combined arrearage could not generate separate $15,000 arrearages to enhance each of the two convictions. The court remanded with instructions to reduce one Class C felony conviction to Class D.[246]

The Indiana Court of Appeals vacated several other convictions that it concluded were proved using the same evidence to support two different crimes, including robbery and battery;[247] theft and obstruction of justice;[248] operating a vehicle in a highway work zone resulting in death and reckless disregard of a traffic control device in a highway work zone resulting in death;[249] robbery and

---

the State did not argue that there were separate victims in this case.

236. *Id.* at 514-15.

237. 935 N.E.2d 1228 (Ind. Ct. App. 2010).

238. *Id.* at 1230-31.

239. *Id.* at 1231.

240. *Id.* at 1232-33.

241. *Id.* at 1232.

242. *Id.*

243. *Id.* at 1233.

244. *Id.*

245. *Id.* at 1234.

246. *Id.*

247. Troutner v. State, 951 N.E.2d 603 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 647 (Ind. 2011).

248. Osburn v. State, 940 N.E.2d 853 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1203 (Ind. 2011).

249. Hurt v. State, 946 N.E.2d 44 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1213 (Ind. 2011).

criminal confinement;[250] and theft and possession of stolen property.[251] It also addressed several cases claiming double jeopardy violations for multiple sentence enhancements, finding violations in some cases[252] but not in others.[253]

XII. SENTENCING—ARTICLE 7, SECTION 4

As happens every year, Indiana appellate courts exercised their authority under article 7 to review and revise criminal sentences. These cases are reviewed in Professor Schumm's article on developments in criminal law.[254] The most noteworthy of these cases was the Indiana Supreme Court's opinion in *Akard v. State*,[255] the first case in which the court of appeals exercised its review and revision authority to *increase* a sentence using the authority the supreme court announced in *McCullough v. State*.[256] *Akard* involved a series of violent sexual crimes committed against a homeless woman who was confined against her will, crimes the supreme court labeled "heinous" and "despicable."[257] The supreme court disagreed with the court of appeals' decision, which increased the sentence from ninety-three years to 118 years.[258] The supreme court left the trial court's sentence intact, reasoning that the State did not argue for a longer sentence at trial and, on appeal, described the sentence as appropriate.[259]

XIII. OTHER CRIMINAL MATTERS

In *Moore v. State*,[260] the defendant was the passenger in a car driven by a designated driver.[261] The car was pulled over by police for a minor infraction,

---

250. Wright v. State, 950 N.E.2d 365 (Ind. Ct. App. 2011).

251. White v. State, 944 N.E.2d 532, *aff'd on reh'g*, 950 N.E.2d 1276 (Ind. Ct. App. 2011), *aff'd*, 963 N.E.2d 511 (Ind. 2012). In the opinion on rehearing, the court noted that the habitual offender enhancement, which had been vacated because of insufficient evidence, could be retried on remand without violating double jeopardy because it is not a separate crime or separate sentence, but rather a sentence enhancement. *White*, 950 N.E.2d at 1278.

252. *See, e.g.*, Deloney v. State, 938 N.E.2d 724 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 279 (Feb. 15, 2011), *trans. denied*, 950 N.E.2d 1210 (Ind. 2011); Jones v. State, 938 N.E.2d 1248 (Ind. Ct. App. 2010).

253. *See, e.g.*, Stokes v. State, 947 N.E.2d 1033 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 638 (Ind. 2011); Orta v. State, 940 N.E.2d 370 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1201 (Ind. 2011).

254. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 45 IND. L. REV. 1067 (2012).

255. 937 N.E.2d 811 (Ind. 2010).

256. 900 N.E.2d 745 (Ind. 2009).

257. *Akard*, 937 N.E.2d at 812-13.

258. *Compare id.* at 814, *with* Akard v. State, 924 N.E.2d 202, *aff'd on reh'g*, 928 N.E.2d 623 (Ind. Ct. App. 2010), *aff'd in part*, *Akard*, 937 N.E.2d 811.

259. *Akard*, 937 N.E.2d at 814.

260. 949 N.E.2d 343 (Ind. 2011).

261. *Id.* at 344.

and the defendant Moore was arrested for public intoxication.[262] She admitted she was intoxicated in a public place but sought reversal of her conviction because, she argued, it violated the public policy encouraging the use of designated drivers.[263] Although the Indiana Court of Appeals reversed the conviction by a 2-1 vote, the Indiana Supreme Court granted transfer and affirmed the trial court's judgment of conviction.[264] It found that her actions met the statutory definition of public intoxication, and it rejected her argument, based on article 1, section 1 of the Indiana Constitution, that she had a right to consume alcoholic beverages (she quoted an 1855 case stating that the constitutional right "embraces the right, in each . . . individual, of selecting what he will eat and drink . . . so far as he may be capable of producing them, or they may be within his reach, and that the legislature cannot take away that right by direct enactment").[265] The court stated that it was not restricting her right to consume alcohol, only her right to appear in public after being intoxicated.[266] Justice Rucker dissented, arguing that the public intoxication statute should be applied only when the intoxicated person is annoying or interfering with the public.[267]

The Indiana Supreme Court reversed a civil forfeiture judgment in *Serrano v. State*,[268] in which a trial court ordered forfeiture of a truck owned by a person who was erroneously arrested because he had the same name as someone for whom there was an outstanding warrant.[269] After the arrest (which followed a police chase), a drug-sniffing dog alerted on the arrestee's truck. But a search turned up only $51 in cash, $500 in quarters, and cocaine residue in the truck's carpet.[270] The trial court concluded that this evidence was sufficient to show that the truck had been used in a drug sale business, but the Indiana Supreme Court reversed, finding that the State had failed to prove that the arrestee was anything more than a cocaine user, a fact insufficient to support forfeiture.[271] The court raised in a footnote the constitutional provision requiring that "all forfeitures" be deposited in the Common School Fund, questioning whether a statute allowing reimbursement of law enforcement costs before depositing any money in the Common School Fund met the constitutional command.[272]

The court of appeals also addressed several Indiana constitutional questions in criminal cases in which it applied the same analysis to the Indiana and federal constitutional provisions at issue. In *McCain v. State*,[273] the court concluded that

---

262. *Id.* at 345.
263. *See id.*
264. *Id.* at 344.
265. *Id.* at 345 (quoting Herman v. State, 8 Ind. 545, 558 (1855) (first alteration in original)).
266. *Id.*
267. *Id.* at 345-46 (Rucker, J., dissenting).
268. 946 N.E.2d 1139 (Ind. 2011).
269. *Id.* at 1140.
270. *Id.*
271. *Id.* at 1141, 1143-44.
272. *Id.* at 1142 & n.3.
273. 948 N.E.2d 1202 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 642 (Ind. 2011).

a defendant's right to cross-examine under the Sixth Amendment and article 1, section 13, was violated when the trial court did not permit cross-examination of a witness as to precisely what penalties the witness avoided by cooperating with the police and testifying against the defendant.[274] The court stated that "the defendant is entitled to elicit the specific penalties a witness may have avoided through her agreement with the State," but the court found the error harmless and did not vacate the conviction.[275] In another case, the court found no violation of article 1, section 13, or the Sixth Amendment when a trial court applied Evidence Rule 412 to preclude inquiries about the prior sexual conduct of a witness in a criminal deviate conduct prosecution, applying the same analysis to both constitutional provisions.[276]

The court of appeals also applied the same analysis to state and federal constitutional claims in *Pryor v. State*,[277] where a defendant claimed ineffective assistance of counsel relating to his waiver of jury trial. He claimed that when he waived his jury-trial right, he did not understand that he was waiving it not only as to the guilt phase, but also as to the habitual offender phase.[278] The court of appeals ruled that the advisement given by the trial court was sufficient to warn the defendant that his waiver applied to both.[279] And in *Boston v. State*,[280] the court of appeals found no violation of the state or federal ex post facto provisions when it concluded that a statutory amendment could be applied retroactively.[281] The statute changed no element of or penalty for the crime charged (operating a motor vehicle while intoxicated), but it did change the rules as to which medical personnel were permitted to administer the blood test that proved this defendant's guilt.[282] The court applied the same analysis to the state and federal claims in concluding that the statutory amendment was remedial and violated no vested right.[283]

---

274. *Id.* at 1207.
275. *Id.* at 1207-08.
276. Conrad v. State, 938 N.E.2d 852, 856-57 (Ind. Ct. App. 2010).
277. 949 N.E.2d 366 (Ind. Ct. App. 2011).
278. *Id.* at 370.
279. *Id.* at 372.
280. 947 N.E.2d 436 (Ind. Ct. App. 2011).
281. *Id.* at 443.
282. *Id.*
283. *Id.*

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

The Indiana General Assembly and Indiana's appellate courts confronted a variety of significant issues during the survey period October 1, 2010, to September 30, 2011. The bills that passed were modest, except for legislation that provided broad new opportunities for restrictions on arrest and conviction records for many Hoosiers. The Indiana Supreme Court saw the end of Justice Boehm's fourteen year tenure and the appointment of Justice David, as both it and the Indiana Court of Appeals addressed issues a wide range of issues that affect cases from their inception to their conclusion. Some of the most significant developments are explored below.

I. LEGISLATIVE DEVELOPMENTS

What looked early in 2011 like a blockbuster year for sentencing reform fizzled into a legislative session with mostly tinkering in the criminal law realm. This section summarizes some of the bills passed in the long session of 2011 to take effect July 1, 2011, and concludes with the failure of the general assembly to pass sweeping sentencing reform, which held considerable promise early in the session.

A. Texting

Few doubt that texting while driving is a bad idea, but the ban enacted in House Bill 1129 may create more problems than it solves.[1] Only those who type, transmit, or read a text or email message while operating a motor vehicle commit a Class C infraction.[2] Drivers remain free to dial their phone, read the *New York Times* app, Google any term they'd like, or play *Angry Birds*. Police may not confiscate the "telecommunications device,"[3] but could presumably ask consent to see it,[4] which savvy drivers will refuse. If an officer tickets a person for the infraction, proof may be difficult at trial without the phone unless the driver makes an admission. Moreover, some motorists will be charged with criminal offenses if an officer sees contraband in their vehicle and makes an arrest. If courts find the officer lacked "an objectively justifiable reason" for the stop (how can an officer tell a person is texting as opposed to engaging in one of the many other things a person does with his or her smart phone?), the evidence may be suppressed.[5]

---

* Clinical Professor of Law, Indiana University Robert H. McKinney School of Law. B.A., 1992, Ohio Wesleyan University. M.A., 1994, University of Cincinnati. J.D., 1998, Indiana University Robert H. McKinney School of Law.

1. H.R. 1129, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).
2. IND. CODE § 9-21-8-59 (2011).
3. *Id.*
4. *See, e.g.*, State v. Washington, 898 N.E.2d 1200, 1206 (Ind. 2008).
5. *See* State v. Massey, 887 N.E.2d 151, 155-58 (Ind. Ct. App. 2008).

B. Sexting

A separate bill creates a new defense to the crimes of child exploitation and obscene performance before minors when a person engages in the consensual exchange of sexual pictures.[6] The defense applies if the defendant is twenty-one or younger, used a wireless device or social networking site to exchange the sexual pictures, and engaged in an "ongoing personal relationship" (but not a familial relationship) with another person who is within four years of the defendant's age.[7] The defense does not apply if the message is then forwarded to others.[8]

C. Restricted Criminal Records

Although Indiana's expungement statute has long provided a small group of individuals an avenue for the complete obliteration of criminal records under narrow circumstances,[9] House Bill 1211 was enacted in the final days of the session to provide relief to a much broader class of both arrest and conviction records.[10]

An individual arrested but not prosecuted, acquitted of all charges, or vindicated on appeal may now petition to restrict access of the *arrest record*.[11] If successful, the court shall order the state police not to disclose or permit disclosure of the arrest record to noncriminal justice organizations.[12] Those convicted or adjudicated delinquent of a misdemeanor or D felony that did not result in injury may now petition to restrict their *conviction record*.[13] The defendant must wait eight years, have satisfied all obligations of the sentence, and cannot have been convicted of any felonies in the interim.[14] The new bill expressly states "the person may legally state on an application for employment or any other document that the person has not been arrested for or convicted of the felony or misdemeanor recorded in the restricted records."[15]

The following chart compares the long-standing expungement statute (the first column on the left) and the new provisions that allow restrictions on arrest records (middle column) or conviction records (far right column).

---

6. *See* IND. CODE §§ 35-49-3-4(b) & (c) (2011).

7. *Id.*

8. *Id.* For an excellent overview of the myriad of concerns underlying sexting, see Jordan J. Szymialis, Note, *Sexting: A Response to Prosecuting Those Growing Up with a Growing Trend*, 44 IND. L. REV. 301 (2010).

9. IND. CODE §§ 35-38-5-1 & -2.

10. H.R. 1211, 117th Gen. Assemb. 1st Reg. Sess. (Ind. 2011).

11. IND. CODE § 35-38-5-5.5 (2011).

12. *Id.*

13. *Id.* § 35-38-8.

14. *Id.*

15. *Id.*

	Expungement (pre-2011)	**Restrict Arrest Records**	**Restrict Conviction Records**
Statute	Ind. Code §§ 35-38-5-1 & -2	Ind. Code § 35-38-5-5.5	Ind. Code § 35-38-8
Eligibility	Person (1) arrested but no charges filed or (2) all charges dropped because (a) mistaken identity (b) no offense or (3) no probable cause	Person arrested but (1) not prosecuted or dismissed; (2) acquitted; or (3) convicted but conviction later vacated	Person convicted or adjudicated delinquent of "a misdemeanor or a Class D felony that did not result in injury to a person"
Defense Procedure	Verified petition in county of charges or arrest. Include: date of arrest, charge, l.e.a. and case identifying information, petitioner's d.o.b. and SSN Serve: l.e.a. and c.r.r.	Verified petition in court where charges filed or trial held. Include: date of arrest; charge; date of dismissal, acquittal or vacated conviction; reason vacated; l.e.a.; known case identifying information; petitioner's d.o.b. and SSN. Serve: pros. and c.r.r.	"the person may petition a sentencing court to order the state police department to restrict access to the records concerning the person's arrest and involvement in criminal or juvenile court proceedings" (no petition specifics)
Timing	No deadlines in statute	Must wait at least (1) 30 days after acquittal (2) 365 days after conviction vacated or (3) 30 days after charges dismissed (if not refiled)	Eight "years after the date a person completes the person's sentence and satisfies any other" sentencing obligation
Prosecutor or law enforcement agency (l.e.a.)	l.e.a.: notify all agencies with records. Agencies may file opposition (with sworn statements) within 30 days.	Pros.: may file opposition within 30 days. Must attach "certified cop[ies] of any documentary evidence showing that the petitioner is not entitled to relief"	No procedure for opposition in statute
Court	(1) summarily grant; (2) set for hearing; or (3) summarily deny if (a) insufficient petition or (b) petitioner not entitled to relief based on l.e.a. affidavits. If hearing: shall grant unless (1) requirements not met or (2) petitioner has a record of arrests or (3) pending charges	(1) summarily grant; (2) set for hearing; (3) summarily deny if (a) insufficient petition or (b) petitioner not entitled to relief based on pros. documentary evidence. If hearing: shall grant unless petitioner is being reprosecuted on same charge	"shall grant" if person is (1) not a sex/violent offender (2) qualifying D felony or misdemeanor; (3) eight years have passed; and (4) satisfied sentencing obligation and no new felony convictions
Relief	l.e.a.: "shall within thirty (30) days of receipt of the court order, deliver to the individual or destroy all fingerprints, photographs, or arrest records in their possession"	"shall order the state police department not to disclose" information to "a noncriminal justice organization or an individual" under Title 10	Order DOC, l.e.a, c.r.r., and others "who incarcerated, provided treatment for, or provided other services" to prohibit release "to a noncriminal justice agency"

Some of the information restricted under the new legislation, though, may already be available to companies that do background checks or be accessible elsewhere.[16] The legislation will likely need to be revisited to meet its well-intentioned goal of giving people a second chance.[17]

D. Guns and Drugs

Some of the most popular areas for legislative intervention are guns and drugs. Although one might expect a stiffening of penalties or broadening of offenses for both, during the 2011 session handgun laws were loosened while marijuana laws were broadened. Senate Bill 506 changed the parameters of restrictions on carrying a handgun without a license by expressly exempting the ability to carry a handgun without a license "in or on" private property and allowing unloaded guns in "legally controlled" vehicles.[18] An owner of property may still prohibit possession.[19] Those who wish to use synthetic cannabinoids were not so lucky. Senate Bill 57 broadened all existing prohibitions on marijuana possession and dealing to include synthetic cannabinoid and salvia.[20]

E. Voyeurism

The voyeurism statute was amended largely in response to a highly publicized case at a mall in Indianapolis. In 2010, voyeurism was defined to include "A person: . . . who . . . peeps into an area where an occupant of the area reasonably can be expected to disrobe, including: (A) restrooms; (B) baths; (C) showers; and (D) dressing rooms; without the consent of the other person . . . ."[21] When a man put a camera on his shoe to look up dresses at a mall,[22] a trial court had little choice but to dismiss the charges under the existing statute.[23] Voyeurism required peeping in areas where people were reasonably expected to disrobe, which did not include mall hallways.[24] In 2011, though, the voyeurism statute was broadened to create the offense of public voyeurism for the non-

---

16. *See generally* Niki Kelly, *Fixes Sought for 2nd Chance Law*, J. GAZETTE, Oct. 14, 2011, http://www.journalgazette.net/article/20111014/LOCAL/310149960/1002 (observing the law "doesn't quite work in the digital world" where "some businesses specialize in doing criminal background checks for private employers and have data already on file that would not be scrubbed" of the information restricted under the new legislation).

17. *See id.* (observing, among other things, that felons could be admitted to practice law without being required to disclose prior crimes and schools may be denied access to criminal records when doing background checks on prospective employees).

18. IND. CODE § 35-47-2-1 (2011).

19. *Id.*

20. *Id.* 35-41-1-24.2.

21. *Id.* § 35-45-4-5(a).

22. *See Police Show Gadgets Inside Man's Pants*, WANE.COM, June 25, 2010, http://www.wane.com/dpp/news/wane-ftwayne-Police-show-camera-inside-mans-pants.

23. *See* Delagrange v. State, 951 N.E.2d 593, 594 (Ind. Ct. App. 2011).

24. IND. CODE § 35-45-4-5(a) (2011).

consensual "peep[ing] at the private area of an individual."[25]

F. Selling Alcohol to the Middle-Aged

Last year's survey mentioned a 2010 bill that criminalized carry-out sales of alcohol without checking identification.[26] The offense was a Class B misdemeanor but included a defense for those selling to someone who "was or reasonably appeared to be more than fifty (50) years of age."[27] The legislation was revisited in 2011 and now criminalizes only sales to a person "who is or reasonably appears to be less than 40 years of age."[28]

G. Bad Test Results and a New Home for the Department of Toxicology

A number of Indianapolis Star articles focused on problems at the Department of Toxicology, which was housed for many years in the Indiana University School of Medicine Department of Pharmacology & Toxicology.[29] For example, an audit of tests during 2007-09 found "a flawed marijuana result every 3.28 days and a false positive marijuana result once every 18 days."[30] Legislation passed in 2011 removed the Department from the School of Medicine and created a new state department of toxicology within the executive branch of state government, which will be led by a director who serves at the governor's pleasure.[31]

But what about the inaccurate tests from the past several years? Flawed tests alone do not necessarily lead to relief for criminal defendants, many of whom pleaded guilty. Those defendants convicted after trial might pursue a post-conviction claim based on newly discovered evidence,[32] while those who pleaded guilty could assert their plea was not knowing and voluntary.[33] Both sets of defendants might also attempt to pursue claims that the State, through one of its agencies, withheld exculpatory evidence in violation of *Brady v. Maryland*.[34]

---

25. *Id.* § 35-45-4-5(d).

26. Joel M. Schumm, *Recent Developments in Indiana Criminal Law & Procedure*, 44 IND. L. REV. 1135, 1135-36 (2011) [hereinafter Schumm, *2010 Recent Developments*].

27. *Id.* at 1136.

28. IND. CODE § 7-1-5-10-23 (2011).

29. *See, e.g.*, Mark Alesia & Tim Evans, *Drug and Alcohol Tests Had "Error After Error,"* INDIANAPOLIS STAR, May 17, 2011, at A1.

30. *Id.*

31. IND. CODE § 9-27-5-1 (2011).

32. IND. R. POST-CONVICTION REMEDIES 1(a)(4); *see* Rhymer v. State, 627 N.E.2d 822, 823-24 (Ind. Ct. App. 1994). Guidance may also be found in cases from other states. *See, e.g.*, *In re* Investigation of W. Va. State Police Crime Lab, Serology Div., 438 S.E.2d 501 (W. Va. 1993).

33. IND. CODE § 35-35-1-4(c) (2011); *see also* Turner v. State, 843 N.E.2d 937, 944 (Ind. Ct. App. 2006).

34. 373 U.S. 83 (1963); *see also* Kyles v. Whitley, 514 U.S. 419 (1995).

H. Forfeitures: More Confusion than Clarity

Article 8, section 2 of the Indiana Constitution has long provided, "The Common School fund shall consist of . . . all forfeitures which may accrue . . . ." The practice of trial courts around the state, however, had taken a different course, with forfeiture funds being retained for law enforcement and rarely sent to the common school fund.[35] Shortly before the end of the legislative session, the Indiana Supreme Court took note of the existing statutory language allowing trial courts to except from the proceeds "law enforcement expenses incurred 'for the criminal investigation associated with the seizure' and a prosecutor's expenses associated with the forfeiture proceeding and the expenses related to the criminal prosecution."[36] The supreme court offered something far short of an endorsement, though: "Whether this limited diversion, calculating actual expenses on a case-by-case basis, is consonant with the constitutional command that 'all forfeitures' be deposited in the Common School Fund is an unresolved question."[37] A bill passed late in 2011 session expressly provided eighty-five percent of forfeiture proceedings to law enforcement and fifteen percent to the common school fund (after the deduction of an administrative fee).[38] Governor Daniels vetoed Senate Bill 215, noting that the

> bill would take more than ninety cents of every dollar collected through forfeiture for the "expense of collection" rather than sending it to the Common School fund. That is unwarranted as policy and constitutionally unacceptable in light of the Supreme Court's recent guidance and the plain language of Article 8, Section 2 of the Indiana Constitution.[39]

I. Failed Sentencing Reform

After months of study, the 15-0 support of the Criminal Code Evaluation Commission, and Governor Daniels' endorsement, Senate Bill 561 proposed a shift from Indiana's "one-size-fits-all sentencing policy for theft and drug offenses to a more graduated approach."[40] Among other things, the bill would have reduced many felony drug offenses by one class felony if less than ten grams were involved and restricted previous strict liability enhancements for proximity within 1000 feet of parks, schools, family housing complexes, and

---

35. *See* Heather et al., *Cashing in on Crime*, INDIANAPOLIS STAR, Nov. 14, 2010, at A1.

36. Serrano v. State, 946 N.E.2d 1139, 1142 n.3 (Ind. 2011) (quoting IND. CODE § 34-6-2-73 (2011)).

37. *Id.*

38. S. Enrolled Act 215, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

39. Letter from Mitchell E. Daniels, Jr., Governor, State of Indiana, to David Long, President Pro Tempore, Indiana State Senate (May 13, 2011), *available at* http://www.in.gov/gov/files/215VetoMessage.pdf.

40. JUSTICE CTR., JUSTICE REINVESTMENT IN INDIANA 2 (2010), *available at* http://issuu.com/csgjustice/docs/jr_indiana_summary_report_final.

youth centers to apply only "when children are present."[41] It would also have reduced theft from a felony to a misdemeanor unless the property taken was valued at $750 or more or the defendant had a prior theft conviction.[42] It wasn't long before "prosecutors assailed [the bill] as soft on crime, senators gutted the bill and even lengthened sentences for some offenders."[43] The Governor threatened a veto of the new bill that no longer achieved the goal of graduated penalties and "smarter incarceration," and the bill died.[44]

II. SIGNIFICANT CASES

The Indiana Supreme Court and Indiana Court of Appeals addressed a wide range of issues that impact criminal cases from their inception to their conclusion. Although the five members of the Indiana Supreme Court were unchanged from the appointment of Justice Rucker in 1999 until the retirement of Justice Boehm in 2010, the replacement of Justice Boehm by Justice David could signal at least a modest shift in the court. Some of Justice David's opinions and votes are mentioned below, and the impact of his appointment is explored in the conclusion.

A. Resisting Unlawful Home Entries by Police

No Indiana Supreme Court case in recent memory has generated the magnitude of public and press reaction that came after the 2011 opinion in *Barnes v. State*.[45] The reaction was not a product of the facts: a defendant convicted of battery on a police officer and other offenses after police responded to a domestic violence call from his wife.[46] Police observed his wife enter the apartment from the parking lot, saw Barnes follow her, and attempted to enter the apartment after Barnes refused to allow them entry to investigate.[47] The reaction focused instead on the breadth of the court's holding: "the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law."[48] The supreme court acknowledged the longstanding common law right to resist unlawful police action but concluded that the right "is against public policy and

---

41. S.B. 561, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011), *available at* http://www.in.gov/legislative/bills/2011/SB/SB0561.3.html

42. *Id.*

43. Heather Gillers, *Gov. Daniels: I'll Veto Amended Prison Bill*, INDIANAPOLIS STAR, Mar. 23, 2011, at A1.

44. *Id.*

45. 946 N.E.2d 572 (Ind. 2011), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011); *see also* Dan Carden, *Ind. Attorney General Wants Cop Entry Ruling Revised, but not Entirely*, NW. IND. TIMES, May 30, 2011, http://www.nwitimes.com/news/local/govt-and-politics/article_e7415da6-3906-5f71-87e3-dc781019b8ae.html (observing that the "[p]ublic reaction to the court's ruling has been overwhelmingly negative").

46. *Barnes*, 946 N.E.2d at 574.

47. *Id.*

48. *Id.* at 577.

modern Fourth Amendment jurisprudence."[49] Specifically, arrestees now have civil redress against unlawful police action and allowing resistance may escalate "the level of violence and therefore the risk of injuries to all parties involved without preventing the arrest."[50] Barnes's convictions were affirmed.[51] Both Justice Dickson and Justice Rucker dissented, concluding "the wholesale abrogation of the historic right of a person to reasonably resist unlawful police entry into his dwelling is unwarranted and unnecessarily broad,"[52] and "it is breathtaking that the majority deems it appropriate or even necessary to erode this constitutional protection based on a rationale addressing much different policy considerations."[53]

Barnes filed a petition for rehearing, and the Attorney General filed a response arguing for the same result but a narrowed holding.[54] The Legislative Council created a summer "Barnes v. State subcommittee" to consider a statutory response to the case.[55] Members of the General Assembly also filed a bipartisan amicus brief joined by forty state senators and thirty-one representatives, asking the court to narrow its holding in a manner consistent with Indiana's robust self-defense statute, which "has long allowed citizens to use 'reasonable' force if the person 'reasonably believes' such force is necessary to prevent or terminate unlawful entry into their home."[56] The legislators' amicus brief argued that the statute was broadened by large majorities in 2006 to make clear Hoosiers had no duty to retreat, which embodies the public policy of the state to grant citizens "greater autonomy to protect themselves from unlawful incursions into their homes."[57]

The Indiana Supreme Court granted rehearing in September. The opinion acknowledged that petitions for rehearing had been filed by "thoughtful people" and did not repeat the broad language that generated the public ire.[58] Instead, the opinion reframed the issue as a narrower one: "the suspected spouse abuser's contention that the trial court erred when it refused to instruct the jury that he had the right to get physical with the police officers if he believed their attempt to enter the residence was legally unjustified."[59] The opinion emphasized that its

---

49. *Id.* at 576.

50. *Id.*

51. *Id.* at 578.

52. *Id.* at 579 (Dickson, J., dissenting).

53. *Id.* at 580 (Rucker, J., dissenting).

54. All briefs filed in the case are available on the Indiana Law Blog. *See* Marcia Oddi, *Ind. Decisions—Attorney General Files Response in* Barnes v. State, IND. L. BLOG (July 27, 2011 5:15 PM), http://indianalawblog.com/archives/2011/06/ind_decisions_a_153.html.

55. *See Legislative Council* Barnes v. *State Subcommittee*, IND. GEN. ASSEMBLY, http://www.in.gov/legislative/interim/committee/lcbs.html (last visited Jun 5, 2012).

56. Brief of Amicus Curiae Senators and Representatives in Support of Appellant's Petition for Rehearing, at 2, Barnes v. State, 946 N.E.2d 572 (no. 82S05-1007-CR-343).

57. *Id.* The author of this Article served as counsel for amici and authored the brief.

58. Barnes v. State, 953 N.E.2d 473, 473 (Ind. 2011).

59. *Id.*

original holding did "not alter, indeed says nothing, about the statutory and constitutional boundaries of legal entry into the home or any other place."[60] It concluded that "[t]he General Assembly can and does create statutory defenses to the offenses it criminalizes, and the crime of battery against a police officer stands on no different ground. What the statutory defenses should be, if any, is in its hands."[61] Justice Dickson concurred in the result, and Justice Rucker dissented, citing "some tension" with the court's opinion and the self-defense statute cited by the legislative amicus brief.[62] The issue is almost certain to resurface as a legislative development in next year's survey.

B. Indigent Counsel Issues

The supreme court and court of appeals each issued opinions about the role and responsibility of trial courts in addressing issues involving appointment of counsel for indigent defendants. Specifically, the supreme court addressed the responsibility of trial courts when confronted with persistent complaints by a defendant about his or her appointed counsel, and the court of appeals addressed the propriety of making a change in determination of indigency status based on obstreperous conduct.

In *Johnson v. State*,[63] the supreme court addressed the not-so-uncommon situation of an indigent defendant writing the trial court to complain about neglect by appointed counsel. There, the trial court had simply passed the complaint along to the county public defender, believing she lacked authority to take any other action.[64] The supreme court detailed the history of "Indiana's reform of public defender services" and the importance of independence of defense counsel through the creation of public defender boards in many counties instead of employment by trial courts.[65] Nevertheless, trial courts "cannot take a complete 'hands-off' approach and totally rely on a bureaucratic agency," which the court cautioned could lead to "inefficiency and overspending" as in England.[66]

Although it would be "impossible and unreasonable for a judge to investigate every" complaint about appointed counsel, the court held that trial courts "should at minimum require assurance from the public defender's office that the issue will be resolved" when confronted with a complaint against counsel who has "a track record of the professional misconduct complained of."[67] Specifically, appointed counsel in *Johnson* had been previously reprimanded and later suspended for neglecting clients, "the very reason prompting the defendant's complaint to the trial judge in this case."[68] The court's opinion suggests that trial courts will

---

60. *Id.* at 474-75.
61. *Id.* at 475.
62. *Id.* (Rucker, J., dissenting).
63. 948 N.E.2d 331 (Ind. 2011), *cert. denied*, 132 S. Ct. 1575 (2012).
64. *Id*. at 333.
65. *Id.* at 337.
66. *Id.* at 338.
67. *Id.*
68. *Id.* at 334 (citing *In re* Schrems, 922 N.E.2d 618 (Ind. 2010); *In re* Schrems, 856 N.E.2d

seldom need to involve themselves in complaints from defendants about appointed counsel, as the vast majority of public defenders have not been disciplined for neglecting their clients' cases. One would also hope that the independence of the defense function, which led to the creation of largely autonomous public defender agencies, would carry with it the responsibility of sometimes trimming its ranks to avoid thrusting counsel with repeated instances of neglecting cases on future clients.

Gilmore v. State,[69] is a must-read for trial judges and others who confront the difficult and often nebulous issues surrounding indigency determinations. There, after a case had been pending for five years and five court-appointed attorneys had withdrawn because of breakdowns in the attorney-client relationship, the trial court entered an order finding the defendant was no longer indigent and had waived his right to counsel by his "obstreperous conduct."[70] The court of appeals reversed, finding first that trial courts cannot reverse an indigency determination without finding a change in circumstances.[71] Rather, an indigency determination must be based on the defendant's financial condition and not his conduct and behavior in dealing with counsel.[72]

The court then turned to a comprehensive discussion of whether the defendant waived or forfeited his right to counsel by his conduct. Although the trial court was understandably frustrated by the delay caused by Gilmore's behavior, which had led five court-appointed lawyers to withdraw, Gilmore had never signaled an interest in representing himself and repeatedly requested representation by counsel.[73] In such cases of "waiver by conduct or forfeiture with knowledge," a defendant "is entitled to a hearing during which he should be warned that if his obstreperous behavior persists, the trial court will find that he has chosen self-representation by his own conduct."[74] Then, the trial court must determine whether he "made a knowing and intelligent waiver of his right to counsel, which includes a warning of the dangers and disadvantages of self-representation established in an on-the-record evidentiary hearing where specific findings are made."[75] In the absence of such a hearing, warning, and findings, the court of appeals vacated the trial court's order and remanded for further proceedings.[76] The Attorney General did not seek transfer in *Gilmore*, and the Indiana Supreme Court has not explicitly imposed the same requirements but likely would set a similar bar. Trial courts that do not conduct a hearing and issue a warning and findings before removing appointed counsel do so at peril of reversal.

1201 (Ind. 2006)).

69. 953 N.E.2d 583 (Ind. Ct. App. 2011).

70. *Id.* at 585.

71. *Id.* at 588.

72. *Id.*

73. *Id.* at 592.

74. *Id.*

75. *Id.*

76. *Id.* at 592-93.

Finally, a more conventional challenge regarding appointment of counsel comes from *Reese v. State*,[77] where a misdemeanor conviction was entered against a defendant after a trial at which he was required to represent himself.[78] Although the defendant was employed early in the case, he did not hire counsel and later became unemployed and was not receiving unemployment compensation.[79] Rather than focusing on the bills the defendant had to pay, the trial court focused on the defendant's failure to save money to hire counsel.[80] Based on his "total financial picture," the court of appeals concluded that ordering the defendant to hire private counsel would result in a substantial financial hardship, remanding for a new indigency hearing and new trial.[81]

C. Discovery for Criminal Defendants

In a pair of cases issued on the same day, the supreme court ruled against defendants who sought discovery in criminal cases. In *In re Crisis Connection, Inc.*,[82] a defendant charged with child molesting sought the counseling records of the alleged victims and their mother.[83] The trial court ordered Crisis Connection to deliver the records for *in camera* review. The court of appeals upheld the order for *in camera* review, concluding the "interest in privacy" of the records was "important" but not strong enough to bar *in camera* review.[84] The supreme court disagreed, focusing on the victim advocate privilege codified in Indiana Code section 35-37-6-9(a),[85] which protects victims and their advocates and service providers from being "compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding."[86]

The supreme court distinguished other cases that had permitted *in camera* review in the face of a statutory privilege that contained exceptions,[87] because the victim advocate privilege prohibits any and all disclosure of information making it clear the *in camera* review "would not reveal any nonprivileged information."[88] The court also rejected the defendant's Confrontation Clause challenge because he would not be prevented from cross-examining the alleged victims "at trial,"[89]

---

77. 953 N.E.2d 1207 (Ind. Ct. App. 2011).
78. *Id.* at 1209.
79. *Id.* at 1211.
80. *Id.*
81. *Id.*
82. 949 N.E.2d 789 (Ind. 2011).
83. *Id.* at 792.
84. *Id.*
85. *Id.* at 792-93.
86. *Id.* (citing IND. CODE § 35-37-6-9(a) (2011)).
87. *Id.* at 794 (discussing exceptions "in connection with a criminal prosecution" or court access).
88. *Id.* at 795.
89. *Id.* at 798.

and rejected his due process challenge because the State's "compelling interest in maintaining the confidentiality of information gathered in the course of serving emotional and psychological needs of victims of domestic violence and sexual abuse" is not outweighed by the defendant's "right to present a complete defense."[90]

In *Crawford v. State*,[91] decided the same day as *Crisis Connection*, the court easily dispatched with a defendant's broad discovery request for footage from the nonfiction police show, "The Shift."[92] The first of the three-step test for determining whether information is discoverable in criminal cases requires a "sufficient designation of the items sought to be discovered (particularity)."[93] Acknowledging that reasonable particularity will vary based on the facts, charges, and information sought in each case, the court nevertheless reiterated that defendants cannot merely request "everything related to the case."[94] The court found "no real difference" between such a broad request and Crawford's requests for footage of "any and all statements" of police officers or anyone "interviewed or questioned" in the specific case.[95] A footnote in the opinion recited some examples of discovery requests that were more particular and had been granted by the trial court, including footage, statements, and reenactments of statements made to specific individuals by name and footage of the crime scene by address.[96] These examples provide counsel and trial courts in future cases a better idea of the contours of reasonable particularity in the context of footage from television programs and more broadly.

Related to the importance of receiving documentary evidence as part of discovery is the importance of receiving the names of likely witnesses from opposing counsel. In *Kennedy v. State*,[97] the trial court permitted a witness discovered in the middle of a trial to testify for the State. Exclusion is appropriate "only if the State has blatantly and intentionally failed to provide discovery or if the exclusion is necessary to avoid substantial prejudice to the defendant."[98] Moreover, any error may be waived if the defendant does not alternatively request a continuance when additional time is an appropriate remedy.[99] In *Kennedy*, the defendant did not request a continuance and refused the trial court's offer of a one-day continuance to investigate the newly disclosed witness. This waived any claim of error.[100] On the merits the court of appeals also found no error in allowing the witness because she had approached the State, which promptly

90. *Id.* at 802.
91. 948 N.E.2d 1165 (Ind. 2011).
92. *Id.* at 1166-67.
93. *Id.* at 1168.
94. *Id.*
95. *Id.* at 1168-69.
96. *Id.* at 1169 n.4.
97. 934 N.E.2d 779 (Ind. Ct. App. 2010).
98. *Id.* at 787.
99. *Id.*
100. *Id.* at 788.

disclosed her to the defense.[101] Defense counsel had an opportunity to depose her, and she did not testify until seven days after she was discovered at which time defense counsel had an opportunity "to vigorously cross-examine her."[102]

D. Jury Issues: Unanimity and Size

The supreme court addressed proper jury instructions to ensure verdicts are unanimous and the court of appeals considered a challenge to a five-person jury. In both cases, defense counsel either agreed or did not object, which helped seal the fate of affirmance.

In *Baker v. State*,[103] a defendant was charged with three counts of child molesting, each involving a different victim, but "the jury heard evidence of multiple acts of molestation concerning each alleged victim."[104] He asserted that some jurors may have relied on different evidence than others in convicting him of each count. The supreme court adopted the reasoning of a California Supreme Court case, which explained

> the State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However if the State decides not to so designate, then the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged.[105]

The court slightly modified the language of a California jury instruction, which "provides a useful model for this jurisdiction."[106] Although the trial court's instruction did not comply with the requirements outlined in the case, the convictions were nevertheless affirmed because defense counsel "neither objected to the trial court's instruction nor offered an instruction of his own," thus resulting in waiver of the issue for appeal.[107]

Beyond unanimity concerns are issues regarding the size of a jury. By statute juries in D felony and misdemeanor cases must include six persons.[108] Trial courts will often seat one or more alternate jurors to replace a juror in the event one cannot conclude the trial due to an unforeseen emergency. In *Bex v. State*,[109] the prosecutor and defense counsel agreed not to seat an alternate and that only

---

101. *Id.*

102. *Id.*

103. 948 N.E.2d 1169 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 781 (Sept. 7, 2011).

104. *Id.* at 1177.

105. *Id.* (citing People v. Jones, 792 P.2d 643 (Cal. 1990)).

106. *Id.* at 1177 n.4.

107. *Id.* at 1178. The court also found the error was not fundamental because "the only issue was the credibility of the alleged victims," and the jury resolved the credibility dispute against Baker. *Id.* at 1179.

108. IND. CODE § 35-37-1-1(b) (2011).

109. 952 N.E.2d 347 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011).

five jurors would decide the case if something happened to one of the six jurors. Nevertheless, counsel later moved for a mistrial after a juror suffered a medical emergency, which was denied.[110] Although the United States Supreme Court has invalidated a state statute allowing five-person juries,[111] it has also held that a criminal defendant may waive his or her right to a twelve-person jury.[112] Similarly, the Indiana Supreme Court has upheld a verdict from an eleven-person jury when defense counsel agreed not to seat an alternate.[113] The court of appeals applied these precedents in *Bex*, upholding the verdict of five jurors based on defense counsel's agreement, finding the defendant had consented to counsel's decision by failing to object.[114]

E. Prosecutorial Misconduct Claims

Challenges to prosecutorial conduct come in many forms, although comments made during closing argument seem to be especially popular fodder for appeal.[115]

Justice David's first opinion was unanimous and involved fairly straightforward claims in a life without parole case. In *Delarosa v. State*,[116] the defendant challenged the State's comment in closing argument that "it would have been great if [the defendant] had admitted" his guilt to police officers.[117] The court concluded that in context the statement did not refer to the defendant's failure to testify but rather suggested a confession to police was not necessary because the defendant had already confessed to others.[118]

The Rules of Professional Conduct prohibit lawyers from stating "a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."[119] Prosecutors must be especially careful when responding to defense counsel's arguments that State's witness is telling the truth. In *Gaby v. State*,[120] the prosecutor crossed the line by telling the jury, "I cannot and would not bring charges that I believe were false" and that "I can tell you that with a guilty verdict on this case I will be able to sleep fine tonight. Just fine. In fact, better than fine. You will be able to also."[121] The court of appeals found the comments were improper vouching because they "were not based solely on reasons which arose from the evidence, but rather,

---

110. *Id.* at 350.

111. *Id.* at 351 (citing Ballew v. Georgia, 435 U.S. 223 (1978)).

112. *Id.* at 352 (citing Patton v. United States, 281 U.S. 276 (1930)).

113. *Id.* at 353 (citing Holliness v. State, 467 N.E.2d 4 (Ind. 1984)).

114. *Id.* at 354.

115. *See, e.g.*, Schumm, *2010 Recent Developments*, *supra* note 26, at 1140-41 (discussing a reversal based on the prosecutor showing a YouTube video during closing argument).

116. 938 N.E.2d 690 (Ind. 2010).

117. *Id.* at 696.

118. *Id.*

119. IND. PROF. COND. R. 3.4(e).

120. 949 N.E.2d 870 (Ind. Ct. App. 2011).

121. *Id.* at 880.

asserted a personal knowledge of the facts at issue."[122]

In *Emerson v. State*,[123] the prosecutor referred to the defendant as a "bully" during voir dire, opening statements, and closing arguments. Defense counsel failed to object or request an admonishment, and the court found any misconduct did not rise to the level of fundamental error.[124] The prosecutor's general questions about bullying during voir dire could "help the prosecutor, as well as defense counsel, determine whether evidence of bullying would negatively affect any of the potential jurors' ability to render an impartial verdict" and were therefore "proper and relevant."[125] The court also found no misconduct based on comments that the defendant "tried to bully his way out of" the initial stop and later trial through aggressive behavior that could be viewed as bullying.[126] Finally, although the prosecutor's request to "stand up to this bully" was deemed improper, it did not make a fair trial impossible because it was a fleeting comment and the jury was advised that counsel's arguments were not evidence.[127]

F. Bad Advice from Counsel Regarding Plea Agreements

In a pair of cases, the court of appeals considered challenges to guilty pleas based on improper advisement of penal consequences. The Indiana Supreme Court has divided such claims into two categories: (1) "claim[s] of intimidation by an exaggerated penalty or enticement by an understated maximum exposure" and (2) "claims of incorrect advice as to the law."[128]

The court of appeals considered a claim from the first category in *Roberts v. State*,[129] where a defendant charged with burglary and theft agreed to plead guilty to both counts in exchange for the State not pursuing a motion to add a habitual offender allegation.[130] One of the convictions alleged in the proposed information for the habitual offender allegation, however, was not the defendant's; therefore, the State could not have lawfully obtained the enhancement.[131] Although a plea agreement under these circumstances was certainly no bargain, the court of appeals upheld the denial of post-conviction relief because Roberts knew the alleged prior conviction was not his, and therefore "the State's threat to pursue the amendment to add the habitual offender count could not have reasonably been Roberts's main motivation for his decision to plead guilty."[132]

Addressing the second category in *Springer v. State*,[133] the court of appeals

---

122. *Id.* at 881.
123. 952 N.E.2d 832 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 649 (Ind. 2011).
124. *Id.* at 837.
125. *Id.*
126. *Id.* at 837-38.
127. *Id.* at 838.
128. Segura v. State, 749 N.E.2d 496, 504-05, 507 (Ind. 2001).
129. 953 N.E.2d 559 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 650 (Ind. 2011).
130. *Id.* at 561.
131. *Id.*
132. *Id.* at 565.
133. 952 N.E.2d 799 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 650 (Ind. 2011).

reversed the denial of post-conviction relief when the defendant explained his guilty plea was based on his "belie[f] he would die in prison if he did not plead."[134] There, the twenty-six-year-old defendant was presented with a choice between a plea agreement with a maximum sentence of 100 years or going to trial with the prospect of 141 years, although the correct maximum would have been "approximately 111 years."[135] Based on the erroneous advisement, the court of appeals concluded the defendant "demonstrated at least a reasonable probability that the hypothetical reasonable defendant would have elected to go to trial if properly advised."[136]

Somewhat related to these cases are post-conviction challenges to the voluntariness of a guilty plea. Although there is no federal constitutional bar to accepting guilty pleas from defendants who simultaneously assert their innocence,[137] Indiana has long held that judges "may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error."[138] This seemingly clear rule becomes a bit murkier in accomplice liability cases. In order to convict a defendant as an accomplice, the defendant must have knowingly or intentionally aided, induced, or caused another person to commit that offense.[139] In *Huddleston v. State*,[140] although the defendant professed that he wanted to plead guilty to murder, he "quite clearly and unequivocally stated during the factual basis colloquy that he did not intend for [the victim] to be killed, nor did he know or anticipate that [his accomplice] would kill [the victim]."[141] The court of appeals concluded the defendant's statements were "an outright denial" of the requisite mens rea for murder, and his later affirmative responses to the trial court when asked if he was guilty of murder were not "sufficient to override his earlier statement expressly denying the requisite culpability for murder."[142] Therefore, the denial of his petition for post-conviction relief was reversed.[143]

G. Crime or Not a Crime?

As documented in previous survey articles, challenges to the sufficiency of evidence in a criminal case are often raised but frequently fail. Reversal is more common when an issue is framed as "a legal one with broader applicability than the facts of the particular case."[144] This section begins with cases where the

---

134. *Id.* at 806.

135. *Id.*

136. *Id.* at 807.

137. *See* North Carolina v. Alford, 400 U.S. 25, 38 (1970).

138. Ross v. State, 456 N.E.2d 420, 423 (Ind. 1983).

139. IND. CODE § 35-41-2-4 (2011).

140. 951 N.E.2d 277 (Ind. Ct. App. 2011).

141. *Id.* at 281.

142. *Id.*

143. *Id.*

144. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 962 (2009) [hereinafter Schumm, *2008 Recent Developments*].

appellate courts reversed for insufficient evidence and then turns to those where the evidence was found sufficient.

1. Poor Parenting Is Not Necessarily a Crime.—Parents or others with a legal obligation to care for a dependent commit D felony child neglect if they knowingly place "the dependent in a situation that endangers the dependent's life or health."[145] In *Villagrana v. State*,[146] the father of a two-year child was watching television and not paying attention when the mother of his child asked him to watch the child while she ran errands. At the next commercial he went to the kitchen to feed the child but could not find her there or elsewhere in the house. He soon noticed the back door was open and went to search for her. A neighbor had found the child and called police and the Department of Child Services.[147] The court of appeals reversed the conviction, emphasizing "the entire incident occurred within approximately twenty minutes" and the defendant's conduct was surely "negligent" but was not knowingly done, i.e., he was not subjectively aware of a high probability that his daughter was placed in a dangerous situation.[148]

2. Reasonable Discipline by Parents and Teachers.—A few years ago, the Indiana Supreme Court set aside a mother's conviction for battery of her child based on reasonable discipline.[149] In such cases the State must prove either "(1) the force the parent used was unreasonable or (2) the parent's belief that such force was necessary to control her child and prevent misconduct was unreasonable."[150] The court adopted a non-exhaustive list of six factors from the *Restatement (Second) of Torts* that should be weighed.[151] There, the court concluded five to seven swats on the buttocks, arm, and thigh with a belt or extension cord was not unreasonable when it left only temporary bruising and did not require medical attention.[152]

In a pair of cases applying *Willis*, the Indiana Court of Appeals found a parent's discipline unreasonable while finding a teacher's discipline was reasonable. First, in *Hunter v. State*,[153] a fourteen-year-old girl engaged in worsening behavioral problems including having a friend forge her father's name on a permission slip for a school trip. The father instructed his daughter to remove her clothing down to her undergarments and go to the living room where he struck her approximately twenty times with a belt on the back, arms, and legs.[154] A scab on her thigh and swollen finger remained three and a half months

145. IND. CODE § 35-46-1-4(a)(1) (2011).
146. 954 N.E.2d 466 (Ind. Ct. App. 2011).
147. *Id.* at 468.
148. *Id.* at 469.
149. Willis v. State, 888 N.E.2d 177 (Ind. 2008).
150. *Id.* at 182.
151. *Id.*
152. *Id.* at 183-84.
153. 950 N.E.2d 317 (Ind. Ct. App. 2011).
154. *Id.* at 319.

later.[155] The court distinguished *Willis* in concluding the "arguably degrading and long-lasting physical effects" made the discipline unreasonable.[156]

In *Barocas v. State*,[157] the court reversed a teacher's conviction for battery against a special needs student whose tongue she "flicked" with two fingers.[158] It agreed the force used by the teacher fell far short of that used in *State v. Fettig*,[159] where the court upheld a trial court's dismissal of battery charges against a gym teacher who slapped a student on the face.[160] The court in *Barocas* found it immaterial that the student "let out a wail" when flicked, finding no authority for the State's suggestion that the reasonableness of force can be determined by the victim's reaction to it.[161]

Although *Hunter* and *Barocas* were both challenges to the sufficiency of the evidence brought after trial, other defendants have filed pretrial motions to dismiss battery charges based on the privilege of reasonable discipline.[162] Rarely are criminal cases resolved by defense motions to dismiss, as highlighted by another recent case where the Indiana Court of Appeals reiterated "it is an abuse of discretion to dismiss a case pursuant to Indiana Code section 35-34-1-4(a)(5) where the State has stated facts sufficient to constitute an offense."[163]

3. Insufficient Evidence for Resisting Law Enforcement.—Resisting law enforcement occurs only when done "forcibly."[164] Several cases have been reversed because resistance was only passive or the purported force used by the defendant was ambiguous.[165] In *Aguirre v. State*, a divided court reversed a conviction because the State did not present any evidence of threatening or violent actions by the defendant during her encounter with police; rather, she only "dove her hand into her purse" to answer a cell phone call from her mentally ill son.[166] Looking to the evidence most favorable to the verdict, though, Judge Baker dissented because the officer testified "when she grabbed Aguirre's hand to place it in handcuffs, Aguirre pulled her hand away."[167] He concluded this was sufficient evidence of resisting,[168] similar to when the defendant "stiffened up"

---

155. *Id.* at 321.

156. *Id.*

157. 949 N.E.2d 1256 (Ind. Ct. App. 2011).

158. *Id.* at 1260-61.

159. 884 N.E.2d 341, 345 (Ind. Ct. App. 2008).

160. *Id.*

161. *Barocas*, 949 N.E.2d at 1260.

162. *See, e.g.*, *Fettig*, 884 N.E.2d at 342.

163. State v. Gill, 949 N.E.2d 848, 850 (Ind. Ct. App.) (reciting two other bases for dismissal of a criminal case including "a jurisdictional impediment to the conviction" and "any other ground that is a basis for dismissal as a matter of law"), *trans. denied*, 962 N.E.2d 642 (Ind. 2011).

164. IND. CODE § 35-44-3-3 (2011).

165. *See* Aguirre v. State, 953 N.E.2d 593, 597 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 653 (Ind. 2011) (collecting cases).

166. *Id.* at 596-97.

167. *Id.* at 597 (Baker, J., dissenting).

168. *Id.*

in an earlier case.[169]

Aguirre highlights the potential conflict between refusing to reweigh conflicting evidence and wearing blinders when confronted with pertinent, uncontroverted evidence that favors the defendant. For example, in reversing an invasion of privacy conviction as summarized below, the Indiana Supreme Court considered the respondent's "mixed messages" of oral notice regarding a protective order.[170]

In *Stansberry v. State*,[171] the defendant charged toward a police officer while removing his clothing despite the officer's threat to use pepper spray.[172] Based on the trial court's comments at the end of a bench trial that it was "satisfied that the attempted resisting was forcible," the court of appeals held the defendant could not be convicted of resisting law enforcement.[173] The trial court had, though, entered a conviction for "attempted resisting law enforcement,"[174] which did not fly either because the trial court had concluded the defendant's "actions fell short of the modest level of resistance necessary to sustain a conviction."[175] Whether an attempted resisting law enforcement conviction could be pursued in a future case remains in doubt, as the court of appeals observed that "almost any action one takes toward thwarting law enforcement is necessarily one of an attempt," but a conviction requires "force."[176]

4. Failure to Register as a Sex Offender.—A detailed statutory scheme governs the requirements of sex offenders to provide information for the sex offender registry, and defendants who make material misstatements or omissions can face felony charges. In *Dye v. State*,[177] the court addressed the special challenges presented by defendants who are illiterate and homeless. There, the defendant acknowledged many of his answers were incorrect because he did not understand the sex offender registry forms.[178] He was not assisted in completing the forms, and he complied with the requirement that homeless registrants appear in person before local law enforcement every seven days.[179] Accordingly, the court found insufficient evidence that he knowingly violated the registry requirements.[180]

5. Violations of Protective Orders.—In a pair of cases, the Indiana Supreme Court provided clearer parameters for adjudicating violations of protective orders,

---

169. Johnson v. State, 833 N.E.2d. 516, 518-19 (Ind. Ct. App. 2005).
170. Tharp v. State, 942 N.E.2d 814, 818 (Ind. 2011).
171. 954 N.E.2d 507 (Ind. Ct. App. 2011).
172. *Id.* at 509.
173. *Id.* at 511-12.
174. *Id.* at 509.
175. *Id.* at 512.
176. *Id.*
177. 943 N.E.2d 928 (Ind. Ct. App. 2011).
178. *Id.* at 931.
179. *Id.*
180. *Id.*

a misdemeanor offense known as "invasion of privacy" in Indiana.[181] In *Joslyn v. State*,[182] the court emphasized that protective orders need not be properly served under the trial rules in order to secure a conviction for invasion of privacy, which simply requires a knowing or intentional violation of an order.[183] There, the defendant received a copy of the protective order at his home from a process server but was not sent a copy by first-class mail as required by Trial Rule 4.1(B).[184] Nevertheless, Joslyn's statements to police and trial testimony about his awareness of the protective order and its terms were sufficient to prove he knowingly violated the order.[185]

In *Tharp v. State*,[186] the court applied the rule from *Joslyn*, reiterating that oral notice can be sufficient, "even when it comes from someone other than an agent of the State if it includes adequate indication of the order's terms."[187] There, the only evidence the defendant knew of the protective order came from his girlfriend telling him about the order "at the same time she told him it was no longer valid."[188] Emphasizing the importance of respondents being given an "adequate opportunity to know that they have been enjoined," and understanding "what is covered by the injunction," the court found the "mixed messages" insufficient for a conviction.[189]

Joslyn and *Tharp* offer useful guidance to lawyers and lower courts, but the issue of knowledge will likely remain a point of contention in many cases when the notice requirements of the trial rules are not followed. Although *Joslyn* offers clear evidence of knowledge through admissions by the respondent, in other cases the protected person's testimony will likely conflict with the respondent's. Factfinders will need to determine not only who to believe but also whether the respondent was provided adequate notice of the specific terms of the protective order. A vague statement that "I got a protective order on you" may not be sufficient.

In some cases, though, direct contempt proceedings may be required instead of an invasion of privacy charge. In *Thomas v. State*,[190] an ex parte protective order was issued and the parties met in court a few weeks later where the respondent told the protected person, "Stop calling me, fagot [sic]."[191] The court of appeals reversed the conviction for invasion of privacy, concluding "the institution of direct contempt proceedings was the more appropriate" under the

181. *See* IND. CODE § 35-46-1-15.1 (2011).
182. 942 N.E.2d 809 (Ind. 2011).
183. *Id.* at 811-12.
184. *Id.* at 812.
185. *Id.* at 813-14.
186. 942 N.E.2d 814 (Ind. 2011).
187. *Id.* at 818.
188. *Id.* at 817.
189. *Id.* at 818.
190. 936 N.E.2d 339 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1198 (Ind. 2011).
191. *Id.* at 339.

circumstances.[192] Judge Bradford dissented, agreeing that "direct contempt proceedings would have been the more efficient and preferred remedy," but finding "nothing in the statute that precluded the State from choosing to file the invasion of privacy charges."[193]

6. Creepy Conduct.—Creepy conduct is not always criminal.[194] Sexual battery requires a touching intended to arouse sexual desires when the victim is compelled to submit to the touching or "so mentally disabled or deficient that consent to the touching cannot be given."[195] In *Ball v. State*,[196] a woman awoke to the defendant "kissing and licking her face."[197] Because "[s]leep is not equivalent to a mental disability or deficiency for purposes of the sexual battery statute," the court reversed the D felony sexual battery conviction.[198] The case was remanded for entry of a Class B misdemeanor battery conviction because "[e]vidence of a touching, however slight, is sufficient to support a conviction for battery."[199]

A case involving voyeurism, lies, and videotape, however, reached the opposite result. Sean Chiszar set up a video camera in his bedroom where he attempted to tape himself having sex with his fiancée.[200] His fiancée heard "beeping sounds," confronted Chiszar, and police were eventually called.[201] Chiszar was ultimately convicted of voyeurism, a Class D felony, which he challenged on appeal on both vagueness and sufficiency grounds.

The base voyeurism offense requires peeping "into an area where an occupant of the area reasonably can be expected to disrobe," and the term "peep" is separately defined as "any looking of a clandestine, surreptitious, prying, or secretive nature."[202] In rejecting Chiszar's vagueness challenge, the court of appeals emphasized the crime is limited to areas where people are expected to disrobe, which would not include living rooms, kitchens, or surprise birthday parties, as the defendant posited.[203] Moreover, the "crux of the statute is consent."[204] The statute provides notice to persons of ordinary intelligence by its limitation to only looking that is "clandestine, surreptitious, prying, or secretive

---

192. *Id.* at 341.

193. *Id.* (Bradford, J., dissenting).

194. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 981-83 (2008).

195. IND. CODE § 35-42-4-8(a) (2011).

196. 945 N.E.2d 252 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 640 (Ind. 2011).

197. *Id.* at 253.

198. *Id.* at 258.

199. *Id.*

200. Chiszar v. State, 936 N.E.2d 816, 819 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1212 (Ind. 2011).

201. *Id.*

202. IND. CODE § 35-45-4-5(2011).

203. *Chiszar*, 936 N.E.2d at 823-24.

204. *Id.* at 823.

[in] nature."[205] "There can be no reasonable purpose for that kind of looking since, by definition, it is without the other person's knowledge, and, therefore, it is without the other person's consent."[206]

In addressing Chiszar's sufficiency claim, the court rejected a narrow interpretation of the word "into" and found it irrelevant whether Chiszar was physically present in the bedroom.[207] To find otherwise "would mean that a conviction for voyeurism by the use of a video camera could only stand if the video camera were set up at the doorway to a room or outside of the room looking in. That could not have been the Legislature's intent."[208] Moreover, the court was not persuaded that Chiszar's fiancée had "impliedly consented to the video taping since she was in a consensual sexual relationship with him."[209] Consent to engage in sex is not tantamount to consent to be taped having sex.[210] Chiszar's grabbing the video camera, running out of the bedroom, and repeated denials further undermined any notion of consent.[211]

Finally, *Temple v. State*[212] provides another example of creepy conduct that was found criminal where the twenty-six-year-old defendant exchanged text messages with a fifteen-year-old neighbor to arrange a sexual rendezvous when she could sneak out of her house. The court interpreted the term "'induce' in a manner consistent with its broad dictionary definition."[213]

7. Public Intoxication Charges for Drunk Passengers.—In *Moore v. State*,[214] a divided panel of the Indiana Court of Appeals reversed a conviction for public intoxication entered against a passenger who was sleeping in a car pulled over by police.[215] The majority attempted to distinguish *Miles v. State*,[216] which had held a man in his tractor-trailer cab parked along a highway was in a public place for purposes of the statute,[217] comparing "the sole occupant of a running and dangerously parked vehicle arrested at a time when a charge of operating while intoxicated was not possible under such circumstances, versus a sleeping passenger in a vehicle traveling upon a public road stopped for an equipment violation."[218] Judge Vaidik dissented, reasoning that

> the key determination is whether the vehicle is in a public place, and in [*Miles*], the defendant was in a parked vehicle three or four feet from the

---

205. *Id.*
206. *Id.*
207. *Id.* at 830.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. 954 N.E.2d 513 (Ind. Ct. App. 2011).
213. *Id.* at 515.
214. 935 N.E.2d 301 (Ind. Ct. App. 2010), *vacated*, 949 N.E.2d 343 (Ind. 2011).
215. *Id.* at 305-06.
216. 216 N.E.2d 847 (Ind. 1966).
217. *Id.* at 849.
218. *Moore*, 935 N.E.2d at 304.

> traveled portion of a busy highway. If being inside a vehicle on the side of a road is in a public place, then being inside a vehicle on the road is also a public place.[219]

She also noted the General Assembly had not amended the public intoxication statute in response to *Miles*.[220] Nevertheless, Judge Vaidik acknowledged the troubling policy implications of discouraging "the practice of securing a designated driver or a taxicab."[221]

Because *Moore* conflicted with *Miles*, it was no surprise that the Indiana Supreme Court quickly granted transfer.[222] Its opinion, which affirmed the conviction, though, did not grapple with the analytic underpinnings of *Miles*, where the court did not engage in a discussion of the purpose of the statute or the need to construe penal statutes strictly against the State. In *Miles*, the supreme court simply observed, "While there are few authorities on the subject, there is some authority to uphold a conviction under this statute of a person in a motor vehicle at the time of the arrest."[223] Rather, the Indiana Supreme Court majority in *Moore* simply (1) "decline[d] the defendant's request to reverse her conviction on public policy grounds," and (2) found her "accountability under the public intoxication statute does not violate her personal liberty rights [to consume beverages of choice] under the Indiana Constitution."[224] Justice Rucker dissented, suggesting that *Miles* should be overruled and pointing to century-old precedent holding that "[t]he purpose of the [law] is to protect the public from the annoyance and deleterious effects which may and do occur because of the presence of persons who are in an intoxicated condition."[225]

This continued criminalization of riding drunk as a passenger in a vehicle is likely to generate a legislative response, although the paucity of appellate case law suggests it has been applied rarely by police and prosecutors. If police arrest a drunk or suspended driver, it may be easier to arrest a drunk passenger for public intoxication than to arrange for someone to pick up that person. If there is another sober driver in the vehicle, though, the car could be released to that person. At least one prosecutor recently declined to pursue a public intoxication charge against a drunk passenger in a vehicle driven by his sober mother.[226] The prosecutor remarked, "I just think it's good business to reward those who use designated drivers."[227]

8. Buying Drugs is a Crime (Even for Criminal Defense Lawyers).—Viewers

---

219. *Id.* at 306 (Vaidik, J., dissenting).

220. *Id.*

221. *Id.* at 307.

222. Moore v. State, 949 N.E.2d 343 (Ind. 2011).

223. Miles v. State, 216 N.E.2d 847, 849 (Ind. 1996) (citing Winters v. State, 160 N.E. 294 (Ind. 1928)).

224. *Moore*, 949 N.E.2d at 345.

225. *Id.* at 346 (Rucker, J., dissenting) (quoting State v. Sevier, 20 N.E. 245, 246-47 (Ind. 1889)).

226. *See* John Tuohy, *NFL Player Off Hook*, INDIANAPOLIS STAR, July 8, 2010, at B6.

227. *Id.*

of *The People's Court* in the 1980s were offered a quip of sage advice at the end of each episode: "Don't take the law into your own hands: you take 'em to court."[228] The lawyer/defendant in *Schalk v. State*[229] could have benefitted from that advice. There, the court of appeals rejected a criminal defense lawyer's challenges to his conviction for possession of marijuana, which resulted from a drug buy he orchestrated with a State's witness in a pending drug case.[230] "His ostensible purpose was to prove that the witness, a confidential informant, was actively dealing drugs and, thus, to discredit the witness who was scheduled to testify against his client at trial."[231] This didn't end well for him. First, although the Indiana Code provides a fairly broad definition of "law enforcement officer," the definition doesn't include criminal defense attorneys.[232] Thus, even if his intent was to deliver the marijuana to a law enforcement officer for use in defending his client at trial, his conduct was not immunized from prosecution.[233] Next, although citizens have a right to arrest others under certain circumstances, that statute was of no aid to Schalk, who arranged an illegal drug buy and never tried to arrest the seller. Finally, the court was not persuaded by his assertion of a "right to defend his clients" under the Sixth Amendment to the U.S. Constitution and article 1, section 13 of the Indiana Constitution; attorneys, who are officers of the court and take an oath to uphold the federal and state constitutions, are not authorized to engage in criminal activity under those same constitutions.[234]

I. A Rare Reversal on Insanity

Appellate courts defer significantly to the verdicts of juries and judges, especially regarding the insanity defense. Even when expert testimony has unanimously concluded a person was insane, guilty verdicts have been affirmed if lay testimony or "other sufficient probative evidence" suggested sanity.[235]

In *Galloway v. State*,[236] the Indiana Supreme Court offered an excellent overview of the history and evolution of the insanity defense. There, although nonconflicting expert and lay testimony established the defendant was insane, a trial court rejected the insanity defense because the defendant could continue to

---

228. *Doug Llewelyn*, IMDB, http://www.imdb.com/name/nm0515770/news (last visited June 5, 2012).

229. 943 N.E.2d 427 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).

230. *Id.* at 431-32.

231. *Id.* at 428. Although not mentioned in the opinion, Schalk's plan could have been difficult to carry through at trial in light of Indiana Rule of Professional Conduct 3.7, which prohibits lawyers from acting as an "advocate at a trial in which the lawyer is likely to be a necessary witness," except under narrow circumstances.

232. *Id.* at 430 (citing IND. CODE § 35-41-1-17 (2011)).

233. *Id.* at 431.

234. *Id.*

235. Galloway v. State, 938 N.E.2d 699, 710 (Ind. 2010), *reh'g denied*, 2011 Ind. LEXIS 349 (May 6, 2011); *see, e.g.*, Thompson v. State, 804 N.E.2d 1146, 1149 (Ind. 2004).

236. *Galloway*, 938 N.E.2d 699.

be a danger to society due to the state's inadequate mental health system.[237] The court emphasized "a person is either sane or insane at the time of the crime; there is no intermediate ground."[238] Although one of the experts in the case submitted a preliminary report opining the defendant was sane, he recanted that opinion after learning critical facts on cross-examination. Without a conflict in expert testimony, lay testimony was necessary to establish sanity. After a lengthy discussion of the limited value of demeanor evidence, the court emphasized such evidence "must be considered as a whole, in relation to all the other evidence. To allow otherwise would give carte blanche to the trier of fact and make appellate review virtually impossible."[239] The court rejected the trial court's findings, including the defendant's deterioration during trial, which is not probative of sanity at the time of the offense.[240] Perhaps most significantly, though, the court made clear it was not appropriate "for the trier of fact to consider the condition of our State's mental health system" in rendering its verdict.[241] Justices Rucker and David joined Justice Sullivan's opinion.

Chief Justice Shepard, joined by Justice Dickson, wrote an impassioned dissent.[242] Relying on the views of "our fellow citizens," he disagreed with the majority's declaration that "it is not relevant what may happen as a result of this reversal by appellate judges."[243] Rather than discussing or distinguishing the precedent cited in the majority's opinion, the dissent instead focused on "some innocent future victim [being] placed at risk by this [c]ourt's decision to second-guess" the trial court.[244]

J. Sentencing Issues Under Appellate Rule 7(B)

Sentencing claims are among the most, if not the most, popular for defendants to raise on appeal in Indiana. They come in many varieties, but the robust review for "appropriateness" under appellate rule 7(B) is raised hundreds of times each year.

1. Increasing Sentences on Appeal.—As discussed in detail in last year's survey,[245] the Indiana Court of Appeals increased a sentence for the first time on appeal in 2010 in *Akard v. State*.[246] The court of appeals increased the ninety-three-year sentence to 118 by focusing on the horrendous nature of the crime.[247] The court relied on the supreme court's opinions in *McCullough v. State*,[248] which

237. *Id.* at 703.
238. *Id.* at 711.
239. *Id.* at 714.
240. *Id.* at 715.
241. *Id.* at 716.
242. *Id.* at 718 (Shepard, C.J., dissenting).
243. *Id.* at 719.
244. *Id.* at 720.
245. *See* Schumm, *2010 Recent Developments*, *supra* note 26, at 1155-59.
246. 924 N.E.2d 202 (Ind. Ct. App.), *aff'd in part*, 937 N.E.2d 811 (Ind. 2010).
247. *Id.* at 211-12.
248. 900 N.E.2d 745 (Ind. 2009).

made clear the power to review and revise sentences included the ability to increase a sentence on appeal—but only when the defendant requested a sentence reduction.[249]

Just a few weeks after granting transfer and hearing oral argument in *Akard*, the supreme court unanimously vacated the increased sentence, emphasizing that the prosecutor had requested a ninety-three-year sentence in the trial court and the Attorney General had argued that sentence was appropriate on appeal.[250] The *Akard* opinion is a narrow one that largely begs the question of when an increased sentence will be appropriate. The supreme court has developed a rich body of case law that applies coherent and consistent principles when *decreasing* a sentence.[251] In the absence of any principles for *increasing* sentences, though, appellate counsel is hard-pressed to advise clients when they are at risk for challenging a sentence. For the time being anyway, the bar for an increase appears to be a very substantial one that has not yet been met in the hundreds of sentencing appeals since *McCullough*.

Defendants who seek to insulate themselves from the possibility of an increased sentence by challenging the sentence on only one count and waiving review of the sentence imposed on other counts "to shield himself from the risk of having his aggregate sentence revised upward on appeal" are out of luck under *Webb v. State*.[252] The court of appeals relied heavily on *Cardwell v. State*,[253] where the supreme court made clear "appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count."[254] In *Webb*, the defendant received a twenty-five year aggregate sentence when the maximum possible sentence would have been forty-five years for one count of robbery as a Class B felony, six D felony counts of fraud, two D felony counts of attempted fraud, and an A misdemeanor count of driving while suspended.[255] Although the trial court appeared to have "exercised no leniency" in imposing the twenty year maximum sentence for robbery, the aggregate sentence of twenty-five years "could have been [imposed] in a number of different ways, and so long as that is an appropriate sentence for Webb's offenses as a whole," the court found "no

---

249. *Id.* at 750-51.

250. *Akard*, 937 N.E.2d at 814. As explained in last year's survey, the Attorney General requested increased sentences several times in the months after *McCullough* was issued. Schumm, *2010 Recent Developments*, *supra* note 26, at 1156. This practice appears to have been curtailed in the months following the supreme court's opinion in *Akard*.

251. For example, in *Smith v. State*, 889 N.E.2d 261 (Ind. 2008), the court cited the defendant's minor criminal history, and poor mental health balanced against his violation of the victim's trust and psychological abuse in reducing a 120-year sentence to sixty. *Id.* at 264. The opinion included a string citation of cases to demonstrate the revision was "consistent with this [c]ourt's general approach to [sentencing] matters." *Id.* at 264-65.

252. 941 N.E.2d 1082, 1087 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1205 (Ind. 2011).

253. 895 N.E.2d 1219 (Ind. 2008).

254. *Id.* at 1225.

255. *Webb*, 941 N.E.2d at 1085, 1088.

reason to meddle with the particular method used by the trial court."[256]

2. Reducing Sentences on Appeal.—During the survey period, the court of appeals issued 1,337 opinions in criminal cases, and nearly thirty percent (391 cases) included a claim for a reduced sentence under appellate rule 7(B).[257] Surprisingly, nearly thirty percent (114) of these cases with a sentencing claim were appealed after the defendant entered into a plea agreement with the State of Indiana. Although many county prosecutors include explicit provisions in plea agreement precluding an appeal of the sentence,[258] some still do not. Of the 391 opinions, less than seven percent (twenty-six cases) were reversed. Reductions sometimes occurred in cases with fairly graphic facts but weighty mitigation regarding the defendant's character. For example, the defendant in *Koch v. State*[259] received a forty-five year sentence for offenses arising from a multi-state abduction of his former girlfriend, which spanned Evansville to New Mexico and included physical abuse, a shot to the ankle, and robbery of her debit card along the way.[260] The court of appeals reduced the sentence to thirty years, emphasizing the defendant's minimal criminal history (two misdemeanor convictions nearly a decade earlier), his service in the military, and his mental illness.[261] Specifically, the court recounted the defendant "believed that someone was trying to kill him, that there was a conspiracy against him, and that he was hearing voices coming from the speakers of his vehicle causing him to rip the speakers out."[262]

Beyond mental illness, other reductions by the court of appeals focused on considerations such as the defendant's age and even reduced sentences below the advisory term. For example, in *Eiler v. State*,[263] the sentence appealed was near the minimum—twenty-two years (with four years suspended) for a Class A felony, which has a sentencing range of twenty to fifty years. In modifying the

---

256. *Id.* at 1088.

257. This data came from Westlaw searches in the Indiana Court of Appeals database on October 10, 2011, which were later tabulated and are on file with the Author. The following search yielded a total of 1337 opinions: "DA(aft 09-30-2010 & bef 10-01-2011) & dn(cr)." A narrowing search then yielded 483 results, which were individually assessed to remove those in which a 7(B) claim was not raised on appeal: "(rule-7 inappropr!) & DA(aft 09/30/2010 & bef 10/01/2011) & DN(cr)."

258. The supreme court upheld the enforceability of these provisions in *Creech v. State*, 887 N.E.2d 73 (Ind. 2008). *See* Schumm, *2008 Recent Developments*, *supra* note 144, at 944.

259. 952 N.E.2d 359 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 653 (Ind. 2011).

260. *Id.* at 364-65, 367.

261. *Id.* at 376.

262. *Id.* As other cases make clear, however, not every defendant suffering from a mental illness will secure reduced sentence on appeal, especially when less than the maximum sentence is imposed. *See, e.g.*, Washington v. State, 940 N.E.2d 1220, 1223-24 (Ind. Ct. App.) (affirming thirty-five year sentence for Class A felony battery when the defendant's "mental illness bears little weight on our analysis of his character"), *trans. denied*, 950 N.E.2d 1202 (Ind. 2011).

263. 938 N.E.2d 1235 (Ind. Ct. App. 2010), *reh'g denied*, 2011 Ind. App. LEXIS 400 (Feb. 24, 2011).

sentence to twenty-two years with ten years suspended, the court focused on the defendant's age (sixty), "his minimal criminal history, his ability to maintain a job for the past twenty-five years, his taking responsibility for his actions, and that he was the family's main financial provider, as well as the fact that he sold cocaine only to the same people with whom he used and that he did not profit financially from doing so."[264]

During the survey period, the Indiana Supreme Court reduced sentences in four cases. In *Sanchez v. State*,[265] Justice David authored an opinion reducing an eighty-year sentence for child molesting convictions involving the defendant's two stepdaughters to forty years. As to the nature of the offense, the opinion noted the offenses were isolated incidents and the absence of "significant force" or injury.[266] Although the defendant had four prior unrelated arrests, none were even remotely related to child molesting.[267] The court concluded the aggravating circumstances warranted an enhanced sentence for an A felony but not consecutive sentences.[268] Justice Dickson dissented in *Sanchez*, as he frequently does when the court reduces a sentence.[269] He emphasized the limited ability of appellate judges to "fully perceive and appreciate the totality of the circumstances personally perceived by the trial judge," which should "restrain appellate revision of sentences to only extremely rare, exceptional cases."[270] He also expressed concern that appellate revisions could foster reliance and "serve as a disincentive to the cautious and measured fashioning of sentences by trial judges," who may not believe their decisions are "essentially final."[271]

Two of the three additional cases in which a sentence was reduced were also child molesting cases, which often include particularly lengthy enhanced and consecutive sentences. In *Horton v. State*,[272] a unanimous court reduced a 324-year sentence to 110 years,[273] which even with good time credit will likely be a life sentence.[274] There, the defendant had no adult criminal history but was in a

---

264. *Id.* at 1239.

265. 938 N.E.2d 720 (Ind. 2010).

266. *Id*. at 722.

267. *Id.*

268. *Id.* at 723.

269. *Id.* (Dickson, J., dissenting); *see also* Smith v. State, 889 N.E.2d 261, 265 (Ind. 2008) (Dickson, J., dissenting); Cardwell v. State, 895 N.E.2d 1219, 1227 (Ind. 2008) (Dickson, J., dissenting).

270. *Sanchez*, 938 N.E.2d at 723 (Dickson, J., dissenting).

271. *Id.*

272. 949 N.E.2d 346 (Ind. 2011).

273. *Id.* at 349.

274. The date of the offense is unclear from the court's opinion. Defendants who are at least twenty-one and commit A felony child molesting offenses against victims under age twelve after June 30, 2008 are classified as credit-restricted felons and must serve nearly eighty-five percent of their sentences instead of the fifty percent for those defendants convicted of other offenses who maintain good behavior in prison. *See* Upton v. State, 904 N.E.2d 700, 704-05 (Ind. Ct. App. 2009).

position of trust with the seven-year-old victim who was molested on a daily basis and contracted herpes.[275]

Justice David was not always in the majority in sentence reduction cases. In *Pierce v. State*,[276] the three-justice majority reduced a 120-year sentence for multiple counts of child molesting against the same ten-year-old victim to eighty years.[277] Although the defendant was in a position of trust and had a prior conviction for child molesting, the majority noted the prior offense had occurred eight years earlier and the defendant had no other criminal record.[278] Justice David, joined by Justice Dickson, emphasized the trial court "did exactly what he was supposed to do—exercise discretion within the required statutory and case law framework" and suggested concern that the majority opinion "is more akin to a second guessing by this [c]ourt."[279] In addition to the prior conviction, the dissent noted that "the molestations occurred over a span of one year and involved fondling, oral sex, and intercourse on multiple occasions."[280]

Outside the realm of child molesting, in *Carpenter v. State*[281] the supreme court cut a forty-year sentence in half for a defendant who was convicted of being a felon in possession of a handgun and a habitual offender.[282] The defendant had stipulated to the latter enhancement, which punished his lengthy criminal history, but offered a fairly benign nature of the offense: he was found asleep in the waiting room of a dental office "apparently drunk or overdosed."[283]

K. Other Sentencing Claims

The appellate courts also addressed a variety of other legal claims of sentencing error involving minimum sentences for A felonies, enhancements, limitations on crimes committed within the same criminal episode, and restrictions on modifying D felonies to Class A misdemeanors.

From the basic realm, in *Mauricio v. State*,[284] the Indiana Supreme Court offered yet another reminder to counsel and trial courts that sentencing statutes at the time of an offense are controlling, and the failure to argue a significant statutory conflict may constitute ineffective assistance of counsel.[285] Beginning with *Smith v. State*,[286] the court has held that a forty-year presumptive sentence applies to murders committed between July 1, 1994, and May 5, 1995, a period

---

275. *Horton*, 949 N.E.2d at 348-49.
276. 949 N.E.2d 349 (Ind. 2011).
277. *Id.* at 353.
278. *Id.* at 352-53.
279. *Id.* at 353 (David, J., dissenting).
280. *Id.*
281. 950 N.E.2d 719 (Ind. 2011).
282. *Id.* at 721-22.
283. *Id.* at 719.
284. 941 N.E.2d 497 (Ind. 2011).
285. *Id.* at 499.
286. 675 N.E.2d 693 (Ind. 1996).

when conflicting statutes were on the books.[287] Because the court in *Mauricio* could not say the trial court "clearly intended to sentence [the defendant] to fifty years as a specific term rather than as the presumptive sentence," the supreme court held appellate counsel was ineffective for failing to raise the issue and remanded the case for resentencing.[288]

1. Minimum Sentence for Class A Felonies.—Other cases have presented statutory conflicts regarding the appropriate parameters of a sentence. Class A felonies generally carry a sentencing range of twenty to fifty years.[289] Another statute, however, provides other restrictions on sentences for A felony child molesting. Indiana Code section 35-50-2-2(b) provides that "the court may suspend only that part of the sentence that is in excess of the minimum sentence," while section 2(i) restricts the court to suspending "only that part of the sentence that is in excess of thirty . . . years" if the defendant was over twenty-one and the victim was younger than twelve.[290] The court of appeals held in *Hampton v. State*[291] that section 2(i) "dictates only the discretion trial courts have in designating which portions of a defendant's sentence may be suspended and does not expressly set sentencing minimums,"[292] but that trial courts retain discretion "whether to sentence defendants to the advisory sentence, and require those so sentenced to serve thirty years of executed time, or to sentence defendants to a sentence below the advisory level under certain circumstances."[293] The Indiana Supreme Court in *Miller v. State*,[294] held that *Hampton* "correctly decided the issue."[295] Because the trial court in *Miller* originally sentenced the defendant to thirty years with ten suspended but later changed the sentence to thirty years executed when the State erroneously asserted section 2(i) required a minimum thirty-year sentence, the supreme court remanded the case to the trial court for resentencing.[296]

2. Firearm Enhancements.—Other cases addressed enhancements, such as the five-year sentence enhancement if a defendant knowingly or intentionally "used" a firearm during the commission of certain delineated crimes, including B felony criminal confinement.[297] In *Nicoson v. State*,[298] the majority upheld the enhancement over the defendant's double jeopardy and statutory challenges.[299] Criminal confinement is enhanced from a C to B felony if a person is "armed"

---

287. *Id.* at 696-98.
288. *Mauricio*, 941 N.E.2d at 499.
289. IND. CODE § 35-50-2-4 (2011).
290. *Id.* § 35-50-2-2.
291. 921 N.E.2d 27, 30-31 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 821 (Ind. 2010).
292. *Id.* at 31.
293. *Id.* at 31 n.5.
294. 943 N.E.2d 348 (Ind. 2011).
295. *Id.* at 349.
296. *Id.*
297. IND. CODE § 35-50-2-11 (2011).
298. 938 N.E.2d 660 (Ind. 2010).
299. *Id.* at 665.

with a deadly weapon, but the section 11 enhancement requires more—the "use" of a firearm in the offense.[300] Justice Rucker, joined by Justice Sullivan, dissented on double jeopardy grounds because the defendant was "armed" with the firearm the entire time he was "using" it.[301] Relying on *Nicoson*, the court of appeals found no double jeopardy violation in *Cooper v. State*,[302] where the defendant was convicted of reckless homicide and a five-year firearm enhancement under Indiana Code section 35-50-2-11 was imposed. In language that rings more in statutory construction than state constitutional double jeopardy jurisprudence, the court concluded:

> [E]ven though the jury relied upon Cooper's use of the shotgun for both the underlying offense and the enhancement, the legislature's intent is clear that criminal offenses committed with firearms are to receive additional punishment. Moreover, if the legislature intended that offenses resulting in serious bodily injury alleged to have been committed with a firearm were to be excepted from the firearm enhancement, it could have drafted the statute in that manner.[303]

3. Conspiracies Are Not Crimes of Violence.—Although trial courts generally have considerable discretion to impose consecutive sentences, Indiana Code section 35-50-1-2(c) limits the total of consecutive terms of imprisonment "arising out of an episode of criminal conduct" to the advisory sentence for the next class of felony.[304] Crimes of violence are excepted from the rule.[305] In *Coleman v. State*,[306] the defendant was convicted of conspiracy to commit robbery, a Class A felony, and possession of a firearm by a serious violent felon, a class B felony, and sentenced to a total of sixty years. The offenses were part of the same episode of criminal conduct, and the defendant argued the sentence should be limited to fifty-five years, the advisory sentence for murder, because neither offense is listed as a crime of violence.[307] The court of appeals agreed, finding conspiracies "akin to attempts," which the Indiana Supreme Court previously held were not crimes of violence.[308] "The legislature has been on clear notice for at least ten years that Indiana courts will strictly construe the meaning of 'crimes of violence' under Section 35-50-1-2, and that courts will not infer that the legislature intended any unlisted offenses to qualify as such crimes."[309]

4. Restrictions on Modifying D Felonies to Misdemeanors.—The difference between a misdemeanor and felony conviction goes far beyond the sentencing

---

300. *Id.*
301. *Id.* at 666 (Rucker, J., dissenting).
302. 940 N.E.2d 1210 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1208 (Ind. 2011).
303. *Id.* at 1216.
304. IND. CODE § 35-50-1-2 (2011).
305. *Id.*
306. 952 N.E.2d 377 (Ind. Ct. App. 2011).
307. *Id.* at 380.
308. *Id.* at 383 (citing Ellis v. State, 736 N.E.2d 731 (Ind. 2000)).
309. *Id.*

ranges of a maximum of one year in jail and three years in prison, respectively.[310] Misdemeanors are often seen as "college-aged high jinks or youthful indiscretions that harmed no one," while felony convictions "are met with much more suspicion and caution."[311] One might think trial courts would be encouraged to give defendants convicted of low level felonies an opportunity to have their convictions later modified to a misdemeanor. After all, as explained in Part I.C., many Hoosiers with D felony convictions may now have those records restricted after waiting eight years and meeting certain conditions such as no additional felony convictions. But in *State v. Brunner* the Indiana Supreme Court reversed a trial court's modification of a pro se defendant's request to change his past D felony drunk driving conviction from 2000 to a Class A misdemeanor nine years later, which the trial court had ordered because the felony conviction "was preventing him from obtaining a second job."[312] The Indiana Supreme Court reasoned that the trial court lacked statutory authority for the modification because Indiana Code section 35-50-2-7(b) limits any such modification "to the moment the trial court first entered its judgment of conviction and before the trial court announced its sentence."[313] "Although it may be equitable and desirable for the legislature to give a trial court discretion in modifying a conviction years later for good behavior, we recognize at this time the legislature has not given any such authority."[314]

L. Probation Revocation

A variety of issues sometimes arise when a defendant is placed on probation, including issues surrounding the type of proof to establish a violation. Generally speaking, the State must prove a violation by a preponderance of the evidence.[315] In *Runyon v. State*,[316] the supreme court considered the burden of proof when the State seeks to revoke a defendant's probation for failure to pay child support. Specifically, the court held the State "has the burden to prove (a) that a probationer violated a term of probation and (b) that, if the term involved a

---

310. *See generally* IND. CODE § 35-50-2-7 (2011).

311. State v. Brunner, 947 N.E.2d 411, 417 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 696 (Aug. 19, 2011).

312. *Id.* at 413.

313. *Id.* at 416.

314. *Id.* at 417. The court acknowledged that a separate statute, IND. CODE § 35-38-1-1.5 (2011), allows modifications within three years "if the person fulfills certain conditions," which includes a guilty plea and consent of the prosecutor. *Id.* The court applied this statute in reversing a trial court's modification in another case decided the same day as *Brunner*. *See* State v. Boyle, 947 N.E.2d 912, 914 (Ind. 2011) (noting the State did not consent, more than three years had passed, and "neither a copy of Boyle's sentencing order is in the record, nor does the CCS entry mention the possibility of modifying his sentence from a Class D felony to a Class A misdemeanor").

315. IND. CODE § 35-38-2-3(e) (2011).

316. 939 N.E.2d 613 (Ind. 2010).

payment requirement, the failure was reckless, knowing, or intentional."[317] However, the probationer has the burden "to show facts related to an inability to pay and indicating sufficient bona fide efforts to pay so as to persuade the trial court that further imprisonment should not be ordered."[318] In *Runyon*, the court upheld the revocation of probation because the defendant had "an opportunity to present facts and explanation regarding his alleged resources, employment circumstances, inability to pay, and efforts to make the required payments."[319]

Justice Sullivan dissented. Although he agreed with the allocation of the burden of proof, he opined that the State had not proven the failure to pay was reckless, knowing, or intentional, and the defendant had established his inability to pay resulted from his job loss, inability to find new employment, and extremely low wages when he was working.[320]

Two days after *Runyon* was issued, the court of appeals reversed a revocation of probation because the State failed to prove that a defendant's failure to pay child support was willful.[321] The probation violation in that case was filed a mere forty-one days after the defendant was placed on probation.[322] The probation officer testified that he had not investigated whether the nonpayment was willful or intentional, and the defendant testified that he was not employed and had not been employed for more than three years.[323]

Beyond the child support payment context, the court of appeals in *Beeler v. State*,[324] addressed the necessity of an evidentiary hearing when a CCS entry noted an admission by the defendant. The court found the entry is "presumptively true" unless "it is shown to be otherwise."[325] Moreover, an alleged error is generally waived for appeal when no objection is made in the trial court, unless fundamental error is shown.[326] Judge Crone dissented, concluding the defendant had established fundamental error because the transcript "does not contain even a single reference" to an admission.[327] Going beyond the State's concession that "it would be a better practice for the trial court to record a defendant's admissions on the record," the dissent opined "it was incumbent upon the State to ensure that the admission was repeated on the record."[328]

CONCLUSION

For more than two decades under the leadership of Chief Justice Shepard, the

317. *Id.* at 617.
318. *Id.*
319. *Id.* at 618.
320. *Id.* (Sullivan, J., dissenting).
321. Snowberger v. State, 938 N.E.2d 294 (Ind. Ct. App. 2010).
322. *Id.* at 298.
323. *Id.* at 297-98.
324. 959 N.E.2d 828 (Ind. Ct. App. 2011).
325. *Id.* at 830-31.
326. *Id.* at 830.
327. *Id.* at 831 (Crone J., dissenting).
328. *Id.*

Indiana Supreme Court has generally been receptive to many claims presented by criminal defendants in non-capital cases.[329] This survey period included relief for defendants in the sentencing realm and a rare reversal based on insanity in a 3-2 opinion, but defendants did not succeed in most of the supreme court cases summarized above.[330]

For the first time in over a decade, the membership of the Indiana Supreme Court changed in 2010, which could mean a shift in some of its jurisprudence. Justice David, who replaced Justice Boehm, has been a swing vote in some of the criminal cases summarized above. He has largely gone along with the majority in reducing sentences and joined Justice Sullivan and Justice Rucker over a strongly worded dissent by Chief Justice Shepard in an insanity defense case. But he also authored the court's 3-2 opinion in *Barnes*, which included broad language that led to a strong public reaction regarding the right to resist unlawful entry into a home by police. The most glaring example of the difference a new justice can make comes from *Hopper v. State*,[331] which was summarized in last year's survey and required trial courts to provide an advisement of the specific risks of waiving counsel before pleading guilty.[332] That 3-2 opinion was authored by Justice Boehm over an impassioned dissent by Chief Justice Shepard, who was joined by Justice Dickson.[333] The Attorney General sought rehearing, which was granted and resulted in a 3-2 opinion authored by Chief Justice Shepard and joined by Justice David.[334] The dissent aptly noted the rehearing opinion "entertains and effectively grants the State's petition even though the State's claim is that this [c]ourt's original opinion was wrongly decided . . . making essentially the same arguments it made before."[335]

Shortly after the survey period ended, Chief Justice Shepard announced his retirement, effective March 2012. Then, in April 2012, Justice Sullivan announced his retirement. One might expect a further shift in approach and perspective in cases summarized in next year's survey, especially without the Chief Justice's leadership in the realm of appellate sentence review.

---

329. In capital cases the supreme court has often divided on 3-2 lines in rejecting claims. *See generally* Joel M. Schumm & Paul L. Jefferson, *Tribute to Justice Theodore R. Boehm*, 44 IND. L. REV. 347, 350 n.30 (2011).

330. Of the seventy-six criminal or civil opinions issued by the Indiana Supreme Court during the survey period, *Nicoson* was one of only two that divided along so-called partisan lines with the three justice appointed by Republican governors (Shepard, Dickson, and David) in the majority and the two appointed by Democratic governors (Sullivan and Rucker) in dissent. The other was *Sloan v. State*, 947 N.E.2d 917 (Ind. 2011), where the majority held the statute of limitation for criminal offenses is tolled when concealment is established "until a prosecuting authority becomes aware or should have become aware of sufficient evidence to charge the defendant." *Id.* at 919.

331. 934 N.E.2d 1086 (Ind. 2010), *aff'd on reh'g*, 957 N.E.2d 613 (Ind. 2011).

332. Schumm, *2010 Recent Developments*, *supra* note 26, at 1150-51.

333. *Id.*

334. *Hopper*, 957 N.E.2d 613.

335. *Id.* at 624 (Rucker, J., dissenting).

2010-2011 ENVIRONMENTAL LAW SURVEY

FREEDOM S.N. SMITH*
SETH M. THOMAS**
JENNIFER ANDRES***
VICTORIA CALHOON****
SARAH MURRAY*****

INTRODUCTION[1]

Here, we survey the federal and Indiana court decisions decided between October 1, 2010 and September 30, 2011 that are most likely to affect the Indiana environmental law practitioner.[2]

---

* Associate, Ice Miller LLP, Indianapolis. B.A., *cum laude*, 2001, DePauw University, Greencastle, Indiana; J.D., *cum laude*, 2004, Indiana University Mauer School of Law.

** Associate, Ice Miller LLP, Indianapolis. B.S., *summa cum laude*, 2001, Indiana University; J.D., *summa cum laude*, 2005, Indiana University Robert H. McKinney School of Law.

*** Associate, Ice Miller LLP, Indianapolis. B.S., 1996, Indiana University; J.D., 2003, Indiana University Robert H. McKinney School of Law.

**** Associate, Ice Miller LLP, Indianapolis. B.A., 2001 Indiana University; J.D., *cum laude*, 2009, Indiana University Robert H. McKinney School of Law.

***** Associate, Ice Miller LLP, Indianapolis. B.A., 2008, Indiana University; J.D., 2011, Washington University—St. Louis School of Law.

1. All opinions expressed in this article are solely those of its authors, and should not be construed as opinions of Ice Miller LLP or any other person or entity.

2. Additional decisions, that because of space constraints could not be addressed here but that may nonetheless be of interest, include: *Huber v. New Jersey Department of Environmental Protection*, 131 S. Ct. 1308 (2011) (denying writ of certiorari in New Jersey appellate court decision upholding a warrantless search of residential backyard with wetlands, noting that denial of certiorari was appropriate because of procedural posture of case and not because of an agreement with the appellate court's holding); *Oceana, Inc. v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011) (holding that National Marine Fisheries Service did not sufficiently establish standardized bycatch reporting methodology); *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011) (holding that petitions challenging Department of Energy's attempt to withdraw application to license Yucca Mountain permanent nuclear waste repository were not ripe and policy announcement was not final agency action); *Sierra Club v. Jackson*, 648 F.3d 848 (D.C. Cir. 2011) (holding that discretionary EPA decision issuing permits for construction of major source facilities was not subject to judicial review); *United States v. Phillips*, 645 F.3d 859 (7th Cir. 2011) (holding that indictment of apartment building owner for removing and disposal of asbestos was sufficient); *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963 (D.C. Cir. 2011) (affirming agency approval of license renewal of hydroelectric project); *Village of Barrington v. Surface Transportation Board*, 636 F.3d 650 (D.C. Cir. 2011) (holding that Surface Transportation Board had authority to impose environmental conditions when approving "minor" railroad mergers and that agency complied with National Environmental Policy Act when it approved merger); *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011), *cert. granted*, 132 S. Ct. 845 (Dec. 12, 2011) (holding that Michigan resident had Article III and prudential standing to sue in action challenging Secretary of the Interior's decision

Continuing on the developments from the prior survey period, this year's survey period presented several key decisions. In Part I, we survey issues surrounding the Clean Air Act (CAA).[3] In Part II, we discuss federal cases involving CERCLA and RCRA. Part III examines cases involving water rights. In Part IV, we address other recent federal cases. Part V considers recent environmental case law arising under state law. Finally, Part VI examines recent opinions that may impact environmental insurance coverage cases under Indiana law.

I. DEVELOPMENTS IN CLEAN AIR ACT CASES

In Part I, we survey issues surrounding the Clean Air Act, including a Supreme Court rejection of private suits relating to greenhouse gas emissions, California's regulation of automobile emissions, and judicial review of EPA rulemaking on emissions. Litigation in matters involving the CAA continued to play a role in shaping environmental law, primarily at the federal level.

A. American Electric Power Co v. Connecticut*: Clean Air Act Displaced Private Cause of Action Regarding GHG Emissions*

In *American Electric Power Co. v. Connecticut*,[4] the U.S. Supreme Court accepted review of a case involving a suit against a group of electric power corporations that owned fossil-fuel fired power plants. Plaintiffs brought a negligence suit based on the theory that the defendants' operations contributed

---

to take a parcel of adjacent land into trust on behalf of Indian tribe for casino use); *Hardin v. Jackson*, 625 F.3d 739 (D.C. Cir. 2010) (affirming lower court decision granting Environmental Protection Agency's (EPA) motion to dismiss challenge of EPA pesticide registration for rice crops), *reh'g en banc denied* (Jan. 7, 2011); *United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010) (holding that expert testimony offered by the EPA was improper and without expert testimony to support an estimate of actual emissions caused by the modifications and that the EPA cannot prevail with respect to nitrogen oxide pollution); *Wickens v. Shell Oil Co.*, No. 1:05-cv-645-SEB-TAB, 2011 WL 3877102 (S.D. Ind. Aug. 31, 2011) (rejecting sanctions motion filed by formerly represented parties against their prior attorney, insurer, and environmental consultant; entering order finding Shell has satisfied the judgment against it); *Continental Insurance Co. v. NIPSCO*, Nos. 2:05-CV-156, 2:05-CV-213, 2011 WL 1322530 (N.D. Ind. Apr. 5, 2011) (rejecting request to continue stay of insurance proceeding during the pendency of further EPA investigation); *Bernstein v. Bankert*, No. 1:08-cv-0427-RLY-DML, 2011 WL 470430 (S.D. Ind. Feb. 3, 2011) (rejecting motion to reconsider summary judgment favoring defendant under the ELA based on statute of limitations and refusing to certify accrual question to the Indiana Supreme Court); *Gast v. Dragon ESP, Ltd.*, No. 1:09-cv-465-RLY-DML, 2010 WL 4702333 (S.D. Ind. Nov. 12, 2010) (dismissing plaintiffs' cause of action against local planning commission for insufficiency of process in dispute over noise and air pollution allegedly caused by manufacturing facility in rural community); *Indiana-Kentucky Electric Corp. v. Save the Valley, Inc.*, 953 N.E.2d 511 (Ind. Ct. App. 2011).

3. 42 U.S.C. §§ 7401-7671 (2006 & Supp. 2010).

4. 131 S. Ct. 2527 (2011).

to global warming and therefore the emissions substantially and unreasonably interfered with public rights, violating federal common law of interstate nuisance or, alternatively, state tort law.[5]

The Court held the CAA and the actions by the EPA in enforcing the CAA displaced the private cause of action brought by the plaintiffs.[6] In rendering its decision, the Court provided a historical perspective on the regulation of greenhouse gases by the EPA. In *Massachusetts v. EPA*[7] the Court held that the CAA authorized EPA to regulate greenhouse gas emissions.[8] As a result of that decision, the EPA began the rulemaking process, finding greenhouse gas emissions from motor vehicles caused or contributed to air pollution which could "reasonably be anticipated to endanger public health or welfare" and therefore rulemaking was appropriate.[9] While initial rulemaking focused solely on motor vehicles, EPA subsequently began developing rules requiring any new or modified major greenhouse gas emitting facility to use best available control technology to control emissions.[10]

The Court then turned its attention to the nuisance claim brought in the current action. Recognizing that it is not typical for courts to be legislative bodies establishing federal common law, the Court found that environmental protection is one area of law where it may be appropriate to do so.[11] However, where Congress has prescribed a regulatory scheme, the ability to develop federal common law judicially is displaced.[12] For example, the Court held in *Milwaukee v. Illinois*[13] that "when Congress addresses a question previously governed by a decision rested on federal common law, the need for . . . law-making by federal courts disappears."[14] The question as to displacement of federal common law rests on whether a statute speaks directly to the question at issue.[15] The Court found that the Act and EPA's rulemaking actions in regulating greenhouse gas emissions after the decision in *Massachusetts v. EPA* did displace "any federal common law right" to seek abatement of fossil fuel plant carbon dioxide emissions.[16] If EPA did not set emission limits for a particular source or pollutant, the appropriate action would be to petition rulemaking, and EPA's response to such request would then be reviewable in court.[17]

Plaintiffs attempted to argue there is no displacement until EPA actually

---

5. *Id.* at 2529.
6. *Id.* at 2537-38.
7. 549 U.S. 497 (2007).
8. *Am. Elec. Power Co.*, 131 S. Ct. at 2532 (citing *Mass.*, 549 U.S. 497).
9. *Id.* at 2533.
10. *Id.*
11. *Id.* at 2535.
12. *Id.* at 2536-37.
13. 451 U.S. 304 (1981).
14. *Am. Elec. Power Co. Inc.*, 131 S. Ct. at 2537 (quoting *Milwaukee*, 451 U.S. at 314).
15. *Id.* (citing Mobil Oil Corp v. Higginbotham, 436 U.S. 618, 625 (1978)).
16. *Id.*
17. *Id.* at 2538.

chooses to exercise its regulatory authority, or, in this scenario, until it sets standards for defendant's plants.[18] The Court held, however, that the delegation to EPA by Congress to determine whether and how to regulate carbon dioxide emissions from power plants is what displaces common law here.[19] A review of that delegated authority is subject to judicial review as a practical matter and if the plaintiffs are not satisfied with EPA's regulations, they can petition separately to have those reviewed.[20] The Court recognized that deference be given to EPA as the appropriate authority to study and develop standards, since judges lack the scientific, economic and technological resources an agency has at its disposal.[21] Because rulemaking had been delegated and undertaken by EPA in regards to carbon dioxide, the plaintiffs' request for judicial limits to be set on defendants' emissions was denied.[22] The question regarding state tort claims was remanded for further consideration by the lower court.[23]

B. Federal Preemption and Standing

Chamber of Commerce of the United States v. EPA[24] involved the California waiver from federal pre-emption prescribed under the CAA. While the CAA generally bars states from adopting their own emissions standards for new motor vehicles, there is an exception to federal preemption for a State that has adopted standards "for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966," if the standards will be, in the aggregate, "as protective of public health and welfare as applicable [f]ederal standards."[25] California was the only state that had adopted emissions prior to March 30, 1966 and was the only one granted preemption.[26] In 1977 the CAA was amended, allowing other states to adopt and enforce standards identical to California's as long as manufacturers were given two years lead time.[27]

The Chamber of Commerce ("Chamber") and the National Automobile Dealers Association (NADA) sought review of an EPA decision granting California a waiver from federal preemption under the CAA. The waiver at issue involved a request by California to EPA to allow the State to develop rules regulating greenhouse gas emissions for new motor vehicles that would preempt any federal rules that may be developed.[28] After a battle between California and EPA over whether to grant the federal preemption, a waiver ultimately was

---

18. *Id.*
19. *Id.*
20. *Id.* at 2539.
21. *Id.*
22. *Id.* at 2540.
23. *Id.*
24. 642 F.3d. 192 (D.C. Cir. 2011).
25. *Id.* at 196 (quoting 42 U.S.C. § 7543(b)(1) (2006)).
26. *Id.*
27. *Id.* (citing 42 U.S.C. § 7507 (2006)).
28. *Id.* at 197-98.

obtained, based in large part on California's demonstration that its standards were intended at least in part to address local or regional air pollution issues.[29] California then established emission standards for manufacturers to have in place for model years 2009-2011, and 2012-2016.[30] The Chamber and NADA sought review of the waiver decision and a challenge on the standards established by California for model years 2009-2011 and proposed limits for model years 2012-2016. However, as is common in litigation, during the pendency of this action the EPA and the National Highway Transportation Safety Administration adopted national standards to allow manufacturers to sell a "single light-duty national fleet" that satisfied California and federal standards for model years 2012-2016, and California agreed to use these standards as well.[31] As a result of negotiations and concessions by and between the various regulatory bodies and automobile manufacturers, the auto manufacturers agreed not to contest the California waiver or the 2012-2016 federal standards.[32] The Chamber and automobile dealers did not agree to such a restriction and brought the current challenge.

The central issue in the case at hand involved whether the Chamber and NADA had standing to sue. Neither brought the action on their own behalf, but rather sued on behalf of their members. When a petitioner claims associational standing, it is not enough to claim in general that its members have been harmed, but must name specific members that have suffered injury.[33] Although the Chamber failed to specifically name any members that were harmed, the NADA identified members that could be conferred with standing.[34]

Standing is demonstrated by showing an injury in fact that is concrete and particularized and actual and imminent, a causal connection between the injury and the conduct complained of, and that the injury is likely to be redressed by a favorable decisions.[35] In regards to the first element concerning injury in fact, the injury alleged by the dealers was based on a potential future injury rather than actual, and in order to prevail on a future claim the injury must be certainly impending to constitute an injury in fact.[36] Also, because the dealers represented by NADA are not the direct object of the government action (manufacturers are), they have a higher burden of proof to demonstrate causation and redressability of the injury alleged.[37]

In regards to the claims for the 2009-2011 standards, the NADA dealers alleged the regulations could impose a restriction on the ability of manufacturers to sell cars in certain areas if the standards could not be met in the design of the car. However, the court found the evidence presented to support this claim was

---

29. *Id.*
30. *Id.*
31. *Id.* at 198.
32. *Id.*
33. *Id.* at 199.
34. *Id.*
35. *Id.* at 200.
36. *Id.*
37. *Id.* at 201.

too speculative and no actual injury or certainly imminent danger was demonstrated.[38] The plaintiffs also argued the possibility of manufacturers mix-shifting the car types sent to different states would impact the ability to meet consumer demand and also may increase the prices of automobiles.[39] The court, however, was not convinced this was "substantially probable" to occur and did not find it supportive of an injury claim.[40]

The standing analysis for NADA members did not improve for model years 2012-2016. Although NADA attempted to argue the regulations could pose an undue burden on manufacturers' ability to produce cars meeting the standards, the court found that manufacturers would have difficulty proving an economic burden argument in light of fact they have corporate mission statements concerning a commitment to improving fuel economy and emissions.[41] Furthermore, because EPA set a national standard for model years 2012-2016, the other issues are moot because manufacturers will need to meet the standards for cars sold anywhere in the United States.[42] Thus, the issue of granting a waiver to California turned out to be inconsequential.[43] NADA attempted to argue that their members could still be harmed more than manufacturers in other states because they could face enforcement from EPA and California and that since the California regulations had not yet been amended to reflect the national standards, the members could still be subject to the California standards if the federal standards were invalidated. The NADA also expressed concern that California might not actually follow the national standard.[44] Again, the court felt these arguments were too speculative in nature to give rise to standing for NADA.[45] And while NADA also requested the EPA decision to grant the waiver to California be vacated in light of the federal standards, the court declined to do so, arguing an avenue exists for challenging standards promulgated by EPA and admonishing the NADA that their claims again would be more appropriate if brought by manufacturers themselves rather than dealers since this is the direct target of the regulations.[46]

C. Challenge to EPA Rulemaking Procedures Under MACT

Medical Waste Institute and Energy Recovery Council v. EPA[47] involved a challenge to EPA's resetting emission control performance standard applicable to hospital/medical/infectious waste incinerators (HMIWI). By way of general

38. *Id.* at 202.
39. *Id.* at 203.
40. *Id.*
41. *Id.* at 205.
42. *Id.* at 205-06.
43. *Id.*
44. *Id.* at 206-09.
45. *Id.* at 209.
46. *Id*. at 211.
47. 645 F.3d.420 (D.C. Cir. 2011).

background, the CAA directs EPA to set "required levels of emissions reductions for nine listed air pollutants" and prescribes the factors to consider in establishing such standards.[48] The level of emission controls stated by EPA under this provision is typically referred to as a maximum achievable control technology, or MACT standard.[49] EPA is directed to establish MACT floors, i.e., minimum levels of stringency for meeting the standards, with an allowance to set more stringent standards if needed, and to review and revise them every five years.[50]

The plaintiffs alleged that the data used by EPA in establishing the MACT standard for HMIWI was deficient, that the "pollutant-by-pollutant" approach in determining target emission levels was impermissible, and that the EPA's decision to remove the startup, shutdown, malfunction (SSM) exemption from the standards was arbitrary.[51] EPA responded, arguing that the Court did not have authority to review the last two issues and that the data set used by EPA in setting the standards was justified.[52]

EPA's first attempt at setting the HMIWI MACT standards began in 1997 and was challenged and remanded for further consideration and explanation of how the EPA developed the standards.[53] After several more attempts at issuing proposed rules and refining its approach for calculating the MACT floor for HMIWI, EPA issued a final rule in 2009.[54] The plaintiffs challenged the data relied on by EPA in setting the MACT standard in final rule. They claimed the data set used by EPA was flawed data since it relied on calculations for data obtained after a number of HMIWI shut down in response to the first rulemaking attempt which skewed the emission results, and also on the fact that the original proposed rule was remanded and not vacated; so EPA should not have used a new data set but instead used the original data which included even those facilities that had been closed.[55] In turn, EPA argued it was not precluded from resetting the MACT floors to correct data errors and the court agreed, finding that although the time gap between remand and final rule was long, nothing prevented EPA from looking at additional data in setting the MACT floor in the final rule.[56] And the fact the original proposed rule was remanded rather than vacated was not to be seen as an affirmation by the court of the data used by EPA originally.[57]

Plaintiffs also disagreed with EPA's decision to set a pollutant by pollutant standard, but the court found this argument was time-barred since the pollutant by pollutant regulatory approach was used in the first proposed rule and the

---

48. *Id.* (citing 42 U.S.C. § 7429 (2006)).
49. *Id.* at 423.
50. *Id.*
51. *Id.* at 422.
52. *Id.*
53. *Id.* at 423.
54. *Id.* at 424.
55. *Id.* at 424-25.
56. *Id.* at 425.
57. *Id.*

plaintiffs failed to challenge it then.[58] Plaintiffs also challenged EPA's removal of the SSM exemption from the final rule. The SSM exemption was in place in the original proposed rule; but because the EPA had received judicial directive to remove the SSM exemption from other standards, it removed the SSM from the final HMIWI MACT standard as well.[59] Plaintiffs argued that because the exemption was in the proposed rules but taken out of the final rule they did not have an opportunity object during the comment period.[60] However, the court found plaintiffs could have filed a motion for reconsideration to include their challenge to the SSM exemption removal and their failure to do so resulted in the waiver of that objection.[61]

II. DEVELOPMENTS IN FEDERAL REGULATION OF RCRA AND CERCLA

This year, several key opinions were rendered involving the Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response Compensation and Liability Act (CERCLA). The Seventh Circuit discussed the requirements for granting consent decrees and held that a RCRA citizen suit could proceed to the extent that it went beyond the scope of a prior IDEM action. The Northern District of Indiana also addressed the requirements for granting consent decrees, allowing a CERCLA action to proceed even though the accompanying ELA claim was precluded, holding that an administratively dissolved corporation that had not published notice of its dissolution could not avail itself of the statute of limitations, and finding that joint and several liability was inappropriate in a CERCLA action and apportioned liability instead.

A. Two-Year Statute of Limitations Did not Protect Administratively Dissolved Corporation Who Did not Properly Dissolve and Notify Creditors: United States v. ARG Corp.

In *United States v. ARG Corp.*,[62] the United States sued ARG for contribution under CERCLA. ARG was an Indiana corporation that owned a 440,000 square foot industrial site located in South Bend, Indiana.[63] In October 2006, ARG sold its site to the South Bend Redevelopment Commission (SBRC).[64] The SBRC soon suspected that the property might be contaminated and contacted the EPA.[65] The EPA investigated and determined that "the site presented an imminent danger to the public health, welfare, and the environment."[66] The EPA ordered ARG to remedy the contamination, and the government subsequently spent over $800,000

58. *Id.* at 426-27.
59. *Id.* at 427.
60. *Id.* at 428.
61. *Id.*
62. No. 3:10-CV-311, 2011 WL 338818 (N.D. Ind. Jan. 31, 2011).
63. *Id.* at *1.
64. *Id.*
65. *Id.*
66. *Id.*

in removing hazardous substances from the property.[67]

In 2008, ARG was administratively dissolved by the State of Indiana.[68] In July 2010, the United States filed a CERCLA action against ARG for reimbursement of the costs incurred in addressing the hazardous conditions at the site. ARG filed a motion to dismiss, claiming that the United States' complaint was filed past the two-year statute of limitations applicable to voluntarily dissolved corporations.[69]

The court began its analysis by examining administrative dissolution.[70] The court noted that administrative dissolution does not grant a corporation immunity from suit or absolute protection from its creditors.[71] An administratively dissolved corporation may not conduct any business except that which is necessary to "'wind up and liquidate its business and affairs . . . and notify claimants.'"[72] The court noted that the language of the voluntary dissolution statute is referenced in Indiana's administrative dissolution statute and thus an administratively dissolved corporation might be able to notify their creditors of their dissolution and cut off those claims.[73] Despite the fact that ARG had never followed any of the notice provisions, it sought to obtain the protections of the two-year limitation applicable to voluntarily dissolved corporations.[74]

The court agreed with the EPA that the two-year statute of limitations applicable to voluntarily dissolved corporations could not apply to ARG.[75] The court found that notice was necessary to trigger the statute of limitations based on a plain reading of the corporate dissolution statute.[76] The court, in explaining its holding, cited favorably to the Southern District of Indiana's decision in *Bernstein v. Bankert*,[77] a case which also rejected application of the two-year statute of limitations to an administratively dissolved corporation.[78] Thus, ARG's motion to dismiss was denied.[79]

---

67. *Id.*

68. *Id.*

69. *Id.*; *see also* IND. CODE § 23-1-45-7 (2011).

70. *ARG Corp.*, 2011 WL 338818, at *2.

71. *Id.*

72. *Id.* (quoting IND. CODE § 23-1-45-7) (alteration in original).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at *3.

77. 698 F. Supp. 2d 1042 (S.D. Ind. 2010).

78. *ARG Corp.*, 2011 WL 338818, at *3 (quoting *Bernstein*, 698 F. Supp. 2d at 1052-53).

79. *Id.* at *3-4. A later decision in the same case was rendered in *United States v. ARG Corp.*, No. 3:10-CV-311, 2011 WL 3422829 (N.D. Ind. Aug. 4, 2011). There, ARG filed a third-party complaint against the City of South Bend, the party to whom ARG sold the contaminated property, alleging that the city was liable for cleanup costs under its purchase and sale contract. *Id.* at *1. Because the contract stated that "[t]he Seller shall remain solely financially responsible for the Remediation Activities arising from the Seller's ownership, use or operation of the property prior to the Closing Date," the court granted the City's motion to dismiss. *Id.* at *2-3.

B. Requirements for Granting Consent Decrees: United States v. George A. Whiting Paper Co. *and* United States v. Western Reman Industrial Inc.

In *United States v. George A. Whiting Paper Co.*,[80] the United States and the State of Wisconsin brought a CERCLA action in 2009 against eleven potentially responsible parties ("PRPs") for contamination of the Fox River in Wisconsin.[81] The governments subsequently entered into a *de minimis* consent decree with the eleven defendants because it had determined that each of the *de minimis* defendants were responsible for discharging no more than one hundred kilograms of Polychlorinated biphenyls ("PCBs") into the Fox River.[82] Appleton Papers Inc. and NCR Corporation, two of several PRPs that were currently paying to clean up the Fox River in compliance with a 2007 EPA order, intervened, arguing that the proposed settlements underestimated the *de minimis* defendants' contributions to the contamination.[83] The district court granted the settlement over the intervenors' opposition.[84] The governments then moved to add a twelfth *de minimis* defendant, which the district granted.[85] Appleton and NCR appealed.[86]

The court noted that it was "constrained by a double dose of deference" because the trial court must defer to the "expertise of the agency and to the federal policy encouraging settlement," and the court of appeals reviewed the lower court's decision only for an abuse of discretion.[87] In reviewing a consent decree, the district court must approve it if it is "reasonable, consistent with CERCLA's goals, and substantively and procedurally fair."[88] Appleton and NCR challenged the substantive fairness of the consent decree.[89]

Appleton and NCR first argued that the district court had no rational basis for concluding that the consent decrees were substantively fair.[90] The Seventh Circuit disagreed, holding that "[a] consent decree is substantively fair if its terms are based on comparative fault."[91] Moreover, comparative fault meets the test for substantive fairness unless it is "arbitrary, capricious, and devoid of a rational

---

80. 644 F.3d 368 (7th Cir. 2011).

81. *Id.* at 371.

82. *Id.* at 371-72. The court also determined that the total amount of PCBs that had been discharged into the Fox River was approximately 230,000 kilograms. *Id.* at 372.

83. *Id.* at 371-72.

84. *Id.* at 371.

85. *Id.*

86. *Id.* at 372.

87. *Id.* (citations omitted).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 372-73 (citing *In re* Tutu Water Wells CERCLA Litig., 326 F.3d 201, 207 (3d Cir. 2003); United States v. Cannons Eng'g Corp., 889 F.2d 79, 87 (1st Cir. 1990)).

basis."[92] The court held that there was adequate support in the record to determine that the district court had a rational basis for granting the consent decree.[93]

In *United States v. Western Reman Industrial Inc.*,[94] the United States brought a CERCLA action against Western Reman Industrial, Inc. ("Western Reman") for contamination of a site that Western Reman operated from July 1996 to October 2004.[95] Western Reman subsequently entered into a consent decree with the court, under which Western Reman would pay $300,000 to the government in reimbursement for costs associated with the cleanup and agreed not to sue the government regarding response costs incurred.[96] The consent decree, in turn, protected Western Reman from "contribution actions or third-party claims concerning response actions and response costs incurred under the consent decree."[97] The government submitted the proposed consent decree with the court for approval.[98]

Like the court in *George A. Whiting Paper Co.*, the *Western Reman* court noted the strong public policy interest in encouraging settlement without litigation and went on to discuss the three factors to be considered when evaluating whether to approve a consent decree settlement: "(1) fairness, both procedural and substantive; (2) reasonableness, and (3) consistency with applicable law."[99] The court then evaluated each factor in turn.[100]

To be procedurally fair, a consent decree must have been negotiated at arms-length and in an open fashion.[101] The court found that the procedural fairness requirement had been met because the government affirmed that "it result[ed] from several years of arms-length negotiations"[102] and was published in the Federal Register for public comments and none were received.[103] Furthermore, no objections had been received by the court, and there was no evidence of bad faith by the parties.[104] As in *George A. Whiting Paper Co.*, the court stated that the substantive fairness requirement was met if the terms of the consent decree are based on comparative fault.[105] Because each party accepted some measure of

---

92. *Id.* at 373 (quoting *Cannons Eng'g Corp.*, 899 F.2d at 87) (internal quotation marks omitted).

93. *Id.*

94. No. 3:11-CV-0008-PPS-CAN, 2011 WL 2117006 (N.D. Ind. May 27, 2011).

95. *Id.* at *1.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at *2.

100. *Id.* at *2-4.

101. *Id.* at *2 (citing *In re* Tutu Water Wells CERCLA Litig., 326 F.3d 201, 207 (3d Cir. 2003)).

102. *Id.* (internal quotation marks omitted).

103. *Id.*

104. *Id.*

105. *Id.* at *3.

responsibility under the consent decree, Western Reman's payment and the government's continuing obligation to remediate the site, the court determined that it met the requirements of substantive fairness.[106]

The court then turned to the reasonableness analysis.[107] Factors relevant to this determination included:

> [The consent decree's] likely efficaciousness as a vehicle for cleansing the environment; the extent to which it satisfactorily compensates the public for actual and anticipated costs of remedial and response measures; the extent to which approval of it serves the public interest; and the availability and likelihood of alternatives to the consent decree.[108]

The court found that the consent decree met this requirement.[109] It served the public interest because the government recovered a portion of its cleanup costs and protects the public health and environment.[110] Because no objections had been received after the opportunity for public comment, the court reasoned that the consent decree further served the public interest.[111] The consent decree also provided a cost-efficient alternative to litigation, the likely next step should the consent decree be denied.[112]

The court finally discussed the consent decree's consistency with CERCLA, the applicable law, and "the extent to which it comports with the goals of Congress."[113] The court noted that the purpose of CERCLA is "(1) to 'abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites,' and (2) to 'shift the costs of cleanup to the parties responsible for the contamination.'"[114] The consent decree met both of these requirements as it helped ensure the continued remediation of the site through Western Reman's payment and the government's cleanup efforts, and it "shift[ed] a portion of the cost to Western Reman that is commensurate with its share of responsibility for the contamination."[115] Thus, the consent decree was approved.[116]

---

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at *4 (quoting Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 827 (7th Cir. 2007)).

115. *Id.*

116. *Id.*

C. CERCLA Action Could Proceed Despite Preclusion of ELA Claim

In *Valbruna Slater Steel Corp. v. Joslyn Manufacturing Co.*,[117] the defendant Joslyn Manufacturing Co. owned and operated a steel mill in Fort Wayne, Indiana from 1928 until 1981.[118] Joslyn sold the site to Slater Steels Corporation in February 1981.[119] Slater attempted several times to seek indemnification from Joslyn for the contamination spanning from 1988 until 1999, but Joslyn denied these requests.[120] Slater filed suit in Indiana state court in July of 2000 bringing two claims of contractual indemnification and another Environmental Legal Action (ELA) claim pursuant to Indiana Code section 13-30-9-1.[121] The trial court dismissed Slater's ELA claim.[122]

In June 2003, Slater filed for bankruptcy, and Valbruna Slater Stainless Inc. ("Valbruna") purchased the site.[123] The purchase agreement for the site noted the existence of the lawsuit and gave Valbruna the "'right to seek to become a party to the [l]awsuit.'"[124] The bankruptcy court approved the purchase and found that Valbruna "was not a successor in interest to Slater except as detailed in the [purchase agreement], and therefore had no other liability for Slater's acts, omissions, or liabilities."[125]

After the bankruptcy order, Joslyn moved to dismiss the Slater suit for failure to prosecute, and the court dismissed it with prejudice.[126] Valbruna brought a lawsuit in the Northern District of Indiana in February 2010 under CERCLA and Indiana's ELA to recover cleanup costs from Joslyn and also sought a declaratory judgment stating that Joslyn would be liable for all future costs related to the contamination.[127] Joslyn then filed a motion to dismiss under the doctrine of res judicata, or claim preclusion, asserting that Valbruna's claims were barred by the prior suit Slater had filed.[128] The court concluded it had jurisdiction over this claim because the CERCLA and declaratory judgment claims raised federal questions and the ELA claim "derive[d] from the same nucleus of operative fact as the CERCLA claim."[129]

The discussion then turned to the requirements of res judicata in Indiana.[130] The court listed the four requirements to find that a claim is precluded:

---

117. 804 F. Supp. 2d 877 (N.D. Ind. 2011).
118. *Id.* at 879.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 879-80.
124. *Id.* at 880 (quoting the purchase agreement).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 880-81.
129. *Id.* at 880.
130. *Id.* at 881.

> (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies.[131]

The court found that Valbruna's CERCLA claim was permitted because the state court could not have adjudicated contribution rights under CERCLA.[132] Because CERCLA claims are within the exclusive jurisdiction of the federal courts, the state court was not a court of competent jurisdiction to decide that claim.[133]

The court, however, concluded that the ELA claim was precluded by the prior *Slater* state court suit.[134] The state court was a court of competent jurisdiction over this state law claim.[135] The court determined that the state court's dismissal of the ELA claim for "failure to state a claim" was a dismissal on the merits.[136] The ELA claim brought by Valbruna was identical to that brought by Slater, so the matter was, or could have been decided, in the prior suit.[137] Finally, because Valbruna had an opportunity to join the Slater suit, but failed to do so, Valbruna was in privity with Slater.[138] For these reasons, Valbruna could not now pursue an ELA claim in the federal suit.[139]

D. Liability to be Apportioned in a CERCLA Action: City of Gary v. Shafer

In *City of Gary v. Shafer*,[140] the city filed CERCLA and ELA actions against a prior owner of a former auto salvage site.[141] In 2009, the parties agreed to bifurcate the issues of liability and damages in separate trials.[142] The court, in the trial on liability, declared that both the city and the defendant, Paul's Auto Yard, were liable for contamination.[143] The current case, decided on August 5, 2011, was limited to allocation of damages as to Paul's Auto Yard.[144] The court

---

131. *Id.* (quoting Hermitage Ins. Co. v. Salts, 698 N.E.2d 856, 859 (Ind. Ct. App. 1998)).

132. *Id.* at 881-82.

133. *Id.*

134. *Id.*

135. *Id.* at 883-84.

136. *Id.* at 884.

137. *Id.*

138. *Id.* at 885-86.

139. *Id.*

140. No. 2:07-CV-56-PRC, 2011 WL 3439239 (N.D. Ind. Aug. 5, 2011).

141. For a more detailed discussion of the facts, including the initial trial on liability, see Seth M. Thomas et al., *2009-2010 Environmental Law Survey*, 44 IND. L. REV. 1165, 1177-79 (2011).

142. *Shafer*, 2011 WL 3439239, at *1.

143. City of Gary v. Shafer, 683 F. Supp. 2d 836, 860-62 (N.D. Ind. 2010).

144. *Shafer*, 2011 WL 3439239, at *1.

previously found that Paul's Auto Yard did only *de minimus* moving of soil at the site.[145] The substantial contamination of the site occurred from sometime in the 1950s until 1993.[146] Paul's Auto Yard's *de minimus* moving of contaminated soil occurred only over a one to two year time period, 1991 until sometime in 1993.[147] The court also found that "[i]n contrast, substantial contamination of the soil was caused by LeRoy Shafer over a time period of decades, by the City of Gary over a time period of decades, and by Waste Management during or after 1993 and continuing over an unspecified period of time."[148]

Ultimately, the court determined that, at most, Paul's Auto Yard caused contamination during approximately 3.95% of the total estimated time, and based on their experts' opinions, Paul's Auto Yard's proportionate share in the contamination of the soil "constituted no more than 0.24% of the whole of the contamination."[149] Noting that "CERCLA provides an express right of contribution among liable parties, and provides that the 'court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate[,]'"[150] the court then found that joint and several liability was inappropriate in this case and decided to apportion liability.[151] Accordingly, Paul's Auto Yard was found to be liable for 0.24% of the total costs.[152]

E. RCRA Citizen Suit Not Barred by Prior IDEM Action

In *Adkins v. VIM Recycling, Inc.*,[153] the defendant VIM Recycling, Inc. (VIM) operated a solid waste dump in Elkhart, Indiana.[154] Plaintiffs were residents who lived near the Elkhart dump.[155] In 1999, the Indiana Department of Environmental Management ("IDEM") ordered VIM to remove waste piles and stop outdoor grinding of solid waste at their location in Goshen, Indiana.[156] Instead of complying with IDEM at its Goshen facility, VIM moved its operations to Elkhart, Indiana. In 2005, IDEM inspected the Elkhart facility and found several violations.[157] IDEM and VIM entered into an agreed order in 2007, which in part focused on VIM's disposal and treatment of "C" grade waste.[158]

---

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at *2.
149. *Id.*
150. *Id.* at *3 (quoting 42 U.S.C. § 9613(f) (2006)).
151. *Id.*
152. *Id.*
153. 644 F.3d 483 (7th Cir. 2011).
154. *Id.* at 487.
155. *Id.* at 488.
156. *Id.*
157. *Id.*
158. *Id.*

However, VIM did not comply with the agreed order, and in October 2008, IDEM filed suit in state court to enforce the order.[159]

The Elkhart residents sought to intervene in the first IDEM lawsuit with the goal of expanding the scope of the proposed order.[160] VIM opposed the intervenors' claims and argued that they should be limited to the "scope of the first IDEM lawsuit as it was originally filed."[161] The state court, agreeing with VIM, instructed VIM to propose a new, more narrow intervention.[162] The intervenors, in turn, voluntarily withdrew their claims that fell beyond the scope of IDEM's suit, sent a Notice of Intent to File a Complaint under RCRA to VIM, IDEM, and the EPA, and when neither IDEM nor the EPA filed a lawsuit to assert the plaintiffs' claims, filed an action in the Northern District of Indiana under the RCRA citizen-suit provision.[163]

The plaintiffs' suit sought relief under both the "violation" and "endangerment" provisions of RCRA and additionally asserted common law claims of nuisance, trespass, negligence, negligence per se, and gross negligence.[164] Additionally, it went further than IDEM's claims and included "A" and "B" grade waste in addition to "C" grade waste.[165] After further inspections of the Elkhart site resulted in additional IDEM violations, IDEM filed a second suit in Indiana state court against VIM.[166] VIM then moved to dismiss the federal lawsuit, arguing that the federal court did not have jurisdiction over the RCRA claims because IDEM was addressing those same claims in state court.[167] The district court granted VIM's motion and declined to exercise supplemental jurisdiction over the state law claims, and the plaintiffs subsequently appealed to the Seventh Circuit.[168]

---

159. *Id.*

160. *Id.* The intervenors "sought injunctive relief that would have required VIM to cease *all* operations pertaining to the illegal disposal of *all* solid waste at the VIM site (not just "C" grade waste), and to remediate the facility to its condition before VIM took it over. The intervenors also sought damages through common law claims of nuisance, negligence, and trespass." *Id.*

161. *Id.* at 489.

162. *Id.*

163. *Id.*

164. *Id.* (citing 42 U.S.C. §§ 6972(a)(1)(A)-(B) (2006)).

165. *Id.* at 490. The complaint alleged that

> VIM was consolidating, disposing of, and causing combustion of wood and engineered wood waste . . . , construction and demolition waste, and "other solid wastes" without cover; was operating a non-compliant solid waste disposal facility; was "open dumping" solid wastes at the site; and was "stor[ing], contain[ing], processing and/or dispos[ing] of solid waste at the VIM site in a manner that has and continues to: create a fire hazard, attract vectors, pollute air and water resources, and cause other contamination."

Id. (citing the plaintiffs' complaint).

166. *Id.* The second suit dealt primarily with the handling of "B" grade waste.

167. *Id.*

168. *Id.* The district court also found that it should abstain from exercising jurisdiction over all RCRA claims under the doctrines established in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943),

After establishing that it had jurisdiction over the plaintiffs' claims, the court began its analysis with the second IDEM suit.[169] The court, looking at the plain language of RCRA, found that the second IDEM suit did not bar the plaintiffs' citizen suit.[170] Because the second IDEM suit was filed after the citizen suit, the citizen suit could proceed.[171] The court then turned to the first IDEM suit.[172] Looking again at the language of 42 U.S.C. § 6972(b)(1)(B), "the earlier government action bars this suit if it was a suit 'to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order,' *i.e.*, if it sought to require compliance with the same requirements that the plaintiffs seek to enforce in this suit."[173] The court concluded that to the extent the citizen suit exceeded the scope of IDEM's first suit, it could proceed.[174] However, the overlapping issues primarily dealing with "C" grade waste, were dismissed.[175]

VIM, argued that IDEM's grades of waste were not different but should fall under the same category of "solid waste" and thus, IDEM's suit and the plaintiffs' citizen suit completely overlapped.[176] The court rejected this argument for three reasons.[177] First, it looked to VIM's opposition to the plaintiffs' intervention in the prior suit, reasoning that had the plaintiffs' claims in their intervention

> truly overlapped IDEM's allegations in their entirety, VIM's objection (and the court's ruling) would have been moot. Having convinced the state court to limit the case to IDEM's narrower "C" grade waste allegations, VIM cannot be permitted to take the opposite position in federal court and claim that there is no difference between the cases.[178]

Furthermore, the court noted that "A" grade waste is not regulated under Indiana state law but is under RCRA, and thus, IDEM's suit and the citizen suit could not have brought claims that completely overlapped.[179] Finally, IDEM's second suit dealt primarily with "B" grade waste, and the court reasoned that the second suit would not have been necessary had the first suit been broad enough to cover "B"

---

and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). *Adkins*, 644 F.3d at 490.

169. *Id.* at 492.

170. *Id.* at 493.

171. *Id.* Under 42 U.S.C. § 6972(b)(1)(B), "a citizen's violation action may not 'be commenced' if the EPA or state agency 'has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State . . . .' The statute prohibits only *commencement* of a citizen suit, not the continued prosecution of such an action that has already been filed." *Id.* (alterations in original).

172. *Id.* at 494.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 494-95.

177. *Id.* at 495.

178. *Id.*

179. *Id.*

grade waste as well.[180] Accordingly, the court found that to the extent that the citizen suit brought claims beyond those of the first IDEM suit, the plaintiffs could proceed.[181]

III. DEVELOPMENTS IN THE LAW RELATED TO WATER RIGHTS

During the survey period, the Supreme Court of the United States, the U.S. Court of Appeals for the Seventh Circuit, and the federal district courts within the Seventh Circuit decided, or indicated that they will decide, cases related to the Clean Water Act (CWA)[182] that touch upon a range of issues including property rights and the ability to challenge an agency's compliance order, facts that demonstrate injury for standing purposes, the Environmental Protection Agency's authority regarding state additions to certain national permits, the requirements for proving criminal "tampering," and a third-party's rights regarding the contents of a consent decree against a municipality for CWA violations.

A. Sackett v. EPA*: Supreme Court to Examine Property Rights Under the CWA Related to EPA Wetlands Determination*

During the survey period, the Supreme Court agreed to hear oral argument in *Sackett v. EPA*,[183] an important property rights case, involving a wetlands regulation dispute under the CWA and EPA's enforcement of this statute. The *Sackett* case involves the question whether a property owner—here, the Sacketts—can obtain judicial review of an EPA wetlands order even though the EPA itself has not brought its own lawsuit.[184] The Sacketts owned a lot in a platted residential subdivision upon which they planned to build a home.[185] Work was interrupted by EPA, who informed the Sacketts the property was a federally protected "wetlands."[186] The Sacketts received an Administrative Compliance Order (ACO)[187] from EPA stating they had violated the CWA by filling a wetland without a federal permit.[188] The ACO ordered the Sacketts to commence

---

180. *Id.*

181. *Id.* The court also considered in depth and rejected the application of the *Colorado River* and *Burford* abstention doctrines. *See id.* at 496-507.

182. 33 U.S.C. §§ 1251-1387 (2006 & Supp. 2010).

183. 622 F.3d 1139 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012).

184. *Id.* at 1141.

185. *Id.*

186. *Id.*

187. A compliance order "is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." *Id.* (quoting S. Pines Assocs. by Goldmeier v. United States, 912 F.2d 713, 715 (4th Cir.1990)). EPA issued the ACO pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a). Sackett v. U.S. Envtl. Prot. Agency, No. 08-cv-185-N-EJL, 2008 WL 3286801 at *1 (D. Idaho Aug. 7, 2008), *aff'd*, 622 F.3d 1139 (9th Cir. 2010), *rev'd*, 123 S. Ct. 1367 (2012). "EPA derives its power to issue compliance orders from 33 U.S.C. § 1319(a)(3) . . . ." *Sackett*, 622 F.3d at 1142.

188. *Sackett*, 622 F.3d at 1142.

restoration of the wetlands, which cost more than the purchase price of the land, under the threat of substantial penalties.[189] The ACO indicated that civil penalties could be up to $32,500 per day or $11,000 in administrative penalties per day for each violation.[190] However, "the civil penalties provision is committed to judicial, not agency, discretion."[191]

The Sacketts sought to challenge the ACO, believing that their land was not wetlands subject to federal regulation.[192] The EPA did not grant the Sacketts a hearing and continued to assert jurisdiction.[193] The CWA does not provide any basis for such a challenge in the absence of a civil action by the EPA.[194]

The Sacketts filed suit in federal court, claiming the ACO was "(1) arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A); (2) issued without a hearing in violation of [their] due process rights; and (3) issued on the basis of an 'any information available' standard that [was] unconstitutionally vague."[195] However, the district court and the United States Court of Appeals for the Ninth Circuit agreed with EPA that the ACO was not subject to a pre-enforcement challenge.[196] The Ninth Circuit noted that in lieu of waiting for an enforcement action, the Sacketts could have applied for a permit, and if the permit was denied, they could have challenged this permit in federal court.[197]

In agreeing to hear the case, the Supreme Court granted certiorari on two questions: 1) "[m]ay petitioners seek pre-enforcement judicial review of the [ACO] pursuant to the Administrative Procedure Act, 5 U.S.C. § 702"; and 2) "[i]f not, does petitioners' inability to seek pre-enforcement judicial review of the [ACO] violate their rights under the Due Process Clause?"[198]

After the survey period, the Supreme Court issued its opinion reversing the Ninth Circuit.[199] The Supreme Court's decision will be addressed in detail during the next survey period, but for environmental practitioners, we will highlight that the Court found that EPA's compliance order to the Sacketts was a final agency action for which the only adequate remedy was judicial review as provided by the APA, allowing the Sacketts' pre-enforcement judicial review of EPA's compliance order.[200] The Court remanded to the Ninth Circuit for further proceedings.[201]

---

189. *Id.* at 1141.
190. *Id.*
191. *Id.* at 1146 (citing 33 U.S.C. § 1319(d) (2006)).
192. *Id.* at 1141.
193. *Id.*
194. *Id.* at 1142 (citing 33 U.S.C. § 1319).
195. *Id.* at 1141.
196. *See id.* at 1141-47; *see also Sackett*, 2008 WL 3286801, at *2-3.
197. *Sackett*, 622 F.3d at 1146.
198. Sackett v. E.P.A., 131 S. Ct. 3092 (2011).
199. Sackett v. E.P.A., 132 S. Ct. 1367 (2012).
200. *Id.* at 1372-74.
201. *Id.*

B. Environmental Group May Challenge Permit Allowing Destruction of Wetlands Near State Park

In *American Bottom Conservancy v. U.S. Army Corps of Engineers*[202] the Seventh Circuit Court of Appeals held that an environmental organization, American Bottom Conservancy (the "Conservancy"),[203] alleged sufficient injury to have standing to sue the United States Army Corps of Engineers ("Corps") for improperly granting Waste Management of Illinois, Inc. (WMI) a permit to destroy wetlands located in a floodplain in southwestern Illinois called the American Bottom.[204] The American Bottom contains wetlands that provide a home for a diverse species of birds and other wildlife.[205]

In that case WMI ran a landfill in the American Bottom referred to as the "Milam Recycling and Disposal Facility" ("Milam Landfill") located near St. Louis, Missouri, and near an Illinois state park containing the second largest lake in Illinois.[206] Since the Milam landfill is filling up with waste from St. Louis, WMI sought to build another 180-acre landfill ("North Landfill") in the American Bottom on a 220-acre tract of land located between the Milam Landfill and the Illinois state park.[207] This tract contained five wetland areas, covering 26.8 acres, all of which were within a half mile of the state park.[208] This area attracted birdwatchers, some of whom were members of the Conservancy.[209] Construction of the North Landfill itself, which needed approval from Illinois Environmental Protection Agency (IEPA), did not require the destruction of wetlands.[210] However, WMI sought to remove soil from the wetlands to transport to the Milam Landfill to use to cover waste there.[211]

To destroy the wetlands, WMI needed a permit from the Corps.[212] WMI sought a permit from the Corps, as required by the CWA, to remove soil from 18.4 acres, sixty-nine percent of these wetlands to use a cover material at the

---

202. 650 F.3d 652 (7th Cir. 2011).

203. "The American Bottom Conservancy is an environmental organization that seeks to preserve the wetlands. Its members include birdwatchers and other people who enjoy seeing wildlife in the wild." *Id.* at 654.

204. *Id.* at 654-55. "'American Bottom' is a 175-square-mile floodplain of the Mississippi River in southwestern Illinois, across the river from St. Louis." *Id.* at 654.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 654-55. The court noted that if construction of the landfill would have impacted wetlands on the property, WMI would have had to apply for a broader permit from the Corps. *Id.* at 655.

211. *Id.*

212. *Id.* at 654 (citing 33 U.S.C. §§ 1311(a), 1344(a), 1362(7) (2006); 40 C.F.R. § 230.3(s)(7) (2012)).

Milam Landfill.[213] Approval would result in the transformation of the wetlands into dry "borrow pit[s]."[214] The Corps granted WMI's permit request, provided WMI create double the amount of wetlands on nearby land that it owned.[215] WMI accepted that condition.[216]

The Conservancy filed suit to challenge the Corps' permit allowing the destruction of the wetlands near the state park.[217] The district court dismissed the Conservancy's suit, holding that the Conservancy had not established standing to sue under Article III of the U.S. Constitution.[218] The Conservancy appealed.

On appeal, Seventh Circuit reversed with instructions to reinstate the suit.[219] The court noted that for standing to exist under Article III, a plaintiff "must allege, and if the allegation is contested must present evidence, that the relief he seeks will if granted avert or mitigate or compensate *him* for an injury—though not necessarily a great injury—caused or likely to be caused by the defendant."[220] The Seventh Circuit further stated that "[t]he magnitude, as distinct from the directness, of the injury is not critical to the concerns that underlie the requirement of standing; and so denying a person who derives pleasure from watching wildlife of the opportunity to watch it is a sufficient injury to confer standing."[221] The court held that "it is enough to confer standing that their pleasure is diminished even if not to the point that they abandon the site" for their bird- and wildlife-watching activities.[222] In this regard, the court noted that the Conservancy's members frequented the state park and would feel a diminution in their birdwatching and wildlife-viewing activities if the wetlands are destroyed.[223] Moreover, it would be many years before the wetlands created by

---

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 655.

218. *Id.* Article III limits the federal judicial power to "Cases" and "Controversies." *Id.* (citations omitted).

219. *Id.* at 660.

220. *Id.* at 656 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)). The court further noted that the standing doctrine was needed "to limit premature judicial interference with legislation, to prevent the federal courts from being overwhelmed by cases, and to ensure that the legal remedies of primary victims of wrongful conduct will not be usurped by persons trivially or not at all harmed by the wrong complained of." *Id.* (citations omitted).

221. *Id.* (citing Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000); *Lujan*, 504 U.S. at 562-63; Sierra Club v. Franklin Cnty. Power of Ill., LLC, 546 F.3d 918, 925-26 (7th Cir. 2008); Am. Bird Conservancy, Inc. v. FCC, 516 F.3d 1027, 1029-31 (D.C. Cir. 2008) (per curiam); Cantrell v. City of Long Beach, 241 F.3d 674, 680 (9th Cir. 2001)).

222. *Id.* at 658 (citing *Friends of the Earth, Inc.*, 528 U.S. at 183; Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972); Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 951 (7th Cir. 2000)).

223. *Id.* at 656-57. The affidavits of the Conservancy's members regarding their activities at the state park were not challenged by either WMI or the Corps. *Id.* at 657. Moreover, WMI did not submit any evidence relating to standing. *Id.*

WMI in the mitigation area would develop to a point at which they provide an equivalent wildlife habitat.[224] The court further noted that "proximity distinguishes this case" from the other standing cases.[225]

C. EPA Has No Authority to Amend or Reject Conditions in a State's Certification of a CWA Permit

The Court of Appeals for the District of Columbia recently handed down its decision in the case of *Lake Carriers' Association v. EPA*,[226] which involved a challenge by several maritime trade associations of a nationwide permit for the discharge of pollutants under the CWA[227] issued by the EPA. This particular nationwide permit[228] was to address the discharge of pollutants incidental to the normal operation of vessels.[229] The trade associations alleged several procedural challenges under the APA related to EPA's decision to incorporate conditions submitted by states to protect their own water quality into this nationwide permit.

The court explained the background of this permit, noting that shortly after the CWA was enacted, "EPA promulgated a regulation exempting incidental vessel discharges from the permitting (and therefore the certification) requirements of the [CWA]."[230] "Exempted discharges included 'sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel.'"[231] After being in force for over thirty years, the Ninth Circuit in 2008 vacated the regulation, finding that EPA did not have the authority to exempt

---

224. *Id.* at 657.

225. *Id.* (citing *Lujan*, 504 U.S. at 563-64; Havens Realty Corp. v. Coleman, 455 U.S. 363, 376–78 (1982); Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1024 (7th Cir.2006); Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 55 (1st Cir.2001)). The court specifically noted that the wildlife and wetlands at issue in this case was only a half mile from the state park. *Id.*

226. 652 F.3d 1 (D.C. Cir. 2011).

227. The Clean Water Act prohibits discharges of pollutants without a National Pollutant Discharge Elimination System (NPDES) permit. *Id.* at 3 (citing 33 U.S.C. §§ 1311, 1342 (2006 & Supp. 2010)).

228.

> EPA regulations explain that permits may be individual (covering discharges from a single source, 40 C.F.R. § 122.21), or general (covering "one or more categories or subcategories of discharges . . . within a geographic area" . . . . Each permit must set out the specific conditions necessary to ensure that the permit holder's discharge of pollution will comply with the water standards mandated by the CWA. 33 U.S.C. § 1342(a)(2).

Id.

229. *Id.*

230. *Id.* at 4.

231. *Id.*

"incidental vessel discharges."[232] The regulation was vacated shortly after.[233]

EPA later enacted a permit covering the previously exempted incidental vessel discharges.[234] This draft permit set out "all of the general EPA-mandated conditions for vessel discharges" and noted that the agency was seeking certifications from all of the states as required by the CWA.[235] During this process, several states commented that they sought differing standards to address unique, local environmental conditions.[236] EPA eventually passed the permit, with approximately one hundred state specific conditions, noting in its response to public comments that the CWA required certifications by the states in which the discharges would originate.[237] The EPA provided notice of the rule for comment, but the associations challenged the rule because the specific states conditions were also not disclosed during the comment period.[238] In particular, the associations argued:

> [1)] EPA erred in failing to provide notice and an opportunity for comment on the final [Vessel General Permit], which contained the state certification conditions; [2)] it was arbitrary and capricious for EPA to issue the permit without considering the possible ill-effects of the state certification conditions[; and 3)] EPA failed to consider the costs of compliance with state conditions in assessing the impact of the permit on small businesses. . . .[239]

In rejecting the associations' arguments, the court of appeals found that the EPA was correct when it determined it did "not have the ability to amend or reject conditions in a [state's] CWA 401 certification" and that the CWA "expressly grants States . . . the right to add conditions to federally issued NPDES permits as necessary to assure compliance with state water quality standards."[240] Consequently, the court noted that under these circumstances, "providing notice and an opportunity for comment on the state certifications would have served no

---

232. *Id.* (citing Nw. Envtl. Advocates v. Envtl. Prot. Agency, 537 F.3d 1006 (9th Cir. 2008)).

233. *Id.*

234. *Id.* at 4.

235. *Id.* For discharges into the waters of a state, the CWA provides that the states may review such permit application before issuance. *Id.* at 3-4. Furthermore, the CWA allows states to put conditions on the federal permit through the review process, also known as certification process. *Id.* (citing 33 U.S.C. § 1341). State conditions become part of the federal permit. *Id.*

236. *Id.* at 4-5.

237. *Id.*

238. *Id.* The final NPDES General Permit challenged by the associations can be found at 73 Fed. Reg. at 79,474. *Id.* "Vessels covered by the permit are required to adhere to the general provisions of the [general permit promulgated by EPA] with respect to all discharges, and are further required to adhere to any . . . certification condition imposed by a state into the waters of which the vessel is discharging pollutants." *Id.* at 5.

239. *Id.*

240. *Id.* at 10 & 11 n.11 (citations omitted).

purpose" and the court refused to "require EPA to do a futile thing."[241]

The court went on to note that:

> EPA's resolution of this matter does not leave the petitioners without recourse. If they believe that the certification conditions imposed by any particular state pose an inordinate burden on their operations, they may challenge those conditions in that state's courts. . . . If they believe that a particular state's law imposes an unconstitutional burden on interstate commerce, they may challenge that law in federal (or state) court. And if neither of these avenues proves adequate, they are free to ask Congress to amend the CWA, perhaps by reimposing the exemption for incidental vessel discharges.[242]

D. No Private Right of Action Under the CWA for Breach of Inter-Municipal Wastewater Contract

In *United States v. United Water Environmental Services Inc.*,[243] the court considered the elements of the CWA's tampering provision, and in particular, what it means to "knowingly tamper" under the CWA.[244] In that case, the IDEM issued NPDES permits[245] to the Gary Sanitary District (GSD).[246] Under those permits, GSD could discharge "treated effluent," provided the permit monitoring methods were adhered to.[247] The E. coli was at issue.[248] The permits permitted GSD to discharge effluent with "no more than 235 E. coli colonies per 100 milliliters of water."[249] To abide by the limitations, GSD needed to disinfect its effluent "on a continuous basis such that violations of the applicable bacteriological limitations for E. coli do not occur" and to monitor E. coli by taking and testing a single "grab" sample each day to measure the E. coli concentration.[250] This information should be recorded and reported on a monthly basis to IDEM.[251]

---

241. *Id.* at 10.

242. *Id.* (citations omitted).

243. No. 2:10-CR-217, 2011 WL 3751303 (N.D. Ind. Aug. 24, 2011).

244. *Id.* at *1.

245. "Under the CWA, pollutants may be discharged into the Nation's waters if the discharge is in compliance with the terms and conditions of a permit issued under the National Pollutant Discharge Elimination System ("NPDES")." *Id.* at *2 (citing 33 U.S.C. §§ 1311(a), 1342 (2006 & Supp. 2010)).

246. *Id.*

247. *Id.*

248. *Id.* at *3.

249. *Id.*

250. *Id.* (emphasis added). Grab samples are "individual samples collected over a period not exceeding [fifteen] minutes and that are representative of conditions at the time the sample is collected." *Id.*

251. *Id.* The permits required that all samples must be "representative of the volume and

The defendants, who operated and maintained GSD's treatment plant pursuant to a long-term contract, were charged with violations of the CWA in a twenty-six-count indictment.[252] The Defendants allegedly conspired to "knowingly tamper with a monitoring method required to be maintained by the Clean Water Act," and "[t]o defraud the United States Government, that is, to hamper, hinder, impede, impair, and obstruct by craft, treachery, deceit, and dishonest means the lawful and legitimate functions of the U.S. EPA in administering and enforcing federal laws and regulations."[253] The government claimed that the defendants did this by conspiring to "'tamper' with the required E. coli monitoring method by changing the levels of chlorine administered at the plant before and after taking samples for E. coli."[254] Furthermore, certain defendants were charged for twenty-five instances of tampering with a monitoring method by "knowingly tampering with a monitoring method required to be maintained under the Clean Water Act, by temporarily increasing the concentration of chlorine before taking E. coli compliance samples, and then decreasing it shortly after."[255]

The defendants attempted to have the indictment dismissed.[256] In particular, the defendants claimed that "it [was] not a crime to raise the level of chlorine added to the effluent [or] take a grab sample, [and thus] it cannot be a crime to raise the chlorine before taking the sample and lower it afterward" unless done with knowledge of wrongdoing.[257] The defendants also argued that even if true, the allegations "did not allege that the conduct at issue was undertaken with consciousness of wrongdoing, in furtherance of, or to conceal other violations."[258] Accordingly, the defendants argued that allowing the prosecution to proceed would violate the rule of lenity.[259]

In rejecting the defendants' claims, the court noted that dismissing an indictment is an "extraordinary measure."[260] The court found that such an extraordinary instance did not exist in this case because there was no ambiguity

---

nature of the monitored discharge flow and shall be taken at times which reflect the full range and concentration of effluent parameters normally expected to be present." *Id.* (citation omitted). The 2006 permit ordered that the samples "not be taken at times to avoid showing elevated levels of any parameters." *Id.* (citation omitted).

252. *Id.* at *1. The counts in the indictment were based on alleged violations of 18 U.S.C. § 371, 33 U.S.C. § 1319(c)(4) and 18 U.S.C. § 2. *Id.*

253. *Id.* (citation omitted).

254. *Id.* (emphasis omitted).

255. *Id.* (emphasis omitted).

256. *Id.*

257. *Id.* at *3.

258. *Id.*

259. *Id.* "The rule of lenity 'insists that ambiguity in criminal legislation be read against the prosecutor, lest the judiciary create, in common—law fashion, offenses that have never received legislative approbation, and about which adequate notice has not been given to those who might be ensnared.'" *Id.* at *6 (quoting United States v. Thompson, 484 F.3d 877, 881 (7th Cir.2007)).

260. *Id.* at *2.

in the CWA's tampering provision.[261] In this regard, the court noted that the tampering provision of the CWA provides that:

> [a]ny person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter [commits a violation against the United States].[262]

As such, a tampering violation occurs where: "(1) a person; (2) tampered with a monitoring method; (3) the method was required to be maintained under the CWA; and (4) the person acted knowingly."[263]

Because "tampering" was not defined in the CWA, nor were there any reported decision defining this term, "tampering" was given its ordinary meaning.[264] In this regard, the court noted that from the definitions of "tamper" found in various dictionaries, it was "clear that tampering is not an innocent event: as Defendants note, there is no such thing as innocently tampering."[265] "[F]rom the words of the statute itself, the purpose of the CWA tampering provision is clear: it is intended to prevent the corrupting of samples, and to ensure accurate, representative reporting."[266] A general definition of tamper, consistent with the aim of the statute, was " to meddle so as to alter, in an improper, corrupting manner."[267] Accordingly, there was no significant ambiguity of "tamper" in the CWA provision.[268]

The court also held that the term "tampering" was not made ambiguous by the scope of the conduct that might be included in the definition, i.e., uncertainty whether charged conduct could be considered tampering.[269] The court noted that the "fact that the individual acts making up the offense conduct are not in and of themselves illegal does not render an indictment insufficient." The court held that "benign, legal acts can be performed in a manner that constitutes a violation of the CWA's tampering provision."[270] The court pointed out that the defendants had been charged with "[t]emporarily increasing the concentration of chlorine before taking compliance samples and reducing it shortly thereafter will not always amount to tampering in violation of the CWA," but it might depending on

---

261. *Id.* at *4-10.

262. *Id.* at *4 (quoting 33 U.S.C. § 1319(c)(4) (2006)) (alterations in original).

263. *Id.* at *4 (quoting 33 U.S.C. § 1319(c)(4); United States v. Panyard, No. 2:07–CR–20037, 2009 WL 37377 (E.D. Mich. Jan. 7, 2009)).

264. *Id.* at *7.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at *9.

270. *Id.* at *8.

the circumstances.[271] These allegations could support a finding that defendants tampered in violation of the CWA.[272]

The court further pointed out that the plain language of the provision showed Congress's intention "to prevent tampering even in the absence of any other violation."[273] Accordingly, the court declined to impose a requirement that an "[i]ndictment allege that [d]efendants' acts were in furtherance of, or to conceal other violations."[274] The court also rejected defendants' suggestion that the indictment must allege defendants knew their conduct constituted tampering and concluded the CWA only required defendants know what they did.[275]

The court also held that the rule of lenity only applied when there were "serious ambiguities in the text of the criminal statute."[276] "If the statute contains an ambiguity, and the text or structure of the statute cannot resolve that ambiguity, then it is proper to look to legislative history. Only then is the rule of lenity applied."[277] The court pointed out

> [because] the [i]ndictment alleges [d]efendants tampered, it is alleging that [d]efendants engaged in the acts set forth in the [i]ndictment in a manner that is not innocent. Because [d]efendants are not charged with increasing chlorine, taking a grab sample, and decreasing chlorine for some legitimate purpose (i.e. because the flow into the plant had increased), this [c]ourt finds that the statute is not ambiguous with regards to whether the charged conduct violates the law.[278]

Accordingly, the court held that a "reasonable person would have known that the acts alleged in the [i]ndictment violate the CWA's tampering provision."[279] As such, the rule of lenity did not apply to this case.[280] Finally, the court noted questions relating to defendants' specific conduct and its violation of CWA "turn on the specific facts of this case, and are for the jury to decide."[281]

E. Third Party Has No Right to Be Involved in Negotiation of Consent Decree to Correct a City's CWA Violations

In *United States v. City of Evansville*,[282] the court held that a company

---

271. *Id.*

272. *Id.* at *9.

273. *Id.* at *6.

274. *Id.*

275. *Id.* at *9-10.

276. *Id.* at *6, 10. "Whether the statute is ambiguous such that the rule of lenity may be utilized turns on statutory interpretation." *Id.* at *6.

277. *Id.* at *7 (citing United States v. LaFaive, 618 F.3d 613, 616 (7th Cir. 2010)).

278. *Id.* at *10.

279. *Id.*

280. *Id.*

281. *Id.*

282. No. 3:09-cv-128-WTL-WGH, 2011 WL 2470670 (S.D. Ind. June 20, 2011).

contracted to operate a violating city's sewer system did not have the right to participate in negotiations between the city and the government to resolve those violations.[283] In that case, the plaintiffs sued the City of Evansville, Indiana ("the City"). They sought both injunctive relief and civil penalties for conduct that plaintiffs felt was in violation of the CWA and Title 327 of the Indiana Administrative Code.[284] Plaintiffs argued the City did not adhere to the terms of multiple National Pollutant Discharge Elimination System (NPDES) permits issued by IDEM.[285] These failures included improper maintenance and operation of the City's wastewater and sewer system as well as allowing untreated sewage and other pollutants to be discharged into various waters.[286] The City responded with a third-party complaint for indemnity and breach of contract against Environmental Management Corporation (EMC), the company operating the City's sewer system under contract.[287]

After lengthy negotiations, the City and the plaintiffs agreed to a proposed consent decree ("Decree") setting out the steps the City would take to obtain compliance with applicable laws and permits, which after the required period for public comment, they asked the court to approve and enter.[288] Third party defendant EMC opposed entry of the Decree.[289] EMC claimed that provisions in the Decree were improper in that they: 1) were "designed to benefit the City in its third-party claim against EMC"; 2) were procedurally unfair because neither EMC nor the City's insurers were included in the negotiations; 3) contained unreasonable agreed civil penalties; and 4) allowed the City to recover costs related to a supplemental environmental project (SEP) against EMC.[290]

The court stated that it "must defer to the expertise of the agency and to the federal policy encouraging settlement" and "must approve a consent decree if it is reasonable, consistent with [the CWA's] goals, and substantively and procedurally fair."[291] In finding that the Decree was reasonable and fair, the court explained that the Decree was a product of the parties' extensive arms-length negotiations, which included "substantial involvement" by the magistrate judge.[292] Furthermore, there was no indication that the resulting agreement was anything but a "fair and reasonable resolution based upon the considered

---

283. *Id.* at *6-8.

284. *Id.* at *1.

285. *Id.* IDEM is authorized by the EPA "to administer the NPDES program in Indiana. The permits issued by IDEM implement the CWA as well as the analogous provisions of Indiana environmental law. The CWA provides that the United States may enforce the provisions of NPDES permits issued by states; Indiana law also provides for the state to enforce the permits issued by IDEM." *Id.* at *1 n.2.

286. *Id.* at *1.

287. *Id.* at *2.

288. *Id.* at *3.

289. *Id.* at *5-8.

290. *Id.*

291. *Id.* at *4 (citation omitted) (alteration in original).

292. *Id.* at *5.

judgment of the parties regarding the relative strength of their legal positions, the expense of continuing the litigation, and the probability that either side would achieve a more favorable outcome at trial."[293] Moreover, the Decree had the "distinct advantage" of implementing changes sooner rather than later, i.e., the end of the litigation, and thus was in line with the interest of the public in improving the quality of Evansville's water.[294]

In rejecting EMC's arguments regarding the impropriety of the Decree, the court noted that EMC's arguments seemed to originate from concerns regarding how the Decree might affect the City's third-party action against EMC.[295] The court pointed out that language alleged to benefit the City in its claim against EMC[296] stated no more than what the City "claimed" it was entitled to recover in its third-party complaint against EMC.[297] As the Decree did not address the question of whether the City was entitled to this recovery, this language could not be a basis for rejecting the Decree.[298] Similarly, the court stated that while "the potential exists for the City to recover some or all of the cost of the SEP from EMC, the fact remains that the City is solely responsible under the Decree for completing the SEP regardless of the outcome of the third-party suit."[299] The court next found that the lack of involvement of EMC and the City's insurers in the negotiation of the Decree also did not invalidate the Decree because the City "could and ultimately did obligate itself to the terms of the Decree without approval or input from its insurers" or EMC.[300] The court further noted that EMC had not provided any support for its contention that third-parties like EMC must be included in these types of settlement negotiations.[301] Indeed, the inclusion of parties like EMC would likely impair the process of reaching a settlement to further the goals of the CWA by introducing interests that conflict with the goals

---

293. *Id.*

294. *Id.*

295. *Id.*

296. The provisions in question read as follow:

> By paying civil penalties and implementing supplemental environmental projects, the Defendants do not release Environmental Management Corporation and will not dismiss their third party action for damages (specifically including these civil penalties and the costs of the supplemental environmental projects) while Environmental Management Corporation was a co-permittee and/or engaged in the operation and management of the Evansville WWTPs and Sewer System.
>
> . . .
>
> Defendants will not receive any reimbursement for any portion of the SEP from any person, except as permitted by Paragraph 50.e.

Id.

297. *Id.*

298. *Id.*

299. *Id.* at *7.

300. *Id.* at *6.

301. *Id.*

of the CWA.[302] Finally, the court noted that there was no evidence to suggest that the civil penalties in the Decree were unreasonable.[303]

F. Vague Remedies Sought in Preliminary Injunction related to Asian Carp Would Get in the Way of Agency Action Already in Progress

The case of *Michigan v. U.S. Army Corps of Engineers*[304] gained national attention when Michigan, Minnesota, Ohio, Pennsylvania and Wisconsin sought a preliminary injunction against government defendants to undertake several remedies to stop Asian carp,[305] an invasive non-native species, from entering the Great Lakes via the Chicago Area Waterway System (CAWS). The Corps constructed a waterway in northeastern Illinois that connected Lake Michigan to the Mississippi watershed through a series of locks, canals, channels and dams.[306] At the time of the suit, the Asian carp were on the "brink" of entering Lake Michigan and the plaintiff states were concerned about the impact the carp would have on the ecosystem and industries of the Great Lakes. The states claimed that the Corps and Metropolitan Water Reclamation District of Greater Chicago (the "District") failed to close down part of the CAWS to stop the carp, thereby violating the federal common law of public nuisance.[307]

The United States District Court for the Northern District of Illinois denied the states' motion for a preliminary injunction,[308] which sought to require the defendants to install extra physical barriers in the CAWS, use new procedures to stop the Asian carp, and accelerate the study of how to permanently separate the Great Lakes and Mississippi watersheds.[309] The district court believed that the states had only a "modest" likelihood of success; the Seventh Circuit found that the plaintiffs would be likely to succeed on the merits of their claim.[310]

---

302. *Id.*

303. *Id.* at *6-7.

304. 667 F.3d 765 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012).

305. As explained in the opinion, Asian carp are "voracious eaters that consume small organisms on which the entire food chain relies; they crowd out native species as they enter new environments; they reproduce at a high rate; they travel quickly and adapt readily; and they have a dangerous habit of jumping out of the water and harming people and property." *Id.* at 768.

306. *Id.*

307. *Id.* The court held that federal common law applied in this case, even though this case did not involve a "traditional" pollutant. *Id.* at 771-72. The court also discussed the recent Supreme Court case, *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), in evaluating the applicability of federal common law. *Id.*

308. *Id.* at 769. To obtain a preliminary injunction, a plaintiff must show "that they are likely to succeed on the merits of their claims, that they are likely to suffer irreparable harm without an injunction, that the harm they would suffer without the injunction is greater than the harm that preliminary relief would inflict on the defendants, and that the injunction is in the public interest." *Id.* (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

309. *Id.*

310. *Id.* at 769-70.

The Seventh Circuit held that the district court's denial of injunctive relief was not an abuse of discretion, even though the appellate court believed that the states had demonstrated that there was a "good or perhaps even a substantial likelihood of harm—that is, a non-trivial chance that the carp will invade Lake Michigan in numbers great enough to constitute a public nuisance."[311] The Seventh Circuit even agreed that the harm would be irreparable and likely based on the information presented about the potential impact of the invasive species on the Lake Michigan and Great Lakes ecosystems.[312] However, in balancing the harm caused by the carp with the harm to the defendants, the court found that an injunction would cause "significantly more harm" than it would avoid.[313] The plaintiff states presented several remediation measures, but after further analysis, the court determined that the proposed remedies were vague, duplicative, and costly without a demonstration of how those measures would reduce the risk of Asian carp entering Lake Michigan.[314] In light of the current efforts of the District and Corps to stop the Asian carp, the court viewed a preliminary injunction as a measure that would "only get in the way."[315] The District, the Corps, and other governmental agencies were better-equipped to weigh the issues and choose solutions than a court, and intervention by a court could undermine the efforts already being undertaken to solve the Asian carp problem.[316] The court emphasized, though, that if the agencies' efforts waned or new information came to light, this determination could be revisited at the permanent injunction stage.[317]

IV. OTHER ENVIRONMENTAL CASES UNDER FEDERAL LAW

A. Critical Habitat Designation Reversal Under the Endangered Species Act, Otay Mesa Property, L.P. v. U.S. Department of Interior

In *Otay Mesa Property, L.P. v. U.S. Department of Interior*,[318] the United States Court of Appeals for the District of Columbia Circuit remanded the case to the lower court to vacate the United States Fish and Wildlife Service's (FWS) determination that plaintiffs' property was occupied by San Diego fairy shrimp, an endangered species under the Endangered Species Act.[319] Four shrimp had

---

311. *Id.* at 769, 799-800. The agency efforts and allocation of funds by Congress were not sufficient to displace the application of federal common law in this case, particularly when compared to the extensive regulatory scheme stemming from the Clean Air Act. *Id.* at 778-80.

312. *Id.* at 769, 788-89.

313. *Id.* at 789.

314. *Id.* at 791-94.

315. *Id.* at 769.

316. *Id.* at 796-87 (citing Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2539-40 (2011)).

317. *Id.* at 799-800.

318. 646 F.3d 914 (D.C. Cir. 2011).

319. 16 U.S.C. §§ 1531-1544 (2006 & Supp. 2010); *Otay Mesa Prop.*, 646 F.3d at 918-19.

been spotted on the plaintiffs' property in a tire rut in 2001, which led FWS to designate 143 acres of plaintiffs' property as critical habitat, even though the shrimp were not seen again in six subsequent surveys during that same year or in any subsequent surveys after the initial sighting.[320] FWS was unable to present substantial evidence that the shrimp were present in 1997, the year of the species' endangered designation, and the ESA defines critical habitat to include "specific areas within the geographical area *occupied by* the species, *at the time it is listed*."[321] The court did not prevent FWS from justifying redesignation under a different part of the critical habitat definition, but it emphasized that based on the record before the court, there was not enough evidence to support the designation.[322]

B. Campground Was a Public Water System Under the Safe Drinking Water Act, United States v. Ritz

In *United States v. Ritz*,[323] the District Court of the Southern District of Indiana addressed whether a campground with spigots and sewer hookups qualified as a public water system (PWS) that made it subject to the Safe Drinking Water Act (SDWA).[324] The owners of the campground disputed that the site was subject to the SDWA, which requires regular testing of water for nitrate and total coliform.[325] The campground had at least fifty campsites, and therefore met the definition of PWS in the SDWA, which requires at least fifteen service connections that provide water for human consumption or connections that regularly serve at least twenty-five people.[326] The court rejected an argument by the defendants that the spigots were not service connections and the court awarded summary judgment to the government on the issue of the applicability of the SDWA.[327]

There was however a question of fact as to whether one of defendants qualified as a PWS operator, which is not defined with the SDWA.[328] The court adopted the approach taken by the Supreme Court in *United States v. Bestfoods*[329] in which the Court applied the plain meaning of the word "operator" to determine the applicability of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).[330] Looking at the plain meaning of the word operator, the court found that the defendant's role as a maintenance manager who

320. *Otay Mesa Prop.*, 646 F.3d at 915, 917.
321. *Id.* at 915 (16 U.S.C. § 1532(5)(A)).
322. *Id.* at 918.
323. 772 F. Supp. 2d 1017 (S.D. Ind. 2011).
324. 42 U.S.C. § 300f (2006 & Supp. 2010).
325. *Ritz*, 772 F. Supp. 2d at 1019-20.
326. *Id.* at 1020-21 (citing 42 U.S.C. § 300f(4)(A)).
327. *Id.*
328. *Id.* at 1021-24.
329. 524 U.S. 51 (1998).
330. *Ritz*, 772 F. Supp. 2d at 1021-22 (citing *Bestfoods*, 524 U.S. at 66-67).

occasionally took water samples was not sufficient to make him "someone who manages, directs, or conducts operations specifically related to the PWS's compliance with, or violation of, the SDWA."[331]

In a later proceeding, the district court assessed a civil penalty of $29,754 against one of the defendants and issued an injunction to perform nitrate and coliform sampling and reporting.[332] There were a total of fifty-eight violations of the SDWA testing and reporting requirements for nitrate and coliform, but the United States did not seek the maximum penalty.[333] The court applied the following factors used by the EPA to calculate civil penalties in environmental cases: "(1) the seriousness of the violation; (2) the economic benefit, if any, resulting from the violation; (3) any history of violations and any good-faith efforts to comply with the applicable requirements; (4) the economic impact of the penalty on the violator; and (5) any other matters as justice may require."[334] In evaluating each of these factors, the seriousness of coliform contamination, the long-standing violations of the testing requirements, and the need to deter additional violations at this site weighed in favor of imposing the civil penalty requested by the United States.[335] The use of a "non-potable" water label on each of the spigots was not sufficient to demonstrate that campers were not at risk when they used the untested water.[336]

V. ENVIRONMENTAL CASES UNDER STATE LAW

A. Collateral Attack on Bankruptcy Injunction not Permitted Under ELA

In *Day v. Chevron*,[337] a property owner had purchased a site for the purpose of selling cars. During construction at the site, three previously unknown underground storage tanks were discovered at the property. The site was later determined to be contaminated with petroleum compounds. Day alleged that Texaco (or Chevron whom Day alleged was the successor in interest) should be liable for cleanup costs at the site. However, in 1987 Texaco filed for bankruptcy and on March 23, 1988 the bankruptcy court had issued a permanent injunction barring litigation against Texaco.[338]

Day argued that Indiana's post-order adoption of the ELA[339] and USTA[340]

---

331. *Id.* at 1022.

332. United States v. Ritz, No. 1:07-cv-1167-WTL-DML, 2011 WL 1743740, at *4-6 (S.D. Ind. May 3, 2011).

333. *Id.* at *1-2.

334. *Id.* at *2.

335. *Id.* at *2-4.

336. *Id.* at *4.

337. 2011 WL 4550160, No. 1:10-cv-01320-RLY-MJD (S.D. Ind. Sept. 29, 2011).

338. *Id.* at *1.

339. *See* IND. CODE §§ 13-30-9-1 to -8 (2011).

340. *See id.* § 13-23-13-8.

permitted his direct lawsuit, notwithstanding the bankruptcy order.[341] Chevron opposed his lawsuit and argued that his pursuit of this litigation would subject him to sanctions from the bankruptcy court for violating the injunction. At issue in this order was whether Day could amend his complaint to seek a declaratory judgment that his ELA and USTA claims were not discharged by the bankruptcy order.[342]

The court declined Day's request to amend his complaint.[343] The court found that no "actual controversy" existed between Day and Texaco.[344] While Day argued that the potentiality of sanctions from the bankruptcy court created a justiciable dispute, the district court believed potential sanctions to be too remote to create a present controversy.[345] More importantly, the court stated that Day only sought an "advisory opinion as to the proper interpretation of the Bankruptcy Court's order" with regard to an ELA claim.[346] Finally, the court noted that Day could have filed a motion directly with the bankruptcy court for leave to file an ELA claim.[347] For all these reasons, the court found that Day's attempt to seek a declaratory judgment as to the viability of his ELA claim was improper.[348]

B. Landlords of Commercial Business not Liable for Tenant's Contamination

The property at issue in *Neal v. Cure*[349] has been the subject of numerous prior court opinions. The Cures owned commercial property that they leased to a dry cleaner (Masterwear) between 1986 and 1991.[350] The Neals operated a business a property close by. The Neals sued the Cures as landlords, Masterwear, and Masterwear's insurer. By the time this opinion was rendered the Neals had settled with Masterwear and its insurer and dismissed them from the case, but still pursued the Cures for additional amounts relating to the contamination.[351]

The Neals asserted four causes of action against the Cures, including claims under Indiana's ELA , nuisance, trespass, and negligence. The Cures requested summary judgment on all of the Neal's claims which was granted by the trial court on all counts and this appeal ensued.[352] As will be discussed in more detail below, the Indiana Court of Appeals affirmed summary judgment on all counts.[353]

---

341. *Day*, 2011 WL 4550160, at *1.
342. *Id.*
343. *Id.* at *2.
344. *Id.* at *1.
345. *Id.*
346. *Id.* at *2.
347. *Id.*
348. *Id.*
349. 937 N.E.2d 1227 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1204 (Ind. 2011).
350. *Id.* at 1229-30.
351. *Id.* at 1229-30 & 1229 n.1.
352. *Id.* at 1230.
353. *Id.* at 1238.

First, the court found that the Neal's nuisance claim was not viable.[354] The undisputed evidence was that "the Cures did not know about the PCE contamination and did not exercise control over Masterwear's operations."[355] The court noted that a landlord can be held responsible for a tenant's nuisance if "the landlord knows about the tenant's nuisance and could stop it, but does not; or if the landlord consents to the tenant's maintenance of a nuisance."[356] The Neals argued that the Cures knew Masterwear used PCE, stored barrels of liquid on the property, and considered Masterwear a "sloppy housekeeper."[357] In addition, other tenants had complained to the Cures about Masterwear, but those complaints did not address the PCE contamination. Finally, while the Cures were aware of a reported spill of PCE in 1991, they were told "it didn't amount to anything."[358] For these reasons, the Indiana Court of Appeals found the Cures had no "actual knowledge of PCE contamination" that would support the Neal's nuisance claim.[359]

The Neals also argued that Indiana should adopt section 837 of the *Second Restatement of Torts*, which would produce liability if a landlord "knew," "should have known," or "had reason to know" that a nuisance was being created.[360] The court of appeals declined to adopt the *Second Restatement* under these facts based on the historic "actual knowledge" standard.[361] Thus, at least at this time, Indiana requires a claimant to meet a high bar to assert a nuisance claim against a landlord for environmental contamination.

The court next addressed the Neals' ELA claim. Under the ELA, a party is liable if they "caused or contributed" to a release of a hazardous substance.[362] The Neals did not argue that the Cures "caused" the contamination, but asserted that the Cures had "contributed" to the contamination. Because the ELA's "caused or contributed" standard is undefined, the court looked to the rule of statutory construction giving the undefined term its "plain and ordinary meaning."[363] The court noted that the ELA was enacted with the stated purpose of "shift[ing] the financial burden of environmental remediation to the parties responsible for creating contaminations."[364] Relying on dictionary definitions and prior decisions on contributory negligence, the court stated that any party who "help[s] to cause or to furnish some aid in causing the result" may be considered to have "contributed" to that result.[365]

---

354. *Id.* at 1233.
355. *Id.* at 1231.
356. *Id.* (citing Joseph Schlitz Brewing Co. v. Shiel, 88 N.E. 957, 958 (Ind. App. 1909)).
357. *Id.* at 1232.
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.* at 1233.
362. *Id.* (citing IND. CODE § 13-30-9-2 (2011)).
363. *Id.* at 1234.
364. *Id.*
365. *Id.* (citation omitted).

During prior federal litigation between the Cures and the City of Martinsville, the court concluded that the Cures liability could not be summarily decided because the City of Martinsville had failed to demonstrate that the Cures had "knowledge of the release."[366] Thus, the federal court rejected the City of Martinsville's motion for summary judgment of liability under the ELA. The Indiana Court of Appeals relied on this prior ruling to affirm summary judgment in favor of the Cures in this case.[367] This leaves some unanswered questions because the federal court's decision on the ELA claim was based on designated evidence that the Cure's had "no knowledge" of the release, whereas in this case, the evidence included knowledge of the 1991 release of contaminants. Second, the federal court case did grant summary judgment against the Cures under CERCLA, so the one-paragraph rejection of Martinsville's motion for summary judgment as to the ELA was not an adjudication of non-liability for the Cures.[368] Nevertheless, the court affirmed summary judgment on the ELA claim.[369]

Third, the Indiana Court of Appeals affirmed summary judgment against the Neals' trespass claim.[370] The trial court had rejected the claim because (a) Indiana law had historically required the trespasser to have committed an "intentional act . . . directly related to the trespass," and (b) the trial court concluded that Indiana should not expand liability for trespass to an "acquiesced" standard for which the Neals advocated.[371] The Indiana Court of Appeals agreed with the trial court's analysis of Indiana law and was not persuaded by the cases from other jurisdictions.[372]

Finally, the court of appeals considered whether the Cures could be liable to the Neals under a negligence theory.[373] The Neals alleged that the Cures were liable for negligence per se because the Cures had violated Indiana Code section 13-30-2-1 which required reporting of the spill.[374] The Indiana Court of Appeals noted that an "unexcused or unjustified violation" of a statutory duty would constitute negligence per se.[375] Yet, the court of appeals declined to impute negligence per se to the Cures based on the tenant's actions.[376] Prior appellate decisions had found no private right of action under Indiana Code section 13-7-4-1, and the court doubted that the Neals could demonstrate a failure to report was the proximate cause of any injuries.[377] For these reasons, the Indiana Court of

366. *Id.* at 1234-35 (citation omitted).
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.* at 1236.
371. *Id.* at 1235-36.
372. *Id.*
373. *Id.* at 1236-38.
374. *Id.* at 1237.
375. *Id.* (citation omitted).
376. *Id.* at 1238.
377. *Id.*

Appeals affirmed summary judgment on the negligence claim.[378]

C. Government is not Liable for Water Damages Arising from Sewage Overflows Where Sewer Damage Previously Unknown

In *Ka v. City of Indianapolis*,[379] Tat-Yik Jarvis Ka and Amanda Beth Ka sued the City of Indianapolis ("the City") for negligence, negligent infliction of emotional distress, trespass, and nuisance when sewage from a City pipe backed up in their house.[380] The trial court granted the City's summary judgment motion and the Kas appealed.[381]

The City had crews cleaning the sewers near the Kas' home.[382] While the crew was cleaning near the Kas' house, the Kas heard a noise and started smelling sewage.[383] The next day, the Kas had trouble with their toilets not flushing correctly and eventually their toilet and shower began to overflow, causing substantial damage to the Kas' home and injury to Amanda.[384] Later, the City arrived and unblocked a clog in the Kas' sewer line.[385] Testimony from sewer experts established that particular portion of the sewer line had pre-existing structural damage.[386]

In rejecting the Kas' claims for damages, the Indiana Court of Appeals held that the City was not liable for the pre-existing structural sewer line damage because there was no evidence that the City had knowledge of this defect.[387] In this regard, the City introduced evidence that the sewers had passed several tests after it was constructed and the City's contractor in charge of the sewers never informed the City of any problems.[388] The court also noted that the plaintiffs had not previously complained of sewer problems.[389] As such, the damage to the sewer line at issue was hidden.[390] Similarly, the court rejected the Kas' nuisance argument because this claim was tied to a single isolated event and not a situation that was ongoing or that could be abated.[391]

---

378. *Id.*
379. 954 N.E.2d 974 (Ind. Ct. App. 2011).
380. *Id.* at 375.
381. *Id.* at 975-76.
382. *Id.* at 976.
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.* at 977-81.
388. *Id.* at 978-79.
389. *Id.*
390. *Id.* at 979.
391. *Id.* at 981-82.

D. Liability for Inter-Municipal Contract Breaches for Wastewater System Costs Are Based on State Law

In 1988 the Town of New Chicago and the City of Lake Station agreed to construct an interceptor sewer system.[392] The combined waters of New Chicago and Lake Station were then treated at Gary Sanitary District (GSD).[393] New Chicago and Lake Station both agreed to comply with federal law, including the CWA, and agreed that Lake Station would charge New Chicago monthly at the "GSD rate."[394] Lake Station also agreed to indemnify and hold harmless New Chicago for any losses or costs arising from Lake Station's negligence or failure to act.[395]

GSD tripled its rate in 1989, but Lake Station failed to notify New Chicago of this, continuing to bill New Chicago at the old rate.[396] Lake Station attempted to reject the rate increase by GSD more than a year after the rate increase was implemented.[397] Lake Station never informed New Chicago of this rate dispute.[398] After Lake Station refused to pay the increased rates, GSD sued Lake Station in 1999.[399] Lake Station again declined to notify New Chicago of the suit.[400] Judgment was entered against Lake Station, and in favor of GSD, in 2005.[401]

Lake Station demanded approximately a half million dollars from New Chicago for its proportionate share of the judgment against it for over $5 million in 2005.[402] Lake Station sued New Chicago in 2007 after New Chicago refused to pay.[403] New Chicago asserted multiple affirmative defenses, among them being laches and equitable estoppel.[404] Lake Station sought partial summary judgment on the issue of liability based on the agreement between the parties, which required compliance with federal law.[405] New Chicago responded by cross-moving for summary judgment on all issues on the grounds of equitable estoppel, laches, and breach of the intermunicipal agreement by Lake Station.[406] The trial court granted Lake Station's motion for partial summary judgment based

---

392. Town of New Chicago v. City of Lake Station, 939 N.E.2d 638, 641-42 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1208 (Ind. 2011).

393. *Id.* at 641.

394. *Id.*

395. *Id.* at 643.

396. *Id.*

397. *Id.* at 643-44.

398. *Id.* at 644.

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.* at 641, 644-45.

403. *Id.* at 641, 645.

404. *Id.*

405. *Id.* at 645-46.

406. *Id.*

on the terms of the contract, and in part, on the terms of the CWA, 33 U.S.C. § 1284(b)(1)(A), which requires that a recipient of waste treatment services must pay its proportionate share of the costs of operation and maintenance.[407] The trial court denied New Chicago's motion for summary judgment.[408] New Chicago appealed.[409]

In reversing the trial court, the Indiana Court of Appeals concluded that Lake Station's only possible claim against New Chicago was for breach of contract as there was no private right of action under the CWA.[410] With regard to the contract issue, the court found that the laches defense was unavailable for Lake Station's breach of contract claim because "laches acts as a limitation upon equitable relief, and an action for breach of contract is a legal claim."[411] However, the court found that New Chicago met its burden of proving the defense of equitable estoppel because:

> (1) New Chicago lacked the knowledge or means of knowledge that Lake Station was not properly billing them because there was no indication that anything was wrong, (2) New Chicago relied on the monthly billings from Lake Station for more than fifteen years without any sort of notice from Lake Station, and (3) Lake Station's conduct caused New Chicago to prejudicially change its position in that New Chicago was prevented from budgeting for the increased rate or joining in the GSD/Lake Station litigation.[412]

As such, the trial court was reversed and summary judgment was entered in favor of New Chicago.[413]

F. The Common Enemy Doctrine and Liability for Water Damages

In *Kinsel v. Schoen*,[414] the Indiana Court of Appeals examined the common enemy doctrine with regard to liability when a homeowner's manmade pond leaked water, flooding a neighbor's septic drainage field, causing it to malfunction. After Kinsel's pond leaked water and flooded the Schoens' property, the county health department filed an action against the Schoens requiring them to replace their failed septic system.[415] The Schoens sued Kinsel and received a judgment against Kinsel at trial for nuisance, trespass, and negligence.[416] Kinsel alleged that the common enemy doctrine should have

---

407. *Id.* at 646 (citation omitted).
408. *Id.*
409. *Id.* at 648.
410. *Id.* at 648-52.
411. *Id.* at 641.
412. *Id.*
413. *Id.* at 657.
414. 934 N.E.2d 133 (Ind. Ct. App. 2010).
415. *Id.* at 136-37.
416. *Id.* at 137.

barred the Schoen's claims and that the award of damages to the Schoens was improper because the Schoens did not mitigate their damages. He also argued that he should not have to pay the Schoens' attorneys' fees and expert witness fees.[417]

The trial court concluded that the common enemy doctrine was not applicable because Kinsel built his pond without a permit; therefore, it was a common nuisance.[418] The trial court also determined that the water from Kinsel's pond "trespassed" on the Schoens' property, making him liable for all damages resulting from the water flowing onto the Schoens' property.[419] In this regard, the court noted that Kinsel had admitted that his pond had been losing water and that the authorities notified him that the pond might cause other problems with the Schoens' septic system and drainage field.[420] He was also held negligent because he failed to take any steps to prevent pond water from infiltrating the Schoens' septic field.[421]

On appeal, Kinsel argued that the common enemy doctrine applied because the Schoens' claim was "based on an overabundance of natural water from snowmelt, rainwater, surface water and groundwater entering his property."[422] In rejecting Kinsel's claims, the Indiana Court of Appeals acknowledged that "all property owners hold dominion over their property with respect to the control of water."[423] It further stated that only "water classified as surface water is governed by the common enemy doctrine."[424] Furthermore, the court defined surface water as "[W]ater from falling rains or melting snows that is diffused over the surface of the ground or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel, is surface water."[425] The court held that Kinsel's private pond was not surface water and therefore the common enemy doctrine did not apply.[426]

---

417. *Id.* at 141.

418. *Id.* at 138.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 139 (citation omitted).

423. *Id.* (citation omitted).

424. *Id.* (citing Argyelan v. Haviland, 435 N.E.2d 973, 976 (Ind.1982)).

> In its most simplistic and pure form the rule known as the "common enemy doctrine," declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.

Id. (quoting *Haviland*, 435 N.E.2d at 975). "The common enemy doctrine may apply regardless of the form of action brought by the plaintiff, that is, regardless of whether the plaintiff asserts his claims as an action for negligence, trespass, or nuisance." *Id.*

425. *Id.* at 140 (citing Kramer v. Rager, 441 N.E.2d 700, 705 (Ind. Ct. App.1982)).

426. *Id.*

Consequently, Kinsel was liable for the Schoens' damages.[427] The court of appeals also noted that there was no evidence that the Schoens' actions aggravated or increased their injuries, and Kinsel did not offer any alternative to the solution required by the health department (putting in a new septic system).[428] Finally, the trial court had the inherent authority to assess attorneys' fees and expenses for the consequential damages suffered by the plaintiffs in this situation.[429]

G. Liability Can Arise from Seller's Knowing Misrepresentations Regarding Presence of Wetlands

The Indiana Court of Appeals recently held in *Wise v. Hays*[430] that a "a seller may be liable for any misrepresentation on the [real estate] sales disclosure form if the seller had actual knowledge of that misrepresentation at the time the form was completed."[431] In *Wise*, the buyers of a sixteen-acre parcel inquired of the sellers as to the designation of a wetlands on the property and whether it would affect future residential development of the parcel.[432] In response, the sellers stated that the property could be developed for additional residential housing.[433] The buyers also received a sales disclosure form in which the sellers responded that there were no structural problems with the house, that they had received no notices from any governmental agencies regarding the property, that there were no additions to the residence performed without a permit and that the property was not in a flood plain, among other things.[434] The buyers purchased the home following a home inspection by a licensed home inspector.[435]

Following the purchase, the buyers began having concerns about the property and obtained copies of past correspondence from the Corps to the sellers, which stated that the property was in violation of the Clean Water Act due to earthwork or excavation work that had been performed by the sellers.[436] The Corps correspondence also warned that wetlands on the property may affect future development of the parcel.[437] In addition, post-purchase, the buyers hired a professional engineer to inspect the residence, who found numerous code

---

427. *Id.*

428. *Id.*

429. *Id.* at 142.

430. 943 N.E.2d 835, 842 (Ind. Ct. App. 2011).

431. *Id.* at 842.

432. *Id.* at 836.

433. *Id.*

434. *Id.* at 836-37.

435. *Id.* at 837. The purchase agreement contained a clause that allowed the buyer to terminate the agreement if the inspection revealed a major defect that the sellers were unable or unwilling to remedy. *Id.* at 836.

436. *Id.* at 837.

437. *Id.*

violations and structural problems with the residence.[438] The buyers filed suit for negligence and fraud based on the sellers' alleged knowing misrepresentations on the sales disclosure form.[439]

The sellers filed a Trial Rule 12(B)(6) motion to dismiss the buyer's claims that cited to exhibits attached to the buyer's complaint.[440] The trial court granted the sellers' motion based on the sellers argument that the buyer had no right to rely on the sellers' representations when the buyer had a reasonable opportunity to inspect the property.[441] This order also cited the exhibits attached to the complaint.[442]

In reversing the trial court decision, the Indiana Court of Appeals noted that in certain instances a seller has the duty to disclose material facts about the property where the buyer makes "inquiries about a condition on, the qualities of, or the characteristics of the property."[443] Furthermore, "[o]nce a seller undertakes to disclose facts within his or her knowledge, the seller must disclose the whole truth."[444] The court went on to state that "[f]or transactions covered by [Indiana Code] [c]hapter 32-21-5, a seller may be liable for misrepresentation on the sales disclosure form if the seller had actual knowledge of that misrepresentation at the time the form was completed."[445] The court held that the correspondence from the Corps and the inspection report from the professional engineer established genuine issues of material fact as to what the sellers had actual knowledge of at the time they made their disclosures.[446] Consequently, the court ruled that the trial court erred in granting summary judgment in favor of the sellers.[447]

VI. DEVELOPMENTS IN INDIANA ENVIRONMENTAL INSURANCE LAW

In this section, we examine recent opinions that may impact environmental insurance coverage cases under Indiana law. Below is a summary of decisions relevant to environment practitioners in the context of insurance.

A. Travelers v. Maplehurst Farms

In *Travelers Insurance Co. v. Maplehurst Farms, Inc.*,[448] the Indiana Court

---

438. *Id.*

439. *Id.* at 838.

440. *Id.*

441. *Id.*

442. *Id.* The court of appeals treated the trial court's order as a ruling on a motion for summary judgment.

443. *Id.* at 840 (quoting Fembel v. DeClark, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998)).

444. *Id.* (citing Ind. Bank & Trust Co. of Martinsville v. Perry, 467 N.E.2d 428,431 (Ind. Ct. App. 1984)).

445. *Id.* at 842.

446. *Id.* at 843.

447. *Id.* at 844.

448. 953 N.E.2d 1153 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 1831 (Oct. 21, 2011), *trans. denied*, 953 N.E.2d 1153 (Ind. 2012).

of Appeals considered an appeal by an insurer who had been ordered to pay costs to its insured for an environmental cleanup at one of the insured's former facilities.[449] The contamination arose from a UST used to store fuel oil during Maplehurst's sixty-plus years operating a dairy.[450] Maplehurst's successor at the facility, Dean Foods reported a leak from the underground storage tank to IDEM in 2002. In January 2002, IDEM ordered Maplehurst to investigate and remedy the leak. Maplehurst retained a law firm and an environmental consultant to help respond to IDEM's claims.[451] Maplehurst began preparing a corrective action plan and submitted that plan to IDEM. Dean, however, demanded that Maplehurst reimburse it for costs it previously incurred in responding to the release. In December 2002, Maplehurst agreed to pay Dean $170,000 for past environmental costs at the site.[452]

During this time, Maplehurst attempted to locate its insurance policies.[453] It encountered difficulties in this process because its business was no longer operating and the executive responsible for purchasing insurance was deceased. By March 2003, it had notified two of its insurers, but it did not notify Travelers until May 30, 2003. Ten days later, Travelers notified Maplehurst that it was searching Travelers records for copies of insurance policies that it may have issued to Maplehurst.[454] In that letter, Travelers reserved the right to argue that Maplehurst violated the notice and voluntary payments provisions in any policies that Travelers issued.

Ultimately, Travelers produced copies of Maplehurst's policies from its own records.[455] On February 21, 2005, Travelers denied coverage on the basis of the notice and voluntary payment provisions. Travelers also objected to the claim on the basis that an IDEM proceeding did not constitute a "suit" under the policy, that the proceeding was not a suit for damages, that an "absolute pollution exclusion" in the policies barred coverage, and that there had been "no occurrence" as defined in the policy.[456]

At the trial court, the parties filed cross-motions for summary judgment regarding the "pre-notice, pre-tender expenditures."[457] Travelers argued that it was not obligated to pay any of the expenses that Maplehurst had incurred prior to May 30, 2003, and that Travelers was not obligated to cover the $170,000 paid to Dean. Maplehurst argued that those expenses were properly reimbursable under the policies.[458] Maplehurst's other insurers argued that they were entitled to reimbursement from Travelers for expenses that those insurers paid Maplehurst

449. *Id.* at 1154.
450. *Id.* at 1155.
451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.* at 1156-57.
455. *Id.* at 1157.
456. *Id.*
457. *Id.*
458. *Id.* at 1157-58.

after they had been notified. Maplehurst also argued that Travelers' other coverage positions were frivolous and that an award of attorneys' fees should be awarded accordingly.

The trial court entered summary judgment for Maplehurst.[459] The court found that Travelers had breached its duty to defend under the policies and that Travelers was obligated to pay pre-tender costs.[460] In that decision, the court distinguished *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*[461] because (a) St. Paul had immediately agreed to defend under the policies without reservation, (b) Dreaded expressly indicated that delayed tender may be "legally excused" in certain circumstances, (c) Dreaded did not address indemnity costs, and (d) no evidence suggested that Travelers had been prejudiced by Maplehurst's notice.[462] The trial court, however, rejected Maplehurst's argument that it should receive an award of attorneys' fees based on Travelers' other coverage positions.

The Indiana Court of Appeals reversed in a split decision.[463] Judge Baker, writing the majority opinion in which Judge Bradford concurred, held that summary judgment should be entered in Travelers' favor based on *Dreaded*.[464] The court found that "the fundamental holding" in *Dreaded* implied that "pre-notice, pretender costs . . . cannot be recovered."[465] Thus, the majority interpreted *Dreaded* as an inflexible prohibition to the recovery of pre-notice expenses. The court rejected Maplehurst's arguments that the difficulties it encountered in finding the policies and or Travelers' failure to demonstrate prejudice were relevant to whether late notice barred these claims.[466]

Judge May dissented from the majority decision.[467] She would have affirmed the earlier decision favoring Maplehurst.[468] She found the trial court's analysis of the "reasonableness" of notice to be compelling and would not interpret *Dreaded* in such a rigid manner.[469] She noted that the majority's conclusion that the late notice precluded pre-tender costs, as a matter of law, would act as a forfeiture of insurance rights that the insured had dutifully obtained by payment of its premiums.[470]

B. State Automobile Mutual Insurance Co. v. Flexdar, Inc.

During the survey period, the court of appeals affirmed summary judgment

---

459. *Id.* at 1158.
460. *Id.*
461. 904 N.E.2d 1267 (Ind. 2009).
462. *Travelers*, 953 N.E.2d at 1158.
463. *Id.* at 1162-65.
464. *Id.* at 1159-61.
465. *Id.* at 1160.
466. *Id.* at 1161-63.
467. *Id.* at 1163 (May, J., dissenting).
468. *Id.*
469. *Id.* at 1163-64.
470. *Id.* at 1164.

against an insurer in *State Automobile Mutual Insurance Co. v. Flexdar*.[471] This opinion addressed whether subsequent forms of insurance policies can be used to demonstrate an ambiguity of a prior form and reaffirmed Indiana law finding the absolute pollution exclusion is ambiguous as a matter of law. After the survey period ended, the Indiana Supreme Court issued its opinion reversing this opinion.[472] The Indiana Supreme Court's decision will be addressed in greater detail during the next survey period, but we will highlight a few key points from the Flexdar litigation for environmental practitioners.

In the court of appeals' decision, the panel considered a trial court's summary judgment order finding coverage was available to Flexdar for losses arising out of environmental contamination from Flexdar's historical operations.[473] Flexdar's manufacturing equipment used trichloroethylene (TCE). Spent solvent was collected and stored for less than three months. During these processes, the solvent leaked from the premises and contaminated subsoil and groundwater. IDEM ordered Flexdar to investigate the contamination and notified the company that it could be liable for the costs of the cleanup and remediation. Flexdar's insurers, including State Auto, declined coverage, citing the pollution exclusion in their policies, and litigation over coverage ensued.[474]

During these proceedings, the trial court refused to consider Flexdar's citation to endorsements used by the insurer in years after the policies at issue in that suit. Flexdar argued that the endorsements were admissible to demonstrate an ambiguity in the older endorsements. [475] In other words, Flexdar argued that if the insurers had "clarified" the language in future insurance forms, then an ambiguity must have been present in the prior forms. The court of appeals affirmed the trial court's rejection of this evidence.[476] Relying on Evidence Rule 407, the court found that such modifications were "subsequent remedial clarifications" which are not admissible to interpret the insurance contract.[477] Because Flexdar had offered no basis for admitting the evidence, other than to prove State Auto was "liable," the evidence was inadmissible.[478]

The court of appeals then revisited the lengthy litigation history of the pollution exclusion under Indiana law. The court concluded that "pursuant to the last fourteen years of precedent, . . . [the] absolute pollution exclusion is ambiguous" and did not preclude coverage in connection with the claim at issue.[479]

In the recent Indiana Supreme Court decision, the court confirmed that

---

471. 937 N.E.2d 1203 (Ind. Ct. App. 2010), *aff'd*, 964 N.E.2d 845 (Ind. 2012), *reh'g denied*, 2012 Ind. LEXIS 526 (June 21, 2012).

472. *Flexdar, Inc.*, 964 N.E.2d 845.

473. *Flexdar, Inc.*, 937 N.E.2d at 1206.

474. *Id.*

475. *Id.* at 1206-07.

476. *Id.* at 1208.

477. *Id.*

478. *Id.*

479. *Id.* at 1212.

Indiana law finds pollution exclusions ambiguous.[480] This opinion, however, was far from unanimous as it involved a splintered 2-1-2 decision with Justice Rucker (joined by Justice Dickson) writing the court's opinion.[481] Justice David concurred in result and Justices Sullivan (joined by Chief Justice Shepard) dissented.[482] Justice Rucker, writing the opinion of the court, concluded that "Indiana decisions have been consistent" in rejecting the pollution exclusions. [483] This recent trend continued with the rejection of State Auto's challenge to those prior opinions. The two dissenting justices would have accepted State Auto's argument and distinguished its policies and this litigation from prior caselaw.[484]

Interestingly, Justice Rucker's opinion also suggests that endorsements issued in subsequent policies may be used to suggest an ambiguity in a litigated insurance policy. While the court of appeals decision held that such references were impermissible, Justice Rucker makes explicit reference to a 2005 State Auto endorsement that was not at issue in the case.[485] He noted that "[b]y more careful drafting[, the insurer had] the ability to resolve any question of ambiguity."[486] Thus, the court tacitly approved the use by an insured of an endorsement that is not at issue in the case, to demonstrate ambiguities in policy language.

CONCLUSION

Recent decisions by both the Indiana and U.S. Supreme Court have increased the potential for environmental litigation. Indiana has reaffirmed its stance as a leader in insurance cost recovery for environmental matters. The U.S. Supreme Court affirmed a private parties' right to judicial review of an EPA compliance order. These two decisions, along with the other opinions discussed herein, indicate that environmental litigation will continue to increase on our courts' dockets in the years to come.

---

480. State Auto. Mut. Ins. Co. v. Flexdar, Inc., 964 N.E.2d 845 (Ind. 2012), *reh'g denied*, 2012 Ind. LEXIS 526 (June 21, 2012).

481. *Id.* at 846.

482. *Id.* at 852 (Sullivan, J., dissenting).

483. *Id.* (majority opinion).

484. *Id.* at 852-54 (Sullivan, J., dissenting).

485. *Id.* at 852 (majority opinion).

486. *Id.*

SURVEY OF RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

KATE MERCER-LAWSON*

INTRODUCTION

On January 1, 1994, Indiana codified its body of evidence law by adopting the Federal Rules of Evidence.[1] Since then, the Indiana Rules of Evidence (the "Rules") have been part of a dynamic interplay. Practitioners, judges, and lawmakers rely on the Rules to guide their daily work; similarly, judicial and statutory changes progressively shape the Rules. This Article details pertinent developments regarding the Rules during the survey period, which spans from October 1, 2010 to September 30, 2011. Topics of discussion are arranged in the same order as the Rules.

I. GENERAL PROVISIONS (RULES 101-106)

A. Scope of the Rules and Preliminary Questions

The Indiana Rules of Evidence are high-minded in purpose and broad in scope; they are intended to promote fairness, efficiency, and the ideal "that the truth may be ascertained and proceedings justly determined."[2] Rule 101(a) states that the Rules "apply in all proceedings in the courts of the State of Indiana except as otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."[3] The Indiana Supreme Court has long espoused the view that when statutes and Rules are at odds, the Rule prevails.[4] However, if a particular evidentiary issue arises for which the Rules do not control, common or statutory law governs.[5]

As a general rule, trial courts have broad discretion when ruling on the admissibility of evidence. Reviewing courts will reverse an evidentiary ruling only for an abuse of discretion by the trial court.[6] This is consistent with Rule 103, which states that if error is to be predicated upon a decision to admit or exclude evidence, two conditions must be present. First, the decision to admit or

---

* Judicial Clerk, United States District Court for the Southern District of Indiana. B.A., *summa cum laude*, 2004, Indiana University; J.D., *summa cum laude*, 2011, Indiana University Robert H. McKinney School of Law; M.H.A. Candidate, 2012, Indiana University Department of Public Health.

1. Romo v. State, 941 N.E.2d 504, 506 (Ind. 2011).

2. IND. R. EVID. 102.

3. IND. R. EVID. 101(a).

4. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: INDIANA EVIDENCE § 101.101 (3d ed. 2007) (citing McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998)).

5. IND. R. EVID. 101(a).

6. Deloney v. State, 938 N.E.2d 724, 728 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1210 (Ind. 2011).

exclude the evidence must affect a substantial right of the party in question.[7] Second, if the ruling is to admit evidence, a timely objection to the evidence must appear in the record, accompanied by specific grounds for such objection.[8] If the ruling is to exclude evidence, an offer of proof must be on record to show the court the substance of the evidence.[9]

Rule 104 is another important general rule because it concerns preliminary questions of admissibility.[10] Practitioners seeking a tutorial on this "gateway" rule should consult the *Courtroom Handbook on Indiana Evidence*.[11] Authored by Judge Robert Miller of the United States District Court for the Northern District of Indiana, this handbook provides a useful set of questions that readily summarizes admissibility as follows:

> • Is the issue of admissibility one for court (*i.e.*, in which relevancy is not dependent on the fulfillment of a condition of fact)? If so:
>
> > • The judge must be persuaded of the facts necessary to admissibility.
> > • Rules of evidence other than privilege do not limit the evidence the judge may consider.
>
> • Is the issue of admissibility one in which the relevancy of evidence depends upon the fulfillment of a condition of fact? If so:
>
> > • The judge does not weigh the evidence, but only decides whether the trier of fact could find that the conditional fact exists.
>
> • If the admissibility of a confession is being challenged, is the jury out of the court room?[12]

B. Limitations on Use of the Rules of Evidence

Despite their widely acknowledged breadth, use of the Rules is limited in certain situations. Rule 101(c)(2) sets forth the exceptions; it states that the Rules cease to govern "[p]roceedings relating to extradition, sentencing, probation, or parole; issuance of criminal summonses, or of warrants for arrest or search, preliminary juvenile matters, direct contempt, bail hearings, small claims, and grand jury proceedings."[13] These exceptions can best be understood in the context of rights. Where a proceeding is not imbued with full constitutional rights, or where it involves "a favor granted by the State," the Rules are

---

7. IND. R. EVID. 103(a).

8. *Id.*

9. *Id.*

10. IND. R. EVID. 104.

11. *See* Paul C. Sweeney & Emmanuel V.R. Boulukos, *Recent Developments in Indiana Evidence Law October 1, 2009—September 30, 2010*, 44 IND. L. REV. 1207, 1207 & n.4 (2011).

12. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE § 104 cmt. 7 (2011).

13. IND. R. EVID. 101(c)(2).

inapplicable.[14] The Indiana Court of Appeals recently stated this concept in *Butler v. State* by noting that "[a] probationer faced with a petition to revoke his probation is not entitled to the full panoply of rights he enjoyed before the conviction."[15]

Similarly, in *Williams v. State*,[16] the court of appeals discussed limitations on use of the Rules in the context of home detention hearings. *Williams* involved a defendant who, after pleading guilty to operating while intoxicated and admitting that he was a habitual substance offender, was sentenced to four years of in-home detention. He tested positive for marijuana on a urinalysis drug screen nearly one year after the imposition of his sentence.[17] Accordingly, the correctional consultants who supervised his detention filed a notice of violation of home detention.

At the hearing on his notice of violation, Williams objected to the State's use of the urinalysis and a "daily summary report" indicating that he had tampered with the home detention monitoring device he was required to use.[18] The trial court overruled his objection and sentenced him to serve the rest of his sentence in jail.[19] He argued on appeal that this evidence had been inappropriately admitted because the State had not established a "foundation of trustworthiness" for its monitoring technology.[20] The court of appeals first established that hearings on petitions to revoke home detention are to be handled in the same manner as hearings on petitions to revoke probation. As the court acknowledged, the Due Process Clause applies to both situations. But the court also noted that there is no right to probation, commenting that "[i]t should not surprise . . . that probationers do not receive the same constitutional rights that defendants receive at trial."[21]

In justifying the use of different evidentiary standards, the *Williams* court stressed the importance of flexibility greater than what is typically present in criminal prosecutions. Such flexibility, according to the court, "allows courts to enforce lawful orders, address an offender's personal circumstances, and protect public safety, sometimes within limited time periods."[22] The result may therefore be that evidence unavailable in a criminal trial is admissible in a probation or home detention revocation hearing. This ruling "does not mean that hearsay evidence may be admitted willy-nilly" in such situations; rather, the court reiterated that the "substantial trustworthiness" standard is to be applied.[23] Despite the trial court's failure to make an explicit finding that the evidence at

---

14. *See* Butler v. State, 951 N.E.2d 255, 259 (Ind. Ct. App. 2011).
15. *Id.*
16. 937 N.E.2d 930 (Ind. Ct. App. 2010).
17. *Id.* at 931.
18. *Id.* at 932.
19. *Id.*
20. *Id.*
21. *Id.* at 933 (quoting Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007)).
22. *Id.*
23. *Id.* (quoting *Reyes*, 868 N.E.2d at 440).

issue was substantially trustworthy, the court of appeals held that this type of error "is not fatal where the record supports such a determination."[24]

C. Rulings on Evidence

Rule 103(a) provides that a court's decision may only be reversed because of an evidentiary ruling if the ruling affected a "substantial right" of the party and the party either objected or made a timely offer of proof, depending on the situation.[25] The language of "substantial rights" also appears in the Indiana Trial Rules, which state that "[t]he court . . . must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."[26] Thus, unless substantial rights are affected, such an error is to be treated as harmless.

In *Gaby v. State*,[27] the Indiana Court of Appeals assessed whether cumulative errors that include an evidentiary ruling can warrant reversal. The defendant in this case was charged with Class A felony child molestation and convicted after a two-day trial. During the victim's testimony, the trial court allowed the prosecutor to refresh the victim's recollection, thereby eliciting further details of the molestation over Gaby's objection.[28] The court of appeals later determined that this evidence had been improperly admitted because the prerequisites for refreshing a witness's recollection had not been met. On its own, this might have been harmless error. However, the prosecutor in this case had also vouched for the victim's credibility during trial, stating that she was "confident" the jury would reach the same conclusion she had drawn about the case and that she would not have brought a charge she thought was false.[29] The court of appeals deemed it inappropriate for this attorney to have couched her argument in these terms, as she should not have "asserted . . . personal knowledge of the facts at issue."[30]

Faced with cumulative errors made by the prosecution, the court of appeals next assessed whether the defendant's substantial rights had been affected. The court noted that error is only harmless "if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor."[31] As it considered the impact of the prosecutor's actions on the jury, the court was ultimately unable to conclude that they would have a cumulatively harmless impact. Here, because the victim's credibility was the central issue at trial, the trial court's evidentiary rulings had more than a de minimis effect on the jury, and they certainly affected Gaby's substantial rights.[32] The court was "compelled" to reverse Gaby's

---

24. *Id.* at 935.
25. IND. R. EVID. 103(a).
26. IND. TRIAL R. 61 ("Harmless error").
27. 949 N.E.2d 870 (Ind. Ct. App. 2011).
28. *Id.* at 878.
29. *Id.* at 880.
30. *Id.* at 881.
31. *Id.*
32. *Id.* at 882.

conviction, although it also concluded that he could be retried.[33]

D. Jury Instructions for Evidence with Limited Admissibility

Rule 105 addresses the way a court must handle evidence that is admissible only as to certain parties or purposes—namely, "the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly."[34] *State v. Velasquez*,[35] a child molestation case, dealt with this rule in the context of preliminary jury instructions. Before either side presented evidence, the trial court addressed the jury as follows:

> Evidence may be presented to you of incidents unrelated to the offenses charged. These incidents are only to be considered as they describe the relationship between . . . [the victim and defendant]. You may not consider it for any other reason. Specifically, you may not consider it as being evidence of . . . [the defendant's] character, nor may it be considered as evidence that . . . [he] acted in conformity with the acts charged.[36]

Following a three-day trial, the jury found Velasquez not guilty on two molestation charges. The State appealed, arguing that the trial court had abused its discretion by giving a "confusing and misle[ading]" preliminary instruction on character evidence before this evidence was presented.[37] In the State's view, such an instruction should only have been tendered at the time the State sought to admit character evidence.

Because the appeal involved interpreting a rule of evidence, the appellate court applied a de novo standard of review. The court looked to *Humphrey v. State*,[38] a 1997 Indiana Supreme Court decision in which the court parsed the verbiage of Rule 105. Instructive to the court was the *Humphrey* court's determination that Rule 105 "enable[s] a party to request a limiting admonishment at the time the evidence is offered, rather than waiting until the jury instructions."[39] Further, the *Humphrey* court had focused on the Indiana rule's use of the term "admonish" rather than "instruct" to support its ultimate holding that Rule 105 admonitions were distinguishable from post-argument limiting instructions.[40] The *Velasquez* court thus concluded that even if the typical practice is to admonish a jury when character evidence is actually offered, what the trial court did was no abuse of discretion.[41] In light of the State's notices

---

33. *Id.*
34. IND. R. EVID. 105.
35. 944 N.E.2d 34 (Ind. Ct. App. 2011), *trans. denied*, 962 N.E.2d 637 (Ind. 2012).
36. *Id.* at 37.
37. *Id.* at 38.
38. 680 N.E.2d 836 (Ind. 1997).
39. *Velasquez*, 944 N.E.2d at 39 (quoting *Humphrey*, 680 N.E.2d at 839 n.7).
40. *Humphrey*, 680 N.E.2d at 839 n.7.
41. *Velasquez*, 944 N.E.2d at 39.

of intent to introduce character evidence, the trial court's decision to admonish the jury sua sponte had not been speculative. Moreover, the preliminary Rule 105 admonishment was neither confusing nor misleading because "jurors are presumed to follow the instructions of the trial court."[42]

II. JUDICIAL NOTICE (RULE 201)

Pursuant to Rule 201, courts may take judicial notice of facts or laws. The Indiana Court of Appeals's holding in *Christie v. State*[43] reminds practitioners that judicial notice contemplates a broad understanding of the term "laws." In this case, a Henry County trial court took judicial notice of materials in the records of the Knightstown Town Court, and the defendant argued on appeal that this constituted error.[44] The appellate court chided both parties for not paying close attention to Rule 201, which defines "law" to include records of any court in Indiana[45] and permits a court to take judicial notice of such law "at any stage of the proceeding."[46] Because the trial court was within its rights to take judicial notice of another court's records, defense counsel was not ineffective for failing to object to such notice at trial.

Graham v. State, an opinion on rehearing, addressed "comments . . . [the court] made regarding the creation and preservation of evidentiary records in post-conviction relief ('PCR') proceedings."[47] One specific issue in this case was that the PCR court had told the defendant that it could obtain part of the record from the superior court; however, this material was never properly entered into evidence or transmitted to the court of appeals. In its original opinion, the court of appeals held that "it was improper for the PCR court to have done so under . . . [then-existing] precedent."[48] The court had been alluding to the fact that Rule 201 did not permit courts to take judicial notice of "records of a court of this state" until January 1, 2010.[49] Nevertheless, the court also stated in its first opinion that "any material relied upon by the trial court . . . should be made part of the record for appeal purposes."[50] On rehearing, the court emphasized that if a PCR court does take judicial notice of another court's records, it should make these records part of the PCR record.[51] Doing so will avoid "plac[ing] a substantial burden upon . . . [the] court on appeal to either track down those

---

42. *Id.* (citing Buckner v. State, 867 N.E.2d 1011, 1016 (Ind. Ct. App. 2006)).

43. 939 N.E.2d 691 (Ind. Ct. App. 2011).

44. *Id.* at 693.

45. IND. R. EVID. 201(b).

46. IND. R. EVID. 201(f).

47. Graham v. State, 947 N.E.2d 962, 963 (Ind. Ct. App.), *aff'g* 941 N.E.2d 1091 (Ind. Ct. App. 2011).

48. *Id.* at 964.

49. *Id.* (citation omitted).

50. *Id.* (citation omitted).

51. *Id.* at 964-65.

records . . . or to attempt to decide the case without benefit of those records."[52]

In re Paternity of P.R.[53] dealt with a party's right to be heard regarding the "propriety of taking judicial notice," as provided in Rule 201(e).[54] Here, the trial court in a custody modification proceeding took judicial notice of a protective order the mother had obtained against an ex-boyfriend. The mother appealed the custody order, contending that the trial court had committed error because "[n]o party requested the court to take judicial notice . . . . [and she] was given no opportunity to object to the extrajudicial inquiry."[55] Noting that Rule 201(c) permits a court to take judicial notice even if it is not requested, the Indiana Court of Appeals also reminded the mother that "a party does not have to be notified *before* a court takes judicial notice."[56] The court acknowledged that parties do have the opportunity to be heard regarding judicial notice, but only upon timely request, which may occur after the court takes judicial notice. In reviewing the case below, the court held that it did not matter that judicial notice was taken after the hearing was over; "[the m]other could have made a timely request . . . . She, however, did not do this."[57] Therefore, her appeal did not constitute a timely request as contemplated by Rule 201(e) because it was not actually made to the trial court.

III. RELEVANCY AND ITS LIMITS (RULES 400-413)

A. Relevant and Irrelevant Evidence

Relevant evidence, the linchpin of any lawsuit, is evidence that has "any tendency to make the existence of any fact . . . of consequence to the determination of the action more probable or less probable than it would be without the evidence."[58] Whereas irrelevant evidence is inadmissible, all relevant evidence is admissible.[59] *In re Paternity of A.S.*[60] involved a father who had recorded telephone conversations he had with the mother of the child in question. At the conclusion of these conversations, he recorded himself ranting about the mother and calling her several profane names.[61] When he appealed the order giving him parenting time every other weekend, he asserted that the post-conversation recordings were irrelevant. The court of appeals disagreed, opining that the father's remarks were "indicative of . . . [his] attitude toward co-

52. *Id.* at 965.
53. 940 N.E.2d 346 (Ind. Ct. App. 2010).
54. IND. R. EVID. 201(e).
55. *Paternity of P.R.*, 940 N.E.2d at 349 (citation omitted).
56. *Id.* at 349-50.
57. *Id.* at 350.
58. IND. R. EVID. 401.
59. IND. R. EVID. 402.
60. 948 N.E.2d 380 (Ind. Ct. App. 2011).
61. *Id.* at 381, 385-86.

parenting."[62] Even if the mother had not heard his insults, the court found them relevant to the issue of whether "his restraint ha[d] its limits" despite the mother's attempts to reach an agreeable solution for the child.[63]

In *Flores v. Gutierrez*, plaintiff Flores brought a personal injury lawsuit after defendant Gutierrez's vehicle struck his vehicle from behind at an intersection.[64] A jury determined that although Gutierrez was liable in the collision, he owed Flores no damages. Flores filed a motion to correct error that was denied; on appeal, he challenged that denial as well as the trial court's admission of certain evidence. Specifically, before trial, Flores had filed a motion to exclude Gutierrez's "Exhibit D," which was a photograph of Flores's vehicle after the accident depicting very little property damage.[65] He challenged the trial court's admission of this photograph on appeal, as well as its exclusion of other medical records he had sought to have admitted.

With regard to the photograph of his vehicle, Flores asserted that it was inadmissible because "it was irrelevant to any determination of his bodily injury."[66] No Indiana precedent existed on whether trial courts could properly admit photos representing property damage to establish bodily injury; thus, Flores used Delaware authority to support his claim. He cited *Davis v. Maute*,[67] a case in which the Delaware Supreme Court reversed such an admission when no expert had testified about the photos. The Indiana Court of Appeals rejected Flores's argument, noting that *Davis* had subsequently been limited to its facts and that other jurisdictions had "reject[ed] the *Davis* reasoning that property damage, without expert testimony to show a link, is not relevant to bodily injury."[68] In the instant litigation, the court concluded that the trial court had properly admitted a duly authenticated and relevant piece of evidence. The court observed that because there is a "commonsense relationship between property damage and personal injury," the trial court correctly concluded that the lack of damage to Flores's vehicle "had some tendency to prove . . . facts relating to his personal injury claim."[69] In other words, according to the Indiana Court of Appeals, "Exhibit D" was relevant evidence.

B. Balancing Required Under Rule 403

Even if a particular piece of evidence is relevant, a court may exclude it pursuant to Rule 403 if its probative value is outweighed by, inter alia, "the

---

62. *Id.* at 386.

63. *Id.*

64. Flores v. Gutierrez, 951 N.E.2d 632, 634 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1116 (Ind. 2012).

65. *Id.* at 635.

66. *Id.* at 637.

67. 770 A.2d 36 (Del. 2001).

68. *Flores*, 951 N.E.2d at 638.

69. *Id.* at 638-39.

danger of unfair prejudice."[70] *Sigo v. Prudential Property & Casualty Insurance Co.*,[71] a breach of insurance contract claim, addressed the nuances of this rule. This lawsuit arose out of a fire loss; Sigo sued his insurance company for refusing to pay the claim when his home burned down. There was a concurrent criminal trial in which Sigo was charged with, tried for, and acquitted of arson.[72] At the civil trial, Prudential filed a motion in limine to exclude any reference to the criminal trial and Sigo's acquittal. The trial court granted the motion and certified the order for interlocutory appeal at Sigo's request.[73]

It was Sigo's position that any evidence regarding his criminal trial and acquittal of arson was admissible in the civil trial under Rules 401 and 403. He argued that: (1) the same witnesses would be featured in both trials; (2) evidence of the criminal trial was relevant to show bias against him; and (3) any prejudice resulting from such evidence would not be "unfair prejudice."[74] The court of appeals held otherwise, first noting that trial courts have significant latitude when performing Rule 403 balancing. According to the court, unfair prejudice "addresses the way in which the jury is expected to respond to the evidence; it looks to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis."[75] The court explained that at old common law, records in criminal cases were inadmissible in civil actions because of a "want of mutuality"—that is, the differences in rules and degrees of proof required in each setting.[76] Although the Indiana Supreme Court later adopted an exception to this rule, which allows a criminal felony conviction as evidence in a civil action, "it is not necessarily conclusive proof in the civil action of the facts upon which the conviction was based."[77]

Without controlling Indiana case law on whether evidence of an acquittal posed the danger of unfair prejudice in a civil trial, the court of appeals looked to decisions in other state and federal courts. The federal cases more directly dealt with evidence of non-prosecution, but the court argued by analogy that they were "instructive and persuasive insofar as Indiana's pertinent Evidence Rule[] mirror[ed] . . . [its] federal counterpart[]."[78] Ultimately, the court of appeals decided both that the trial court had properly excluded evidence of Sigo's acquittal under Rule 403 and that it was in no position to make new law on this point. Chief Judge Robb wrote that the court "presume[d] that had the drafters of the statute or Rule intended acquittal evidence to be admissible, they would have expressly said so."[79] However, she also included a footnote indicating that

---

70. IND. R. EVID. 403.
71. 946 N.E.2d 1248 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 649 (Ind. 2011).
72. *Id.* at 1249.
73. *Id.* at 1250.
74. *Id.*
75. *Id.* at 1251 (quoting Ingram v. State, 715 N.E.2d 405, 407 (Ind. 1999)).
76. *Id.*
77. *Id.* at 1252 (citing Kimberlin v. DeLong, 637 N.E.2d 121, 124 (Ind. 1994)).
78. *Id.* at 1253. The state cases did directly discuss evidence of acquittal in civil trials.
79. *Id.* at 1254.

a proper limiting instruction might lessen the danger of unfair prejudice in cases like *Sigo*.[80]

In *Granger v. State*,[81] the defendant appealed her convictions on several counts of felony child molestation and one count of felony child solicitation. She asked the court of appeals to consider whether the trial court had abused its discretion by admitting certain evidence of a sexual nature: photographs of her body, playing cards depicting naked figures, various sex toys, and condoms.[82] In particular, she believed that these items were introduced to inflame the jury, thereby unfairly prejudicing her case. The court of appeals affirmed the trial court and reminded the defendant that "[e]ven grisly autopsy photographs, which could prejudice a jury against a defendant, are admissible when they are relevant to an issue the State must prove."[83] The defendant's argument that she could have stipulated to the contents of the photographs was to no avail, as she did not so stipulate. Accordingly, the trial court was within its discretion to find that Rule 403's balancing test permitted introduction of the photographs.[84] With respect to the other items, the court determined that the victims' testimony belied the defendant's argument that the danger of unfair prejudice outweighed the items' probative value. The court stated that excluding these items would have "left the State with more than just 'a credibility contest'" and did not disturb the trial court's admission of any disputed pieces of evidence.[85]

C. Other Crimes, Wrongs, or Acts

Indiana law generally forbids the admission of "propensity evidence" in court.[86] As a practical matter, this means that evidence of a person's other crimes, wrongs, or acts may not be used to prove that he has acted similarly in the instant matter.[87] However, propensity evidence is admissible for certain limited purposes "such as proof of motive, intent, preparation, plan, knowledge, identity, or absence or mistake or accident."[88] The Indiana Supreme Court decided *Turner v. State*[89] during this year's survey period, a case that involved a horrific group shooting and presented several evidentiary issues. With respect to Rule 404(b), the court readily decided that testimony relating the defendant's expressed hope to commit robbery at or near the crime scene was admissible to show motive. Proclaiming that evidence of motive is always relevant, the court concluded that

---

80. *Id.* at 1254 n.3.
81. 946 N.E.2d 1209 (Ind. Ct. App. 2011).
82. *See id.* at 1212.
83. *Id.* at 1218.
84. *Id.*
85. *Id.* at 1220 (quoting Rafferty v. State, 610 N.E.2d 880, 884 (Ind. Ct. App. 1993)).
86. Payne v. State, 854 N.E.2d 7, 18 (Ind. Ct. App. 2006).
87. IND. R. EVID. 404(b).
88. *Id.*
89. 953 N.E.2d 1039 (Ind. 2011).

this testimony evinced motive to obtain property from the decedents.[90] This case also reviewed what courts do in assessing "404(b) evidence"; first, they determine that the evidence relates to a matter other than the defendant's propensity to commit the charged offense, and second, they engage in the balancing required by Rule 403.[91] Finding no errors at either step, the court held that the challenged testimony regarding Turner was admissible.

The application of Rule 404(b) extends beyond defendants. In *Davis v. State*,[92] the defendant hoped to benefit from this rule when appealing his conviction for possession of cocaine. Law enforcement officers searching for Davis on an outstanding warrant apprehended him in a sport utility vehicle. Having observed his attempt to hand Daniels, the passenger, a bag they suspected to be cocaine, the officers ordered them to stop the car.[93] They determined that the bag was cocaine and found amounts of money on Davis that suggested drug dealing. Davis denied that the bag was his; before trial, he tried to admit evidence of Daniels's prior drug convictions to show that Daniels was inclined to possess cocaine. The trial court granted the State's motion to exclude these convictions.[94]

On appeal, Davis asserted that evidence of Daniels's criminal history was admissible to establish the identity of the person who possessed cocaine on the day in question. He further alleged that her criminal history "[made] it more likely that *she* was the owner of the drugs."[95] The court of appeals agreed, remarking that "Rule 404(b) applies to persons other than defendants."[96] In this instance, "it was the State's intent to show that Davis was a cocaine dealer" and that "a drug transaction occurred between Davis and Daniels. Accordingly, from the State's theory, it follow[ed] that Daniels's record as a user and possessor was indeed relevant."[97] Somewhat unfortunately for Davis, though, the court also concluded that excluding this evidence caused Davis no prejudice, and it affirmed the trial court.

It is rare for an error predicated on Rule 404(b) to serve as grounds for a mistrial. In *Owens v. State*,[98] a defendant convicted of child molestation moved for a mistrial when, in violation of an order to exclude "any mention of his prior domestic battery conviction and any evidence of prior uncharged misconduct," a witness testified that Owens "abused us."[99] The court of appeals characterized the defendant's request as "an extreme remedy that is warranted only when less

---

90. *Id.* at 1057.

91. *Id.* (citing Wilson v. State, 765 N.E.2d 1265, 1270 (Ind. 2002)).

92. 948 N.E.2d 843 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).

93. *Id.* at 845-46.

94. *Id.* at 846.

95. *Id.* at 848 (emphasis added).

96. *Id.* (citing Garland v. State, 788 N.E.2d 425, 430 (Ind. 2003)).

97. *Id.*

98. 937 N.E.2d 880 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1205 (Ind. 2011), *opinion vacated by* 964 N.E.2d 845 (Ind. 2012).

99. *Id.* at 884, 894.

severe remedies will not satisfactorily correct the error."[100] By contrast, the court deemed the challenged testimony too vague to have put the defendant in peril. The court did not believe this brief statement had been offered as propensity evidence and concluded that the judge's instruction to disregard the witness's statement cured any error.[101]

D. Subsequent Remedial Measures

Rule 407 provides that "[w]hen after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."[102] The Indiana Court of Appeals considered this rule in the insurance context in *State Automobile Mutual Insurance Co. v. Flexdar, Inc.*,[103] which was also transferred to the Indiana Supreme Court during the survey period. In this case, State Auto sought a declaration that it owed no coverage when its insured, Flexdar, was found to have leaked the industrial solvent trichloroethylene (TCE) from its premises. The original State Auto insurance policy excluded from coverage damage caused by "pollutants," defined rather vaguely as irritants or contaminants.[104] Flexdar contended that the policy exclusion was ambiguous as written. While the case was pending on a summary judgment ruling, Flexdar sought to admit as evidence a new policy endorsement form that State Auto drafted after Flexdar became its insured. This form, which the trial court excluded, specifically identified TCE as a pollutant subject to State Auto's policy exclusion. Although the trial court granted summary judgment for Flexdar, one issue on appeal was whether the later endorsement form should have been admitted into evidence.[105]

The Indiana Court of Appeals set forth the two foci of Rule 407 as follows: "The first is that permitting proof of subsequent remedial measures will deter a party from taking action that will prevent future injuries. The second is doubt over the probative value of subsequent measures in proving omission or misconduct."[106] Next, the court relied on the Seventh Circuit Court of Appeals's holding in *Pastor v. State Farm Mutual Automobile Insurance Co.*[107] to support its view that Rule 407 called for excluding the endorsement form. In *Pastor*, the court opined that the insured "wanted to use the evidence that State Farm, to avert future liability to persons in the position of the plaintiff, changed the policy to establish State Farm's 'culpable conduct.'" The Seventh Circuit believed that

---

100. *Id.* at 895 (quoting Francis v. State, 758 N.E.2d 528, 532 (Ind. 2001)).

101. *Id.*

102. IND. R. EVID. 407.

103. 937 N.E.2d 1203 (Ind. Ct. App. 2010), *trans. granted*, 950 N.E.2d 1205 (Ind. 2011), *rev'd on other grounds by* 964 N.E.2d 845 (Ind. 2012).

104. *Id.* at 1205.

105. *Id.*

106. *Id.* at 1207.

107. 487 F.3d 1042, 1045 (7th Cir. 2007).

allowing this revision as evidence would "discourag[e] efforts to clarify contractual obligations," thereby violating Rule 407.[108] Thus, in the instant litigation, the Indiana Court of Appeals affirmed the trial court's exclusion of State Auto's new endorsement form.[109]

E. Evidence of Liability Insurance

Just as evidence of subsequent remedial measures is generally inadmissible to show negligence or culpability, "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully."[110] *Wisner v. Laney*,[111] a negligence action alleging failure to diagnose a patient's transient stroke, concerned the Rules' stance on addressing evidence of liability insurance in voir dire. Here, the plaintiff's counsel asked prospective jurors whether they worked for or owned stock in ProAssurance Insurance Company. Counsel also sought prospective jurors' opinions on injured parties seeking damages.[112] Despite a motion in limine against discussing insurance at trial, the defendants did not argue that the jury pool had been corrupted.

The Indiana Court of Appeals admonished the defendants for having waived their objection to insurance questions but considered the objection nonetheless.[113] Even though the defendants recognized precedent allowing insurance questions during voir dire, they argued that such questions must be posed in good faith and disputed the plaintiff's good faith.[114] As it considered Rule 411's import, the court stated:

> The rationale for not allowing evidence of insurance is that if the jury becomes aware that the defendant carries liability insurance and will not carry the brunt of any judgment, the jury may be prejudiced in favor of an excessive verdict. On the other hand, if the jury becomes aware that the defendant does not have insurance and will bear the burden of any judgment, the jury may be prejudiced in favor of a minimal verdict. . . . Rule 411 does not limit the allowable evidence regarding insurance only to financial interest, but also allows evidence going to bias or prejudice.[115]

Bearing in mind the underlying rationale of Rule 411, and noting that it is not

---

108. *Id.* at 1045.

109. *State Auto. Mut. Ins. Co.*, 937 N.E.2d at 1208. The Indiana Supreme Court's 2012 reversal of this decision focused on contested policy language rather than the admissibility of the endorsement form.

110. IND. R. EVID. 411.

111. 953 N.E.2d 100 (Ind. Ct. App. 2011), *trans. granted*, 963 N.E.2d 1115 (Ind. 2012).

112. *Id.* at 109.

113. *Id.*

114. *Id.* at 109-10 (citing Stone v. Stakes, 749 N.E.2d 1277, 1281 (Ind. Ct. App. 2001)).

115. *Id.* at 110 (citations omitted).

strictly applicable to voir dire, the court found the challenged questions "legitimate attempts to ascertain any potential for bias or prejudice."[116] The court also found no evidence that these questions had been asked in bad faith. As a result, the court concluded that the voir dire questions regarding insurance did not support the defendant's motion to correct errors.

F. Evidence of Past Sexual Conduct

The "rape shield rule," Rule 412, reflects the policy and underlying principles of the Indiana Rape Shield Act.[117] This rule provides that, with limited exceptions, evidence of the past sexual conduct of a victim or witness is inadmissible; it also provides specific procedures for parties seeking to introduce such evidence.[118] "Rule 412 is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes."[119]

In *Conrad v. State*,[120] the victim attended a party, fell asleep on the host's sofa, and woke up to find Conrad violating her sexually. Conrad was charged with two counts of criminal deviate conduct. During the jury trial, he made three unsuccessful offers of proof to introduce testimony that the victim had been "making out" with another party guest "just before" he encountered her.[121] Conrad was convicted and sentenced to twelve years in prison. When he appealed, he claimed that his proffered evidence of the victim's conduct with other party guests was not barred by Rule 412.[122]

Examining the ambit of Rule 412, Judge Bailey wrote that "[e]vidence 'of the classic sort precluded by the Rape Shield Rule' seeks to draw the fact-finder's attention to prior sexual conduct 'simply to show that the victim has consented in the past in the hope the inference will be drawn that she consented here.'"[123] It is noteworthy that Conrad disputed neither the policy of the rape shield rule nor the sexual nature of his victim's alleged conduct with the other individual. What he did argue was that her alleged activity with this person was "contemporaneous with any activity involving Conrad[,] and thus Rule 412's proscription against 'past sexual conduct' did not apply."[124] Nevertheless, Judge Bailey and the rest of the court did not find his argument persuasive. The court dismissed the notion that Rule 412 was as time-sensitive as Conrad suggested. "These events occurred in 'a very close period of time,'" wrote the court, "[b]ut they were not

---

116. *Id.*

117. *See* State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999). The Indiana Rape Shield Act is codified at IND. CODE § 35-37-4-4 (2012).

118. IND. R. EVID. 412.

119. Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997).

120. 938 N.E.2d 852 (Ind. Ct. App. 2010).

121. *Id.* at 854.

122. *Id.* at 855.

123. *Id.* (quoting *Williams*, 681 N.E.2d at 200).

124. *Id.* at 855-56 (internal citation omitted).

contemporaneous, as Conrad does not claim that he and . . . [the other partygoer] were simultaneously engaged in activity of a sexual nature with S.L."[125] The court declined to examine any possible intricacies of the word "past" and held that Conrad's proffered testimony could only constitute evidence of the victim's past sexual conduct, which Rule 412 bars.[126]

Additionally, the *Conrad* court determined that the evidence at issue could not have been introduced under any of the exceptions to Rule 412. Earlier in the opinion, the court explicitly stated the exceptions as follows: "unless that evidence would establish evidence of prior sexual conduct with the defendant, would bring into question the identity of the defendant as the assailant, or would be admissible . . . under Rule 609."[127] None of these applied to Conrad's situation, and the court did not create a new exception "based on a perceived need to impeach testimony."[128] As such, the court affirmed the trial court's exclusion of the evidence.

IV. PRIVILEGES (RULES 501-502)

On September 20, 2011, the Indiana Supreme Court published an order amending the Indiana Rules of Evidence.[129] Most notably affecting the rules regarding privilege, this order amended Rule 501, the general rule regarding privilege, and added Rule 502, which governs the attorney-client privilege and work product protection. The new versions of these rules took effect beginning January 1, 2012.

Rule 501 changed only marginally due to the supreme court's order. The current text of the rule is as follows:

> Rule 501. Privileges
> (a) General Rule. Except as provided by constitution or statute as enacted or interpreted by the courts of this State or by these or other rules promulgated by the Indiana Supreme Court or by principles of common law in light of reason and experience, no person has a privilege to:
> (1) refuse to be a witness;
> (2) refuse to disclose any matter;
> (3) refuse to produce any object or writing; or
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing.
> (b) Waiver of Privilege by Voluntary Disclosure. Subject to the provisions of Rule 502, a person with a privilege against disclosure waives the privilege if the person or person's predecessor while holder

125. *Id.* at 856 (citation omitted).

126. *Id.*

127. *Id.* at 855. "A common-law exception exists . . . where the victim has admitted the falsity of a prior accusation of rape or where a prior accusation is demonstrably false." *Id.*

128. *Id.* at 856.

129. IND. SUPREME CT., ORDER AMENDING INDIANA RULES OF EVIDENCE (Sept. 20, 2011), *available at* http://www.floydcounty.in.gov/SupremeCourtFilings/94S00-1101-MS-17e.pdf.

> of the privilege voluntarily and intentionally[130] discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.
> (c) Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege. A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.
> (d) Comment Upon or Inference from Claim of Privilege; Instruction. Except with respect to a claim of the privilege against self-incrimination in a civil case:
>
> (1) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding, or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
>
> (2) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
>
> (3) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.[131]

Rule 502 tracks its federal counterpart to some degree. Federal Rule of Evidence 502 was designed to address the "widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive," especially in cases involving significant electronic discovery.[132] Although it strives to set manageable standards, it "does not purport to supplant applicable waiver doctrine."[133] The text of Indiana's rule, which does not contain the federal version's definitions or references to state proceedings, is as follows:

> Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> (a) Intentional disclosure; scope of a waiver. When a disclosure is made in a court proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:
>
> (1) the waiver is intentional;

---

130. The words "and intentionally" represent the only change to Rule 501 besides the reference to new Rule 502.

131. IND. R. EVID. 501.

132. FED. R. EVID. 502 (Advisory Committee Note No. 2).

133. *Id.*

> (2) the disclosed and undisclosed communications or information concern the same subject matter; and,
> (3) they ought in fairness to be considered together.
> (b) Inadvertent disclosure. When made in a court proceeding, a disclosure does not operate as a waiver if:
> (1) the disclosure is inadvertent;
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and,
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Indiana Rule of Trial Procedure 26(B)(5)(b).
> (c) Controlling effect of a party agreement. An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
> (d) Controlling effect of a court order. If a court incorporates into a court order an agreement between or among parties on the effect of disclosure in a proceeding, a disclosure that, pursuant to the order, does not constitute a waiver in connection with the proceeding in which the order is entered is also not a waiver in any other court proceeding.[134]

V. WITNESSES (RULES 601-617)

A. Competency of Witnesses

Under Rule 601, every person is competent to be a witness at trial unless the Rules or Indiana General Assembly state otherwise.[135] Even children are treated as competent witnesses, although special proceedings must occur to establish their competency to testify at trial. A child's competency is established by a showing that she (1) can distinguish between telling the truth and telling a lie; (2) knows she is required to tell the truth; and (3) understands what a true statement is.[136] In *D.G. v. State*,[137] the Indiana Court of Appeals concluded that a trial court's failure to conduct this line of inquiry for a six-year-old witness was not harmless error. Because a year had passed since the child testified, the court determined that a competency assessment at this late date would not cure the error, and it reversed and remanded the action.[138]

The Rules also address when juror competency may be attacked. "It has long been established in Indiana that a jury's verdict may not be impeached by the testimony or the affidavit of the jurors who return it."[139] This longstanding rule

---

134. IND. R. EVID. 502.
135. IND. R. EVID. 601.
136. *See* Kien v. State, 866 N.E.2d 377, 385 (Ind. Ct. App. 2007).
137. 947 N.E.2d 445 (Ind. Ct. App. 2011).
138. *Id.* at 450.
139. Sienkowski v. Verschuure, 954 N.E.2d 992, 995 (Ind. Ct. App. 2011), *trans. denied*, 963

is designed to avoid juror harassment and prevent lawsuits from becoming "contest[s] of affidavits and counter-affidavits and arguments and re-arguments as to why . . . a certain verdict was reached."[140] Nevertheless, Rule 606(b) permits a juror to "testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror."[141]

Sienkowski v. Verschuure, a negligence case arising out of a motor vehicle accident, involved a plaintiff's attempt to skirt the contours of Rule 606(b).[142] After trial, the jury deliberated and initially returned a verdict for Sienkowski in the amount of $336,300. The trial court found a mathematical error in the jury's calculation, and after further deliberation, the jury replaced the first amount on the verdict form with $128,712.[143] Sienkowski filed a motion to vacate the judgment. Accompanying his motion were an affidavit and letter from two jurors, both stating that the number appearing on the final verdict form was not the number to which the jurors had agreed during their deliberations. Verschuure moved to strike these pieces of evidence, and the trial court struck them from the record.[144]

When his case reached the Indiana Court of Appeals, Sienkowski asserted that the affidavit and letter were admissible to show that "the verdict entered by the trial court . . . [was] not the actual verdict 'which all of the jurors unanimously agreed be entered.'"[145] He debated the semantics of the term "verdict," arguing as follows:

> The verdict is not the mere paper upon which such agreement is written. If the writing on the paper is wrong because of inadvertence, oversight or mistake, the verdict form does not contain the jury's actual verdict. When bringing such an error to the trial court's attention, the inquiry is not into the "validity" of the verdict[;] the inquiry is whether the information written on the verdict form is in fact the verdict.[146]

The court of appeals firmly disagreed with Sienkowski's approach to Rule 606 and the exceptions contained in subpart (b). In affirming the trial court's refusal to admit the affidavit and letter, the court ruled that disputing a number on the verdict form was no different from directly attacking the validity of the verdict.[147] Despite Sienkowski's attempt to distinguish the number from the jurors' ultimate

---

N.E.2d 1115 (Ind. 2012); *see generally* Ward v. St. Mary Med. Ctr., 658 N.E.2d 893 (Ind. 1995); Karlos v. State, 476 N.E.2d 819 (Ind. 1985).

140. Stinson v. State, 313 N.E.2d 699, 704 (Ind. 1974).

141. IND. R. EVID. 606(b).

142. *Sienkowski*, 954 N.E.2d at 993.

143. *Id.* at 993-94.

144. *Id.* at 994-95.

145. *Id.* at 995 (citation omitted).

146. *Id.* at 995-96.

147. *Id.* at 996.

agreement, the court deemed these pieces of evidence inadmissible to impeach the verdict.[148]

B. Impeachment

Pursuant to the Rules, a witness's credibility may be attacked by any party—even the party who called the witness.[149] The typical prohibition on evidence of other crimes is also suspended for the purpose of impeaching a witness. Rule 609 specifies that "evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted[,] but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement."[150] *Britt v. State*[151] allowed the court of appeals to address impeachment with respect to Rules 607 and 609. In this case, the defendant appealed several convictions and argued that the trial court improperly prevented him from introducing evidence of one of his witness's prior criminal convictions. He argued that because Rule 609's "mandatory language regarding impeachment by former convictions" should not have limited the questions he opted to ask his own witness, the trial court lacked discretion to exclude this evidence.[152]

With respect to Britt's reading of Rule 609(a), the court of appeals partially agreed. Because Indiana's version of this rule is not subject to the balancing test of Rule 403,[153] the court held that Britt was correct about its language being mandatory. The court cautioned him, however, that "Rule 609(a) is expressly limited to those circumstances where the evidence of the prior conviction is being offered 'for the purpose of attacking the credibility of a witness.'"[154] The circumstances of this case did not persuade the court that Britt had intended to introduce the witness's convictions to impeach his credibility. Rather, the court believed that he had offered the convictions as propensity evidence—that is, to suggest that the witness was more likely than Britt to have committed the robbery at issue.[155] Britt ultimately conceded that he had not attempted to attack this witness's credibility, which rendered Rule 609(a) inapplicable. The court added in a footnote that "[e]ven though . . . Rule 607 authorizes a party to impeach the credibility of his own witness, a party is forbidden from placing a witness on the stand if his sole purpose in doing so is to present otherwise inadmissible evidence cloaked as impeachment."[156] Put otherwise, although Britt was otherwise

148. *Id.*
149. IND. R. EVID. 607.
150. IND. R. EVID. 609(a).
151. 937 N.E.2d 914 (Ind. Ct. App. 2010).
152. *Id.* at 915.
153. *See* Jenkins v. State, 677 N.E.2d 624, 627 (Ind. Ct. App. 1997).
154. *Britt*, 937 N.E.2d at 916 (quoting IND. R. EVID. 609(a)).
155. *Id.* at 916-17.
156. *Id.* at 917 n.3.

permitted to impeach his own witness under Rule 607, he had not done so within the confines of Rule 609.

C. Refreshing a Witness's Recollection

Although Rule 612 permits a witness to use a writing or object to refresh his or her memory, it does not specify a method for refreshing recollection.[157] Judge Miller has written that only a "simple colloquy" is required and instructs practitioners along these lines:

> The witness first must state that he does not recall the information the questioner seeks. The witness should be directed to examine the writing, and be asked whether that examination has refreshed his memory. If the witness answers negatively, the examiner must find another route to extracting the testimony or cease the line of questioning.
>
> If the witness replies that the writing has refreshed his memory, he may be examined on the subject but may not testify from the writing itself.[158]

In *Gaby v. State*,[159] as discussed above, the Indiana Court of Appeals examined a trial transcript to determine whether the prosecution had properly refreshed a witness's recollection. The colloquy at issue was between a child victim and the prosecuting attorney, who was questioning her about the details of her alleged molestation. Without hesitation, the victim declared that the defendant had not made any noises, asked her to "touch his private parts," or touched parts of her body besides her genitals during the alleged molestation.[160] The prosecutor, ostensibly flustered, continued direct examination as follows:

> Q. Okay. Let me jump ahead for a second. Do you remember when—this time last year, April of '09 when you finally told what he had done many, many years ago and you were interviewed at a special house called Hartford House, do you remember that?
> A. Yes.
> Q. Okay. And do you remember seeing a copy of your statement, of your interview?
> A. Yes.
> Q. Okay. Did I in fact give you a copy?
> A. Yes, ma'am.
> Q. If I showed you a copy of that do you think that would refresh your memory as to some of these questions I just asked?
> A. Yes.[161]

---

157. IND. R. EVID. 612; *see* Thompson v. State, 728 N.E.2d 155, 160 (Ind. 2000).

158. MILLER, *supra* note 4, § 612.101.

159. 949 N.E.2d 870 (Ind. Ct. App. 2011).

160. *Id.* at 877-78.

161. *Id.* at 878.

Defense counsel objected to this attempt to refresh the child's recollection, averring that she had not demonstrated any lack of recollection of events. However, the trial court permitted the child to review her statement; she subsequently provided slightly different answers.[162]

In reviewing the record, the Indiana Court of Appeals "agree[d] with Gaby that the transcript clearly show[ed] that . . . [the victim] did not testify as to any lack of recollection regarding the events before the prosecutor showed her the transcript . . . . [but] simply gave answers the prosecutor neither expected nor desired."[163] The court recognized that before Indiana adopted the Rules, precedent permitted counsel to refresh a witness's recollection if the witness had "inadvertently omitted certain crucial facts" due to time or circumstantial pressure.[164] Nevertheless, the court insisted that it was bound by *Thompson v. State*,[165] which indirectly nullified pre-Rules decisions by requiring a witness to affirmatively state a lack of recollection before counsel could refresh her recollection.[166] As in *Thompson*, the court chided the trial court for admitting testimony that changed "on the pretext of refreshing the witness'[s] recollection."[167] The court ultimately believed the witness had testified clearly enough to foreclose the need to refresh her recollection, and it reversed the trial court.

VI. OPINIONS AND EXPERT TESTIMONY (RULES 701-705)

A. Lay and "Skilled" Witnesses

When a witness does not testify as an expert, his testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[168] Rule 701 therefore governs the testimony of lay witnesses. This rule informed the Indiana Court of Appeals in *Lesh v. Chandler*, a private nuisance case in which the trial court enjoined Lesh from targeting a flood light at the Chandlers' home and playing loud, disturbing music.[169] The trial court had relied on neighbors' testimony in making its findings of fact; Lesh contended that the neighbors lacked knowledge sufficient to provide a volume standard. In denying Lesh's request to reweigh the evidence, the appellate court noted that Rule 701 affords trial courts broad discretion in determining whether lay witness testimony has a rational basis and lends clarity

---

162. *Id.*

163. *Id.* at 879.

164. *Id.* at 879 n.7 (citing Poore v. State, 501 N.E.2d 1058, 1061 (Ind. 1986); King v. State, 296 N.E.2d 113, 115 (Ind. 1973)).

165. 728 N.E.2d 155 (Ind. 2000).

166. *See Gaby*, 949 N.E.2d at 879 n.7 (citing *Thompson*, 728 N.E.2d at 160).

167. *See id.* at 879-80.

168. IND. R. EVID. 701.

169. Lesh v. Chandler, 944 N.E.2d 942, 946 (Ind. Ct. App. 2011).

to the proceedings.[170]

Rule 701 also pertains to "skilled witnesses," who are persons "with 'a degree of knowledge short of that sufficient to be declared an expert under . . . [Rule] 702, but somewhat beyond that possessed by the ordinary jurors.'"[171] *Davis v. State*,[172] discussed above in the context of relevancy, was also reviewed on appeal through the lens of Rule 701. Here, the other disputed issue was whether a detective should have been allowed to testify that the denominations of money found on the defendant suggested drug dealing.[173] The appellate court compared his situation to a 2003 case where such testimony was considered "helpful in determining the issue of intent to deliver."[174] Because the instant litigation involved felony possession of—and not dealing in—cocaine, the court deemed the 2003 case comparison inapposite.[175] Finding the detective's conclusion "too speculative," the court did not find his testimony "helpful to a determination of a fact in issue."[176]

B. Expert Testimony

Pursuant to Rule 702(a), a witness "qualified as an expert by knowledge, skill, experience, training, or education" may testify if his specialized knowledge will help the court understand the evidence or a disputed fact.[177] *In re Estate of Lee*[178] dealt with attorneys who provided expert witness testimony in an appeal of a legal malpractice action. The case arose when decedent Lee's personal representative filed a complaint against Colussi, Lee's attorney, and alleged that Colussi had committed malpractice in his treatment of estate assets. Colussi rejoined that it was not his duty to monitor the estate's checking account. In response to Colussi's answer and counterclaim, the estate relied on depositions of two other attorneys—Bigley and Finnerty—who had testified that Colussi's failure to control and monitor the estate's checking account breached the applicable standard of care.[179] The trial court granted summary judgment for Colussi.

The Indiana Court of Appeals focused on selected excerpts of the record in determining whether summary judgment was proper, including the following:

---

170. *Id.* at 949 n.5.

171. Linton v. Davis, 887 N.E.2d 960, 975 (Ind. Ct. App. 2008) (quoting Mariscal v. State, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997)).

172. 948 N.E.2d 843 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).

173. *Id.* at 847.

174. *Id.* (quoting Davis v. State, 791 N.E.2d 266, 269 (Ind. Ct. App. 2003)).

175. *See id.*

176. *Id.* at 847-48. As noted above, the court nevertheless declined to reverse Davis's conviction.

177. IND. R. EVID. 702(a).

178. 954 N.E.2d 1042 (Ind. Ct. App. 2011), *reh'g denied*, *trans. denied*, 967 N.E.2d 1034 (Ind. 2012).

179. *Id.* at 1045, 1048 n.3.

> While expert testimony is appropriate in a legal malpractice case to determine if the defendant's actions fall below the standard of care application to a recognized duty, experts may not testify to conclusions of law. . . . The testimony of Bigley and Finnerty as to their practice as attorneys in monitoring an estate bank account are simply their personal opinions based on their own experiences which renders their opinions as to Colussi's actions lacking foundation and inadmissible conclusions of law.[180]

The court responded to the foregoing statements by characterizing the trial court as "confuse[d]," noting specifically that "[t]he trial court's statement that Bigley's testimony lacked foundation because it was based on his personal opinions and experiences is puzzling. . . . [P]ersonal experience is very often the source of a witness's expertise."[181] Bigley's legal credentials were undisputed; accordingly, the court believed there was proper foundation for his opinion testimony.[182] Furthermore, the court clarified that "although experts may not testify as to conclusions of law, such as the existence of a duty, expert witnesses are permitted to testify to the standard of practice within a given field."[183] In the court's view, Bigley's testimony did not concern the existence of Colussi's duty; indeed, the court imputed such a duty by virtue of Colussi's employment by the estate.[184] Bigley's testimony was instead meant to establish the standard of care that Colussi should have observed. As such, the court deemed the testimony admissible for that purpose and reversed the grant of summary judgment.[185]

Indiana's version of Rule 702 is not identical to its federal counterpart, which was amended in 2000 to codify elements embodied in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[186] Unlike Federal Rule 702, Indiana's rule provides that "[e]xpert scientific testimony is admissible only if the court is satisfied that the *scientific principles* upon which the expert testimony rests are reliable."[187] The Indiana Supreme Court has stated that its intent in adopting this version of Rule 702 is to "liberalize . . . the admission of reliable scientific evidence," not to add unnecessary roadblocks for trial courts.[188] To be sure, Indiana courts may—and indeed, often do—consider factors from *Daubert* in determining reliability. But "there is no specific 'test' or set of 'prongs' which *must* be considered in order to satisfy Indiana Evidence Rule 702(b)."[189]

In *Turner v. State*, the Indiana Supreme Court reiterated that "*Daubert* is

---

180. *Id.* at 1046 (internal citation omitted).
181. *Id.* at 1047.
182. *Id.*
183. *Id.*
184. *Id.* at 1047-48.
185. *Id.* at 1047-48, 1050.
186. 509 U.S. 579 (1993).
187. IND. R. EVID. 702(b) (emphasis added).
188. Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 460 (Ind. 2001).
189. Carter v. State, 766 N.E.2d 377, 380 (Ind. 2002) (citation omitted).

merely instructive in Indiana, and we do not apply its factors as a litmus test for admitting evidence under . . . Rule 702(b)."[190] At issue when the court accepted the case was the testimony of Michael Putzek, a firearms and tool mark examiner. Putzek provided testimony regarding the source of tool marks on cartridge casings; he opined that the marks came from "the 'same tool' of 'unknown origin.'"[191] Because Turner objected to the introduction of Putzek's testimony, the trial court held a preliminary hearing at which Putzek presented his qualifications to testify as an expert. The trial court denied Turner's motion to exclude the expert testimony, applying the *Daubert* factors as it came to its decision.[192]

Turner alleged on appeal that Putzek's opinion did not satisfy Rule 702(b)'s requirements for scientific reliability. He took particular issue with the subjective nature of firearms tool mark identification and characterized the process as rife with flaws and inconsistencies.[193] However, the supreme court dashed his hopes when it ruled that "it is not dispositive . . . whether Putzek's . . . technique can be and has been tested, whether the theory has been subjected to peer review and publication, whether there is a known or potential error rate, and whether the theory has been generally accepted within the relevant field of study."[194] To be sure, the court recognized the shortcomings of Putzek's methods and testimony and clearly noted his uncertainty and inability to cite other research to support his findings.[195] But the court ultimately ruled that these drawbacks "all inform[ed] the fact finder's judgment on weighing this evidence . . . [and did] not render the evidence inadmissible."[196] The court was informed by other jurisdictions that have analyzed evidence like Putzek's "as something other than 'scientific,'" and it observed the similarity of his techniques to "other observational . . . characteristics which this [c]ourt has found to be 'on the margins of testimony governed by Rule . . . 702(b) as expert scientific testimony.'"[197] With respect to Turner's other challenge, the court concluded that Turner's cross-examination of Putzek provided an ample foundation for the trial court to evaluate Putzek's credibility and assign proper weight to the testimony.[198] The court affirmed the trial court's ruling on this piece of evidence, underscoring the concept that Rule 702(b) gives trial courts broad discretion.[199]

Experts have additional leeway due to Rule 703; they may base their testimony on inadmissible evidence if "it is of the type reasonably relied upon by

---

190. Turner v. State, 953 N.E.2d 1039, 1051 (Ind. 2011).
191. *Id.* at 1045-46 (citation omitted).
192. *Id.* at 1048.
193. *Id.* at 1049.
194. *Id.* at 1051.
195. *See id.*
196. *Id.*
197. *Id.* at 1052-53 (quoting West v. State, 755 N.E.2d 173, 181 (Ind. 2001)).
198. *See id.* at 1053.
199. *Id.* at 1053-54.

experts in the field."[200] In *Jackson v. Trancik*,[201] the Indiana Court of Appeals explored the contours of this rule. Dr. Trancik, who initiated this action to collect an outstanding balance on Ms. Jackson's medical bill, employed the theory of account stated and moved for summary judgment. In her response, Jackson designated as evidence the affidavit of Lewis, who owned a firm specializing in the review of medical bills. This affidavit stated, inter alia, that Dr. Trancik had billed three of four procedures incorrectly, thereby overcharging Jackson by $3700.[202] The trial court issued an order to strike the affidavit and granted Dr. Trancik's motion for summary judgment.

As a preliminary matter, the Indiana Court of Appeals ruled that Lewis, although not a medical doctor, was nevertheless an "expert" as contemplated by the Rules.[203] The court classified medical billing as "a proper subject for expert opinion" given its extension "beyond the knowledge of ordinary lay persons."[204] Next, the court addressed Dr. Trancik's contention that the affidavit improperly relied on hearsay sources of information. The critical issue was therefore whether any otherwise inadmissible evidence in the affidavit was generally relied upon by other medical billing experts. For purposes of Rule 703, the court was satisfied by Lewis's use of an official coding system employed by the American Medical Association—"the nation's official . . . (HIPAA) compliant code set."[205] The court cautioned that this showing pertained only to admissibility, not the weight to be given Lewis's affidavit, but it concluded that the trial court erred by striking the affidavit.

C. Opinion on Ultimate Issue

Witness testimony in criminal trials is limited by Rule 704(b); a witness "may not testify to opinions concerning intent, guilt, or innocence . . . [or] the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."[206] *Steinberg v. State*[207] addressed this rule when the defendant appealed his murder conviction and sixty-five year prison sentence. Steinberg had placed three collect calls to his parents as he awaited trial in the Floyd County Jail, and the trial court admitted the recordings of these calls over his objection. He ostensibly wanted these calls excluded in part because of "his mother's statements explicitly expressing doubt about his mental health, credibility, and innocence."[208] Indeed, he alleged that "his mother's tone of voice and repetitive questioning expressed disbelief," thus violating Rule 704(b) by "directly . . .

---

200. IND. R. EVID. 703.
201. 953 N.E.2d 1087 (Ind. Ct. App. 2011).
202. *Id.* at 1090.
203. *Id.* at 1092-93.
204. *Id.* at 1093.
205. *Id.* at 1092-93.
206. IND. R. EVID. 704(b).
207. 941 N.E.2d 515 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1202 (Ind. 2011).
208. *Id.* at 522-24.

[attacking his] truthfulness, sanity and innocence."[209] The court of appeals was unconvinced, opining in a footnote that "[t]he practical difficulties of scrutinizing a witness's tone of voice for purposes of Evidence Rule 704(b) are too numerous to mention."[210] In the court's view, nothing about the mother's comments suggested a direct opinion as to Steinberg's guilt. The evidence was perfectly permissible even if it could lead to an inference because it did not otherwise go against Rule 704(b).[211]

VII. HEARSAY (RULES 801-806)

A. Hearsay Generally

Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[212] Except as provided by law, or as accommodated by the many exceptions in the Rules, hearsay is not admissible.[213] In *Sandefur v. State*,[214] the defendant addressed the hearsay rule while appealing his convictions of invasion of privacy and misdemeanor battery. At trial, a police officer testified that the non-testifying victim had mouthed the words "he hit me" to the officer while pointing at the defendant.[215] The trial court overruled the defendant's hearsay objection but instructed the jury members to evaluate the officer's interpretation of the victim's facial movements as they would any piece of testimony.

In determining whether the trial court had incorrectly decided that the officer's testimony was not hearsay, the Indiana Court of Appeals consulted the Rules to determine whether a "statement" had been made. Rule 801(a) provides that a "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[216] The court first held that pointing to a perpetrator is a prime example of nonverbal conduct serving as an assertion.[217] Next, the court dismissed the defendant's argument that the officer's testimony was not hearsay because he was not "completely certain" of what the victim intended to say.[218] "The import of Officer Thompson's testimony," Judge Crone wrote, "was that . . . [the victim] was trying to communicate to him, without allowing Sandefur to hear, that Sandefur hit her."[219]

---

209. *Id.* at 525 (citation omitted).
210. *Id.* at 525 n.12.
211. *Id.* at 525-26.
212. IND. R. EVID. 801(c).
213. IND. R. EVID. 802.
214. 945 N.E.2d 785 (Ind. Ct. App. 2011).
215. *Id.* at 787.
216. *Id.* at 788 (quoting IND. R. EVID. 801(a)).
217. *Id.* (citing Hall v. State, 284 N.E.2d 758, 762 (Ind. 1972)).
218. *Id.*
219. *Id.*

As a result, the court of appeals concluded that the officer's testimony about mouthed words was hearsay.

B. Excited Utterance

Despite the court's holding in *Sandefur* that Officer Thompson's testimony was hearsay, the court found it appropriately admitted under Rule 803(2), the excited utterance exception to the hearsay rule.[220] The court explained the exception as follows:

> In order for a hearsay statement to be admitted as an excited utterance, three elements must be present: (1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. This is not a mechanical test, and the admissibility of an allegedly excited utterance turns on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications.[221]

In this situation, Officer Thompson had arrived on the scene to find the victim in tears while the defendant yelled at her. The victim was cowering in a corner, bleeding, and struggling to make eye contact when she mouthed "he hit me" to Officer Thompson. Viewing her unwillingness to accuse her attacker aloud in the context of these observations, the court believed that "[h]er demeanor showed that she was still under stress, and her statement related to the startling event."[222] Thus, her otherwise excludable hearsay statement was admissible under Rule 803(2).

C. Then Existing State of Mind

The defendant in *Stewart v. State*[223] argued against employing one of the hearsay exceptions when he appealed his conviction on sixteen counts of various crimes. After the murders at issue, one of Stewart's friends received a call from Turner, a man similar in appearance to Stewart. Turner, who obviously knew of Stewart, said that he needed to "deal with Stewart before the police did because Turner was afraid that Stewart was going to" blame the murders on him.[224] At trial, the court admitted testimony concerning Turner's statements over Stewart's hearsay objection based on the hearsay exception contained in Rule 803(3). This rule permits as evidence statements "of the declarant's then existing state of mind . . . . [and] applies to statements of any person to show his or her intent to act in a particular way."[225] The court of appeals agreed with the State with very little

---

220. *See id.*

221. *Id.* (quoting Boatner v. State, 934 N.E.2d 184, 186 (Ind. Ct. App. 2010)).

222. *Id.* at 789.

223. 945 N.E.2d 1277 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 646 (Ind. 2011).

224. *Id.* at 1284.

225. *Id.* at 1286 (quoting IND. R. EVID. 803(3)).

analysis. Judge Kirsch wrote, "Turner[] . . . wanted to find Stewart to deal with him before the police found Stewart. In this statement, Turner was expressing his own intent to act in a particular way."[226] After a quick discussion of the testimony's relevance, the court found that the trial court properly admitted the evidence.

D. Medical Diagnosis Exception

In the same order in which it amended Rules 501 and 502, the Indiana Supreme Court also amended Rule 803(4).[227] The amended rule reads, "Statements made by persons who are seeking medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[228]

Prior to the amendment of this rule, the Indiana Court of Appeals decided *A.J. v. Logansport State Hospital*.[229] This case involved a man who was charged with child molestation, found incompetent to stand trial, and committed to Logansport State Hospital for competency restoration services in 2009. Later that year, the hospital filed a petition for his involuntary commitment; the trial court held a hearing on the petition in September 2010. At the hearing, the hospital submitted "Exhibit 1," a psychological testing report that included a sexual risk assessment and expressed that A.J. was likely to sexually reoffend.[230] The trial court considered this piece of evidence in its decision committing A.J. for further sexual rehabilitative services.

One of the issues A.J. raised on appeal was an objection to "Exhibit 1" as inadmissible hearsay. The Indiana Court of Appeals summarily disregarded his argument, observing that A.J.'s doctors had established a foundation that "Exhibit 1" was part of his treatment record.[231] Because the psychological testing report was intended to assess the risk of A.J.'s sexual recidivism, it was admissible as "both a statement made for the purposes of medical treatment pursuant to Evidence Rule 803(4) and a record of regularly conducted business activity pursuant to Evidence Rule 803(6)."[232] The court thus quickly held that the hearsay rule did not bar the inclusion of "Exhibit 1" at the commitment hearing.

Perry v. State[233] addressed the purpose and application of Rule 803(4) in somewhat more detail. Here, Perry appealed convictions on several counts, and part of the action involved an accusation that he had assaulted N.D., his ex-

---

226. *Id.*

227. IND. SUPREME CT., *supra* note 129.

228. IND. R. EVID. 803(4). Previously, the words "for purposes of" appeared in place of the words "by persons who are seeking." IND. SUPREME CT., *supra* note 129.

229. 956 N.E.2d 96 (Ind. Ct. App. 2011).

230. *Id.* at 103.

231. *Id.* at 110.

232. *Id.*

233. 956 N.E.2d 41 (Ind. Ct. App. 2011).

girlfriend. After N.D. told an emergency room nurse that Perry had sexually assaulted and strangled her, the nurse prepared a medical report documenting N.D.'s treatment and naming Perry as the assailant.[234] The nurse's report was admitted as evidence at trial over Perry's hearsay objection.

As a preliminary matter, the court of appeals determined that multiple levels of hearsay[235] were involved: (1) N.D.'s out-of-court statements to the nurse, and (2) the nurse's out-of-court document reporting what N.D. said to her.[236] The court first addressed whether N.D.'s statements to the nurse were admissible under Rule 803(4), stating the rationale for this rule as follows: "a declarant's self-interest in seeking treatment reduces the likelihood that she will fabricate information that she provides to those who treat her."[237] Rule 803(4) requires a court to determine the declarant's motive—namely, whether it was to provide information furthering diagnosis and treatment—and whether an expert would reasonably rely on the declarant's statement in providing care.[238] The court observed that although statements attributing fault are not generally covered by Rule 803(4), courts may exercise discretion to admit such statements in sexual abuse and domestic violence cases. Quoting its own precedent, the court wrote that "[t]he physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ"[239] when the abuser and victim are in a close relationship.

In affirming the trial court's ruling, the court of appeals determined that N.D.'s case warranted admitting statements describing her attack and identifying Perry as the perpetrator. The court held that her statements to the nurse directly pertained to diagnosing and treating N.D.'s physical injuries and possible sexually transmitted diseases, as well as referring her to domestic abuse counseling and determining how she would be discharged from the hospital.[240] Although the court acknowledged that some of N.D.'s statements exceeded the scope of the medical diagnosis exception and should have been redacted, it did not view the error as one mandating reversal.[241] The court also determined—with little analysis—that the second level of hearsay comported with Rule 803(6), as the nurse's report was properly considered a business record.[242]

---

234. *Id.* at 46.

235. Hearsay within hearsay is admissible only if each level of hearsay comports with an exception to the hearsay rules. IND. R. EVID. 805.

236. *Perry*, 956 N.E.2d at 49.

237. *Id.* (citing McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996)).

238. *Id.* (citing *In re* Paternity of H.R.M., 864 N.E.2d 442, 446 (Ind. Ct. App. 2007)).

239. *Id.* (quoting Nash v. State, 754 N.E.2d 1021, 1024-25 (Ind. Ct. App. 2001)).

240. *Id.* at 50.

241. *See id.*

242. *Id.* at 50-51.

E. Statements Against Interest

In *Lanham v. State*,[243] the defendant appealed convictions for possession of marijuana and other paraphernalia, contending that the search warrant police officers had used was based on uncorroborated hearsay. The court reminded the parties that for affidavits, "[t]he trustworthiness of hearsay . . . can be established in a number of ways . . . . One such . . . consideration is whether the informant has made a declaration against penal interest."[244] Here, the hearsay declarant was a minor who admitted to a police officer that she had smoked marijuana with the defendant and noticed drug paraphernalia at the defendant's home. The defendant argued that the minor had made this statement not against penal interest, but to win favor with police officers. The court, however, found no evidence of an attempt to "curry favor" with law enforcement; the minor had neither been caught in an illegal act nor been charged with any sort of violation.[245] Because she had admitted drug activity in front of her mother and a police officer, the court viewed her statement as "one that tends to subject the declarant to civil or criminal liability such that a reasonable declarant would not have made the statement unless believing it to be true,"[246] thus placing her affidavit within the ambit of Rule 804(b)(3).

State v. Chavez[247] dealt with Rule 804(b)(3) in somewhat greater detail. In this murder case, the State filed an interlocutory appeal of the trial court's order excluding statements that implicated Chavez in the crime. One of the statements came from Redmon, a friend and co-worker of Chavez's brother Mark. Redmon declared that Mark had confided in him, revealing that Chavez had shot one of the victims and fled from police with two dead bodies in his truck.[248] The trial court did not indicate whether it had excluded Redmon's statement based on the Rules or Chavez's right to confront witnesses against him.

It was the State's position that Redmon's statement containing Mark's account of the crime was admissible as a statement against interest. In considering this argument, the Indiana Court of Appeals walked through the mechanics of Rule 804 hearsay exceptions. First, the court deemed Mark "unavailable" for purposes of the rule because of his Fifth Amendment right not to testify.[249] The court then examined the text of Rule 804(b)(3) and paid particular to its second sentence: "A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception."[250] The State argued that the purpose of this sentence was to protect a defendant's right to

---

243. 937 N.E.2d 419 (Ind. Ct. App. 2010).

244. *Id.* at 424 (citations omitted).

245. *Id.*

246. *Id.*

247. 956 N.E.2d 709 (Ind. Ct. App. 2011).

248. *Id.* at 711.

249. *Id.* at 712.

250. IND. R. EVID. 804(b)(3).

confrontation and urged the court to consider it with an eye toward *Crawford v. Washington*.[251] Noting *Crawford*'s holding that the Sixth Amendment bars "testimonial" hearsay, the State argued that Mark's "non-testimonial" statements should not be excluded.

The Indiana Court of Appeals rejected the State's call to admit the contested statements. "[A]lthough many of our evidence rules mirror the Federal Rules," Judge Crone wrote, "Federal Evidence Rule 804(b)(3) does not include a provision excluding statements from codefendants. Thus, our supreme court's addition of this provision . . . appears to be a deliberate choice."[252] The court cautioned that despite the similar issues involved in the Sixth Amendment and hearsay rules, the two authorities are not interchangeable. Without considering whether Mark's admissions about the crime were "testimonial" as contemplated by *Crawford*, the court explained that "reliability remains a fundamental concern of our hearsay rules."[253] It appeared to the court that the contested statements were not sufficiently reliable for purposes of Indiana's Rule 804(b)(3). Hence, the court concluded that the State had failed to show any abuse of discretion by the trial court in excluding these statements.

F. Past Recollection Recorded

A recorded statement or memorandum that is otherwise hearsay may nevertheless be admitted under Rule 803(5), the "past recollection recorded" hearsay exception, if:

> (a) the memorandum or record relates to a matter about which a witness once had knowledge, (b) the witness has insufficient recollection at trial to enable the witness to testify fully and accurately, (c) the witness is shown to have made or adopted the memorandum or record, (d) the memorandum or record was adopted when the matter was fresh in the witness's memory, and (e) the memorandum or record is shown to reflect the witness's knowledge correctly.[254]

In *Horton v. State*,[255] the Indiana Court of Appeals considered the defendant's argument that the trial court had improperly allowed the jury to view a videotaped interview. The video consisted of testimony of a child molestation victim describing her abuse in detail. When the child took the stand at trial, she struggled to remember details and hence was permitted to watch her interview. The trial court let the video go before the jury based on Rule 803(5) when the child still foundered in her testimony, and Horton raised this as an error on

---

251. 541 U.S. 36 (2004).

252. *Id.* at 713 (internal footnote omitted).

253. *Id.* at 714 (citing Jackson v. State, 925 N.E.2d 369, 374-75 (Ind. 2010)).

254. Impson v. State, 721 N.E.2d 1275, 1282-83 (Ind. Ct. App. 2000).

255. 936 N.E.2d 1277 (Ind. Ct. App. 2010), *vacated on other grounds by* 949 N.E.2d 346 (Ind. 2011).

appeal.[256]

In his argument, Horton contended that the video was improperly admitted on several bases. The court of appeals disagreed and walked through various aspects of Rule 803(5). First, the court found that "[t]he video clearly [depicted a matter about which the victim had knowledge] . . . because the video . . . [was] of a DCS employee interviewing R.M. about the molestation, and the trial judge and attorneys discussed what the video might reveal prior to the video's admission."[257] Next, the court dismissed Horton's assertion that his victim had a complete, accurate memory of the events, observing that she had frequently answered questions by saying she did not remember.[258] The court then refuted Horton's argument that the video did not correctly reflect the victim's knowledge, stating that

> where R.M.'s statements in the video covered the same issues as her testimony prior to admission of the video, they were largely consistent with her live testimony. The video filled in many of her live testimony's gaps as to details R.M. did not remember, adding specific details one might expect a child to more vividly remember days after the incidents but perhaps not remember as vividly months later at a trial.[259]

Finding the core components of Rule 803(5) satisfied, the court deemed it particularly persuasive that the child victim had failed to recall details of her molestation after watching her taped interview during a break in the trial. She had, however, timely adopted the video statement that was otherwise consistent with her testimony, and the court saw no error in the trial court's decision to admit the video under the "past recollection recorded" hearsay exception.

G. Public Records and Reports

Another issue debated in *Perry v. State* was the admissibility of the actual medical records containing hearsay statements.[260] Before concluding that Rule 803(6) permitted the trial court to consider them, the appellate court consulted Rule 803(8). This rule governs the admissibility of public records and reports; it clearly excludes from its scope "investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case."[261] The court of appeals rationalized this exclusion as follows: "[O]bservations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in

256. *Id.* at 1281.
257. *Id.* at 1282.
258. *Id.*
259. *Id.* at 1283.
260. Perry v. State, 956 N.E.2d 41, 50 (Ind. Ct. App. 2011).
261. IND. R. EVID. 803(8)(a).

criminal cases."[262] Even so, the court declined to find that Rule 803(8) covers treating medical personnel who cooperate with law enforcement officers.[263] Finding the rule inapplicable to the case at bar, the court of appeals found no error in its admission as a business—not public—record.[264]

VIII. AUTHENTICATION AND IDENTIFICATION (RULES 901-903)

An important prerequisite for admitting any piece of evidence is proper authentication or identification. The Rules declare that this condition precedent is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims."[265] In *Taylor v. State*,[266] the Indiana Court of Appeals was asked to rule on whether a defendant's letter to a judge had been properly authenticated before the trial court admitted it. The court first stated that Rule 901 requires a showing of (1) "[e]vidence demonstrating a reasonable probability" that the matter is what it proponent claims it to be, and (2) a condition "substantially unchanged as to any material feature."[267] Examining the defendant's letter, the court then concluded that Rule 901 had been satisfied. The envelope housing the letter bore the defendant's return address, a state facility, and its date corresponded to when the defendant was in custody. Additionally, the letter was written in the first person and provided details about the crime at issue that "only someone who had been involved would be likely to know."[268] Based on this information, the court of appeals held that the State had set a proper foundation for admitting this letter under Rule 901; similarly, the trial court had not erred by admitting the letter.

IX. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1002—known as the "best evidence rule"—instructs that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required."[269] The terms "writings" and "recordings" are defined as "letters, words, sounds, or numbers, or their equivalent," set down by various methods.[270] In *Romo v. State*,[271] the Indiana Supreme Court dealt with the application of the best evidence rule when a trial court admitted English translations of Spanish recordings as substantive evidence. The defendant had conducted three drug transactions with a confidential informant who was secretly

---

262. *Perry*, 956 N.E.2d at 51 (quoting Fowler v. State, 929 N.E.2d 875, 879 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 825 (Ind. 2010)).

263. *Id.*

264. *Id.*

265. IND. R. EVID. 901(a).

266. 943 N.E.2d 414 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1207 (Ind. 2011).

267. *Id.* at 418 (citing Herrera v. State, 710 N.E.2d 931, 938 (Ind. Ct. App. 1999)).

268. *Id.* at 419.

269. IND. R. EVID. 1002.

270. IND. R. EVID. 1001.

271. 941 N.E.2d 504 (Ind. 2011).

recording the conversations. Because the defendant and informant communicated in Spanish, a bilingual specialist with the police department transcribed the conversations into a written English translation.[272] A jury found the defendant guilty on all charges, and the supreme court granted transfer after the court of appeals affirmed the convictions.

Writing for the court, Justice Dickson acknowledged that the Rules do not specifically discuss the admissibility of written translations. He also noted that Rule 1004,[273] which offers exceptions to the best evidence rule, does not authorize the use of transcripts in lieu of original recordings.[274] Next, he reviewed three recent cases[275] in which the Indiana Supreme Court considered the role transcripts of recordings might play at trial and summarized their holdings:

> Although *Small*, *Tobar*, and *Roby* view the function of transcripts of recordings purely as an aid to assist the jury's understanding of the actual recording, and Evidence Rule 1002 requires the original of a recording, if available . . . both *Small* and *Roby* leave open the possibility of a more robust role for transcripts where the recording is inaudible or indistinct. For juries without appropriate foreign language comprehension, audio recordings of foreign language speakers may . . . require special consideration.[276]

The court also compared this case to *United States v. Estrada*,[277] a 2001 Seventh Circuit case in which it was deemed appropriate for a trial court to admit English translations of Spanish recordings without also playing the recordings for the jury.[278] However, the court observed that *Estrada* made such an allowance as an aid for the jury, not as substantive evidence.[279] Thus, the court also discussed the Fifth Circuit's handling of similar situations and noted that "[t]he Fifth Circuit has expressly allowed a transcript of a taped conversation to be admitted as substantive evidence."[280] The court similarly relied on the Eighth Circuit's directive in *United States v. Placensia* that "where the discussions were in Spanish, transcripts of the discussions as translated into English *are* evidence."[281] Bearing in mind the aforementioned persuasive federal authority,

---

272. *Id.* at 506.

273. An original is not required if it: (1) was lost or destroyed; (2) is not obtainable by judicial process; (3) is in the hands of the party against whom it is offered; or (4) relates only to collateral matters. IND. R. EVID. 1004.

274. *Romo*, 941 N.E.2d at 506.

275. Roby v. State, 742 N.E.2d 505 (Ind. 2001); Tobar v. State, 740 N.E.2d 106 (Ind. 2000); Small v. State, 736 N.E.2d 742 (Ind. 2000).

276. *Romo*, 941 N.E.2d at 507.

277. 256 F.3d 466 (7th Cir. 2001).

278. *Romo*, 941 N.E.2d at 507.

279. *Id.*

280. *Id.* (citing United States v. Onori, 535 F.2d 938 (5th Cir. 1976)).

281. *Id.* at 508 (emphasis added) (quoting United States v. Placensia, 352 F.3d 1157, 1165 (8th Cir. 2003)).

the court ultimately concluded that English translation transcripts of recorded statements in foreign languages are indeed substantive evidence.[282] The court made this determination independently of Rule 1002, rationalizing that "the original recording, being solely in Spanish, would not likely convey to the jury the content of the recorded conversations. Applying the rule to limit the evidence of content to the original Spanish recordings would not serve the purpose of the rule because it could not prove any content."[283] As an aside, the court noted that although such transcripts may be used as substantive evidence, "it is generally the better practice to play such foreign language recordings to the jury upon a reasonable request by a party."[284]

Arlton v. Schraut,[285] a medical malpractice action, concerned the best evidence rule with respect to photographs. To remedy his choroidal neovascularization, Arlton became a patient of Dr. Schraut and underwent laser photocoagulation surgery. Dr. Schraut took a series of angiogram photos of Arlton's retina in the course of treatment.[286] At trial, the court admitted—with no objection—three discs containing high-resolution enlarged duplicate images of the angiograms. When Arlton offered six printouts consisting of enlargements of the discs' photos, defense counsel did object, and the trial court sustained the objection.[287]

On appeal, Arlton argued that his enlargements of the angiograms were admissible because they were enlargements, and the other side had presented no evidence that they had been otherwise altered. His opponent claimed that Arlton lacked the requisite skill to have interpreted the angiograms and created these images as proper exhibits.[288] The court of appeals defined Arlton's images as "duplicates"[289] and noted that Rule 1003 permits duplicates in evidence "to the same extent as . . . [originals] unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[290] Here, the court found neither a true question of authenticity nor any indication of unfairness. Arlton's expert witness had adequately established a proper foundation for the enlarged angiograms by testifying that they accurately reflected the images in the discs—to which the defendant had not objected.[291] Seeing no evidence as to alteration of the angiograms, the court of appeals decided that the trial court had abused its discretion by excluding Arlton's proffered evidence.[292] The court ultimately

---

282. *Id.*
283. *Id.*
284. *Id.*
285. 936 N.E.2d 831 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1200 (Ind. 2011).
286. *Id.* at 834.
287. *Id.* at 835-36.
288. *Id.* at 836-37.
289. The term "duplicate" contemplates enlargements. *See* IND. R. EVID. 1001.
290. *Id.* at 837 (quoting IND. R. EVID. 1003).
291. *Id.* at 838.
292. *Id.*

reversed the decision of the lower court and remanded Arlton's case for a new trial.

CONCLUSION

Now well into their third decade of usage, the Indiana Rules of Evidence continue to develop and interact with the Federal Rules of Evidence as well as with common and statutory law. The ubiquitous nature of the Internet is likely to spur on future evolution of the Rules, and our state courts will necessarily respond by reinterpreting or otherwise clarifying previous holdings concerning various Rules. Because glancing at the text of the Rules is unlikely to help attorneys considering practical application of the Rules, regular consultation of emerging decisions will be a vital part of any litigator's practice.

RECENT DEVELOPMENTS IN FAMILY AND MATRIMONIAL LAW

KATHLEEN E. RUDIS*
MICHAEL R. KOHLHAAS**
JAMES A. REED***
KEVIN P. MCGOFF****

INTRODUCTION

During the survey period, October 1, 2010 through September 30, 2011, numerous Indiana appellate court decisions were published involving family and matrimonial law. These decisions involve topics such as dissolution of marriage, child custody, support, relocation, paternity, and adoption. This Article reviews and examines developments in Indiana's family and matrimonial case law during the survey period.

I. DISSOLUTION OF MARRIAGE

The following section reviews noteworthy cases involving jurisdictional issues, marital property issues, property valuation issues, distribution issues, maintenance issues, and other matters related to the dissolution of marriage.

A. Jurisdictional Issues

Jurisdictional issues frequently arise in family law. In one noteworthy case, *Cotton v. Cotton*,[1] the Indiana Court of Appeals considered whether the summons

---

* Associate, Bingham Greenebaum Doll LLP; professional profile *available at* http://www.bgdlegal.com/professionals/xprAttorneyDetails4.aspx?xpST=AttorneyDetail&attorney=367. Since graduating from law school in 2009, Katie has practiced with the firm's litigation and private client departments, where she represents clients on an array of matters from family and matrimonial law to health care and business litigation.

** Partner, Bingham Greenebaum Doll LLP; professional profile *available at* http://www.bgdlegal.com/professionals/xprAttorneyDetails4.aspx?xpST=AttorneyDetail&attorney=361. Mike concentrates his practice in a variety of personal representations, including matrimonial law and wealth transfer planning. His clients include executives, professional athletes, civic leaders, as well as other high-profile and high net worth individuals.

*** Partner, Bingham Greenebaum Doll LLP; professional profile *available at* http://www.bgdlegal.com/professionals/xprAttorneyDetails4.aspx?xpST=AttorneyDetail&attorney=371. Jim is the founder of the matrimonial and family law group at Bingham Greenebaum Doll and leads the firm's private client department. He is a Fellow of the American Academy of Matrimonial Lawyers.

**** Partner, Bingham Greenebaum Doll LLP; professional profile *available at* http://www.bgdlegal.com/professionals/xprAttorneyDetails4.aspx?xpST=AttorneyDetail&attorney=375. Kevin practices with the firm's litigation and private client departments, where he represents clients in matters from family and matrimonial law to legal ethics.

1. 942 N.E.2d 161 (Ind. Ct. App. 2011).

served with a petition for dissolution of marriage must include a clear statement of the risk of default for failure to appear or otherwise respond.

In *Cotton*, the husband and wife married in 2002.[2] In March 2009, the husband filed a petition for dissolution of marriage. The wife was served with a summons and copy of the petition, but she failed to appear and did not respond to the petition.[3] At the final hearing in September 2009, the wife did not appear and she received no notice of the final hearing.[4] The trial court defaulted the wife and entered a final dissolution decree awarding joint legal and physical custody of the parties' son.[5] The wife appealed this ruling.

On appeal, the wife contended that the decree was void because it was entered without personal jurisdiction over her, due to insufficiency of process; specifically, the summons used by the husband did not include language articulating a risk of default for doing nothing.[6] In reviewing the summons, the court of appeals concluded: "We hold that due process requires that, at a minimum, a respondent in a dissolution proceeding be notified of the risk of default for failure to appear or otherwise respond."[7] The court of appeals added, "[T]he command of Trial Rule 4(C)(5), grounded in due process, is that the respondent in a dissolution proceeding must be given notice in a 'clear statement' of the risk of default for failure to appear or other respond."[8] Concluding that the subject summons did not comply with Trial Rule 4(C)(5), or the Due Process Clause, the dissolution decree was reversed and remanded for further proceedings.[9]

B. Property Distribution

Distributing marital property raises issues involving how to define the marital estate, how to value marital property, and how to distribute marital property.

1. Defining the Marital Estate.—Generally, assets are subject to division when there is an immediately existing right of present enjoyment. In *Ford v. Ford*,[10] the Indiana Court of Appeals reviewed a trial court decision considering whether the husband's employer-funded health benefit account constituted a marital asset subject to division. The court also considered the value of the account.

During dissolution proceedings between the parties in *Ford*, the parties reached a mediated settlement, in which they agreed to all issues except whether the husband's employer-funded health benefit account, valued at $28,694.31

---

2. *Id.* at 163.
3. *Id.*
4. *Id.* at 163-64.
5. *Id.* at 163.
6. *Id.* at 163-65.
7. *Id.* at 165.
8. *Id.*
9. *Id.* at 166.
10. 953 N.E.2d 1137 (Ind. Ct. App. 2011).

constituted a divisible marital asset.[11] The trial court found that the account was a divisible marital asset.[12] The trial court also found that because the parties had agreed on a value of the account, the trial court should accept that value.[13]

On review, the Indiana Court of Appeals found that the husband had an immediately-existing right of present enjoyment of the account, and therefore was vested in possession with regard thererto.[14] Thus, the court found that the trial court properly concluded that the account was a divisible marital asset.[15] The court did consider the contingencies that might impact the account in the future, but the court determined that the contingencies did not change the fact that the husband had an immediately-existing right of present enjoyment of the account.[16]

The court's review of the valuation of the asset revealed that the parties agreed only that "the sum of $28,694.31 was the amount of employer contributions in the [account] as of March 2010."[17] The court ruled that this was not the same as agreeing that the value of the account as a marital asset was $28,694.31.[18] Moreover, the court found that due to the various contingencies that might affect the husband's future enjoyment of the account, "the [a]ccount might well be valued at substantially less than $28,694.31."[19]

The court affirmed the trial court's conclusion that the account was a marital asset subject to division, but reversed and remanded the trial court's judgment regarding valuation of the account.[20]

2. Property Valuation Issues.—Several cases during the survey period addressed the issue of valuing property includable in the marital estate. Specifically, the court considered valuation when the value of an asset has changed significantly during the pendency of dissolution. In *McGrath v. McGrath*,[21] the Indiana Court of Appeals considered the selection of a valuation date for a marital asset, where the trial court has a choice between using a date of filing value and a date closer to the final hearing, and the value of the asset changed significantly during the pendency due solely to market fluctuation.

In *McGrath,* the wife filed a petition for dissolution of marriage in 2005.[22] Several months later, the real estate property that the couple owned in Michigan City was appraised for $389,000.[23] In late 2009, as the parties' final hearing

---

11. *Id.* at 1141.
12. *Id.*
13. *Id.*
14. *Id.* at 1142-43.
15. *Id.*
16. *Id.* at 1143.
17. *Id.* at 1144 (citation omitted).
18. *Id.*
19. *Id.*
20. *Id.*
21. 948 N.E.2d 1185 (Ind. Ct. App. 2011).
22. *Id.* at 1185.
23. *Id.*

approached, the property was appraised again, this time for $229,000.[24]

In April 2010, the parties' final hearing was held.[25] Both the 2005 and 2009 appraisals for the Michigan City property were admitted into evidence.[26] Following the final hearing, the trial court awarded the Michigan City property to the husband at its 2005 valuation, which the husband argued reduced his share of the marital property to less than fifty percent.[27]

The court of appeals noted the general axioms that the trial court has broad discretion in determining the date on which marital assets should be valued.[28] Further, "for purposes of choosing a date upon which to value marital assets, the trial court may select any date of filing between the date of filing the petition for dissolution and the date of the final hearing."[29] Nevertheless, the court of appeals concluded that "the court abused its discretion in failing to consider the substantial change in value of the [Michigan City real estate] as expressed in the 2009 appraisal report."[30] The trial court's decree was reversed and remanded with instructions to take into account the decline in the value of the Michigan City real estate.[31]

Additionally, during the survey period, the Indiana Court of Appeals issued case law regarding supplemental property settlement payments. The court determined that when more than one property was at issue, the properties must be viewed collectively for purposes of equalization payments.[32]

3. Distribution Issues.—Cases regarding distribution issues can arise when a party to dissolution believes their spouse dissipated assets, when events subsequent to dissolution complicate future retirement distribution, or when a property settlement agreement requires clarification. The court has determined that awarding one party more than 100% of the marital estate is an abuse of discretion, absent a finding of dissipation. In *Smith v. Smith*,[33] the Indiana Court of Appeals considered whether the trial court abused its discretion in awarding one party more than 100% of the marital estate, absent a finding of dissipation that supported the award.

---

24. *Id.*

25. *Id.*

26. *Id.* at 1188.

27. *Id.* at 1185-87.

28. *Id.* at 1187 (citing Wilson v. Wilson, 732 N.E.2d 841, 845 (Ind. Ct. App. 2000)).

29. *Id.* (citing *Wilson*, 732 N.E.2d at 845).

30. *Id.* at 1189.

31. *Id.* Judge Friedlander concurred with a separate opinion, stressing the inconsistencies present in the trial court's decree. *Id.* (Friedlander, J., concurring).

32. *See* Connolly v. Connolly, 952 N.E.2d 203, 207-08 (Ind. Ct. App. 2011) ("[I]n the event of a post-dissolution increase in value of husband's ownership interest in [the property], [w]ife would be entitled to an 'equalization payment' based upon an increase in the value of that interest. . . . it is not disputed that [h]usband's ownership interest in [the property] decreased. Accordingly, wife is not entitled to an equalization payment based on [h]usband's ownership interest (alteration omitted) (citation omitted)).

33. 938 N.E.2d 857 (Ind. Ct. App. 2010).

In *Smith*, the only contested issue for the divorce proceeding was the division of marital assets.[34] The parties had assets of about $46,000 and debts of about $39,000, making the value of the marital estate about $7,000.[35] The husband earned, or was capable of earning $1,310 per week and the wife earned, or was capable of earning $686. The trial court found that the wife rebutted the presumption of an equal division of the marital estate due to the earning abilities of the parties.[36] The wife's net award by the trial court was around $11,500 and the husband's was around (-$4,500).[37] The husband subsequently appealed.[38]

On appeal, the husband argued that the trial court abused its discretion by awarding the wife more than one-hundred percent of the net marital estate.[39] The court of appeals agreed with the husband, noting that "[a]bsent a finding of dissipation of assets, a property division cannot exceed the value of the marital assets without being considered an improper form of maintenance and an abuse of discretion."[40] The court reversed and remanded to the trial court for a reasonable division of the marital estate not to exceed the net value of the marital estate.[41]

Although this opinion cites the 1999 *Pitman*[42] case, its dicta reveals an important distinction between the two cases. *Pitman* stands for the proposition that, even when dissipation occurs, the divorce court may not divide the marital estate as though the dissipated asset remains fictionally part of the marital estate.[43] Further, *Pitman* notes that, where the remaining, non-dissipated marital property is insufficient to make the non-dissipating party whole, even after receiving one-hundred percent of the remaining marital estate, the aggrieved party's only remedy is to seek a rescission of the transaction that resulted in the dissipation.[44]

By contrast, the *Smith* court implies that, with a finding of dissipation, an award of more than one-hundred percent of the marital estate to the non-dissipating party may be proper.[45] In that regard, *Smith* appears to reverse a portion of the *Pitman* holding. In *Pitman*, the court of appeals found the trial court erred in awarding a money judgment to the wife to compensate her for stock that the husband dissipated through a transfer to family members as part of divorce planning.[46] Under *Smith*, that finding of dissipation would seem to support the overall division of the marital estate undertaken by the *Pitman* trial

---

34. *Id.* at 859.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 860.
39. *Id.*
40. *Id.* at 861.
41. *Id.*
42. Pitman v. Pitman, 721 N.E.2d 260 (Ind. Ct. App. 1999).
43. *See id.* at 267.
44. *Id.*
45. *See Smith*, 938 N.E.2d at 861.
46. *Pitman*, 721 N.E.2d at 267.

court.

In another case during the survey term, *Bandini v. Bandini*,[47] the court also addressed the restructuring of benefits so as to decrease divisible retirement benefits. In *Bandini*, the Indiana Court of Appeals reviewed a trial court decision considering whether the husband violated the dissolution decree when, after the divorce, he restructured his military benefits so as to reduce his monthly retirement benefit (that was being shared with the wife) in an effort to acquire an increase in new disability benefits (which the husband did not have to share with the wife).

In this case, the husband and wife married in 1971.[48] The husband was in the Army and Army Reserve until 1995.[49] The parties divorced in 2005.[50] The property settlement agreement that was incorporated into their decree provided that the "[w]ife shall have . . . (50%) of [h]usband's USAR military retirement/pension plan by QDRO, including survivor benefits."[51] The husband turned sixty in 2008 and began receiving retirement benefits.[52] The government divided each monthly payment so that the husband and wife each received approximately $925.[53] Also, in 2008, the husband applied for Combat-Related Special Compensation (CRSC) based upon hearing problems that the husband experienced.[54] Receipt of CRSC payments requires the recipient to make waivers of a corresponding portion of retirement pay.[55] However, the net advantage to the recipient is that, unlike retirement pay, the CRSC payments are not taxable income.[56]

In July 2008, the husband was approved for CRSC of $1006 per month, meaning that the retirement payment that he and wife each received dropped from $925 each, to $548 each.[57] The wife demanded that the husband begin paying her the shortfall between her prior payment and the new payment.[58] When the husband refused, the wife filed a contempt petition.[59] After a hearing, the trial court agreed with the wife and ordered the husband to make up for past missed payments, as well as prospectively pay the wife one-half of the his CRSC

---

47. 935 N.E.2d 253 (Ind. Ct. App. 2010).

48. *Id.* at 255.

49. *Id.*

50. *Id*. at 255-56.

51. *Id.* at 256 (citation omitted).

52. *Id.*

53. *Id.*

54. *Id.*

55. Def. Fin. & Accounting Serv., *Combat Related Special Compensation (CRSC) FAQs*, MILITARY.COM, http://www.military.com/benefits/military-pay/special-pay/combat-related-special-compensation-crsc-faqs.html (last visited June 3, 2012).

56. *Id.*

57. *Bandini*, 935 N.E.2d at 256.

58. *Id.* at 256-57.

59. *Id.* at 257.

payments.[60] The husband appealed.[61]

On appeal, the court of appeals affirmed the trial court's determination.[62] The court reasoned that the decree had referred generically to an equal division of the husband's military retirement benefit and, to the extent that the husband unilaterally converted a portion of that retirement benefit to CRSC benefits, the wife was entitled to be made whole.[63]

In cases where a transfer contemplated under the decree could not be implemented, the court has considered reformation of the decree. For example, in *Evans v. Evans*,[64] the Indiana Court of Appeals considered whether the trial court acted within its discretion by reforming a decree, pursuant to Trial Rule 60(B), to provide an alternate transfer of property to the wife after it was determined that the transfer of retirement funds by QDRO originally contemplated under the decree could not legally be implemented.[65]

In *Evans*, the trial court issued its decree and property division orders on March 7, 2007.[66] The decree found a net marital estate of $743,860, and concluded that each party should receive half, or $371,930. The wife was allocated property worth $263,255.[67] The remaining $108,675 due to the wife to reach her fifty percent share was to be accomplished by a QDRO that allocated the wife an interest in the husband's UAW pension that would pay her the subject shortfall over ten years, plus five percent interest.[68]

In the following months, counsel for the parties twice failed to accomplish the acceptance by the plan administrator of a QDRO that would perfect the intended allocation.[69] Before the issue could be resolved, the wife died.[70] The wife's estate filed a motion in the divorce court and successfully replaced the wife as an interested party.

The wife's estate also filed a motion to compel payment of the outstanding $108,675, which the trial court construed as a Trial Rule 60(B) motion.[71] After a hearing, the trial court concluded that transfer of the $108,675 via QDRO was a legal impossibility, and instead issued an alternative order for the payment of $108,675 against the husband and in favor of the wife's estate.[72] The husband appealed.

The husband asserted on appeal that the trial court abused its discretion by

---

60. *Id.* at 257-58.
61. *Id.* at 258.
62. *Id.* at 264.
63. *Id.*
64. 946 N.E.2d 1200 (Ind. Ct. App. 2011).
65. *See id.* at 1202-03.
66. *Id*. at 1202.
67. *Id.*
68. *Id.*
69. *Id.* at 1202-03.
70. *Id.* at 1203.
71. *Id.*
72. *Id.*

correcting the decree pursuant to Trial Rule 60(B)[73] and, further, the motion filed by the wife's estate was not timely.[74] The court of appeals concluded that the estate's motion properly fell under the catch-all provision of Trial Rule 60(B)(8) to equitably implement relief from a judgment.[75] The court further held that, while the motion could have been filed earlier, it was nevertheless filed within a reasonable time under the circumstances.[76] Thus, the trial court's order was affirmed.[77]

The court further addressed settlement issues in other case law. Notably, the court of appeals determined that a trial court may exercise continuing jurisdiction to reexamine a property settlement where the nature of which is to seek clarification of a prior order.[78] In other significant case law, the court determined that a drafted property settlement agreement, that remains unsigned by one of the parties and is not yet court-approved, is not enforceable upon the death of one of the divorce litigants.[79]

4. Maintenance Issues.—During the survey period, the Indiana appellate courts have also addressed various maintenance issues. Evidence of changes in health and financial circumstance justify termination of incapacity-based spousal maintenance. The burden for modifying maintenance awards rests with the party seeking modification, and decision of whether to grant such modification is within the sound discretion of the trial court.[80]

However, an incapacity-based maintenance award is proper when the spouse received disability prior to the marriage and the incapacity was undisputed. In *Clokey v. Clokey*,[81] the Indiana Court of Appeals considered whether the trial court abused its discretion in making a $2,000 per month incapacity-based maintenance award in favor of the wife, where she had been receiving social security disability payments prior to the marriage and the husband did not dispute her incapacity.[82]

The parties married in 2004.[83] The husband was a retired professor with

---

73. *Id.*

74. *Id.* at 1204.

75. *Id.* at 1205-06.

76. *Id.* at 1206-07.

77. *Id.* at 1208. Judge Riley dissented in part. *Id.* (Riley, J., dissenting in part).

78. *See* Shepherd v. Tackett, 954 N.E.2d 477, 480-82 (Ind. Ct. App. 2011) (clarifying a settlement agreement consistent with the parties' intent is different from modifying the agreement, and under the circumstances, it was appropriate for the trial court to provide an alternate means of securing the husband's existing obligation after learning the original QDRO could not be enforced).

79. Murdock v. Estate of Murdock, 935 N.E.2d 270, 274 (Ind. Ct. App. 2010) (reversing and remanding to probate court to determine whether the husband's filing for divorce constituted forfeiture of his right to inherit from the wife's estate).

80. *See* Pala v. Loubser, 943 N.E.2d 400, 409 (Ind. Ct. App.) (affirming trial court's termination of spousal maintenance), *trans. denied*, 950 N.E.2d 1212 (Ind. 2011).

81. 956 N.E.2d 714, *aff'd on reh'g*, 957 N.E.2d 1288 (Ind. Ct. App. 2011).

82. *Id.* at 715-16.

83. *Id.* at 716.

assets exceeding $600,000.[84] The wife was not working at the time, but was receiving social security disability of $741 per month. During the marriage, the parties' assets apparently depleted quite rapidly, and they filed for bankruptcy in 2009.[85] In early 2010, the husband filed a petition for dissolution of marriage. After the final hearing, the trial court's decree included both an unequal division of the remaining marital estate to the wife, and an incapacity-based maintenance award of $2,000 per month in the wife's favor.[86] The husband appealed, asserting the trial court failed to give consideration to his age, ability to pay, and other circumstances.[87] The husband further asserted that the trial court based the maintenance award, in part, on a finding that the husband had dissipated the marital estate.[88]

On review, the court of appeals concluded that the trial court's finding of dissipation by the husband related to its unequal division of the marital estate in the wife's favor, not its decision to order maintenance.[89] As such, the court of appeals concluded that the trial court did not abuse its discretion in issuing its maintenance award.[90]

C. Child Custody, Parenting Time and Third Party Visitation

Custody, parenting time, and visitation disputes are a prominent area of Indiana family law. The following is a brief review of several notable cases from the survey period.

1. Modification of Custody.—In *Best v. Best*,[91] the Indiana Supreme Court reviewed a modification of custody decision. There, the mother and father divorced in 2004.[92] In 2005, the trial court approved the parties' agreement on child custody, parenting time, and support as to their two children, a daughter and a son. Significant litigation over parenting issues followed. In 2007, the trial court approved an agreed entry providing that the daughter would be enrolled in public schools.[93] The father subsequently filed a contempt petition against the mother, reciting that she had failed to enroll the daughter in public school.[94] The mother responded with a petition for modification. The trial court subsequently denied the mother's modification request, found the mother in contempt, and ordered the mother to enroll the daughter in public school.[95]

---

84. *Id.*
85. *Id.* at 716 n.2.
86. *Id.* at 717.
87. *Id.* at 718.
88. *Id.* at 719.
89. *Id.*
90. *Id.*
91. 941 N.E.2d 499 (Ind. 2011).
92. *Id.* at 501.
93. *Id.*
94. *Id.*
95. *Id.*

In 2008, the father, citing the mother's additional non-compliance, filed a petition to modify custody.[96] The mother filed her own petition to modify custody in response. The trial court granted the father's petition to modify, giving him sole legal custody and primary physical custody of both the son and daughter.[97] The mother appealed.

In considering the mother's appeal, the court of appeals affirmed the trial court's order except as to two points: First, the court of appeals reversed the trial court's decision to modify *physical* custody of the daughter; second, the court of appeals reversed the trial court's finding of contempt.[98]

On transfer, the Indiana Supreme Court summarily affirmed the court of appeals' decision, except for its reversal of the trial court's modification of the physical custody of the daughter.[99] The mother had asserted that the trial court's modification lacked two supporting findings: 1) that a change in circumstances in any of the factors set forth Indiana Code section 31-17-2-21 had occurred, and 2) that the modification of physical custody was in the daughter's best interest.[100] However, the supreme court noted that the trial court's findings listed each of the statutory factors and specifically discussed evidence relevant to each factor.[101] The court also viewed the mother's appeal of the physical custody order as an impermissible request to reweigh evidence.[102] The court stated, "We find no error in the trial court's decision to place [the daughter's] primary physical custody with the father, subject to its specification of parenting time."[103] The decision of the trial court was affirmed, except for its finding of contempt as to the mother, which the court reversed through summary adoption of the court of appeals' determination of the contempt issue.[104]

Additionally, in *Werner v. Werner*,[105] the Indiana Court of Appeals considered whether the trial court's findings were sufficient to support its judgment under the "best interests of the child" standard, when the mother had waived argument as to the standard used when determining whether to modify custody.[106] In this case, the parties were married in 1999 and there were two children born of the marriage.[107] The mother filed a petition for dissolution in 2008.[108]

The parties agreed on all aspects of the dissolution other than physical

---

96. *Id.*
97. *Id.*
98. *Id.* at 502.
99. *Id.* at 503-04.
100. *Id.* at 502.
101. *Id.* at 503.
102. *Id.*
103. *Id.* at 504.
104. *Id.*
105. 946 N.E.2d 1233 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 641 (Ind. 2011).
106. *See id.* at 1235-36.
107. *Id.* at 1235.
108. *Id.*

custody.[109] After the final hearing, the trial court issued its decree, which stated in pertinent part that the children were to reside with the mother through the end of the 2008-2009 and 2009-2010 school years, with the father having physical custody during the summers.[110] The trial court also called for a review hearing during summer 2010 to review the terms of the custody arrangement and stated that the determination of custody at that hearing would be "governed by the 'best interests' test, as opposed to the standard which governs the modification of custody orders."[111] Neither party objected. As the review hearing began, the trial court reiterated its intention to utilize the "best interests" test.[112] The trial court then issued extensive findings and granted physical custody to the father.[113] The mother appealed.

On appeal, the mother argued that the court improperly applied the "best interests" standard instead of "best interests" *plus* a substantial change in a factor outlined under Indiana Code section 31-17-2-8.[114] The court of appeals determined that the mother waived this argument by not objecting to the court's announcement to use the "best interests" standard in both the dissolution decree and at the beginning of the review hearing.[115]

The mother's second challenge was "that the trial court's detailed findings and judgment [were] clearly erroneous."[116] The court viewed this argument "an invitation to reweigh evidence and assess witness credibility," and refused to do so.[117]

2. Third Party Visitation.—In *Kitchen v. Kitchen*,[118] the Indiana Court of Appeals considered whether the trial court erroneously concluded that it had the authority to award third party visitation to persons other than a grandparent, parent or step-parent.[119]

In this case, sometime after the parties were married and a child was born, the mother filed a petition for dissolution of marriage.[120] In March 2006, the trial court entered a dissolution decree whereby the parents would share legal custody of the child, with the mother having physical custody and the father having regular parenting time.[121] The mother and child then lived with a maternal aunt

---

109. *Id.* at 1236.

110. *Id.* at 1239.

111. *Id.* (emphasis omitted) (citation omitted).

112. *Id.* at 1240.

113. *Id.* at 1244.

114. *Id.* at 1245-46.

115. *Id.* at 1246.

116. *Id.* at 1247.

117. *Id.* Judge Kirsch dissented on the basis that the parents' failure to object to the correct standard cannot operate as a waiver of utilizing the correct standard. *Id.* at 1247-48 (Kirsch, J., dissenting).

118. 953 N.E.2d 646 (Ind. Ct. App. 2011).

119. *Id.* at 647.

120. *Id.*

121. *Id.*

and uncle until December 2007, when the mother died after an extended illness.[122] At that same time, the father petitioned the trial court for immediate custody of the child, while the aunt and uncle filed a petition for guardianship. Ultimately, the father entered into an agreement with the aunt and uncle, which provided that the aunt and uncle would be granted temporary custody and the father was allowed parenting time.[123] However, this arrangement quickly deteriorated.

In June 2009, the trial court held the previously scheduled custody hearing.[124] The father was granted full custody of the child and the aunt and uncle were granted visitation. Then, in March 2010, the father filed a petition requesting that the trial court vacate the portion of its June 2009 custody order granting visitation to the aunt and uncle.[125] The trial court denied the father's petition, finding that the time for such a challenge had passed.[126]

On review, the Indiana Court of Appeals analyzed statutes and case law, which generally do not award third party visitation to persons other than a grandparent, parent or step-parent.[127] Noting that parental rights are constitutionally protected under the Fourteenth Amendment, the court "adhere[d] to the limitation of [Indiana] statutes and case law conferring standing [to petition for visitation] only to parents, grandparents, and step-parents."[128] Thus, the court, in accordance with these findings, determined that "[T]he trial court erred in concluding that it had the authority to grant third-party visitation to persons other than parents, step-parents, or grandparents."[129]

4. Grandparent Visitation.—In *M.S. v. A.L.S. (In re J.D.S.)*,[130] the Indiana Court of Appeals considered whether the grandmother's petition to modify grandparent visitation was properly dismissed due to a lack of standing.[131] Here, the father and mother had two children during their marriage.[132] In 2002, the father filed a petition for dissolution of marriage. In 2003, the grandmother intervened in the dissolution requesting grandparent visitation with the children. A month later, the trial court approved an agreed entry that gave grandmother visitation.[133]

In 2007, the grandmother sought to modify the visitation. After a hearing, the

---

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 648.

127. *Id.* at 648-49.

128. *Id.* at 649-50 (citing Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this court.")).

129. *Id.* at 650.

130. 953 N.E.2d 1187 (Ind. Ct. App. 2011), *trans. denied*, 2012 Ind. LEXIS 319 (Ind. Jan. 5, 2012).

131. *Id.* at 1188.

132. *Id.*

133. *Id.*

trial court modified the grandmother's visitation and included a provision that the grandmother would not allow the children to have contact with their father during her visitation time and that any violation would subject the grandmother's visitation to termination.[134]

In 2008, the mother filed a contempt petition against the grandmother, asserting that the grandmother permitted contact between the father and the children during the grandmother's visitation.[135] After a hearing, the trial court ordered that the grandmother's visitation be "TERMINATED" as a result of the violation.[136] In February 2010, the father's parental rights to the children were terminated, and the mother's new husband concurrently adopted the children. Three months later, the grandmother filed a petition to "modify" her grandparent visitation.[137] The mother moved to dismiss the petition, which was granted. The grandmother appealed.

On review, the court of appeals concluded that, at the time the grandmother's petition was filed in 2010, the father's parental rights had already been extinguished, thus removing the grandmother's standing to seek visitation.[138] While the grandmother previously enjoyed a visitation order, in 2008 it was expressly "terminated," not suspended, limited, or otherwise reduced in a temporary manner.[139] Thus, the grandmother's 2010 petition, despite its title, was not really a petition to modify visitation but instead a petition to establish visitation anew.[140] Since the grandmother's petition was not filed until after the father's parental rights had been terminated, the grandmother lacked standing to seek visitation and trial court's dismissal of her petition was proper.[141]

II. CHILD SUPPORT RULES AND GUIDELINES

The following section reviews noteworthy cases on the topic of child support and the Indiana Child Support Rules and Guidelines (the "Guidelines").

A. Calculating Child Support

1. Income Averaging Technique.—In *Trabucco v. Trabucco*,[142] the Indiana Court of Appeals considered, among other things, whether the trial court properly relied upon the use of an "income averaging" technique to determine weekly gross income for child support purposes.[143] The husband and wife married in 1988, and had two children of the marriage. The husband worked as a physician,

134. *Id.*
135. *Id.* at 1188-89.
136. *Id.* at 1189.
137. *Id.*
138. *Id.* at 1190.
139. *Id.*
140. *Id.*
141. *Id.* at 1190-91.
142. 944 N.E.2d 544 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 640 (Ind. 2011).
143. *Id.* at 547.

while the wife was a homemaker. In 2003, the parties moved from New York to Columbus, Indiana.[144]

A marijuana possession conviction of the husband resulted in a six-month suspension of the husband's medical license.[145] Struggling to rehabilitate his medical career, the husband relocated to Nevada in 2007 and opened an urology clinic. The husband reported an annual income of $104,026 for 2007 and $67,407 for 2008.[146] The wife filed her petition for dissolution in 2007. Under the terms of a court preliminary entry, the husband transferred $200,000 from marital accounts to a separate account to fund the college expenses for the parties' son, with left over funds being divided equally between the parties.[147]

After a final hearing, the trial court issued its decree. The decree calculated child support using, as the husband's income, an average of the amounts reported on the tax returns from 2004 through 2008, after throwing out the highest and lowest income figures.[148] The decree also awarded the husband an E*Trade brokerage account using a date of filing value, even though the account lost substantial value during the pendency due to market declines.[149] The decree also awarded various IRA's to the parties.[150] The decree allocated sixty-four percent of the marital estate to the wife and thirty-six percent of the marital estate to the husband.[151] The husband appealed.

On appeal, the husband challenged the income averaging technique used by the trial court to calculate his income for child support purposes.[152] The husband argued that his income at the time of the final hearing was very low due to his relocation to Nevada, and that the trial court's income averaging technique amounted to an unfair imputation of income.[153] The Indiana Court of Appeals rejected the husband's argument, first noting that income averaging is a recognized child support income calculation method, especially for the self-employed.[154] The court also noted that, because the husband failed to present detailed documentation of his income, he cannot assign error to the method used by the trial court.[155]

The husband also alleged trial court error for including the monies used to fund the college account in the marital estate.[156] The court of appeals rejected this argument, noting that it was uncontroverted that the account was funded with

---

144. *Id.*
145. *Id.*
146. *Id.* at 548.
147. *Id.*
148. *Id.*
149. *Id.* at 558.
150. *Id.* at 556-57.
151. *Id.* at 548.
152. *Id.* at 549.
153. *Id.* at 551-52.
154. *Id.* at 552.
155. *Id.* at 553.
156. *Id.*

marital property.[157]

Next, the husband assigned error to the "double counting" of certain IRA's.[158] The record suggested that various individual IRA's may have been consolidated into a single IRA prior to the final hearing, but the decree allocated them as separate and distinct assets.[159] The court of appeals remanded the issue for determination by the trial court as to whether "double counting" of the IRA's had occurred.[160]

Finally, the husband claimed error as to the valuation of the E*Trade brokerage account that was awarded to him under the decree.[161] Near the date of filing, the account had a value of $325,132.[162] Closer to final hearing, the account was worth just $97,470.[163] The husband admitted to withdrawing just over $50,000 from the account during the pendency, but asserted that the remaining decline of $176,000 was due to market decline and should not be counted as part of his share of the marital estate.[164] The trial court awarded the account to the husband with a date of filing value of $325,132.[165] The court of appeals recited the well-settled doctrine that a trial court has discretion to value marital property on the date of filing, the date of final hearing, or any date in between.[166] As such, the trial court's valuation date was not an abuse of discretion.[167]

2. Separate Child Support Worksheets.—Separate child support worksheets should not be used for each child. In *In re Marriage of Blanford*,[168] the Indiana Court of Appeals considered whether the trial court erred by calculating child support using separate child support worksheets for each child, where the parties had two children, one of whom divided time equally between the parents, and one of whom lived full-time with the mother.[169]

In this case, the parties divorced in 1998, with two children.[170] In 2009, the trial court entertained various motions concerning modification of custody, parenting time, and child support. After hearing evidence, the court ordered that one child would divide equal time between the parties, while the other child would spend full-time with the mother and have no overnight parenting time with the father due to a deterioration in the father-child relationship. In calculating the new child support level, the trial court used two child support worksheets, one

---

157. *Id.* at 554.
158. *Id.* at 556-57.
159. *Id.* at 557.
160. *Id.*
161. *Id.* at 558.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 559-60 (citing Reese v. Reese, 671 N.E.2d 187, 191 (Ind. Ct. App. 1996)).
167. *Id.* at 560.
168. 937 N.E.2d 356 (Ind. Ct. App. 2010).
169. *Id.* at 358.
170. *Id.* at 359.

giving the father no parenting time and another giving the father 182 overnight parenting time credit.[171] The father was ordered to pay child support to the mother in the amount of the total of the two worksheets.[172] The father appealed.

The father's appeal highlighted a shortcoming of the child support worksheet relevant to the case, in that use of a child support worksheet contemplates that all of the parties' children will have the same number of overnights with the non-custodial parent.[173]

The Indiana Court of Appeals noted that the trial court's method for calculating child support unfairly inflated the father's support obligation because of the recognition that additional children cost only marginally more to raise.[174] Thus, the trial court's use of two child support worksheets, one for each child, treated each child as that most expensive "first child," and never gave the father the appropriate, discounted support amount for a second child.[175]

The father argued on appeal that the trial court should have instead used one child support worksheet that included two children, and then, for the parenting time credit, used an average number of overnights for the two children.[176] The court of appeals declined to adopt the father's proposed method, noting that this method "might extend [the father] too much or too little credit in calculating his support obligation[,]" because the cost for the mother to have one child full-time, and a second child half-time, is not necessarily the same as having two children three-fourths of the time.[177]

On remand, the Indiana Court of Appeals instructed the trial court to calculate support with both children on one support worksheet, and provided that the trial court:

> adjust the number of days of overnight credit to reach what appears to be an appropriate result for setting [the father's] weekly support obligation. Because the Guidelines do not afford a basis on which to set the number of days of overnight credit, the trial court must explain the reasons for its use of the specific number of days of overnight credit in its order.[178]

The trial court's child support order was reversed and remanded.[179]

---

171. *Id*. at 360-61.

172. *Id.* at 362.

173. *Id.* at 360-61.

174. *Id.*

175. *See id.*

176. *Id.* at 361-62. That is, one child at zero overnights and a second child at one hundred eighty-two overnights resulted in an average of ninety-one overnights. *See id.*

177. *Id.* at 362.

178. *Id.*

179. *Id.*

B. Complications on Ability to Pay Child Support

In *J.M. v. D.A.*,[180] the Indiana Court of Appeals considered, among other things, whether the trial court acted within its discretion by imputing income to the father after he decided to leave his job and attend school full-time.[181]

In 2003, the parties divorced with two children. The father was ordered to pay child support. In 2008, the father petitioned to modify child support.[182] At the hearing regarding the father's petition, evidence was presented that the father was fired by Tyson Foods for abandoning his job.[183] Prior to his firing, the father had been earning $13 per hour plus bonuses. After leaving Tyson, the father became a full-time student at Ivy Tech.[184] After the hearing, the trial court denied the father's requested modification and, further, found the father in contempt for non-payment of child support.[185] The father appealed.

The court of appeals provided an extended discussion of the issue of voluntary underemployment and imputation of income in child support calculations.[186] Ultimately, the court of appeals concluded that the father's efforts to go back to school full-time, while admirable, were not responsible in light of having children to support (including two children with the mother, and two subsequent children).[187]

The court then noted that contempt for non-payment of child support is proper only upon a two-part finding: 1) "that the delinquency was the result of a willful failure by the parent to comply with the support order," and 2) that the "parent ha[d] the financial ability to comply."[188] Here, the trial court made no finding concerning the father's ability to comply.[189] The Indiana Court of Appeals concluded that the record did not support such a finding, and thus, the trial court's finding of contempt against the father was reversed.[190]

Judge Bradford dissented. He would have affirmed the trial court's contempt finding, noting that the father did not dispute that he was aware of his ongoing child support obligation, yet chose to go to school full-time instead of working and supporting his children.[191]

In other case law during the survey period, the court further considered the appropriateness of a contempt order for non-payment of child support. The court has further reinforced that a finding of contempt is appropriate only where

---

180. 935 N.E.2d 1235 (Ind. Ct. App. 2010).
181. *Id.* at 1237.
182. *Id.*
183. *Id.*
184. *Id*.
185. *Id.* at 1238.
186. *Id.* at 1239-42.
187. *Id.* at 1237, 1242.
188. *Id.* at 1243.
189. *Id.* at 1244.
190. *Id.*
191. *Id.* at 1244-45.

violation of the underlying court order is willful.[192]

C. Legal Standards and Bright-Line Rules in Child Support Modification

During the survey period, the Indiana appellate courts also issued case law regarding child support modification. While the provisions of Indiana Code section 31-16-8-1 provide grounds for modification,[193] in certain cases a substantial and continuing change in circumstances must also support modification.[194]

In *Holtzleiter v. Holtzleiter*,[195] the Indiana Court of Appeals considered whether a party who establishes satisfaction of the statutory bright-line test for child support modification (that is, at least one year has passed since support was last ordered, and a new support order would differ by at least twenty percent from the existing order) is entitled to modification.[196] In 2008, the parties divorced, with two children. Pursuant to the decree, the father was ordered to pay child support of $317 per week. This was based upon the father's gross income at the time of $89,239 and income imputed to the mother based upon the minimum wage.[197] Over a year later, the father filed a petition to modify. In his petition, the father asserted that there had been "an ongoing and substantial change in circumstances warranting a modification of the child support."[198]

At the parties' hearing, the father introduced a worksheet indicating that his existing support obligation was 43.5% higher than it would be under a current application of the Guidelines.[199] This differential was attributed to the father losing his job and taking a new job that paid $30,000 per year less, and the

---

192. L.R. v. N.H. (*In re* G.B.H.), 945 N.E.2d 753, 756 (Ind. Ct. App. 2011) (finding abuse of discretion where the father had paid child support while employed, made diligent efforts to find employment after losing his job, and that the father resumed paying support when his unemployment benefits commenced).

193. IND. CODE § 31-16-8-1 (2011) ("Provisions of an order with respect to child support or an order for maintenance . . . may be modified or revoked. . . . Except as provided in section 2 of this chapter, modification may be made only: (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or (2) upon a showing that: (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.").

194. *See* Reinhart v. Reinhart, 938 N.E.2d 788, 792-93 (Ind. Ct. App. 2010) (estopping the father from relying on the provisions in Indiana Code section 31-16-8-1 because he agreed to a support amount in excess of the guideline amount, and failed to show a substantial and continuing change in circumstances).

195. 944 N.E.2d 502 (Ind. Ct. App. 2011).

196. *Id.* at 503.

197. *Id.* at 504.

198. *Id.* (citation omitted).

199. *Id.* at 503.

mother finding employment.[200] However, the trial court denied the father's petition to modify, concluding that, while there had been a change in circumstances, it did not render the existing support level unreasonable.[201] The father appealed.

The court of appeals concluded that a petition to modify child support need not expressly plead satisfaction of the twelve-month/twenty percent change bright-line test to be considered by the trial court, something the father had not expressly pleaded.[202] Therefore, the father did not waive proceeding under the modification statute.[203] Since the father satisfied the twelve-month/twenty percent criteria, a modification of the father's support was appropriate.[204] Thus, the trial court's denial of the father's petition to modify support was reversed and remanded for further proceedings.[205]

D. College Expenses, Ability of an Adult Child to Earn Income, and Repudiation

1. College Expense Obligations.—In *R.R.F. v. L.L.F.*,[206] the court of appeals considered, among other things, whether the trial court erred in not including the mother's tax credits when allocating college expense obligations.[207] The parties had two children, born in 1987 and 1991.[208] Upon the parties' dissolution of marriage in 2001, the mother had primary physical custody and the father paid child support and exercised parenting time. In 2005 and 2006, the parties entered into agreed orders that modified the father's support obligation and provided that the father would pay college and private school expenses for the children.[209] In 2008, the parties entered into another agreed entry, providing for the father to pay a lump sum for support from March 2008 to May 2009 (the youngest child's eighteenth birthday).[210] The parties agreed to address any further support after May 2009 when the time came. The parties also stipulated that upon payment of the lump sum, the father would have no arrearage and would be current through May 2009.[211]

Upon the youngest child's enrollment in college, in the fall of 2009, the

---

200. *Id.* at 505.

201. *Id.*

202. *Id.* at 506. On this point, the court acknowledged that it was reaching a different conclusion than the 2000 *Hay* case, decided by another panel of the Indiana Court of Appeals. *Id.*

203. *Id.*

204. *Id.* at 507.

205. *Id.*

206. 935 N.E.2d 243 (Ind. Ct. App. 2010), *decision reached on appeal by* 956 N.E.2d 1135 (2011).

207. *Id.* at 245.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

mother petitioned to modify support, establish educational obligations, establish support for the period after May 2009, and to adjudicate arrearage.[212] The trial court granted the petition, establishing the amount of college expenses due by each party and rejecting the father's contention that support should begin only as of September 2009 (the date of filing of the petition).[213] The trial court determined that instead of treating the petition as a petition to modify, it was to be treated as a petition to establish support, and thus, could relate back to May 2009.[214]

The father also requested set-offs for nonconforming support contributions.[215] The trial court found that these set-offs did not meet the requirements set forth by Indiana law, and therefore, declined to give the father any set-off.[216] The trial court also declined the father's request for reimbursement from the mother for tax credits she received for college payments that the father was not entitled to.[217] The trial court noted it was without jurisdiction to "usurp federal tax law" that allowed the credits.[218] The father appealed, presenting three issues for review: the order to pay retroactive support; the denial to award the father a set-off in light of the tax credits the mother will receive as a result of the child's enrollment in college; and the denial to award the father credit for nonconforming support payments.[219]

The Indiana Court of Appeals found that the trial court did not err when it treated the "modification" petition as a petition to establish support for the time period after May 2009, giving weight to the prior agreed entry that stated the parties would revisit the issue when the time comes.[220] The court held that the provision in the parties' agreed entry, whereby the father ceased support upon the child's eighteenth birthday, was contrary to law and void, as the child had not been emancipated.[221]

Next, the court considered the father's contention that the trial court did not properly consider the significant tax credit the mother would receive for her contribution to the child's college expenses before assigning each party's obligation.[222] The division of expenses was ordered to be approximately sixty-four percent for the father and thirty-six percent for the mother.[223] After the mother's significant tax credit, her actual obligation was to be only 1%.[224] Citing

---

212. *Id.* at 246.
213. *Id.*
214. *Id.* at 246-47.
215. *Id.* at 247.
216. *Id.*
217. *Id.* at 248.
218. *Id.*
219. *Id.* at 248-52.
220. *Id.* at 248.
221. *Id.* at 248-49.
222. *Id.* at 249.
223. *Id.*
224. *Id.* at 251.

Guideline 8(b) and *Borum v. Owens*,[225] the court remanded with the instructions that the trial court consider the reduction in the parents' obligation toward college expenses realized by the mother's tax credit and then apportion the parties' obligation appropriately.[226]

The father's final assertion was the trial court erred in failing to give him credit for certain nonconforming support payments.[227] After the May 2009 child support obligation ceased, the father made several payments for the child "in much the same way that he would have had the child support order been in place."[228] The court treated these as payments of an undefined support obligation.[229] The court remanded with the instruction that "the [trial] court shall issue an order crediting the [f]ather for those payments."[230]

2. Support to an Adult Child.—In *Sexton v. Sedlak*,[231] the Indiana Court of Appeals considered, among other things, whether the trial court acted within its discretion by not terminating child support as to a child who was over eighteen and not enrolled in school, even though there was evidence presented that the child was earning in excess of the minimum wage.[232]

The parties married in 1989, and divorced with three children in 1998. Pursuant to the parties' original decree, the parties shared legal and physical custody of the children, and no child support was due between the parties. In 2002, following a motion by the mother and a hearing, primary physical custody of the children shifted to the mother, and the father was ordered to pay support of around $154 per week.[233] The father paid accordingly through August 2005, when the parties apparently made an informal change in the custody arrangement; two months later, the mother filed a petition to modify child support, reciting that the parties had returned to shared custody and that child support payments should be terminated.[234] The trial court denied that motion and took no action, referring the parties to seek legal counsel, to prepare child support worksheets, etc. No further action was taken on this support modification petition.[235] In 2006, the parties signed and notarized an agreement that provided for shared custody and recited that no child support payments would be due between the parties.

---

225. 852 N.E.2d 966, 969 (Ind. Ct. App. 2006) ("If the trial court determines that an order for college expenses is appropriate, the parents' contributions shall be roughly proportional to their respective incomes.").

226. *R.R.F.*, 935 N.E.2d at 250-51.

227. *Id.* at 251.

228. *Id.* at 252.

229. *Id.*

230. *Id.*

231. 946 N.E.2d 1177 (Ind. Ct. App. 2011), *trans. denied*, 2011 Ind. LEXIS 666 (Ind. July 20, 2011).

232. *Id.* at 1180.

233. *Id.*

234. *Id.*

235. *Id.* at 1181.

However, the agreement was not filed with the trial court.[236]

In early 2009, the oldest of the parties' three children turned twenty-one.[237] In June 2009, the father filed a motion to emancipate the parties' middle child, who was nineteen, along with a request to modify custody and support for the youngest child.[238] Following a hearing, the father's request to emancipate the middle child was denied. Further, the trial court calculated a net arrearage of $28,000 based primarily upon the father's lack of support payments since 2005, and in spite of the apparent informal agreement between the parties that no support would be due during that time.[239] The trial court also reduced the father's support obligation, from the $154 per week obligation that had existed since 2002, to $117 per week.[240] However, the support was lowered retroactively only to June 2009 when the father's petition to modify was filed.[241] The father appealed.

The father's primary argument on appeal was that the trial court erred when it did not retroactively modify his child support obligation to $0 for the period back to the mother's 2005 petition to modify that was never acted upon.[242] The court of appeals disagreed, concluding that the trial court acted within its discretion by using June 12, 2009, as the effective date for support modification.[243]

Next, the father assigned error to the trial court's refusal to terminate child support as to the parties' middle child.[244] It was uncontroverted that this child was over eighteen and was not attending or enrolled in school.[245] Disputed, however, was the ability of this child to support herself.[246] The father referred to evidence in the record of this child earning in excess of the minimum wage.[247] However, the court of appeals concluded that this earning history did not per se establish cause to terminate weekly support and, instead, the father was simply asking the court of appeals to reweigh evidence. The court of appeals concluded that the trial court's decision not to terminate weekly support as to the parties' middle child was within its discretion.[248]

Finally, the father appealed the calculation of his new child support obligation.[249] The court of appeals rejected various arguments by the father as to

---

236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 1181-82.
240. *Id.* at 1182.
241. *Id.*
242. *Id.* at 1183.
243. *Id.* at 1186.
244. *Id.*
245. *Id.* at 1187.
246. *Id.*
247. *Id.*
248. *Id.* at 1188.
249. *Id.*

the trial court's imputation of income based upon voluntary underemployment.[250] However, the court of appeals agreed with the father that the trial court erred when it failed to consider the amount that the parties' middle child was earning in calculating the child support amount.[251] Thus, while the trial court's order was generally affirmed, the calculation of the new support level was reversed and remanded for consideration of the middle child's ability to support herself in calculating the father's child support obligation.[252]

3. Repudiation.—Repudiation is not a release of responsibility for child support payments but may obviate a parent's obligation to pay certain expenses. In *Lechien v. Wren*,[253] the Indiana Court of Appeals considered, among other things, whether repudiation was a release of a parent's financial responsibility for the payment of child support.[254] The parties were married and had two children.[255] The daughter was born in 1987 and the son was born in 1991. In 1999, the mother filed a petition for dissolution of marriage, and in 2000 a decree of dissolution was granted. The court awarded physical custody of both children to the mother.[256] Then, in 2008, the court entered a nunc pro tunc order, restoring the mother's maiden name. Also in 2008, the court ordered the father to pay child support for the son in the amount of $177 per week. In 2009, the son filed a petition to have his last name changed from the father's last name to the mother's maiden name.[257] "During the hearing on his request, the son acknowledged that by changing his name a judge could later decide that he was repudiating his father and that he did not want any help from him and that support could end."[258]

In 2010, the mother filed a modification petition and requested support for son's higher education. She alleged that the son would be residing with her while attending college at IUPUI and requested support modification and a higher educational support order dividing college expenses between herself, the father, and the son.[259] The trial court found that the son and the father had a troubled relationship since the divorce, with the father having sporadic parenting time.[260] The trial court also found that in spite of the judge's warning of the possible adverse effects of the requested name change upon receiving college money from

---

250. *Id.* at 1189.

251. *Id.* at 1190.

252. *Id.* Judge Kirsch dissented in a separate opinion, expressing concern that the majority opinion "promote[d] formalism over fairness" in addressing the retroactive modification. *Id.* at 1190-91 (Kirsch, J., dissenting).

253. 950 N.E.2d 838 (Ind. Ct. App. 2011).

254. *Id.* at 840.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* In fact, the trial court determined that the father had no parenting time since 2008. *Id.* (citation omitted).

the father, the son nevertheless sought to change his name to the mother's maiden name.[261] Pursuant to Indiana case law, the trial court concluded that the son had repudiated the father and was not entitled to college expense contribution from him.[262] The trial court further concluded that the father's duty to pay child support should be modified, ordering the father to pay $69 per week for the son.[263]

The mother appealed the trial court's order, raising two issues: 1) whether the evidence supported the trial court's determination that the son repudiated his relationship with the father; and 2) whether the trial court erred in modifying the father's weekly child support obligation.[264]

Upon review, the court found that the evidence supported the trial court's conclusion that the son repudiated his relationship with the father.[265] The court then found "that while Indiana law recognizes that a child's repudiation of a parent under certain circumstances will obviate a parent's obligation to pay certain expenses, . . . any such repudiation is not a 'release of a parent's financial responsibility to the payment of child support.'"[266] The court concluded that "repudiation [was] not an acceptable justification to abate support payments for a child less than twenty-one years of age."[267]

Based upon the record and the Guidelines, the court concluded that the trial court erred in adjusting the father's support obligation.[268] The court found this result

> consistent with the general duty of a parent to provide support for a child until the child is twenty-one years old, and as previously stated repudiation [was] not a release of a parent's financial responsibility for the payment of child support and [was] not an acceptable justification to abate support payments for a child less than twenty-one years of age.[269]

The court affirmed the trial court's determination that the son repudiated his relationship with the father, reversed the court's modification of the father's child support obligation from $177 to $69, and remanded the case to the trial court with instructions to enter a child support order consistent with its opinion.[270]

III. ISSUES PERTAINING TO RELOCATION

From time to time in Indiana family law issues pertaining to relocation,

---

261. *Id.* at 841.
262. *Id.*
263. *Id.*
264. *Id.* at 842, 844.
265. *Id.* at 844.
266. *Id.* at 845 (quoting Bales v. Bales, 801 N.E.2d 196, 199 (Ind. Ct. App. 2004).
267. *Id.* (citing *Bales*, 801 N.E.2d at 199-200).
268. *Id.* at 847.
269. *Id.* (citing *Bales*, 801 N.E.2d at 199-200).
270. *Id.*

attempts at jurisdictional advantage by maintaining a substantial connection to Indiana, and enforcement of foreign child support orders arise. The following section reviews several such noteworthy cases from the survey period.

A. Burden of Demonstrating a Proposed Relocation

In *T.L. v. J.L.*,[271] the Indiana Court of Appeals clarified case law regarding the "legitimate" and "good faith" reasons for a proposed relocation. In dicta, the court of appeals suggested that the first prong of the relocation test—that the reasons for the proposed relocation are legitimate and made in good faith—was not intended to be too high a bar, such that the trier-of-fact never gets to the more important second prong: the best interests of the child.[272]

In *T.L.*, the parties married in 1999, had two children together, and divorced in 2009.[273] They shared joint legal custody of the children, with the mother having primary physical custody of the children subject to the father's parenting time, which was exercised regularly. The father had been a lifelong resident of Montgomery County, Indiana. In 1998, the mother moved to Montgomery County from Tennessee for her job.[274] The father had extended family in the area; the mother had extended family back in Tennessee.

In early 2010, the mother filed a notice of intent to relocate to Tennessee after her employer closed its operations.[275] The mother's petition stated a variety of reasons for the proposed move: her older family members were in poor health and need her care; she had a better support network in Tennessee; she had better employment opportunities in Tennessee; and the children would have an excellent quality of life in Tennessee.[276] The father objected to the mother's proposed relocation.

The trial court concluded that the mother had failed to satisfy the first prong of the relocation test. Specifically, the court found that the mother "failed to meet her burden of proof that the proposed relocation [was] for a legitimate reason and in good faith."[277] The trial court also noted that the father had "clearly shown that the move would not be in the best interests of the children."[278] The mother appealed.

The Indiana Court of Appeals, reviewing this issue, noted:

> [O]ur case law has not set forth explicitly the meaning of legitimate and good faith reasons in the relocation context . . . . it is common in our society that people move to live near family members, for financial

---

271. 950 N.E.2d 779 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 1617 (Aug. 17, 2011).

272. *Id.* at 788.

273. *Id.* at 780.

274. *Id.*

275. *Id.* at 782.

276. *Id.*

277. *Id.* at 783 (citation omitted).

278. *Id.* (citation omitted).

> reasons, or to obtain or maintain employment. We infer that these and similar reasons—such as mother gave and the trial court largely accepted—are what the legislature intended in requiring that relocation be for "legitimate" and "good faith" reasons. . . .
>
> If part one, the requirement of a legitimate and good faith reason, posed an inordinately high bar for a relocating parent to meet, it could too often prevent trial courts from reaching part two and appropriately deciding the dispute based upon the best interests of the affected child.[279]

Thus, the court of appeals concluded that the mother had advanced legitimate, good faith reasons for the proposed relocation.[280] Nevertheless, after a detailed review of the factors affecting the children were they to remain in Indiana or relocate to Tennessee, the court of appeals concluded that "the evidence supported the trial court's conclusion that relocation . . . was not in the children's best interests."[281] As a result, the trial court's judgment denying the mother's request to relocate was affirmed.[282]

B. Jurisdiction in the Aftermath of Relocation

In *Lombardi v. Van Deusen*,[283] the Indiana Court of Appeals considered whether the trial court had jurisdiction over a child support modification issue, in the aftermath of relocation. The parties' marriage was dissolved in 1999 and the father was ordered to pay child support.[284] After the divorce, the father moved to Illinois. The mother later filed for a support modification in the Illinois county where the father lived. The Illinois county had jurisdiction pursuant to an agreed order filed in the Indiana court and signed by both parties.[285] The Illinois court modified the child support order. The father did not object to Illinois jurisdiction.

In 2004, the father filed a motion with the Indiana court asking it to reassume jurisdiction over parenting and child support matters.[286] The mother objected. The Indiana court made a CCS entry indicating that since both parties wished that jurisdiction remain in Indiana, it reassumed jurisdiction.[287] The mother again objected. Later that year, the father filed a petition to modify child support in the Indiana court, arguing that Illinois no longer had jurisdiction because he moved to Pennsylvania.[288] The mother again objected. The Indiana court took no action on this petition for five years, and during this time, the mother received no child

---

279. *Id.* at 787 (citations omitted).
280. *Id.*
281. *Id.* at 790-91.
282. *Id.* at 791.
283. 938 N.E.2d 219 (Ind. Ct. App. 2010).
284. *Id.* at 221.
285. *Id.*
286. *Id.*
287. *Id.* at 221-22.
288. *Id.* at 222.

support from the father.[289] In 2009, the father filed a motion to establish child support, arguing for the first time that the Illinois court had not had subject matter jurisdiction; therefore, its prior modification of the original Indiana support order was void.[290]

The Indiana court held a hearing on this motion in 2009.[291] Immediately prior to the hearing, the father and his counsel attended a conference in chambers, which the mother (who appeared pro se) was not permitted to attend. Additionally, during the hearing, the mother was not allowed uninterrupted argument. After cutting the hearing short at the request of the father's attorney, the trial court granted the father's motion, finding the Illinois court never had jurisdiction and that the original support order remained in effect.[292] The mother appealed.

The court of appeals was unconvinced by the father's argument that the Illinois court never had jurisdiction.[293] The mother properly registered the child support order in Illinois, and the parties filed an agreed order in the Indiana court transferring jurisdiction over child support issues to Illinois.[294] Indiana no longer had jurisdiction over the child support at that point.[295]

Turning toward the Indiana court's actions, the appellate court determined that the Indiana court never reassumed jurisdiction after the Illinois court because the father did not follow the Uniform Interstate Family Support Act (UIFSA) requirements.[296] The court of appeals noted that the Indiana court, if it had jurisdiction, could have issued a *prospective* modification, but not a *retroactive* modification.[297] Therefore, the court held that the Illinois court's modification order was valid and the Indiana court's order declaring it a nullity was invalid, along with its purported retroactive modification.[298]

The court also took exception to the trial court's conduct by holding an ex parte meeting that explicitly excluded the mother.[299] The court ordered that on remand, the case must be assigned to a different judge.[300]

IV. PATERNITY AND MATERNITY

Issues pertaining to paternity and—occasionally maternity—arise in Indiana family law. The following section reviews several such noteworthy cases from

---

289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at 222-23.
293. *Id.* at 224.
294. *Id.*
295. *Id.*
296. *Id.* at 225.
297. *Id.* at 226.
298. *Id.*
299. *Id.* at 227.
300. *Id.*

the survey period.

A. Establishing Paternity

1. Admission of Mail-In DNA Tests.—In *In re T.M.*,[301] the Indiana Court of Appeals considered whether a trial court abused its discretion in a paternity suit by refusing to admit a mail-in DNA test, where there was no information in the trial court record establishing a foundation to support the reliability of the results.

In this case, the child was born in 1995 to unmarried parents.[302] The father executed a paternity affidavit the day after the child's birth, claiming to be the child's natural father. In 1997, the father and the mother filed a joint petition to establish support and related matters. Several days later, the court entered an order establishing their parental status. Up until the child reached the age of fourteen, the father held himself out to be the child's father.[303] In 2009, the father's wife purchased a DNA kit from Walgreens and required that the father and the child take mouth swabs and mail them in for testing. The mother did not provide her permission for the child to participate in the test.[304] The results of the DNA test was issued by e-mail and informed the father that he was not the child's biological father. In 2010, the father moved to set aside his paternity affidavit and for DNA testing.[305]

At the hearing, the trial court refused to admit the mail-in DNA results into evidence following the mother's objection on the grounds that they were not properly certified.[306] The trial court then denied the father's petition, "finding no fraud, duress or mistake of fact."[307] The trial court noted by the father relied on the mail-in paternity test in petitioning to rescind his paternity affidavit, "the results of which were not obtained through the course of ordinary medical care or inadvertent discovery."[308] The trial court further noted that the mother testified regarding her exclusive relationship with the father, believing that he was in fact the biological father of the child.[309] The father appealed.

On appeal, the court of appeals found that there was no dispute that the father executed a paternity affidavit in 1995 claiming to be the child's biological father.[310] The court then noted that once a man has executed a paternity affidavit according to the statutory requirements, "he is the child's legal father unless the affidavit is rescinded pursuant to the same statute."[311] Considering that the father

---

301. 953 N.E.2d 96 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 649 (Ind. 2011).
302. *Id.* at 97.
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 98.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.* The statutory requirements for a paternity affidavit are found in Indiana Code section

filed his petition to rescind his paternity fourteen years after he executed it, the court held that "a man who executed a paternity affidavit may not fail to timely request genetic testing under Indiana Code section 16-37-2-2.1 and then, as a matter of course, request such testing as a fishing expedition."[312] The court stated that legal fathers may not rescind paternity after the sixty-day time limitation, unless fraud, duress or a material mistake of fact is present.[313] The court further noted that paternity may be challenged by the legal father only in "extreme and rare instances," using "evidence that has become available independently of court action."[314]

The court found that admissibility of evidence, such as the mail-in DNA test, was a matter within the trial court's discretion and was reversible only upon a showing of abuse of discretion.[315] The court considered that the mail-in DNA kit "specifically stated it was not to be used for legal purposes, and there was no information from the purported laboratory where the tests were conducted, or the persons conducting those tests, establishing a foundation to support the reliability of their results."[316] Moreover, the court could find no place in the trial court record where the father introduced facts in support of the admissibility and reliability of such tests.[317]

The court distinguished the matter from *In re Paternity of M.M.*,[318] "wherein . . . [the court of appeals] reversed and remanded for genetic testing when two genetic tests showed that a father, who had executed a paternity affidavit for a child, shared no genetic link to the child."[319] While the court found that the tests in *In re M.M.* were unclear, both parents consented to the genetic testing, both parents took a DNA test, these results were admitted at trial, and the father's relief was denied on public policy grounds.[320] Therefore, the court emphasized the importance of the fact that the admissibility of tests in *In re M.M.* was not at issue, but also contrasted the cases based on the number of tests conducted, whether both parents consented, and whether the mothers offered testimony unsupportive of a finding of fraud.[321] The court affirmed the trial court's judgment, finding no abuse of discretion in the trial court's refusal to admit the test results.[322]

2. Sperm Donor Agreements.—In *J.F. v. W.M.* (*In re M.F.*),[323] the Indiana

---

16-37-2-2.1. *See id.*

312. *Id.* at 99 (citation omitted).

313. *Id.*

314. *Id.* (citations omitted).

315. *Id.*

316. *Id.*

317. *Id.*

318. 889 N.E.2d 846 (Ind. Ct. App. 2008).

319. *In re T.M.*, 953 N.E.2d at 99 (citing *In re M.M.*, 889 N.E.2d at 849).

320. *Id.* (citing *In re M.M.*, 889 N.E.2d at 849).

321. *Id.*

322. *Id.*

323. 938 N.E.2d 1256 (Ind. Ct. App. 2010), *reh'g denied*, 2011 Ind. App. LEXIS 475 (Mar.

Court of Appeals considered whether the trial court erred in interpreting how a sperm donor agreement applied to paternity issues. The mother was cohabiting and in a long-term relationship with a woman ("life partner").[324] The father, a friend of the mother's, agreed to provide sperm to the mother, which resulted in a pregnancy. After conception, but before birth, the parties signed a donor agreement that contained provisions whereby the mother waived all right to financial assistance and support from the father; the father waived all rights of custody or visitation for the resulting child.[325] The donor agreement also contained a covenant not to sue in which the mother and father agreed to refrain from bringing an action to establish legal paternity. The child was born in September 1996.[326] Years later, in 2003, another child was born to the mother, while the mother and life partner were still together.

In 2008, the relationship ended between the mother and life partner, and the mother filed for financial assistance, which ultimately resulted in the county filing a petition to establish paternity.[327] The father responded with multiple defenses, all grounded in the donor agreement. It was established through DNA testing that the father was the biological father of both children.[328] At the hearing, the father stressed that the donor agreement precluded a paternity action. The mother claimed that the donor agreement was invalid as against public policy, running "afoul of the principle that the law will not enforce a contract that divests a child of support from either parent."[329] Entering findings and conclusions sua sponte, the trial court held that the donor contract was valid and that the mother was prohibited from establishing paternity with the father.[330] The mother appealed.

The court of appeals determined that the viability of the donor agreement depended on the manner in which insemination occurred.[331] According to *Straub v. B.M.T.*,[332] if insemination occurred via intercourse, the donor agreement would be unenforceable as against public policy.[333] The court determined that because the mother was looking to avoid the donor agreement, she maintained the burden of proof on such matters of avoidance.[334] While recognizing the strong public policy in favor of parents supporting their biological children, the court could not

---

14, 2011).

324. *Id.* at 1257.

325. *Id.* at 1257-58.

326. *Id.* at 1258.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 1260. Other criteria for the enforceability of donor agreements are that a physician be involved in the insemination process and that a written, thorough, and formalized instrument exist to memorialize the arrangement. *Id.* at 1261 n.1.

332. 645 N.E.2d 597 (Ind. 1994).

333. *In re M.F.*, 938 N.E.2d at 1259-60.

334. *Id.* at 1260.

find any legal basis for allocating the burden to the father.[335] The court determined that the trial court did not err in denying her petition to establish paternity for the older child.[336] The court then addressed the issue as it related to the younger child.

The donor agreement contained a clause that the father would not be responsible for the older child "and any further children which might result from the [the father's] donated sperm."[337] However, the rest of the donor agreement was drafted with the older child in mind, by using such phrases as "the child," "such child" and "the child due to be born on or about September 19, 1996."[338] The court concluded that the trial court erred in applying the donor agreement to the younger child as the donor agreement indicated that the contract applied specifically and only to the older child.[339]

B. Setting Aside Paternity

1. Paternity Based on Fraud or Mistake.—During the survey period, the court of appeals addressed the time limitation to set aside paternity based on intrinsic fraud. In *Jo. W. v. Je. W.*,[340] the court of appeals reviewed a decision that a father's motion to establish paternity was not an independent action, as the father did not allege or present evidence of *extrinsic* fraud or fraud upon the court.

In this case, the parties were married in 2001, and a child was born in 2003.[341] The mother filed for dissolution of marriage in 2005, and the trial court entered the dissolution decree in 2006.[342] Four years later, in 2010, the father filed a verified motion to establish paternity.[343] The trial court denied the father's motion, finding that the motion did not comply with the time limits required by Indiana Trial Rule 60(B)(3).[344] The father then filed a motion to correct error which the court also denied. The father appealed.

On appeal, the father asserted that the mother committed extrinsic fraud by indicating on the dissolution petition that there was a child born of the marriage.[345] In considering this allegation, the court noted that Trial Rule 60(B)(3) contemplates "a motion based on intrinsic fraud, extrinsic fraud, or

---

335. *Id.*

336. *Id.* at 1261.

337. *Id.* at 1262 (emphasis omitted).

338. *Id.* at 1262-63 (citation omitted).

339. *Id*. at 1263. Judge Crone dissented, arguing that the father should bear the burden of proving the consistency between the donor agreement and public policy. *Id.* at 1264-65 (Crone, J., dissenting).

340. 952 N.E.2d 783 (Ind. Ct. App. 2011).

341. *Id.* at 784-85.

342. *Id.* at 785.

343. *Id.*

344. *Id.*

345. *Id.* at 786.

fraud on the court . . . if the fraud was committed by an adverse party and had an adverse effect on the moving party."[346] Additionally, the court noted that while relief under Trial Rule 60(B)(3) has a one-year time limit, this does not prohibit the trial court from entertaining an independent action for relief from a judgment, order or proceeding, or for fraud upon the court.[347] The court then found that "[a]n independent action can be brought within a reasonable time after the judgment and must allege either extrinsic fraud or fraud upon the court."[348]

When the mother filed the dissolution action, she was required to include any child "of the marriage" in the dissolution petition as set forth in Indiana Code section 31-15-2-5.[349] The court found that the child was presumed to be of the marriage.[350] The court noted that the father failed to attend the dissolution hearing, did not respond to the mother's petition, and failed to rebut the presumption of paternity.[351] Moreover, the court considered that the father did not argue that the mother questioned the child's paternity or ever indicated that he might not be the father, nor did he present evidence that the mother improperly influenced the court's decision.[352] Thus, the court found that the elements of extrinsic fraud and fraud upon the court were not satisfied.[353] The court concluded that the fraud alleged by the father was only intrinsic fraud, governed by Trial Rule 60(B)(3).[354] Therefore, the father's motion for relief needed to be brought within one year from the date of the judgment challenged.[355]

2. Vacating Child Support Arrearages.—Child support arrearages should be vacated if paternity is based on fraud or mistake. In *C.L. v. Y.B.* (*In re Paternity of D.L.*),[356] the court of appeals considered whether a child support arrearage that accrues in a man who mistakenly believes he is the father of the child should be vacated if genetic testing subsequently determines the man is not the father and, thus, the paternity was based upon fraud or a mistake of fact.

In this case, in 1996, the mother gave birth to a child, and then brought a paternity action against the purported father.[357] The purported father admitted paternity, and was ordered to pay child support. In 2008, the purported father petitioned to modify custody of the child. At the time, he had a child support arrearage.[358] After a hearing, the trial court modified custody and reduced the

346. *Id.* at 785 (citation omitted).
347. *Id.* at 786 (citing IND. TR. R. 60(B)).
348. *Id.* (citation omitted).
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.* at 786-87.
354. *Id.* at 787.
355. *Id.*
356. 943 N.E.2d 1284 (Ind. Ct. App. 2011).
357. *Id.* at 1284.
358. *Id.* at 1285.

purported father's weekly child support obligation.[359] In 2008, the mother put the issue of custody back before the court. DNA testing was ordered by agreement.[360] The result of the DNA testing established that the purported father was not the child's biological father.[361] It was later determined the biological father's paternity had been established by stipulation in another cause number.[362] At the time, purported father had a support arrearage of approximately $9000.[363] The trial court denied the purported father's request to vacate his arrearage and he subsequently appealed.[364]

On review, the Indiana Court of Appeals noted Indiana Code section 31-14-11-23, which provides: "If a court vacates or has vacated a man's paternity of a child based on fraud or mistake of fact, the man's child support obligation, including any arrearage, terminates."[365] Based upon this statute, and in a review of first impression, the court of appeals concluded that the purported father's paternity was based upon a mistake of fact and, therefore vacated the arrearage.[366]

3. Setting Aside Paternity.—In *J.M. v. M.A.*,[367] the Indiana Supreme Court considered whether genetic testing that excludes the party as the biological father is required, when a party seeks to set aside a paternity affidavit. The mother and "father" began dating in 1998, at which time the mother was already four months pregnant with what both parties knew was another man's child.[368] When the mother gave birth, the "father" signed a paternity affidavit acknowledging himself as the natural father of the child. The "father" was not quite eighteen years old at the time.[369]

In 2009, upon the application of benefits for the child, the State intervened by filing a Title IV-D petition against the "father" to establish child support and health insurance coverage.[370] The "father" was given notice, and a hearing was set.[371] The "father" filed a pro se motion for continuance, reciting that he was working out-of-state and was trying to obtain legal counsel. The "father's" continuance was denied, and in his absence, the trial court entered a default judgment adjudicating the "father" as the father of the child, and ordering him to pay support of $47 per week.[372]

---

359. C.L. v. V.B. (*In re* D.L.), 938 N.E.2d 1221, 1223 (2010), *clarified and aff'd*, 943 N.E.2d 1284 (Ind. Ct. App. 2011).

360. *In re D.L.*, 943 N.E.2d at 1284.

361. *Id.* at 1284-85.

362. *Id.* at 1285.

363. *In re D.L.,* 938 N.E.2d at 1223.

364. *In re D.L.*, 943 N.E.2d at 1285.

365. *Id.* (quoting IND. CODE § 31-14-11-23 (2011)).

366. *Id.*

367. 950 N.E.2d 1191 (Ind. 2011).

368. *Id.* at 1191.

369. *Id.*

370. *Id.* at 1192.

371. *Id.*

372. *Id.*

The "father" obtained counsel, and filed a motion to set aside the default judgment of paternity and support.[373] At the hearing on that motion, the evidence, including testimony from the mother, was that the "father" was *not* the child's biological father, and that the mother was puzzled as to why the "father" signed the paternity affidavit in the first place.[374] The trial court denied "father's" motion to set aside, and the "father" appealed.

The court of appeals agreed with the "father" that the trial court erred when it refused to set aside its default judgment against the "father."[375] Indiana Code section 31-14-7-3 permits a paternity affidavit to be rescinded only after a determination that: (1) fraud, duress, or material mistake surrounded its execution; and (2) that genetic testing excludes the man as the child's father.[376] The court of appeals concluded that, under the totality of the circumstances, the "father's" execution of the paternity affidavit constituted a material mistake of fact.[377] And, importantly, the court of appeals determined it unnecessary to meet the technical statutory requirement of genetic testing in light of the stipulation of all parties regarding paternity.[378] Thus, the court of appeals vacated the trial court's order finding paternity and ordering support.[379]

The Indiana Supreme Court granted transfer. The supreme court also agreed it was appropriate to reverse the denial of the motion to set aside the trial court's default judgment.[380] However, the supreme court disagreed with the court of appeals' conclusion that the statutory genetic testing requirement could be avoided.[381] Therefore, the supreme court remanded the issue to the trial court so that the request to rescind the paternity determination could be made in compliance with Indiana Code section 31-14-7-3.[382]

C. Custody Issues in Paternity Cases

Indiana case law suggests that the trial court has significant discretion in deciding custody issues; however, the best interests of the child must be considered.[383]

---

373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.* at 1192-93.
377. *Id.* at 1192.
378. *Id.*
379. *Id.*
380. *Id.* at 1193.
381. *Id.*
382. *Id.*
383. *See* K.W. v. B.J. (*In re* M.W.), 949 N.E.2d 839, 843 (Ind. Ct. App. 2011) (reversing the trial court where "nothing in the record indicate[d] that the trial court considered the best interests of [the child] before determining custody," and where the mother did not know custody would be decided at the hearing).

1. Suspending Parenting Time.—In *P.S. v. W.C.* (*In re W.C.*)[384] the Indiana Court of Appeals considered whether the trial court erred by suspending the mother's parenting time in the absence of evidence that the mother endangered the child's physical health and well-being, or significantly impaired the child's emotional development.[385] The parties had one child together in 2000.[386] The father's paternity of the child was established two years later, and the father received parenting time under the Guidelines.[387] In 2009, custody was modified from the mother to the father, and in 2010, the trial court significantly the restricted the mother's parenting time.[388]

At a subsequent review hearing, the father testified in detail about the mother's parenting time interactions with the child, claiming she was treating him like a baby and discussing the ongoing court proceedings.[389] Following this review hearing, the trial court issued an order suspending the mother's parenting time and contact with the child.[390] The mother appealed.

On appeal, the court of appeals first observed that the trial court "failed to make the requisite statutory finding of endangerment to [the child's] physical health and well-being or significant impairment to [the child's] emotional development."[391] The court noted that the mother's parenting time was already limited and that the record presented "does not approach the egregious circumstances in which we have previously found that parenting time may be terminated."[392] Therefore, because no evidence in the record supported the conclusion that the mother posed a threat to the child, the suspension of parenting time was reversed.[393]

2. Modifying Joint Custody to Sole Custody.—In *B.M.S. v. E.M.* (*In re A.S.*),[394] the Indiana Court of Appeals reviewed the trial court's decision to modify joint legal and physical custody of the daughter, in light of evidence that the parties failed to co-parent effectively.[395] The mother and the father had one child together, a daughter, who was born in 2007.[396] In 2008, paternity was formally established, and the parties agreed to joint legal custody, and an alternating weekly equal-time parenting schedule.[397]

Subsequently, the parties' co-parenting relationship became increasingly

---

384. 952 N.E.2d 810 (Ind. Ct. App. 2011).
385. *Id.* at 811.
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.* at 812-13.
390. *Id.* at 814.
391. *Id.* (citing IND. CODE § 31-14-14-1(a) (2011)).
392. *Id.* at 816-17 (citation omitted).
393. *Id.* at 817.
394. 948 N.E.2d 380 (Ind. Ct. App. 2011).
395. *Id.* at 381.
396. *Id.* at 381-82.
397. *Id.*

hostile and acrimonious.[398] Matters came to a head when the mother began to threaten to withhold parenting time, which resulted in the father filing a motion for custody and parenting time, to which the mother responded with a petition to modify custody. After a hearing, the trial court modified the joint custody arrangement to sole legal custody and primary physical custody with the mother, subject to alternating weekend parenting time with the father.[399] The father appealed.

The father disputed whether the modification by the trial court was in the daughter's best interests.[400] The father's appeal endeavored to critique the mother's parenting behaviors to portray her as the less capable parental figure, and argued that custody should have been awarded to him.[401] Nevertheless, the court of appeals determined that there was ample evidence that the parties could no longer co-parent effectively, and that the father was less willing to be cooperative than the mother.[402] Thus, the modification of custody was not an abuse of discretion.[403]

3. Appointment of a Parenting Coordinator.—In *K.L. v. M.H.* (*In re C.H.*),[404] the Indiana Court of Appeals reviewed the trial court's decision to appoint a Level II Parenting Coordinator.[405] The parties dated and lived together in 2005. Later that year, the mother gave birth to a child. Paternity was subsequently established.[406] The mother and the father's relationship was turbulent, and they eventually separated.

The mother and father began to disagree on various custody and parenting time issues. The mother filed a petition to establish child support and a parenting time schedule.[407] As part of the trial court's review of the matter, the trial court ordered the parties to participate in parenting time coordination with an appointed Level II Parent Coordinator.[408] The trial court also ordered a parenting time schedule and child support order. The mother appealed.

On appeal, the mother argued that the appointment of the parenting coordinator was an abuse of discretion because neither party requested or agreed to such appointment.[409] On review, the court of appeals noted that the mother and the father clearly had a difficult time communicating and working through

---

398. *Id.* at 381, 384.

399. *Id.* at 384.

400. *Id.* at 387.

401. *Id.*

402. *Id.* at 388.

403. *Id.* Judge Robb filed a lengthy dissent, believing the parents' reluctance to cooperate was not a sufficient basis to modify custody. *Id.* at 390-93 (Robb, J., dissenting).

404. 936 N.E.2d 1270 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1210 (Ind. 2011).

405. *Id.* at 1271.

406. *Id.*

407. *Id.*

408. *Id.* at 1272.

409. *Id.* at 1274.

parenting time issues.[410] The court also noted that, when the trial court announced its intention of appointing a parenting coordinator, the mother responded, "that would be great."[411] Thus, the court of appeals concluded that in light of the evidence and the spirit of the Guidelines, the trial court did not err in its appointment.[412]

V. ADOPTIONS

Issues related to adoption occasionally arise in Indiana family law. The following section reviews several such noteworthy cases from the survey period.

A. Limits on Statutory Law Circumventing Adoption Law

In *M.S. v. C.S.*,[413] the Indiana Court of Appeals considered whether Indiana Code section 31-17-2-3, which, on its face, broadly permits any parent or non-parent to initiate proceedings to determine the custody of a child, may circumvent Indiana's more restrictive adoption statute.

In *M.S.*, the parties were involved in a same sex relationship. The biological mother was artificially inseminated and subsequently had a child.[414] After petitioning the trial court in 2007, the court awarded joint legal custody to the couple and parenting time to the partner. The relationship between the couple ended in 2009 and soon after, the trial court, sua sponte, voided its 2007 order.[415] The partner appealed, arguing the order was valid.

On review, the court of appeals noted that Indiana Code section 31-17-2-3 does broadly permit the initiation of a custody determination by either "a parent" or "a person other than a parent."[416] But, the court of appeals concluded that the Indiana General Assembly could not have intended this statutory provision to be used to establish joint custody between a parent and any non-parent, because doing so would circumvent the procedural safeguards set forth in the adoption statutes.[417] The court further explained that, because the trial court lacked authority to issue the 2007 order, it was void and not merely voidable.[418]

The partner argued that, even in the absence of the 2007 order, she was nevertheless entitled to parenting time with the child.[419] However, the Indiana Court of Appeals refused to consider whether the partner was a legal parent of the

---

410. *Id.*

411. *Id.* (citation omitted).

412. *Id.*

413. 938 N.E.2d 278 (Ind. Ct. App. 2010).

414. *Id.* at 281.

415. *Id.*

416. *Id.* at 282 (quoting IND. CODE § 31-17-2-3 (2011)).

417. *Id.* at 282-83. The court specifically noted the procedural safeguard requiring consent of the natural parent. *Id.* (citing IND. CODE § 31-19-9-1(a)(2) (2011)).

418. *Id.* at 284.

419. *Id.* at 285.

child because she failed to raise that argument before the trial court.[420] The partner also argued that she was entitled to third party visitation with the child.[421] The court determined that even if there was a basis for third party visitation, the partner was not entitled to it because such visitation would not serve the best interests of the child.[422] The trial court's decision was affirmed.[423]

B. Consent to Adoption

Consent to adoption is required absent a showing of a failure to pay support. In *In re Adoption of M.B.*,[424] the Indiana Court of Appeals reviewed the trial court's denial of a petition to adopt a child without the parent's consent.[425]

The mother and the father became engaged approximately two months after the birth of the child, but never married.[426] During the first five months of the child's life, the mother would leave the child at the father's home when she went to work to avoid the cost of daycare. After that initial period, the mother unilaterally decided to take the child to daycare.[427] The mother then allowed the father to see the child one day a week. Shortly thereafter, the mother began seeing stepfather and they were married approximately one year later.[428]

Since the child's birth, the father was intermittently employed, generally in minimum wage or low-paying jobs.[429] He offered to arrange child support payments, but the mother refused the offer. The father exercised visitation informally one day per week until July 2009, when the mother refused to allow the father to see the child from that point forward.[430] In September 2009, the father filed a petition to establish paternity. The stepfather filed a petition to adopt the child and a motion to proceed with the adoption without the consent of the father in October of 2009.[431] Relying on Indiana Code section 31-19-9-8, the court determined that the stepfather had not met his burden by "clear, cogent, and indubitable evidence" that he could proceed forward without the consent of the father.[432]

The court of appeals examined the language of Indiana Code section 31-19-9-8, which provides that the stepfather could proceed without the father's consent

---

420. *Id.*

421. *Id.* at 285-86.

422. *Id.* at 287. This determination was supported by trial testimony regarding a violent alteration between the parties that was witnessed by the child. *Id.*

423. *Id.*

424. 944 N.E.2d 73 (Ind. Ct. App. 2011).

425. *Id.* at 74.

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.* at 75.

430. *Id.*

431. *Id.*

432. *Id.* at 76.

if the father had "knowingly fail[ed] to provide for the care and support of the child when able to do so as required by law or judicial decree."[433] The court found that even though the father had limited income and there was no formal support order, he had a common law duty to provide support.[434] However, the trial court correctly determined that the father's provision of childcare constituted support.[435] The trial court's denial of stepfather's adoption petition was affirmed.[436]

Additionally, consent to adoption is not required upon evidence of serious drug addiction and knowing and intentional failure to pay child support. For example, in *B.F. v. L.F.* (*In re Adoption of K.F.*),[437] the Indiana Court of Appeals considered whether the trial court correctly determined that the mother's consent to the adoption of her children was not required where the mother did not pay child support and had a drug addiction.[438]

The parties divorced in 2002. The father was awarded custody of their two children; the mother was ordered to pay support.[439] The mother battled a serious drug addiction, and she paid little child support to the father. By 2009, her arrearage was over $14,000.[440] The mother's parenting time was required to be supervised, and the mother was subject to drug screens that she repeatedly failed. The mother was arrested for dealing heroin in 2009.[441]

The father remarried the stepmother in 2006.[442] In 2008, the stepmother filed a petition to adopt the children. Typically, a natural parent's consent is required before a third party may adopt a child. However, by statute, such consent is not required under various circumstances, including: 1) when the parent knowingly fails to provide for the care and support of the child as required by law or decree; or 2) it is proven by clear and convincing evidence that the parent is unfit, and that the best interests of the child would be served if adoption can proceed without the parent's consent.[443]

After a hearing, the trial court determined that these exceptions had been proven, and the adoption of the children by the stepmother was approved without the mother's consent.[444] The mother appealed.

The mother disputed the lack of support exception finding, saying she had struggled to maintain employment since the divorce.[445] The court of appeals

---

433. *Id.* (quoting IND. CODE § 31-19-9-8(a)(2) (2011)).
434. *Id.* at 77.
435. *Id.*
436. *Id.* at 78.
437. 935 N.E.2d 282 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1196 (Ind. 2011).
438. *Id.* at 283.
439. *Id.*
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.* at 286 (citing IND. CODE § 31-19-9-8 (2011)).
444. *Id.* at 287.
445. *Id.* at 288.

rejected the mother's argument, finding it dispositive that, on three occasions since the decree, the mother had signed agreed entries that recited her non-payment of support was knowing and willing.[446]

As to the issue of the mother's unfitness, the court of appeals reviewed the significant evidence of failed drug screens, and evidence of the mother using cocaine, heroin, Percocet, and assorted opiates.[447] "The evidence is sufficient to prove that [the m]other is unfit to be a parent."[448] Since the record supported the trial court's conclusion that the mother had failed to support the children, and that the mother was an unfit parent, the trial court's approval of the stepmother's adoption, without the mother's consent, was affirmed.[449]

C. Granting Adoption Before the Requisite Objection Period Has Run

In *D.H. v. J.H.*, (*In re L.C.E.*),[450] the Indiana Court of Appeals considered whether the trial court erred when it granted an adoption petition without giving the custodial stepfather of the child thirty days, per statute, to file an objection to the adoption petition. The stepfather and mother married in 1999.[451] At that time, the mother had a prior born child ("child") for whom paternity had not been established.[452] During the parties' marriage, two more children were born. The stepfather and the mother divorced in 2007.[453] Under their settlement agreement incorporated into the decree of the Johnson County Circuit Court, custody, parenting time, and support were determined as to the other children; however, the decree was silent as to the child.

In 2009, the stepfather filed an emergency petition for custody in the divorce court and was granted joint legal custody and primary physical custody of all of the children, including the child.[454] In 2010, the mother's father ("grandfather") filed a petition to adopt the child in the Lawrence County Circuit Court. Twenty-six days later, the court granted the adoption petition.[455] Three days after that, but still within thirty days of the filing of the grandfather's petition, the stepfather filed his objection to the adoption proceedings.[456] The stepfather appealed.[457]

The court of appeals concluded that the stepfather had standing because of

---

446. *Id.*

447. *Id.* at 289.

448. *Id.*

449. *Id.*

450. 940 N.E.2d 1224 (Ind. Ct. App. 2011).

451. *Id.* at 1225.

452. *Id.* The opinion suggests an open question as to whether the child was the stepfather's biological child.

453. *Id.*

454. *Id.*

455. *Id.* at 1226.

456. *Id.*

457. *Id.*

the 2009 court order giving him joint legal custody of the child.[458] The court also noted that, by statute, such an objection by a party with standing must be filed within thirty days of service of the adoption petition.[459] Here, the stepfather timely filed his objection.[460] However, the Lawrence County Circuit Court had already granted the adoption petition.[461] In reversing the trial court's granting of the grandfather's adoption petition, the court of appeals noted that the trial court "erred when it failed to consider [the s]tepfather's objection . . . because [the s]tepfather was [the child's] legal custodian pursuant to the Johnson County order."[462]

D. Post Adoption Visitation Rights for Biological Parents

In *J.S. v. J.D.*,[463] the Indiana Court of Appeals considered whether: 1) Indiana Code section 31-19-16-2 is the exclusive means for a biological parent, who has consented to adoption, to petition for and assert visitation rights; and 2) the trial court lacks the power to grant visitation rights to birth parents outside of this statute.[464]

The child was born to the biological father and the biological mother in 2002.[465] The parents were still in high school and the child had significant health problems. The mother's parents adopted the child shortly thereafter, with the consent of both biological parents.[466] The father visited the child regularly and was referred to as "dad" by the child. The mother and father were married and eventually moved in together with the child.[467] They had a second child during this period. They eventually filed a petition to adopt the child, to which the adoptive parents (grandparents) consented, but this process was never finalized.[468]

In 2008, the mother filed for dissolution from the father.[469] The child was not named in the petition. During the pendency of the dissolution, the father exercised regular visitation with both children.[470] The marriage was eventually dissolved and the settlement agreement made no mention of visitation with the child (but did provide for visitation with the second child).[471] The father still

---

458. *Id.* at 1228.
459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*
463. 941 N.E.2d 1107 (Ind. Ct. App. 2011), *trans. denied*, 2011 Ind. LEXIS 478 (Ind. June 2, 2011).
464. *Id.* at 1108.
465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.* at 1109.

continued visitation until the mother remarried and visitation with the child was terminated. The father continued to exercise visitation with the second child.[472]

The father filed a petition to establish visitation for the child in the dissolution court and moved to join necessary parties, including the child's adoptive parents.[473] The trial court, citing *Collins v. Gailbreath*,[474] granted the visitation petition on the grounds that the father "qualified as a third-party nonparent custodian" whose court-ordered visitation was in the child's best interests.[475] The trial court stated its judgment did not affect the adoption decree.[476] The mother and the adoptive parents appealed.[477]

Relying on *In re Visitation of A.R.*,[478] the court of appeals concluded that Indiana Code section 31-19-16-2 was the exclusive means for seeking visitation privileges.[479] The court distinguished *Collins* because the father was a birth parent, not a third-party nonparent.[480] The judgment of the trial court was reversed and remanded with instructions to vacate the visitation order.[481]

E. Jurisdiction to Issue Conclusions Regarding an Adoption Petition

In *Devlin v. Peyton*,[482] the Indiana Court of Appeals considered whether the dissolution court had proper jurisdiction to issue conclusions regarding an adoption petition filed in a different jurisdiction, when the adoption court denied a motion to transfer to the dissolution court.[483] The court of appeals determined that because the adoption was still pending in the adoption court, the dissolution court did not have jurisdiction over the adoption.[484] Because the adoption court denied the father's motion to transfer to the dissolution court, the adoption action remained in the adoption court.[485] The father's only recourse was an interlocutory appeal.[486] Expressing no opinion on the merits, the court vacated the dissolution court's conclusions regarding the adoption petition, and affirmed that court's conclusions on the issue of parenting time, noting that the mother failed to

---

472. *Id.*

473. *Id.*

474. 403 N.E.2d 921 (Ind. Ct. App. 1980).

475. *J.S.*, 941 N.E.2d at 1109.

476. *Id.*

477. *Id.*

478. 723 N.E.2d 476, 479 (Ind. Ct. App. 2000).

479. *J.S.*, 941 N.E.2d at 1110.

480. *Id.* at 1111.

481. *Id.* Judge Crone concurred in the result, by separate opinion. *Id.* at 1111-13 (Crone, J., concurring).

482. 946 N.E.2d 605 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 988 (May 24, 2011).

483. *Id.* at 606.

484. *Id.* at 607.

485. *Id.*

486. *Id.*

challenge that issue.[487]

CONCLUSION

This Article reviews developments in Indiana's family and matrimonial law through the examination of many notable cases. These decisions will undoubtedly impact future cases involving dissolution of marriage, child custody, support, relocation, paternity, and adoption.

487. *Id.* at 607-08.

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ*

During this survey period,[1] the Indiana appellate courts addressed fewer decisions than in past years. This Article examines the most significant decisions on coverage issues affecting automobile, homeowners, and commercial general liability insurance policies and their impact upon the field of insurance law.[2]

I. AUTOMOBILE COVERAGE CASES

A. Emotional Distress Claim Did not Satisfy Definition of "Bodily Injury" to Permit Recovery for an Uninsured Motorist Claim

The facts in the *Taele v. State Farm Mutual Automobile Insurance Co.*[3] decision are tragic. A husband and wife were traveling behind an automobile with their thirteen-year-old daughter riding as a passenger.[4] An uninsured motorist traveling in the opposite direction on the interstate, lost control of his vehicle, crossed the median, and struck the automobile that carried the daughter,

---

* Partner, Lewis Wagner, LLP. B.A., 1987, Hanover College; J.D., 1990, Indiana University Robert H. McKinney School of Law.

1. The survey period for this Article is approximately September 30, 2010 through October 1, 2011.

2. Selected cases which were decided during the survey, but are not addressed in this Article include: *Trinity Homes, L.L.C. v. Ohio Casualty Insurance Co.*, 629 F.3d 653 (7th Cir. 2010) (deciding commercial general liability policy provided insurance coverage for faulty workmanship of subcontractor hired by insured); *Westfield Insurance Co. v. Hill*, 790 F. Supp. 2d 855 (N.D. Ind. 2011) (holding that insurer was entitled to summary judgment of no coverage for claim of mother of sexual abuse victim for emotional distress against insured); *State Farm Fire and Casualty Co. v. Nokes,* 776 F. Supp. 2d 845 (N.D. Ind. 2011) (finding insurance company was entitled to summary judgment of no coverage for foster child's sexual abuse claim against foster parents); *Jackson v. Allstate Insurance Co*., 780 F. Supp. 2d 781 (S.D. Ind. 2011); *American Family Mutual Insurance Co. v. Bower*, 752 F. Supp. 2d 957 (N.D. Ind. 2010) (holding that homeowners' insurer was not entitled to summary judgment of no coverage for sexual abuse victim's claim against parents/pastor of perpetrator); *Michel v. American Family Mutual Insurance Co.*, 2010 WL 3039506 (N.D. Ind. 2010) (holding that disagreement between insurer and insured on value of underinsured motorist claim, standing alone, did not demonstrate claim for breach of duty of good faith); *National Union Fire Insurance Co. v. Standard Fusee Corp.*, 940 N.E.2d 810 (Ind. 2010) (applying "uniform-contract-interpretation approach" in deciding choice of law for environmental coverage dispute), *reh'g denied*, 2011 Ind. LEXIS 410 (Ind. May 20, 2011); *Quiring v. GEICO General Insurance Co.*, 953 N.E.2d 119 (Ind. Ct. App. 2011) (deciding that injured driver was not a resident in mother's home to be entitled to underinsured motorist coverage under mother's automobile policy); *Auto-Owners Insurance Co. v. Hughes*, 943 N.E.2d 432 (Ind. Ct. App.) (requiring insurance company to supply insured with copy of insurance policy if asked), *trans. denied*, 962 N.E.2d 647 (Ind. 2011).

3. 936 N.E.2d 306 (Ind. Ct. App.), *trans. denied sub nom.* Taele v. Figueroa, 950 N.E.2d 1209 (Ind. 2011).

4. *Id*. at 307.

resulting in her death. The husband and wife witnessed the accident by looking in the rear view mirrors of their vehicle.

Although the husband and wife were not directly involved in the accident, it was alleged that a part of the uninsured motorist's automobile may have struck their windshield.[5] As a result of witnessing the accident, the husband suffered emotional distress, which included a diagnosis of high blood pressure and depression. The husband and wife presented an uninsured motorist claim under their automobile insurance policy to recover for their emotional distress injuries.[6]

The insurer denied their claim by contending that their emotional distress did not satisfy the definition of "bodily injury" in the policy, which was defined to include "bodily injury to a person and sickness, disease or death which results from it."[7] The trial court granted the insurer's summary judgment motion, and an appeal ensued.[8]

The court of appeals first analyzed Indiana law to determine whether the emotional distress claims stated recognizable claims for negligent infliction of emotional distress under Indiana law.[9] Indiana follows the "direct impact" test which requires a claimant to have a direct impact with the negligence of another before he or she may seek recovery under a negligence theory for emotional trauma.[10] A few years ago, the supreme court expanded the group of individuals who could pursue a claim for negligent infliction of emotional distress to include a bystander who witnessed or came upon the scene of the death of or serious injury to a loved one "with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling."[11]

Although the court concluded that the insureds possessed a negligent infliction of emotional distress claim against the other motorist, it was still necessary for the insureds to satisfy the definition of "bodily injury" to pursue a claim under the policy.[12] The court engaged in an extensive review of recent supreme court decisions which addressed whether emotional distress claims met the definition of "bodily injury" within an insurance policy.[13] After reviewing these cases, the court concluded the husband and wife were not entitled to

---

5. *Id.*

6. *Id*.

7. *Id.* (emphasis omitted). Interestingly, this definition replaced a more restrictive definition which provided "[b]odily injury—means physical bodily injury to a person and sickness, disease or death which results from it. A person does not sustain bodily injury if that person suffers emotional distress in the absence of physical bodily injury." *Id*. (emphasis omitted).

8. *Id*.

9. *Id.* at 308.

10. *Id.* (citing Shuamber v. Henderson, 579 N.E.2d 452, 456 (Ind. 1991)).

11. *Id.* (citing Groves v. Taylor, 729 N.E.2d 569, 573 (Ind. 2000)).

12. *See id.* at 310.

13. *See id.* at 308-10; *see also* Bush v. State Farm Mut. Auto. Ins. Co., 905 N.E.2d 1003 (Ind. 2009); State Farm Mut. Ins. Co. v. D.L.B., 881 N.E.2d 665 (Ind. 2008); Elliott v. Allstate Ins. Co., 881 N.E.2d 662 (Ind. 2008); State Farm Mut. Auto. Ins. Co. v. Jakupko, 881 N.E.2d 654 (Ind. 2008).

uninsured motorist benefits, because they were not directly impacted and did not sustain a direct physical injury from the accident.[14] In order to establish "bodily injury" to permit the insureds to recover for their emotional trauma, it was necessary for them to sustain a physical impact of some sort.[15] The court rejected the suggestion that the piece of the other vehicle that collided with the insureds' windshield demonstrated a "direct impact."[16]

In this case, the court of appeals correctly followed precedent from the Indiana Supreme Court regarding the definition of "bodily injury" in an insurance policy. While the outcome is unfortunate for the family in this tragic case, this opinion provides a consistent line of decisions addressing the scope of "bodily injury" as it relates to emotional distress claims.

B. Insured Who Received Medical Payments Benefits Could not Reduce Insurer Lien After Settlement with Tortfeasor

The decision of *Wirth v. American Family Mutual Insurance Co.*[17] addresses the common question of whether an insurance company that issues medical payments coverage to its insured can demand full repayment when the insured settles with a tortfeasor. The insured was injured as a result of a motor vehicle accident, and his medical bills of $1969.26 were paid by his automobile insurance company under the medical payments coverage.[18] The insured filed a negligence lawsuit against the other motorist, and settled his claim for $3500.

The insured could not reach an agreement with the automobile insurance company on the amount to repay for the medical payments lien.[19] The insured filed a lawsuit against the insurance company seeking a declaration on whether the insurer possessed a subrogation right to demand repayment of its lien. After the trial court entered summary judgment in favor of the insurer, which required the insured to repay the full amount of the lien, an appeal ensued.

The insured contended that the automobile insurer lacked a right to seek repayment of the lien.[20] The insured presented an affidavit from a long time plaintiff's attorney valuing the insured's claim at approximately $8000.[21] Because the insured did not collect the full value of his claim from the tortfeasor, he argued that the insurer's right to subrogate to recover its lien did not exist.[22] The insured relied upon an Indiana case, which determined that a subrogation lienholder could not recover the amount paid to its insured until the insured was

---

14. *Taele*, 936 N.E.2d at 310.
15. *Id*. at 311.
16. *Id*. at 310 n.3.
17. 950 N.E.2d 1214 (Ind. Ct. App. 2011).
18. *Id*. at 1215.
19. *Id*.
20. *Id*. at 1216.
21. *Id*. at 1215.
22. *Id*. at 1216.

fully satisfied for the amount of its judgment against a tortfeasor.[23] However, based upon the insured's complete settlement with and release of the tortfeasor, in contrast to an unsatisfied judgment, the court distinguished the case relied upon by the insured.[24]

The insured also argued that if the insurance company could pursue its subrogation right, then the trial court erred by not determining the full value of the insured's lawsuit against the tortfeasor—regardless of the settlement amount.[25] Relying upon an Indiana Supreme Court decision,[26] the insured contended that the trial court should have considered factors such as the risk to the insured of the allocation of comparative fault or inadequate insurance coverage to compensate for the loss to determine whether the settlement was reasonable.[27] However, the court of appeals concluded that the insured did not present any evidence to suggest that the insurance company's lienholder interest should be reduced because of comparative fault or lack of insurance.[28]

This case offers guidance to attorneys representing plaintiffs/insureds with medical payments liens, that they should attempt to compromise and settle the lien, if possible, before settling with a tortfeasor. Otherwise, the insured will have the burden to demonstrate that the lienholder's interest should be reduced for other reasons.

C. Court Concluded that Boyfriend of Unmarried Couple Living Together May Be Entitled to Liability Insurance Coverage under Girlfriend's Policy

In today's society, a common living arrangement involves two individuals residing as an unmarried couple. In *Estate of Kinser v. Indiana Insurance Co*.,[29] the court of appeals addressed the availability of automobile insurance for an unmarried couple living together with their children from other relationships.[30] Each member of the couple possessed their own automobile which was insured with different insurance companies. Because both worked at the same company, they often rode together in the girlfriend's car with each taking turns as the driver. Normally, the boyfriend would use his automobile for most errands, but occasionally, would use the girlfriend's vehicle for long drives because of its fuel efficiency.[31] Both had keys to the other's vehicle in case the other accidentally was locked out of the vehicle. The boyfriend did not drive the girlfriend's automobile without asking for permission, and the evidence showed that he only

---

23. *Id.* at 1217 (citing Capps v. Klebs, 382 N.E.2d 947 (1978)).

24. *Id*. This concept of a lienholder not being permitted to collect its interest if the insured has an unsatisfied claim, is also codified at IND. CODE § 34-51-2-19 (2011).

25. *Wirth*, 950 N.E.2d at 1217.

26. Dep't of Pub. Welfare v. Couch, 605 N.E.2d 165 (Ind. 1992).

27. *Wirth*, 950 N.E.2d at 1217.

28. *Id*.

29. 950 N.E.2d 23 (Ind. Ct. App. 2011).

30. *Id*. at 25.

31. *Id*.

asked for permission to drive the girlfriend's car on one previous occasion.[32]

On a day when both the boyfriend and girlfriend were not working, they decided to take their children to a museum in the girlfriend's vehicle.[33] As the boyfriend was driving, they were involved in a terrible accident that resulted in his death and injuries to his family members and another motorist. The other motorist pursued a liability claim against the boyfriend's estate, seeking insurance coverage under the boyfriend's liability insurance policy for the girlfriend's car.[34] The insurer of the girlfriend's automobile filed a declaratory judgment action, arguing that coverage was excluded for the estate because the girlfriend's car was available for the boyfriend's regular use[35]: "We do not provide [l]iability [c]overage for the ownership, maintenance, or use of: . . . 2. Any vehicle, other than 'your covered auto,' which is: a. Owned by you; or b. Furnished or available for your regular use."[36] Because of the living situation and the frequent use of the girlfriend's vehicle by the boyfriend, the insurer contended that no coverage was available to the boyfriend's estate.[37]

The trial court granted summary judgment to the boyfriend's insurance company.[38] On appeal, the court first observed that the exclusion served a vital purpose in protecting insurers from having to insure vehicles that are regularly used by an insured, but which the insured pays no premium for the insurance coverage.[39] In determining whether the exclusion applied, the court focused upon a "concept of mutual understanding" between the driver and the vehicle owner on the right of the driver to regularly use the automobile.[40] In making this determination, the court looked to the meaning of whether the vehicle was "furnished" or "available" to the driver to regularly use.[41] The court concluded that "furnished" meant that the driver "is given keys to access and permission to use a given vehicle for a purpose as general or specific as both the furnisher and recipient mutually understand."[42] The court determined that "availability" referred to whether the vehicle was "readily obtainable" by the driver.[43]

The court of appeals ultimately determined that an issue of fact existed on whether the girlfriend's automobile was "furnished" or "available" for use to the boyfriend.[44] As a result, the court reversed the summary judgment to the

---

32. *Id*.
33. *Id*.
34. *Id*.
35. *Id.*
36. *Id*. at 27 (alteration in original).
37. *Id.*
38. *Id*. at 25.
39. *Id*. at 27.
40. *Id*. at 28.
41. *Id*. at 28-29.
42. *Id*. at 28.
43. *Id*. at 29.
44. *Id*. at 30.

insurer.[45] Typically, these cases will be very fact sensitive based upon the driver's ability to use the vehicle.

D. Court Determines that Garage's Automobile Policy Does not Apply to Accident Involving Vehicle Using Garage's Temporary License Plate

The case of *Cotton v. Auto-Owners Insurance Co*.[46] presented an interesting question as to the extent of coverage available under an automobile dealership's garage liability policy. A passenger was injured in an automobile accident after the driver lost control and struck a bridge.[47] The driver had recently purchased the automobile but had not registered it with Indiana Bureau of Motor Vehicles. Before the accident, the driver obtained a temporary license plate from his grandfather who owned a motor vehicle dealership, but whose dealership was not the seller of the vehicle. Additionally, the driver was not an employee of the dealership.[48] The dealership was insured under a garage liability policy from Auto-Owners.

After the accident, the passenger sued the driver, the grandfather, the dealership and Auto-Owners seeking recovery for personal injuries and a declaratory judgment finding that the garage policy with Auto-Owners provided coverage to the driver for the accident.[49] The trial court granted summary judgment to Auto-Owners finding that there was no coverage available under the garage policy.[50]

The garage policy specified that insurance coverage was afforded to the dealership for expected maintenance and operation of automobiles by employees of the dealership, and included those uses that were "incidental thereto" and "in connection with" the purpose of the garage or dealership.[51] The court was asked to determine whether the driver's use of the automobile in this case was "incidental to" and "in connection with" a business purpose of the dealership.[52]

The passenger contended that the dealership's ability to distribute temporary license plates, even if it did not sell the vehicle on which the plate was placed, was an act "incidental to" the garage business.[53] Relying upon an earlier decision from the Indiana Court of Appeals, the court interpreted the policy language, stating:

> Generally speaking, to provide a temporary license plate may well be incidental to a licensed auto dealer's business, but Auto-Owners' garage policy provides coverage only if the plate is used "in connection with"

---

45. *Id*.
46. 937 N.E.2d 414 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1204 (Ind. 2011).
47. *Id.* at 415.
48. *Id*.
49. *Id*.
50. *Id.*
51. *Id*. at 416.
52. *Id*. at 416-17.
53. *Id*. at 417.

> the business operations. In other words, the use of the plate must be "directly incidental to the garage business."[54]

No evidence was produced to suggest that the automobile was being used "incidental to" or "in connection with" the dealership.[55] The court concluded that the garage policy did not apply to provide coverage to the driver.[56] This case provides an excellent example of how a court may interpret and apply insurance policy language. Because the driver had no connection with the garage, a finding of coverage would be well beyond the intent of the garage policy's language.[57]

II. COMMERCIAL GENERAL LIABILITY CASES

A. Court Addresses Triggering Date of Multiple Liability Insurance Policies

The decision in *Grange Mutual Casualty Co. v. West Bend Mutual Insurance Co.*[58] presented an interesting analysis on the application of multiple liability insurance policies in a situation where damages were not readily apparent. A contractor was hired to construct a school, and subcontracted the sewer installation and plumbing work.[59] After construction was completed, the school experienced a flood resulting in significant water damage. The flooding was caused by a fractured storm drain pipe that was negligently installed by the subcontractor.[60]

The contractor's insurance company settled with the school on its claim for the water damage.[61] The insurer pursued a subrogation and declaratory judgment action against the subcontractor and its insurers to recover the amounts paid to the school. During the time the subcontractor performed the work for the school, it was insured by West Bend, but at the time the flooding occurred, the subcontractor was insured by Grange.[62] West Bend and Grange settled the subrogation claim of the contractor's insurer, and filed declaratory judgment actions against each other to determine which policy was triggered to provide coverage to the subcontractor.[63]

Each insurer also filed cross-motions for summary judgment, contending that

---

54. *Id.* at 417-18 (quoting Auto. Underwriters, Inc. v. Hitch, 349 N.E.2d 271, 274 (Ind. Ct. App. 1976)).

55. *Id*.

56. *Id*. at 418.

57. *See id.*

58. 946 N.E.2d 593 (Ind. Ct. App. 2011).

59. *Id*. at 594.

60. *Id*.

61. *Id*.

62. *Id*.

63. *Id.*

there was no "occurrence"[64] as required in their policy to establish coverage.[65] The trial court concluded that an "occurrence" existed at the time the flooding occurred.[66] Thus, the trial court granted summary judgment to West Bend, and denied summary judgment to Grange.[67]

On appeal, the court observed that each insurer incorrectly focused upon the timing of when the work was performed in determining whether there was an "occurrence."[68] Instead, the proper focus should have been on "the timing of the property damage," which was what the policy required in order trigger a coverage obligation.[69]

The court concluded that both companies' policies were triggered.[70] The Grange policy was found to apply because the water damage clearly occurred during its policy period.[71] The court also concluded that the West Bend policy was implicated because it covered the subcontractor at the time it negligently installed the storm drain.[72] Additionally, because the West Bend policy also provided coverage for "any continuation, change or resumption of that . . . 'property damage' after the end of the policy period," the court determined the policy encompassed the water damage resulting from the damaged drain pipe, even though the damage manifested after the end of the West Bend policy period.[73]

B. Court Determines that Liability Policy Provides no Coverage for Prospective Damages from a Loss

In *Continental Casualty Co. v. Sycamore Springs Homeowners Ass'n, Inc.*,[74] the Seventh Circuit addressed whether an assignee of an insured's rights under a commercial general liability policy could recover for prospective damages. A residential developer built a subdivision in a low-lying area which was subject to flooding.[75] The developer used a builder who was insured with Continental Casualty Company. During construction, the builder filled a retention pond, and also built along other areas which resulted in a reduction of the subdivision's ability to absorb rainwater. After a significant amount of rain, the subdivision

---

64. The policies defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id*. at 595 n.3.

65. *Id*. at 595.

66. *Id*. at 595-96.

67. *Id*.

68. *Id*. at 595.

69. *Id.*

70. *Id*. at 597.

71. *Id*.

72. *Id*.

73. *Id*. (alteration in original).

74. 652 F.3d 804 (7th Cir. 2011).

75. *Id*. at 804.

flooded, and a number of homes were damaged.[76]

The homeowners association sued the builder.[77] In its complaint, the association asked that the builder pay damages and undertake efforts to reduce *future* flooding.[78] The builder passed the lawsuit on to Continental, which filed a declaratory judgment action, contending insurance coverage was not owed. The association settled its lawsuit with the builder, where the builder paid only a portion of the settlement, and the association retained an assignment to pursue the remainder of the settlement under the builder's insurance policy with Continental.[79]

The district court concluded that no coverage was available to the builder because the association's complaint only sought compensation for improvements made to the property as a means of preventing future flooding rather than for damages caused by the flooding.[80] On appeal, the Seventh Circuit affirmed the district court.[81] The court rejected the association's argument that its complaint did not seek prospective relief because it sought monetary damages.[82] Instead, the court observed that a commercial general liability policy is not intended to provide monetary damages to cover improvements made to property to address an insured's potential negligence, but only to address damages that had already occurred because of the insured's negligence.[83]

This case provides guidance to practitioners to closely scrutinize the types damages sought under an insurance policy in determining whether coverage is owed. Damages arising from improvements made to property, rather than damages relating to a past loss, are not covered.[84]

III. HOMEOWNERS INSURANCE CASES

A. Insured Was not Entitled to Insurance Coverage for Use of Golf Cart Away from His Home

Frequently, many homeowners acquire golf carts or other motorized vehicles to drive on their property or within their neighborhood. The court's determination in *Wicker v. McIntosh*[85] provides guidance on whether liability insurance coverage extends to accidents involving the use of a golf cart.

In this case, the plaintiff filed a negligence lawsuit for injuries he sustained

---

76. *Id*.
77. *Id*.
78. *Id*. at 805.
79. *Id*.
80. *Id*.
81. *Id*. at 806.
82. *Id*.
83. *Id*.
84. *See id.*
85. 938 N.E.2d 25 (Ind. Ct. App. 2010).

as a passenger in a golf cart accident.[86] The owner of the golf cart, who was driving at the time, was insured under his father's homeowner's insurance policy for liability coverage. The homeowner's insurance company intervened in the lawsuit, and asserted a complaint for declaratory judgment, arguing its policy only covered the golf cart to the extent of its use on the owner's property.[87] The insurance company filed a motion for summary judgment, and the injured passenger filed a cross-motion. The trial court granted the insurer's motion, and an appeal ensued.

The language of the insurance policy excluded personal liability coverage for:

> (1) The ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an "insured":
>
> (2) The entrustment by an "insured" of a motor vehicle or any other motorized land conveyance to any person; or
>
> (3) Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph (1) and (2) above.[88]

However, the policy exclusion did not apply to: "A motorized land conveyance designated for recreational use off public roads, not subject to motor vehicle registration and . . . [o]wned by an 'insured' and on an 'insured location[.]"[89]

The court concluded that the policy excluded coverage because the accident did not occur at the "insured location," which was the insured's home.[90] In this case, the accident occurred away from the insured's home, and the exception to the exclusion, therefore, did not apply.[91]

Owners of small motorized vehicles, such as golf carts, should be aware of this decision and its guidance on the extent of liability coverage that may be available. If the accident would have happened on the premises designated in the policy, the exception to the exclusion would have applied and coverage would have existed.[92] For accidents that occur away from the insured's home, such as driving through a residential neighborhood, a policy with similar language would exclude coverage.

---

86. *Id*. at 26.
87. *Id*.
88. *Id.* at 27 (citation omitted).
89. *Id.* at 27-28 (third alteration in original) (citation omitted).
90. *Id*. at 29.
91. *Id*.
92. *See id.*

B. Insured Lacked Insurance Coverage for Liability Claim After Guest Consumed Controlled Substance Prescribed for Insured

In *Forman v. Penn*,[93] the court interpreted the language of an insurance policy to determine whether a personal liability exclusion applied to a sad fact situation. Here, the insured lived with his girlfriend and her teenage son.[94] The son invited two other teenage boys to spend the night at the insured's home. The girlfriend kept physician-prescribed methadone in the home.[95] During the overnight stay, one of the guests ingested the methadone, resulting in serious injury. The parties disputed whether the son supplied the guest with the methadone or whether the guest consumed it without the son's knowledge.[96]

The injured guest filed suit against the named insured, his girlfriend, and her son.[97] The insured and the son contended that they were entitled to liability coverage under the homeowners policy.[98] The insurer intervened in the lawsuit and sought a declaratory judgment, arguing that the policy excluded coverage for bodily injury

> [a]rising out of the use, sale, manufacture, delivery, transfer, or possession by any person of a Controlled Substance(s) as defined by the Federal Food and Drug Law at 21 U.S.C.A. Sections 811 and 812. Controlled Substances include but are not limited to cocaine, LSD, marijuana and all narcotic drugs. However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the orders of a licensed physician.[99]

The insurer contended that the exclusion applied because the methadone was a "controlled substance."[100] The trial court agreed, and granted summary judgment to the insurance provider on the insured's and son's requests for insurance coverage.[101]

The insured and son contended that the exception to the exclusion applied, because the girlfriend had a valid prescription for the methadone.[102] However, the court found that the exception did not apply because the guest was not involved in a "legitimate use of" a prescribed drug, and he was not "following the orders of a licensed physician."[103] The court determined that the clear and unambiguous

---

93. 945 N.E.2d 717 (Ind. Ct. App.), *trans. denied sub nom.* Penn v. W. Reserve Mut. Cas. Co., 962 N.E.2d 639 (Ind. 2011).

94. *Id*. at 719.

95. *Id*.

96. *Id*.

97. *Id*. The injured teenager also sued the other guest. *Id.*

98. *Id*.

99. *Id*. at 720 (alteration in original) (citation omitted).

100. *Id*.

101. *Id.* at 719.

102. *Id*. at 721.

103. *Id*. at 720.

language in the policy excluded liability coverage for the insured or the girlfriend's son.[104] This case presents an unfortunate situation for the named insured and his girlfriend's son who claimed they were not involved in the guest's ingestion of the methadone.[105] However, the policy exclusion was clear that no coverage was available in this instance, and the court correctly applied the language to the facts of the case.[106]

C. Court Interprets Extent of Coverage Available to Insured for a Fire Loss to Rebuild Home

French v. State Farm Fire & Casualty Co.[107] addressed an interesting dispute between an insured and insurance company regarding the benefits available under a homeowners policy after a fire. The insured purchased a manufactured home, and after the purchase, the insured contacted an independent insurance agent to acquire coverage.[108] The agent asked the insured a number of questions about the home, but did not ask the insured about the home's price or if it was a manufactured home. The insured believed that he had told the agent about owning a manufactured home, but the agent denied being so told, and further claimed that the insured said it was "under construction," which suggested that it was a "stick-built"[109] home.[110]

An insurance policy was issued on the home with a provision that the insurance company would pay "the reasonable and necessary cost to repair or replace [the home] with similar construction."[111] A fire eventually destroyed the home, and the insured submitted a claim. An adjuster for the insurer visited the home, and discovered that the home was a manufactured home and not a stick-built home.[112] The insurance company offered to cover the cost of replacing the home with another manufactured home, but the insured wanted to start over with a stick-built home.[113] The insured eventually accepted the amount offered, "but reserved the right to seek additional coverage" up to the limits of the policy for a stick-built home.[114] The insured also filed suit against the insurance company for breach of the insurance policy and the agent for negligence in procuring the

---

104. *Id*. at 721.

105. *Id.*

106. *See id.*

107. 950 N.E.2d 303 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 650 (Ind. 2011).

108. *Id*.

109. *See generally Stick Construction v. Pre-Manufactured Construction*, PRIDE BUILDERS, http://www.pride-home.com/about/stick_v_engineered (last visited June 18, 2012) ("The traditional way to build a home has long been described as 'stick built homes.' That is, assembling the building, on site, out of lumber . . . .").

110. *French*, 950 N.E.2d at 306-07.

111. *Id*. at 307 (citation omitted).

112. *Id*.

113. *Id*.

114. *Id*.

insurance policy.[115]

The relevant portion of the insurance policy provided that it would "pay up to the applicable limit of liability . . . the reasonable and necessary cost to repair or replace with similar construction and for the same use on the premises . . . the damaged part of the property."[116] While the insured argued that a stick-built replacement home was of "similar construction" to the manufactured home, the insurer disagreed, contending that its cost was not "reasonable and necessary" as required by the policy.[117] The trial court denied the summary judgment motions of both parties.[118]

The appellate court examined the disputed policy terms, and found they were ambiguous in meaning.[119] Despite finding the policy language ambiguous, the court of appeals determined that the trial court was correct in denying summary judgment to either party.[120]

The appellate court also rejected the insurer's argument that the insured concealed facts in the acquisition of coverage which permitted the insurer to rescind the policy.[121] Specifically, the insurance company contended that the insured's statement that the home was "under construction" at the time the policy was acquired, constituted a concealment of the fact that the house was a manufactured home.[122] The court concluded that a manufactured home also must be "constructed" such that there was no concealment or misrepresentation by the insured to allow the policy to be rescinded.[123]

This case provides an example of the fact sensitive nature of insurance coverage disputes. Clearly, neither party was entitled to a summary resolution of the case, based upon each having a plausible construction of the policy terms based upon the disputed facts.[124]

D. Court Enforces Insurance Policy Limitation of Action Clause

The decision of *Trzeciak v. State Farm Fire & Casualty Co.*[125] offers important guidance regarding the enforceability of insurance policy time limitations and the applicable statute of limitations for a breach of good faith claim by an insurer. An insured filed a lawsuit against his homeowner's

---

115. *Id*

116. *Id*. at 309 (alterations in original) (citation omitted).

117. *Id*.

118. *Id*. at 307.

119. *Id*. at 309-10.

120. *Id.* at 310. Typically, ambiguous insurance policy language is construed against the insurance company as drafter of the policy. *Id.* at 309 (citing Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co., 698 N.E.2d 770, 773 (Ind. 1998)).

121. *Id.* at 314.

122. *Id*. at 311-12.

123. *Id*. at 312.

124. *See id.* at 310.

125. 809 F. Supp. 2d 900 (N.D. Ind. 2011).

insurance company to recover for a loss allegedly sustained when the insured was arrested by the police and for breach of the insurer's duty of good faith.[126] His complaint was filed over six years after the date of loss.

The insurer filed for summary judgment, contending the suit was prohibited by a one-year policy limitation on suits against the insurer.[127] The district court granted the insurer's motion, and determined that Indiana has long enforced insurance policy limitation of action clauses.[128] The court found no justification for not enforcing the policy limitation.[129]

Additionally, the insurer contended that the insured's claim for breach of duty of good faith was also time-barred.[130] The district court agreed and concluded that the claim for breach of duty of good faith, was a tort remedy.[131] Consequently, it was subject to Indiana's two-year personal property statute of limitations.[132] The court also applied the "discovery rule," which requires the running of the statute of limitations "when the [insured] knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another."[133] The court concluded that the insured did not bring the action against the insurer within two years of the date of accrual.[134]

IV. MISCELLANEOUS CASE LAW

In *Ashby v. Bar Plan Mutual Insurance Co.*,[135] the court interpreted an insurance policy's condition requiring notice to the insurance company of a malpractice lawsuit against its insured, and whether the doctrine of estoppel could result in the condition not being enforced. An insured attorney abandoned his legal practice and disappeared.[136] Before his disappearance, two clients hired the attorney to pursue personal injury actions on their behalf. The attorney had filed a lawsuit for one of the clients, which was dismissed because of the attorney's failure to comply with court orders.[137] The other client's action was time-barred by the statute of limitations due to the attorney's failure to file a lawsuit against the tortfeasor.

The attorney purchased malpractice insurance coverage, but had not disclosed

---

126. *Id*. at 904.

127. *Id*. Indiana has a statute which requires that residential homeowner's policy limitations on suits against the insurer must be two years or more. IND. CODE § 27-1-13-17 (2011).

128. *Trzeciak*, 809 F. Supp. 2d at 909-10 (citing New Welton Homes v. Eckman, 830 N.E.2d 32, 34-35 (Ind. 2005)).

129. *Id.*

130. *See id*. at 913.

131. *Id*.

132. *Id*. (citing IND. CODE § 34-11-2-4(2) (2011)).

133. *Id*. (quoting Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 843 (Ind. 1992)).

134. *Id.* at 913-14.

135. 949 N.E.2d 307 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 995 (Ind. Nov. 1, 2011).

136. *Id*. at 309.

137. *Id*.

the possible claims asserted by the two clients.[138] The clients filed a malpractice action against the attorney, but never actually notified the attorney of their action because his whereabouts were unknown. However, the clients did notify the malpractice insurance company for the attorney of their claims, who responded that it was investigating the claims against the attorney.[139] The insurer eventually moved to intervene in the malpractice lawsuit and contended that there was no coverage available to the missing attorney for the malpractice claims.[140]

The insurer filed for summary judgment, arguing that the attorney failed to satisfy the insurance policy's notice condition.[141] Specifically, the policy required the insured to provide notice to the insurer within twenty days of when a claim was first made against the attorney.[142] Because notice to the insurer of the clients' malpractice claim came from the clients and not the attorney, the insurer argued that the policy condition was not satisfied and no coverage was owed.[143]

The trial court granted summary judgment to the insurer.[144] However, the court of appeals reversed the judgment, by determining that the clients' notice to the insurer satisfied the policy notice condition.[145] The supreme court granted transfer, and concluded that the policy's notice condition was not satisfied because the attorney did not supply the insurer with notice of the clients' lawsuit.[146]

However, even if the policy condition was not satisfied because the attorney did not supply notice to the insurer, the supreme court found a question of fact existed on whether estoppel applied.[147] Specifically, the court concluded that the insurer failed to mention in its acknowledgement letter to the clients that a potential coverage question existed on the failure of the insured attorney to supply notice to the insurer.[148] Consequently, the court found that a question of fact existed as to whether the clients could have located the attorney, if the insurer had disclosed the notice provision, such that the twenty-day requirement would have been satisfied.[149]

This decision appears to create a duty upon the insurer to inform a third party to an insurance contract of coverage issues, even though there is no relationship

---

138. *Id*.

139. *Id*.

140. *Id.*

141. *Id*. at 310.

142. *Id*.

143. *Id*. at 310, 312.

144. *Id*. at 310.

145. *Id.*

146. *Id.* at 312.

147. *Id.* at 312-13. The court defined "estoppel" to refer to a situation where "one's own acts or conduct prevents the claiming of a right to the detriment of another party who was entitled to and did rely on the conduct." *Id*. at 313 (quoting Brown v. Branch, 758 N.E.2d 48, 51-52 (Ind. 2011)).

148. *Id*.

149. *Id*.

between the third party and the insurer.[150] If the policy and its conditions are part of a contract between the insured and the insurer, then an insured's failure to comply with a condition, should bar coverage. This case appears to permit a stranger to the insurance contract to become involved in seeing that the policy conditions are complied with by the insured, by placing an additional notification duty upon the insurer.

150. A third party beneficiary to an insurance policy cannot sue the insurance company for breach of duty of good faith because there is no "special relationship" to justify the imposition of a duty. Cain v. Griffin, 849 N.E.2d 507, 515 (Ind. 2006).

DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN*

INTRODUCTION

Over the survey period, Congress enacted and President Obama signed into law significant changes in the Patent Act.[1] These changes, both substantive and procedural, usher in a new set of issues and considerations involved in obtaining and defending patent rights. While these statutory changes (and the regulatory changes to be expected from the United States Patent and Trademark Office (PTO)) constitute the most tangible example, several cases of practical value to Indiana legal practitioners and those concerned with technology development have also come down. The summary and analytical review provided in this Article will assist lawyers, inventors, technology managers and others concerned with protection of intellectual property.

I. THE AMERICA INVENTS ACT: NEW ISSUES IN PATENT PROTECTION

On September 16, 2011, President Obama signed into law the Leahy-Smith America Invents Act (AIA).[2] The AIA makes a number of substantive changes to the patent law. Of particular interest are the revisions regarding what information is to be considered during the examination of a patent application being of particular interest. New proceedings are created for contesting and reviewing applications and issued patents. Procedures within the PTO are also changed, as are a number of litigation-related practices.

Beyond the substance of these statutory changes, there is a range of effective dates that surround the provisions.[3] The general effective date provided in the AIA is one year from the date of enactment, or September 16, 2012.[4] However, a small number of provisions were made effective immediately on enactment,[5] and perhaps the most important revisions—those involving the scope of prior art—are generally not effective until March 16, 2013.[6] As this Article reviews particular aspects of the new law, effective dates and such known practicalities will be discussed in addition to substance.

---

* Partner, Woodard, Emhardt, Moriarty, McNett & Henry LLP, Indianapolis; Adjunct Professor, Indiana University Robert H. McKinney School of Law; J.D., *summa cum laude*, 1996, Indiana University Robert H. McKinney School of Law.

1. 35 U.S.C. §§ 1-376 (2006 & Supp. 2010).

2. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified in scattered sections of 35 U.S.C.).

3. *See generally America Invents Act: Effective Dates*, U.S. PAT. & TRADEMARK OFF. (Oct. 5, 2011), http://www.uspto.gov/aia_implementation_aia-effective-dates.pdf [hereinafter *AIA Effective Dates*].

4. *Id.* at 1; *see also* America Invents Act § 35.

5. *AIA Effective Dates*, *supra* note 3, at 1-2.

6. *Id.* at 6.

II. INFORMATION TREATED AS PRIOR ART

Under existing law, the United States patent system is commonly called a "first-to-invent" system because an inventor's right to a patent depends at least in part on the date the invention is conceived.[7] For example, current law provides that an inventor cannot obtain a patent if his or her invention was known to others in this country before the date the inventor invented it.[8] Section 3 of the AIA moves the law toward a system that relies principally on the date a patent application is filed in determining what information is considered against it in examination.[9] While not a true "first-to-file" system, insofar as some references prior to a patent application's actual filing date are excepted from use in examining the application, the new system places a premium on early filing and early publication.

A. Effective Date

The changes are not effective until March 16, 2013, and will thereafter be applicable only to patents or applications having a claim with an effective filing date on or after March 16, 2013.[10] Accordingly, patents or applications with a filing date before March 16, 2013, and patents or applications in which all of the claims are entitled to a filing date prior to March 16, 2013,[11] will be considered under the statutes in effect prior to the AIA's enactment.[12] As an example, suppose Application A is filed on January 1, 2012, and Application B is a continuation of Application A filed on July 1, 2013; both applications will be treated under the current statute, *without* applying the changes enacted in the AIA.

On the other hand, patents or applications filed on or after March 16, 2013, which do not or cannot claim priority to an application filed before March 16, 2013, and patents and applications having at least one claim not entitled to a filing date prior to March 16, 2013, will be treated under the AIA's prior art provisions.[13] Thus, assume Application C is filed on January 1, 2012, and Application D is a continuation-in-part of C filed on July 1, 2013. Application D will be treated under the AIA's prior art provisions if any claim in it includes subject matter added in Application D. If all claims of Application D include only subject matter supported by Application C, *and are never amended to include matter added in Application D*, then Application D will be treated under the law prior to the AIA.

---

7. *See* 35 U.S.C. §§ 102(a), (g)(1) (2006).

8. *Id.* § 102(a).

9. America Invents Act § 3.

10. *AIA Effective Dates*, *supra* note 3, at 6.

11. *See, e.g.*, 35 U.S.C. §§ 119(a)-(d) (benefit of prior foreign application), 119(e) (benefit of prior domestic provisional application), 120 (benefit of prior domestic non-provisional application), 365 (benefit of international application) (2006).

12. *See* America Invents Act § 3.

13. *See id.*

B. Substance of the "First-to-File" Prior Art Provisions

The AIA replaces the seven subsections in current Section 102,[14] which define novelty and address "prior art," with a single subsection divided into two paragraphs.[15] The revisions under the AIA maintain that one is entitled to a patent unless the claimed subject matter is "patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention;"[16] or, if the claimed subject matter "was described in a patent issued under [S]ection 151," or a patent application "published or deemed published under [S]ection 122(b) . . . [that] names another inventor and was effectively filed before the effective filing date of the claimed invention."[17] Presumably, following existing common law, the "claimed invention" is whatever the subject matter is that is being claimed at the time of the analysis.[18] Accordingly, prior art usable to disprove novelty of an invention consists of patents, publications, public uses, on-sale matter, and information "otherwise available to the public" that is earlier than the earliest filing date to which a claim is entitled. The second portion of the new Section 102(a) is comparable to the old Section 102(e), providing that published applications and patents are effective as prior art on their effective filing dates, not on their publication date.[19]

Having broadened the category of prior art to include public information prior to an application's effective filing date, the AIA then provides exceptions. The new Section 102(b) defines those exceptions in terms of "disclosures"—specifically, the timing and maker(s) of such disclosures.[20] A disclosure that otherwise qualifies under Section 102(a)(1)—patents, publications, on-sale, public use, and otherwise-known art—will *not* be considered prior art if it meets a timing condition and a source condition.[21] The timing condition requires the disclosure be made less than one year prior to the effective filing date.[22] The source condition requires one of two options: (1) the disclosure was made by an inventor or by one who obtained the information from an inventor (directly or indirectly), or (2) the disclosure's subject matter was previously publicly disclosed by an inventor or one who obtained it from an inventor.[23]

---

14. 35 U.S.C. §§ 102 (a)-(g) (2006).

15. *See* America Invents Act § 3 (to be codified at 35 U.S.C. § 102).

16. *Id.* (to be codified at 35 U.S.C. § 102(a)(1)).

17. *Id*. (to be codified at 35 U.S.C. § 102(a)(2)).

18. *See, e.g.*, Ralston Purina Co. v. Far-Mar-Co, Inc., 772 F.2d 1570, 1575-77 (Fed. Cir. 1985).

19. *Compare* 35 U.S.C. § 102(e), *with* America Invents Act § 3 (to be codified at 35 U.S.C. §102(a)(2)).

20. *See* America Invents Act § 3 (to be codified at 35 U.S.C. § 102(b)).

21. *Id.* (to be codified at 35 U.S.C. § 102(b)(1)).

22. *Id.* (to be codified at 35 U.S.C. § 102(b)(1)).

23. *Id.* (to be codified at 35 U.S.C. § 102(b)(1)).

These exceptions appear to be aimed at preserving something of the one-year grace period provided in the old Section 102(b).[24] That is, an inventor's public disclosure does not operate as prior art to his own application if the application is filed within one year of the disclosure.[25] Considered another way, the inventor has one year from that public disclosure to file a patent application. Further, an inventor's own disclosure operates to bar use of other later disclosures of that same subject matter as prior art.[26] This last provision raises significant questions of scope: For example, if an inventor discloses a species, and someone else discloses a genus (after the inventor's disclosure but before his application), it is not clear from the statutory language whether the genus is eliminated as prior art to the inventor's application. Guidance from the PTO in the form of rulemaking or policy concerning these provisions has not yet been offered.

Exceptions are also provided relating specifically to art that otherwise qualifies under the new Section 102(a)(2)—U.S. patents and published applications with an earlier effective filing date. Such information will *not* be treated as prior art if it meets one of three source conditions similar to those noted above.[27] That is, a U.S. patent or published application is not prior art if its subject matter (1) was obtained from an inventor, (2) was disclosed by one who obtained it from the inventor before the reference's effective filing date, or (3) was owned by (or subject to obligation to assign to) the same person as the application.[28] These exceptions prevent information in a patent or application that was obtained from the inventor (legitimately or not) from being used as prior art. Further, the principle from existing law that commonly-owned subject matter should not be applicable against each other is also preserved.[29]

Note that the term "disclosure" is not defined in the new Section 102(b). That is, while the statute defines exceptions to prior art in terms of disclosures by or through an inventor, it does not specify what conditions have to be met in order for information in question to be a "disclosure." The term could be interpreted as merely a shorthand way to refer to the entire list of references delineated in Section 102(a). In that sense, a "disclosure" as used in the new Section 102(b) is patents, printed publications, public uses or sales, or something "otherwise available to the public."[30] However, an alternative meaning for "disclosure" could be created by a court. While debate may continue as to what the scope of such a disclosure exception might be (e.g., what effect might the disclosure of a genus that fits the exception have on species), the language of the

---

24. *See* 35 U.S.C. § 102(b) (stating that an inventor is entitled to a patent unless "the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States").

25. America Invents Act §3 (to be codified at 35 U.S.C. § 102(b)(1)).

26. *See id.*

27. *See id.* (to be codified at 35 U.S.C. § 102(b)(2)).

28. *Id*. (to be codified at 35 U.S.C. §§ 102(b)(2)(A)-(C)).

29. *See* 35 U.S.C. § 103(c) (2006).

30. America Invents Act § 3 (to be codified at 35 U.S.C. § 102(a)(1)).

statute indicates that whatever the "disclosure" is, if it fits the timing and source requirements, it will not be considered prior art.

These exceptions present some potentially difficult questions for inventors, their companies, and patent practitioners. The rule of thumb in the past has been to be careful about publicly disclosing one's inventions, as such disclosure starts a one-year period running within which a U.S. patent application must be filed,[31] and it limits or eliminates the opportunity for patent protection in other countries. Those considerations remain under the AIA scheme. However, the AIA provides some potential benefits from public disclosure, namely the possibility of defeating the use of others' information between the inventor's disclosure and the inventor's filing date.[32]

The revised prior art section also includes subsections concerning joint research agreements and defining the effective filing date of an application.[33] New Section 102(c) provides that if subject matter was developed and a claimed invention was made by or on behalf of at least one party to a joint research agreement, within the scope of the agreement, and a patent application concerning the claimed invention discloses the names of the parties to the agreement, then the subject matter is deemed to fit within the common ownership exception of Section 102(b)(2)(C).[34] The agreement must be "in effect on or before the effective filing date" applicable to the claimed invention.[35] Accordingly, assume an agreement between Corporation A and Corporation B for research in Field F. An invention in F is made by A and claimed in a patent application that identifies A and B. That application will not be deemed prior art to an application for subject matter by B, under the exception for commonly-owned subject matter.

The explanation of the concept of "effective filing date" is given in the new Section 102(d). The effective filing date for U.S. patents and published applications (i.e., references under Section 102(a)(2)) is the filing date of the earliest priority application under Sections 119, 120, 121, or 365(a)-(c) to which the reference can claim benefit.[36] If there is no such earlier-benefit application, then the reference's effective filing date is its actual filing date.[37] This represents a significant change in current law, as previously a U.S. patent or published application that claimed benefit back to a foreign application was treated as prior art to other applications as of its U.S. filing date.[38] Under the new law, such a U.S. patent or published application will be treated as having its foreign filing date when used as prior art against other applications.[39]

Thus, for example, assume inventor C files a new patent application on July

---

31. *See* 35 U.S.C. § 102(b) (2006).
32. America Invents § 3 (to be codified at 35 U.S.C. § 102(b)(1)(B)).
33. *See id.* (to be codified at 35 U.S.C. §§ 102(c)-(d)).
34. *Id.* (to be codified at 35 U.S.C. §§ 102(c)(1)-(3)).
35. *Id.* (to be codified at 35 U.S.C. § 102(c)(1)).
36. *Id.* (to be codified at 35 U.S.C. § 102(d)(2)).
37. *Id.* (to be codified at 35 U.S.C. § 102(d)(1)).
38. *See In re* Hilmer, 359 F.2d 859, 878, 883 (C.C.P.A. 1966).
39. *See* America Invents Act § 3 (to be codified at 35 U.S.C. § 102(d)(2)).

1, 2013. Another inventor files a U.S. patent application R1 on August 15, 2013, claiming priority to a German application that was filed on June 1, 2013, and R1 is published by the PTO. The current law would ignore the German filing date, and R1 would *not* be prior to C's application. Under the AIA, however, R1 is effective as a reference as of the foreign filing date of June 1, 2013, and unless an exception from the new Section 102(b)(2) applies, is prior art to C's application. The example assumes that the prior foreign or other benefit application adequately discloses the subject matter relied on in the later patent or application. As before, where a provisional, parent or other benefit application does not disclose subject matter in a later application or patent, that later application or patent cannot use the benefit application's filing date as its reference date.[40]

C. Changes to the Obviousness Provision

New Section 103 is essentially the same as old Section 103(a), with a change to refer to the effective filing date of the applicant's claimed invention, as opposed to "the time the invention was made," and other changes that are largely cosmetic.[41] Existing Sections 103(b) and 103(c) are removed from the new Section 103.[42] The new obviousness statute thus provides that a patent may not be granted if the differences between the claimed invention (the subject matter of the claim at issue) and prior art (the information identified in Section 102) are such that the claimed invention would have been obvious to one of ordinary skill in the art at a time before the effective filing date of the claimed invention.[43] The new obviousness analysis explicitly centers on the filing date for the claim, but otherwise appears no different from the existing analysis.

D. Uncodified AIA Section 14

This section does not amend or create a new section of Title 35. However, it affects what is and is not considered to be prior art in a narrow field. Specifically, "strateg[ies] for reducing, avoiding, or deferring tax liability . . . shall be deemed insufficient to differentiate a claimed invention from the prior art" in analyzing a claim under new Sections 102 and 103.[44] The term "tax liability" is defined to refer to such liabilities under federal, state, local or foreign jurisdictions.[45] In situations where such a strategy is the only difference between a claim and the prior art, the claim will be considered at least obvious, if not anticipated. Logically, if a claim recites such a strategy by itself, presumably that claim is also unpatentable as anticipated and/or obvious. Section 14 does not

---

40. *See* America Invents Act § 3 (to be codified at 35 U.S.C. § 102(b)(2)).

41. *Compare* 35 U.S.C. §103(a) (2006), *with* America Invents Act § 3 (to be codified at 35 U.S.C. § 103).

42. *See* America Invents Act § 3 (to be codified at 35 U.S.C. § 103).

43. *Id.*

44. *Id.* § 14 (to be codified at 35 U.S.C. § 257).

45. *Id.* § 14(b).

apply to a "method, apparatus, technology, computer program product or system" used solely for preparing a tax return or other tax filing, including one that organizes or transfers data for such a filing.[46] The section also does not apply to the quoted items that are used solely for "financial management" to the extent it is severable from or does not limit use of any tax strategy.[47]

Note that section 14 seems to imply that the strategies it names are in the prior art, at least insofar as they do not distinguish a claim from the prior art. Nevertheless, the section does not explicitly make them a part of Section 102 or otherwise call them prior art. It is an open question as to whether such strategies (general or specific) might be affirmatively used (along with inferences by the person of ordinary skill) to reject or invalidate claims, or whether this section can only be used negatively to say that a recitation of a strategy is not enough for patentability. It is also unclear exactly what the term "strategy" as used in section 14 contemplates.

E. Issues Going Forward

1. No New Types of Prior Art.—While the changes to Section 102 in the AIA alter the *dates* for determining what is prior art, they do not appear to create new *types* of prior art. As the table below indicates, the art categories under current law are similar or identical to art under the new law.

46. *Id*. § 14(c)(1).

47. *Id.* § 14(c)(2).

Current Law[48]	**New Law**[49]
102(a): Information publicly known or used by others in United States, in publications or patents anywhere, before invention date	102(a)(1): Information in patents, publications, otherwise available to public, before effective filing date 102(b)(1): But not if the disclosure is less than one year before effective filing date and either comes from inventor or is after public disclosure by or from inventor
102(b): Information in patents or publications anywhere, or in public use or on sale in United States, more than one year before filing date	102(a)(1): Information in public use, on sale, otherwise available to the public before effective filing date 102(b)(1): But not if the disclosure is less than one year before effective filing date and either comes from inventor or is after public disclosure by or from inventor
102(e): Information in another's patent or published application), filed before invention date	102(a)(2): Information in another's U.S. patent or U.S. application published (or deemed published), before effective filing date 102(b)(2): But not if disclosure comes from inventor, is after public disclosure by or from inventor, or is commonly owned
102(f): One cannot obtain a patent for subject matter he did not invent	No similar provision; derivation proceedings of new Section 135 and 291 may address this situation
102(g): One cannot obtain a patent if another invented the subject matter previously	No similar provision; others' inventions are prior art if publicly disclosed (new Section 102(a)(1)) or applied for (new Section 102(a)(2)) and not excepted (new Section 102(b))

Before March 16, 2013, patents, publications, sales and public knowledge were all deemed to be applicable to a patent application in determining whether its subject matter was new and unobvious, and the same types of information will be used after that date, with the caveat that the information will be applicable without regard to the inventor's date of invention.[50] Substantively at least, prior

48. 35 U.S.C. § 102 (2006).

49. America Invents Act § 3 (to be codified at 35 U.S.C. § 102).

50. *Id.*

art may remain very much the same as it ever was.

2. Derivation Issues.—Under existing Section 102(f), one could not obtain a patent for subject matter that he or she did not invent.[51] Where a person obtains information about a device, process, or composition from someone else, and did not create new subject matter himself, that person cannot obtain a patent in his or her own name.[52] While the AIA purports to maintain that principle, there appear to be holes in the statutory language that could result in a deriver obtaining a defensible patent. Ideally, the exceptions to prior art in the new Section 102 keep someone else's disclosure or patent application that was derived from an inventor from being used as a reference against the inventor.[53] That is, if someone obtains information from the inventor, whether directly (e.g., the inventor tells him) or indirectly (e.g. he takes information—legitimately or not—from the inventor), that person's disclosure is not prior art to the inventor as long as any timing condition is met.[54]

As a practical matter, however, it is unclear how an inventor would establish before the PTO examiner that a reference in someone else's name was obtained from the inventor. The examiner has no way of knowing whether an article, patent application, or other reference has information obtained from the inventor, and so he or she naturally will cite the reference against the inventor's application in rejecting it. The inventor should have the opportunity to establish that the reference information was obtained from the inventor to remove that reference from consideration. In order to do that, the inventor would need provable evidence of derivation. Further, it is not clear whether a declaration-type presentation (akin to a Rule 131[55] declaration under current law) would be sufficient to allow the examiner to withdraw the reference, or whether a derivation proceeding as provided in the new statute[56] would be required to resolve the issue.

Similar issues naturally exist under the current law, but an avenue to defeat a deriver's patent or application exist (in old Sections 102(f) and (g),[57] and in interference practice). The new law seems to present the possibility that a deriver who files before a legitimate inventor could obtain a patent *and be able to defend it against the legitimate inventor*. Assume, for example, that a deriver D files a new application on July 1, 2013, and the inventor A files his application on August 1, 2013, having not previously publicly disclosed the claimed subject matter. A's application is not prior art to D's application, because it does not have an earlier effective filing date, and because evidence of prior invention is not relevant under the new Section 102. A may be able to remove D's application as prior art if he can establish that it fits an exception to prior art under new Section

---

51. 35 U.S.C. § 102(f) (2006).

52. *Id.*

53. America Invents Act § 3 (to be codified at 35 U.S.C. § 102(b)).

54. *Id.* § 3 (to be codified at 35 U.S.C. § 102(b)(1)).

55. Affidavit or Declaration of Prior Invention, 37 C.F.R. § 1.131 (2011).

56. America Invents Act § 3 (to be codified at 35 U.S.C. §§ 115(h)-(I)).

57. 35 U.S.C. §§ 102(f)-(g) (2006).

102(b). A may also be able to use the derivation proceedings contemplated by the new law to prove his entitlement to a patent. However, if A cannot provide evidence of the derivation, the first-filing deriver D will end up with the patent.

Accordingly, very careful control of an inventor's information, along with records of who does or may have access to it, should be maintained against the possibility of having to prove that someone else published or filed it with the PTO.

3. Disclose ASAP, or File ASAP?—One of the largest questions to consider, particularly with smaller or medium-size clients, is whether to disclose the invention as early as possible, or to wait on disclosure until an application is on file. Early disclosure, as it does under current law, starts the one-year clock running by which an application must be filed in order to keep that disclosure from becoming prior art.[58] It also presents the risk of derivation and/or earlier filing by another, and eliminates the possibility of protection in most foreign countries. Advantages of early disclosure under the new law are that it can remove prior art arising between the disclosure and the filing date, and that it may create prior art to a competitor's invention that has not been disclosed or filed upon.[59] In this sense, an early disclosure may be thought of as a "provisional-provisional" application, as it may defeat later-filed art and may trigger art effect against other applications.

Naturally, if foreign protection is desired, then a disclosure prior to filing an application should not be made, in light of most foreign jurisdictions' requirement of absolute novelty. The risk, of course, is that some sale, article, application or other reference may be created between the date of invention and the date of filing.

4. File Now or Later?—Generally speaking, where a choice exists it seems better to file before the March 16, 2013 effective date because treatment under the old law permits using one's invention date to "swear behind" and remove references in appropriate situations that might not be removable under the new law.[60] Applications in which all claims will have an effective filing date prior to March 16, 2013 (continuations, divisionals, CIPs claiming only parent-disclosed matter, applications claiming foreign or PCT benefit) can be filed either before or after that date and use the existing law. Several other considerations will go into the question of whether to file an application before or after March 16, 2013. These factors include:

1. Whether all claims in an application can and should claim the benefit of an "old-law" application (e.g., a consideration *not* to claim benefit to obtain more term);
2. Whether the state of development of an invention warrants filing before the effective date;
3. How long the time period is between a putative conception or actual reduction to practice and a filing;

---

58. *See* America Invents Act § 3 (to be codified at 35 U.S.C. § 102(b)).

59. *See id.* (to be codified at 35 U.S.C. § 102(a)).

60. *AIA Effective Dates*, *supra* note 3, at 6.

4. Known or suspected activities and disclosures of competitors;
5. Whether an early disclosure (to raise the exceptions to prior art in Section 102(b) and/or to create prior art for others) is a better business or strategic path over a filing before the effective date; and
6. Whether existing interference procedures might be desirable.

Of course, facts and issues particular to the client or to the situation may answer some of these questions or raise others.

III. INVENTOR DECLARATIONS/STATEMENTS AND FEES

A. Declarations or Statements by Inventors

The AIA revises Sections 115 and 118[61] and their provisions concerning the execution of a patent application by an inventor. The revisions do not change the basic requirement of identifying the inventors of claimed subject matter, nor that of having the inventor make a statement under oath or acknowledging penalties that he or she believes himself or herself to be an original inventor and that he or she authorized the application. However, under the new law, which is effective as of September 16, 2012, these requirements may be met not only by a declaration paper signed by the inventor, as is the current practice, but also in an executed assignment.[62] In appropriate cases, the new provisions will permit the assignee (if any) of an invention or application to make the application to the PTO, and to have the patent issued in its name as well.[63]

Current Section 115 is now one paragraph, specifying the oath that the applicant/inventor must make with his or her patent application.[64] New Section 115 is expanded to nine separate subparagraphs.[65] The first includes the requirements to name the inventor for any invention claimed in the application, and to have each inventor execute an oath or declaration except as otherwise provided.[66] The second and third subsections specify the statements required in an oath or declaration (see above) and that the PTO may require additional information.[67] The fourth subsection follows current practice to permit a "substitute statement" in lieu of a declaration where an inventor is dead, incapacitated, cannot be found or reached after diligent effort, or refuses to make a declaration while obliged to assign the invention.[68]

The new Section 115(e) includes the notable change of permitting the required inventor statements to be included in an assignment, where an inventor

---

61. 35 U.S.C. §§ 115, 118 (2006).
62. America Invents Act § 4 (to be codified at 35 U.S.C. § 118).
63. *Id.*
64. 35 U.S.C. § 115 (2006).
65. *See* America Invents Act § 4 (to be codified at 35 U.S.C. § 115).
66. *Id.* (to be codified at 35 U.S.C. § 115(a)).
67. *Id.* (to be codified at 35 U.S.C. §§ 115(b)-(c)).
68. *Id.* (to be codified at 35 U.S.C. § 115(d)).

is obliged to assign the invention.[69] Thus, for an inventor A who has an obligation to assign inventions to corporation C, the statute permits the assignment document from A to C to include the statements that the application was authorized to be made by A and that A believes himself to be the original inventor of a claimed invention in the application. However, the statute does not say how such an assignment is to be filed.[70] Proposed rules have been published by the PTO to open the way for including the declaration statements in assignments.[71] In particular, the PTO proposed to require a "conspicuous indication, such as by use of a check-box on the assignment cover sheet," that would tell the PTO that an assignment is provided both as an assignment and as fulfillment of the inventor's required statements.[72] With the PTO's current electronic processes, an assignment that has both such purposes will have to be separately recorded with the Assignment Recordation Branch.[73] The statute indicates that including the statements in an assignment obviates the need to file a separate declaration.[74]

An oath, declaration, substitute statement or assignment as above is not needed for applications claiming benefit of an earlier-filed application, so long as that earlier-filed application had the necessary oath, declaration, substitute statement or assignment.[75] The PTO may require a copy of the document(s) in the earlier application to be included in the later application.[76] Naturally, it will be necessary to file a new document for a continuation-in-part application where new material is claimed. New section 115(h) also provides for supplementation or correction of the statements in an oath, declaration, substitute statement or assignment.[77] In particular, one making such a statement may at any time withdraw, replace or correct it.[78] Conversely, once an individual has made an oath, declaration or assignment as provided, the PTO may not require that individual to make any additional oath, declaration or other statement equivalent to those required by the statute.[79] This subsection further notes that a patent is not invalid or unenforceable for a failure under Section 115 if that failure is corrected.[80]

The final subparagraph of revised Section 115 gives the language concerning acknowledgment of penalties that must be included in a declaration or

---

69. *Id.* (to be codified at 35 U.S.C. § 115(e)).

70. *See id.*

71. *See* 77 Fed. Reg. 982,991 (Jan. 6, 2012) (proposing amendments to 37 C.F.R. §§ 1.63(c)(1)(i)-(ii)).

72. *Id.*

73. *Id.*

74. *Id.*

75. America Invents Act § 4 (to be codified at 35 U.S.C. § 115(g)(1)).

76. *Id.* (to be codified at 35 U.S.C. § 115(g)(2)).

77. *Id.* (to be codified at 35 U.S.C. § 115(h)).

78. *Id.* (to be codified at 35 U.S.C. § 115(h)(1)).

79. *Id.* (to be codified at 35 U.S.C. § 115(h)(2)).

80. *Id.* (to be codified at 35 U.S.C. § 115(h)(3)).

statement.[81] Thus, if the inventor's statements are to be included in an assignment, the assignment document should include that acknowledgment language.

B. Filing by Someone Other than the Inventor

The language of the old Section 118 is incorporated into the revisions to Section 115, noted above. The new Section 118 permits an assignee (or one holding an obligation from an inventor to assign) to "make an application for patent."[82] Further, a person can make an application on behalf of and as agent for the inventor if the person shows a "sufficient proprietary interest" and that the filing "preserves rights of the parties."[83] Under this language, if inventor A is obliged to assign to corporation C, C can "make" the patent application, presumably in its own name. Likewise, person B can apparently apply on behalf of A to protect one or both of their rights in the invention. What might be a "sufficient" proprietary interest in this context is not clearly defined. Of course, the statements (e.g., via declaration or assignment) from A must still be filed.

When a patent is issued on an application filed by someone other than the inventor, it will be issued in the name of the real party in interest, with notice to the inventor.[84] In the above hypotheticals, the patents would be issued to corporation C or person B, with notice to A.

C. Fee Structure Changes

The majority of section 10 of the AIA is administrative in nature, providing the means and authority for the Director to set and change fees.[85] Naturally, these issues may be of little interest to practitioners beyond the assurance that year to year changes in fees will no doubt be advertised by the PTO as they occur.

However, one interesting addition in the AIA regarding fees is the creation of a third fee tier for "micro entities."[86] Currently, the PTO set fees for its services, and allows a fifty percent reduction for "small entities," notably individual inventors, non-profit organizations and universities, and small businesses (generally less than 500 employees).[87] AIA section 10 creates a new Section 123 of Title 35, which defines a "micro entity" and gives a seventy-five percent fee reduction from the regular or large entity level to such entities.[88] To qualify as a micro entity, an applicant must make a certification that (1) he is a small entity under PTO regulations; (2) he is not a named inventor on more than

---

81. *Id.* (to be codified at 35 U.S.C. § 115(i)).

82. *Id.* (to be codified at 35 U.S.C. § 118).

83. *Id.*

84. *See id.*

85. *Id.* § 10.

86. *See id.* § 10 (to be codified at 35 U.S.C. § 123).

87. *See United States Patent and Trademark Office Fee Schedule*, U.S. PAT. & TRADEMARK OFF. (June 13, 2012), http://www.uspto.gov/web/offices/ac/qs/ope/fee092611.htm.

88. America Invents Act § 10 (to be codified at 35 U.S.C. § 123).

four previously filed patent applications; (3) he did not have a gross income higher than three times the median household income (referring to Internal Revenue Code, Census Bureau statistics, and currency exchange rates); and (4) he has not (and is not obliged to) assigned or conveyed a license or ownership interest in the application to one who did not meet requirement (3) above.[89]

Accordingly, individuals, not-for-profits and small business (the usual small entities) may qualify for the micro entity reduction with a showing of the three remaining factors. The statute provides that foreign applications, provisional applications, and PCT applications for which the U.S. basic national filing fee was not paid do not count toward the four applications set forth in the second requirement. Additionally, applications in which the applicant has assigned (or is under an obligation to assign) *all ownership rights* as a result of previous employment are not counted toward the second requirement.[90] One who had an obligation to assign, but leaves his or her position to open a new business, for example, is not restricted from micro entity status merely by virtue of his or her prior applications for the employer. The income requirement naturally is intended to have those who can pay the small entity fees do so.

From these requirements, it is evident that a "micro entity" is an independent inventor who is not a frequent applicant. It is theoretically possible that a small business or a not-for-profit might fit most of the definition, but the requirement that the applicant not be a named inventor on more than four applications seems to eliminate organizations, as they are not "inventors."

In addition, the new Section 123 includes a particular provision for institutions of higher education.[91] That is, a micro entity includes an applicant that certifies that (a) his employer (i.e., from whom applicant obtains the majority of his income) is an institute of higher education, or (b) he has (or is obliged to) assigned or conveyed a license or ownership interest to an institute of higher education.[92] In other words, university professors or technicians, or others obliged to assign to a university, are deemed micro entities. This provision does not refer at all to the requirements noted above, and so it would appear that this is a separate avenue to micro entity status. Thus, the language appears to allow a professor who does not meet the gross income requirement above, or that has applied for numerous patents, to be considered a micro entity.

IV. NEW PROVISIONS RELATING TO LITIGATION

A number of changes relating to patent litigation were also included in the AIA, most of which were effective as of enactment on September 16, 2011.[93] They include a new defense for activities that previously would be considered patent infringement, clarification on use of advice of counsel relative to

89. *Id.*

90. *Id.*

91. *Id.* (to be codified at 35 U.S.C. § 123(d)).

92. *Id.*

93. *See AIA Effective Dates*, *supra* note 3, at 1-2.

willfulness determinations, and non-substantive measures for handling patent litigation.

A. Prior-User Defense

Currently, the Patent Act provides a narrow defense to patent infringement for users of patented business methods who can establish that they have been using the method prior to the filing date of the patent.[94] The AIA amends that provision to include a broader prior-user defense, for one using a manufacturing or other commercial process or subject matter used in such a process.[95]

The provision permits a defense to infringement with respect to subject matter consisting of a process, or machine, manufacture, or composition used in a manufacturing or other commercial process, which would otherwise infringe.[96] The defense is available if the person, acting in good faith, commercially used the subject matter in the United States.[97] The use must be in connection with an internal commercial use or an actual arm's length sale or commercial transfer of a useful end result of such commercial use.[98] The use must have occurred at least one year before the earlier of (A) the effective filing date of the otherwise-infringed claim, or (B) the date the claimed invention was disclosed to the public so as to qualify for the exception under the "first-to-file" provision of new Section 102(b).[99]

It is not evident from the statute what is meant by "good faith," and whether that term connotes legitimacy in development (e.g., not stolen from an inventor), legitimacy in use (e.g., needed for business or non-token use), or some other factor. Uses in premarket regulatory review or non-profit laboratory uses are defined to be "commercial uses" for purposes of this defense.[100] Moreover, items sold by one who is entitled to a prior-user defense exhaust patent rights.[101] Thus, if one makes a product with a process for which the user can assert the prior-user defense, further sale or use of that product will not be an infringement.[102]

The defense must be established by clear and convincing evidence.[103] This is unusual in the sense that factual defenses to infringement (e.g., that an accused device lacks an element in a patent claim, or the existence of a license to the patent) require proof by a preponderance of the evidence.[104] The clear and

---

94. *See* 35 U.S.C. § 273 (2006).

95. America Invents Act § 5 (to be codified at 35 U.S.C. § 273).

96. *Id.* (to be codified at 35 U.S.C. § 273(a)).

97. *Id.*

98. *Id.*

99. *Id.* (to be codified at 35 U.S.C. § 273(a)(2)).

100. *Id.* (to be codified at 35 U.S.C. § 273(c)).

101. *Id.* (to be codified at 35 U.S.C. § 273(d)).

102. *Id.*

103. *Id.* (to be codified at 35 U.S.C. § 273(b)).

104. *See* Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2240-41 (2011) (discussing the preponderance of evidence standard).

convincing evidentiary standard is reserved for challenges to a patent's validity, not for factual defenses.[105] The high evidentiary standard for invalidity defenses is based in the statutory presumption of validity and the examination procedure in the PTO.[106] Perhaps the requirement of clear and convincing evidence for the prior-user defense is an implication of a statutory presumption against the validity of such defenses.

As an example, suppose that A files a patent application concerning a process on January 1, 2012, and it issues on January 1, 2014. B has used the process continuously since December 1, 2010, and in good faith. C has used the process continuously since December 1, 2011. If A sues both B and C, B may assert the new prior-user defense because he has been using the process longer than one year before the effective filing date of A's claims. C cannot use the prior-user defense, because she has not been using the process for a sufficient length of time. The result may change based on public disclosure of the process. For example, if A publicly disclosed the process on July 1, 2011, then B cannot use the prior-user defense. His use began less than one year before A's public disclosure.

Numerous exceptions to the defense are also included in the statute.[107] The prior-user defense is personal to the one who performed or directed the performance of the protected commercial use, and those controlling, controlled by or under common control with that person.[108] The defense is not assignable except to the patent owner or with a transfer of at least the line of business to which the defense relates.[109] The defense is limited to sites at which the otherwise-infringing subject matter is in use before the infringed claim's filing date.[110] The defense cannot be asserted by one who derived the subject matter from the patentee or those in privity with the patentee.[111] The defense is limited to the subject matter of the prior use, and does not provide a general license to the patent.[112] The infringer cannot use any activities before an abandonment of a commercial use to establish his entitlement to the defense.[113] Thus, an infringer that is using subject matter, and then abandons that use and restarts, can only establish a prior-user defense based on activities after the restart.

Perhaps the most interesting exception is that the prior-user defense cannot be asserted as to a claimed invention that was owned or subject to assignment to an "institution of higher education" or a technology transfer organization for such institution(s), at the time the invention was made.[114] Thus, the general rule is that

---

105. *Id.* at 2240.
106. *Id*. at 2241; *see also* 35 U.S.C. § 271 (2006 & Supp. 2010).
107. *See* America Invents Act § 5 (to be codified at 35 U.S.C. § 273(e)).
108. *Id.* (to be codified at 35 U.S.C. § 273(e)(1)(A)).
109. *Id.* (to be codified at 35 U.S.C. § 273(e)(1)(B)).
110. *Id.* (to be codified at 35 U.S.C. § 273(e)(1)(C)).
111. *Id.* (to be codified at 35 U.S.C. § 273(e)(2)).
112. *Id.* (to be codified at 35 U.S.C. § 273(e)(3)).
113. *Id.* (to be codified at 35 U.S.C. § 273(e)(4)).
114. *Id.* (to be codified at 35 U.S.C. § 273(e)(5)).

no prior-user defense is available as against patented inventions made at or by universities.[115] That exception does not apply "if any of the activities required to reduce to practice the subject matter of the claimed invention could not have been undertaken using funds provided by the [f]ederal [g]overnment."[116]

A successful assertion of the defense eliminates liability for infringement, and would logically seem to allow the prior user to continue using without liability. If one pleads the prior user defense but fails to demonstrate a reasonable basis for it, "the court shall find the case exceptional for the purpose of awarding attorney fees."[117] The term "reasonable basis" is not defined in the statute, but it should be considered to be in the realm of establishment of a prima facie case. It is understandable that an unsupportable prior user allegation would set the asserter up for an award of attorney fees against him, but a supported defense found by a jury not to be sufficient should not so expose the defendant. Nonetheless, not only does the statute make it more difficult to establish the defense by virtue of the heightened evidentiary standard, but it also places the shadow of attorney fees over the one who asserts the defense. Notably, even if it is established, the prior-user defense by itself does not invalidate the patent under Sections 102 or 103, which requires public disclosure.[118]

B. Venue Change for PTO Suits

Section 9 of the AIA makes technical amendments to Sections 32, 145, 146, 154, and 293 of Title 35, and Section 1071 of Title 15, to change the venue relating to the PTO to the Eastern District of Virginia from the District of Columbia.[119] For example, venue for a district court action appealing from the PTO lies in the Eastern District of Virginia.[120] No substantive changes were made. Actions against the PTO, or original actions challenging acts of the PTO, must henceforward be brought in the Eastern District of Virginia.[121]

C. Elimination of Invalidity for Lack of Best Mode

Section 15 of the AIA changes Section 282 of the Patent Act[122] (regarding defenses to infringement) to state that "failure to disclose the best mode shall not be a basis on which any claim of a patent may be canceled or held invalid or otherwise unenforceable."[123] It also changes Sections 119(e) and Section 120 to remove the best mode requirement, so that priority benefit may be obtained even

---

115. *Id.*
116. *Id.* (to be codified at 35 U.S.C. § 273(e)(5)(B)).
117. *Id*. (to be codified at 35 U.S.C. § 273(f)).
118. *Id.* § 3 (to be codified at 35 U.S.C. §§ 102-103).
119. *Id.* § 9.
120. *Id.* § 9(a).
121. *See id.*
122. 35 U.S.C. § 282 (2006).
123. America Invents Act § 15(a) (to be codified at 35 U.S.C. § 282(3)(A)).

though a best mode is not disclosed.[124] No change to Section 112 is made, so that a specification must still set forth the best mode contemplated by the inventor.[125] The result appears to be that if an inventor hides a better mode of carrying out his or her invention, there may be no effect on the validity of the patent. There may nevertheless be some consequence for an attorney—such as discipline by the PTO—if a best mode is known but not disclosed.

D. Advice of Counsel not Usable to Prove Willfulness or Intent to Induce

Section 17 of the AIA adds a new Section 298 that provides:

> The failure of an infringer to obtain the advice of counsel with respect to any allegedly infringed patent, or the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer willfully infringed the patent or that the infringer intended to induce infringement of the patent.[126]

This provision codifies the substance of prior opinions finding that the attorney-client privilege did not permit requirement of disclosure of advice of counsel in order to show non-willfulness regarding infringement, and did not permit an adverse inference to be drawn against defendants who did not produce such advice of counsel.[127] The fact of a lack of resort to counsel or that no advice was presented to a jury appears to be irrelevant to the issues of willfulness, or to whether the accused intended to induce another to infringe. It appears to leave open the possibility of introducing such evidence for other purposes.

Unlike other litigation-related portions of the AIA, this provision is not effective until September 16, 2012.[128] However, since the provision generally codifies existing common law, it is difficult to imagine a situation in which the letter and spirit of the provision would not be observed.

E. Limitations on Joinder in Patent Litigation

Section 19 of the AIA addresses a number of jurisdictional and procedural matters in litigation.[129] A change to 28 U.S.C. 1338 specifies that no state court shall have jurisdiction over claims for relief arising under an Act of Congress relating to patents.[130] Provisions relating to removal of cases and Federal Circuit jurisdiction are also included.[131]

This section also creates a new Section 299 of the Patent Act that

---

124. *Id.* § 15(a) (to be codified at 35 U.S.C. §§ 119(e)(1), 120).

125. *See id.*

126. *Id.* § 17 (to be codified at 35 U.S.C. § 298).

127. *See, e.g.*, Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337 (Fed. Cir. 2004).

128. America Invents Act § 17 (to be codified at 35 U.S.C. § 298).

129. *See id.* § 19 (to be codified in various sections of 28 and 35 U.S.C.).

130. *Id.* § 19(a) (to be codified at 28 U.S.C. § 1338(a)).

131. *Id.* §§ 19(b)-(c) (to be codified at 28 U.S.C. § 1295(a)(1) and 28 U.S.C. § 1454).

significantly limits the ability to join accused infringers in one action or consolidate actions for trial.[132] The language creates a presumption of non-joinder, stating that joinder or consolidation can occur only under several simultaneous conditions.[133] The right(s) to relief must be asserted against parties jointly, severally or in the alternative, and must arise out of the same series of transactions or occurrences. The transaction(s) or occurrence(s) must relate to the making, using, selling, offering for sale or importing of the same accused subject matter.[134] Further, questions of fact common to all defendants must be at issue. In addition, the new provision specifies that multiple defendants may not be joined or actions consolidated "based solely on allegations that they each have infringed" patent(s) in suit.[135]

F. Summary Analysis of the Above Provisions

The litigation-oriented sections of the AIA generally appear intended to reduce the ability of patent owners to successfully litigate otherwise valid and enforceable patents against various classes of accused infringers. The prior-user defense allows a manufacturer to keep their processes as trade secrets without any concern that someone else might eventually get a patent on the process and make them liable for infringement.[136] It therefore encourages manufacturers not to file patents on their processes. Willful infringers are benefitted by the new advice of counsel provision that ensures that any legal advice received which would prove willful infringement never makes it into evidence.[137] The joinder of parties provision forces a patent owner facing industry wide infringement to go after each infringer in a separately filed case, thereby multiplying the costs to enforce their patents in court.[138] Lastly, the best mode defense provision seems to favor the unscrupulous patent owner that fails to disclose the best mode of the invention as they are no longer in danger of losing their patent rights.[139]

V. DERIVATION PROCEEDINGS

With the advent of a general "first-to-file" policy in the AIA, determinations of when different inventors created their inventions no longer matter. However, the principle of awarding patents only for an inventor's actual act of invention remains. One who receives information of an invention from another is not entitled to a patent absent an assignment from the inventor.[140] Consequently, methods for challenging another's application or patent as having been taken

---

132. *Id.* § 19(d) (to be codified at 35 U.S.C. § 299).
133. *Id.* (to be codified at 35 U.S.C. § 299(a)).
134. *Id.*
135. *Id.* (to be codified at 35 U.S.C. § 299(b)).
136. *Id.* § 5 (to be codified at 35 U.S.C. § 273).
137. *Id.* § 17 (to be codified at 35 U.S.C. § 298).
138. *Id.* § 19 (to be codified in various sections of 28 and 35 U.S.C.).
139. *Id.* § 15 (to be codified at 35 U.S.C. §§ 119(e)(1), 120, 282).
140. *See* discussion *supra* Part II.B.

from another are also a part of the AIA, generally taking the place of the interference proceedings that determined which of two inventors invented subject matter first. These methods will come into effect on March 16, 2013.[141]

Although such cases are quite infrequent, occasionally two patents issue claiming the same subject matter. In such cases where one patent owner contends that the other patent's inventors derived the subject matter from the inventors of his patent, the AIA creates a new Section 291 providing for a civil action to establish such derivation.[142] The section requires the patent owner to show that the patents claim the same subject matter, and that his patent has an earlier effective filing date than the other patent, as well as showing that the subject matter was obtained from his inventors.[143] A repose date is also specified: Such an action must be filed within one year beginning on the issue date of the allegedly-derived patent that names an inventor alleged to have derived the subject matter.[144]

The repose date raises questions of what happens if an allegedly derived patent does not name someone alleged to have derived the subject matter. Is the date for filing a Section 291 action tolled, or is it still measured from the challenged patent's date of issue? Or is the condition that an alleged deriver be named in a challenged patent a prerequisite for suit? The latter interpretation makes some sense, because if no alleged deriver is named in the other patent, it logically follows that there is no ground (at least prima facie) for asserting derivation. However, if an unscrupulous one can take another's idea, hide the taker by naming different inventors, and still avoid a derivation fight, it would seem that Section 291 has a significant and problematic loophole—even if the number of conflicting issued patents is very small.

Section 3 of the AIA also creates an intra-PTO proceeding for handling issues of derivation when raised in examination of a patent application.[145] In a sense, these proceedings within the PTO will (eventually) replace interferences, which are used to determine who of multiple inventors is entitled to a patent when they claim the same subject matter.[146]

Changes to Section 135 of the Patent Act will permit an applicant to file a petition with the PTO alleging that one or more inventors in an earlier-filed application derived subject matter from the inventor(s) of the applicant's application.[147] Specifically, the petition must set out a discussion of the derivation, establish that the deriving inventor obtained information without authorization of the "true" inventors, and that one or more of the petitioner's claim(s) are the same or substantially the same as one or more of the earlier

---

141. *See AIA Effective Dates*, *supra* note 3, at 6.

142. America Invents Act § 3 (to be codified at 35 U.S.C. § 291).

143. *Id.*

144. *Id.* (to be codified at 35 U.S.C. § 291(b)).

145. *Id.* (to be codified at 35 U.S.C. § 135).

146. *See Frequently Asked Questions: Derivation Proceedings*, U.S. PAT. TRADEMARK OFF., http://www.uspto.gov/aia_implementation/faq.jsp (last modified June 12, 2012).

147. America Invents Act § 3 (to be codified at 35 U.S.C. § 135).

application's claim(s).[148] The petition must be under oath and supported by "substantial evidence."[149] The deadline for filing is one year from the first publication by the PTO of a claim that is the same or substantially the same as a claim of the earlier application.[150]

The deadline is curiously defined in terms of publication of a claim that is substantially the same as a claim in the earlier application. If the derivation proceeding is only open to a *later* applicant, since an earlier applicant naturally has the better claim under the coming first-to-file system, then the deadline must be the publication date of the petitioner's own application. Further, unless the petitioner is aware of the alleged deriver's application and drafts her claims to be substantially the same as those in the deriver's application, the claims that publish in the petitioner's application will not fit the "substantially the same" criterion. It follows that the deadline may as a matter of fact be essentially non-existent. If the offended inventor knows of the alleged deriver's claims, then she will copy one or more of them and will have an incentive to attack the alleged deriver as soon as she can. If she does not know of the other's claims, then unless she is (un)lucky enough to file and publish claims that are substantially the same as the other's claims, the clock does not start ticking.

Once the petition for a derivation proceeding is filed, the director (i.e., an office or individual(s) designated by the director of the PTO) will determine whether the petition meets the legal prerequisites. That determination is final and non-appealable.[151] If the director decides that the petition is satisfactory, then the proceeding is instituted.[152]

The proceeding will be handled by the Patent Trial and Appeal Board (PTAB), which is the re-named Board of Patent Appeals and Interferences (BPAI).[153] While rules for handling derivation proceedings have not been proposed for comment yet, they will likely be quite similar to existing standards and procedures used in interference proceedings. The current rules pertaining to the BPAI have general provisions as well as specific sections dedicated to appeals and contested cases.[154] A section dedicated to the specifics of derivation proceedings and post-grant patent reviews would fit perfectly within the existing framework.[155]

Assuming that the rules for derivation proceedings will be similar to current interference practice, an opportunity for each party to file motions to redefine the contest may be allowed. Evidence will be submitted, in the form of invention

---

148. *Id.*

149. *Id.* (to be codified at 35 U.S.C. § 135(a)).

150. *Id.*

151. *Id.* (to be codified at 35 U.S.C. § 135(b)).

152. *Id*.

153. *Id*.; *see also* America Invents Act § 7 (to be codified at 35 U.S.C. § 6).

154. *See* Practice Before the Board of Patent Appeals and Interferences, 37 C.F.R. pt. 41 (2011).

155. *See id*.; *see also* Christopher A. Brown, *Recent Developments in Intellectual Property Law*, 38 IND. L. REV. 1181, 1183 (2005).

records, declarations of witnesses and the like, and perhaps along with a motion to name the party's inventors as entitled to a patent. With the evidence and arguments in hand, the PTAB may correct the naming of the inventor in any application or patent.[156] It may also defer action until after issuance of a patent to the claimed invention or until after re-examination or PTO review of a patent to the claimed invention.[157] An adverse decision by the PTAB operates as a final refusal of claims in an application, or (if no further appeal is taken) a cancellation of claims in a patent.[158] As in other jurisdictions, settlement is encouraged in the PTO, and so the statute provides that the parties may file a written agreement with the PTAB naming the proper inventors.[159] The PTAB will review the agreement, and unless it is inconsistent with the record in the proceeding, it will act consistent with the agreement.[160]

Presumably the publication of proposed rules within the next few months will provide further guidance as to how and when to consider such derivation proceedings. As previously noted, in the author's view, there remain some questions as to whether these derivation proceedings can adequately protect against the possibility of non-inventing "inventors" applying for and obtaining patents. It would appear that situations can arise in which a legitimate inventor or others cannot attack a patent awarded improperly to one who did not invent the subject matter. It is hoped that the forthcoming rules will assist in filling such gaps.

VI. MARKING

The AIA provides a new way to mark products covered by an issued patent, and reduces liability when done incorrectly. Current law provides that one can mark the word "patent" or "pat." along with the number of a patent covering a "patented article" on the article itself.[161] Marking is not required, but a failure to mark products results in the loss of the right to claim damages in infringement, except as against those having actual notice of the patent.[162] While important, marking can also be somewhat onerous, particularly for products covered by several patents or when a new patent issues that covers part of a product. In such cases, patentees have had to change markings, which is at least a change of label or packaging, and can involve replacement of metal stamps or other tools used to place a number on a product.[163]

---

156. America Invents Act § (to be codified at 35 U.S.C. § 135(b)).

157. *Id.* (to be codified at 35 U.S.C. § 135(c)).

158. *Id.* (to be codified at 35 U.S.C. § 135(d)).

159. *Id.* (to be codified at 35 U.S.C. § 135(e)).

160. *Id.*

161. 35 U.S.C. § 287(a) (2006).

162. *Id*.

163. *See, e.g.*, Pequignot v. Solo Cup Co., 608 F.3d 1356, 1361-62 (Fed. Cir. 2010), *reh'g en banc denied*.

The AIA provides an alternative that is currently in effect: virtual marking.[164] While the customary method of marking is still usable, if the patentee prefers he or she can simply mark the product with "Patent" or "Pat." as usual, but instead of particular patent number(s) the marking can include an Internet address that is freely accessible.[165] The Internet address must associate the patent number with the article in question.[166] In this way, patent owners can quickly and easily make changes when necessary to the patent markings for their products.

In addition, the AIA limits the ability to sue for improper marking.[167] In response to a number of recent cases, the qui tam suits previously permitted are no more.[168] Now, only the United States can now sue for the up to $500 penalty per offense for false marking.[169] Even so, the statute specifically provides that cases of actual competitive injury due to false marking may be brought for one's provable damages.[170] The changes to the marking statute also defines as *not* a violation the situation in which the number of an expired patent, which covered the product at issue, remains marked with respect to the product.[171] The rationale is that there is no competitive harm in the presence of the expired patent number, as it is now relatively easy to determine whether a patent is in force, and the interested party can accordingly determine his course of action.

VII. PATENT REVIEW PROCEEDINGS

The U.S. patent system, unlike that of the European Union and other jurisdictions, has never had broad administrative avenues to oppose or challenge patents as they issue from the PTO.[172] Certainly, interference proceedings have been used to challenge issued patents, but only in cases where another inventor claimed the same subject matter. Ancillary issues including validity of the issued patent might be joined in an interference, but one could not get to an interference without directly conflicting claimed subject matter. Re-examination proceedings were once only ex parte, and have in the last decade been opened to inter partes handling, but are limited only to challenges based on other patents or printed publications. Challenges to validity of a patent, on practically any ground, can be asserted in patent litigation, assuming one can afford it.

The AIA has created, effective September 16, 2013, a proceeding akin to "opposition" in the European Patent Office (EPO).[173] These post-grant reviews

---

164. America Invents Act § 16(a) (to be codified at 35 U.S.C. § 287(a)).

165. *Id.*

166. *Id.*

167. *See id.* § 16(b) (to be codified at 35 U.S.C. § 292).

168. *See, e.g.*, *Pequignot*, 608 F.3d 1356.

169. America Invents Act § 16(b)(1) (to be codified at 35 U.S.C. § 292(a)).

170. *Id.* § 16(b)(2) (to be codified at 35 U.S.C. § 292(b)).

171. *Id.* § 16(b)(3) (to be codified at 35 U.S.C. § 292)).

172. *See* Kali Murray & Esther van Zimmerman, *Dynamic Patent Governance in Europe and the United States: They Myriad Example*, 19 CARDOZO J. INT'L & COMP. L. 287, 326 (2011).

173. America Invents Act § 6(d) (to be codified at 35 U.S.C. §§ 321-329).

allow one to challenge a patent on numerous grounds without having to fit into interference or wait to be sued for infringement. At the same time, the AIA has revamped existing inter partes re-examination proceedings to parallel the new post-grant reviews.[174] Traditional ex parte re-examination remains available as well, on a limited bases and with limited participation by a third party as has been customary.[175]

A. Post-Grant Review

A post-grant review permits a party to challenge a patent's claims based on any grounds in the statute.[176] Thus, if a third party believes the claims are not proper under Section 112, or if it is believed that a prior sale or public disclosure defeats the claims, he or she may petition for a post-grant review.[177] They are not limited only to presentations of prior publications or patents.

To begin the process, the party seeking review must prepare and file a petition identifying its grounds for review.[178] Statutory requirements for the petition include an identification of the real parties in interest, an identification "with particularity" of each claim challenged and the grounds and evidence (including relied-on patents, publications, and/or affidavits) supporting the challenge, and any other information required by rule.[179] The petitioner must also provide the petition documents to the patent owner. The deadline for filing a post-grant review petition is nine months from the patent's issue date.[180] However, a review may be denied or stay granted where the patent is in or becomes involved in litigation.[181]

The patent owner then will have an opportunity, if he wishes, to file a response arguing why post-grant review should be declined.[182] With the petition and any response in hand, the director (or designee) considers whether the petition, if not rebutted, shows either "it is more likely than not that at least [one] of the claims challenged . . . is unpatentable," or that the petition "raises a novel or unsettled legal question . . . important to other patents or patent applications."[183] The director has three months to decide whether to institute the

---

174. *Id.* § 6(a) (to be codified at 35 U.S.C. § 311-319).

175. *See* 35 U.S.C. §§ 301-07 (2006); Request for Ex Parte Reexamination, 37 C.F.R. § 1.510 (2011).

176. America Invents Act § 6(d) (to be codified at 35 U.S.C. §§ 321(a)-(b)). The procedure will be usable with respect to certain patents in September 2012. *See id.* § 18 (to be codified at 35 U.S.C. § 321); *see also infra* note 200 and accompanying text. It is otherwise usable by third-parties to attack patents for which the first-to-file provisions apply. *See supra* note 13.

177. *See id.*

178. *Id.* § 6(d) (to be codified at 35 U.S.C. § 321(a)).

179. *Id.* (to be codified at 35 U.S.C. § 322).

180. *Id.* (to be codified at 35 U.S.C. § 321(c)).

181. *Id.* (to be codified at 35 U.S.C. § 325).

182. *Id.* (to be codified at 35 U.S.C. § 323).

183. *Id.* (to be codified at 35 U.S.C. §§ 324(a)-(b)).

review, and his decision is final and non-appealable.[184]

The PTAB will conduct the post-grant review, using a "preponderance of the evidence" standard,[185] but rules concerning their handling have not yet been proposed. As with derivation proceedings, noted above, the body of existing rules and substantive law that the BPAI has used in interferences are likely to be used as a guide or pattern for post-grant review rules. Given the long-standing existence of oppositions in Europe, it will not be surprising if the PTO also patterns rules after established EPO practice. The goal is to have the proceeding finished within twelve months (eighteen if good cause is shown), which is again in line with current interference goals.[186]

The statute further provides for estoppel against the parties as to any issue raised or that could have been raised based on a decision by the PTAB in the post-grant review.[187] Again, this is similar to the rules governing interference decisions. However, estoppel is not raised where the parties settle the proceeding, with the agreement in settlement filed with the PTAB.[188] It remains to be seen whether this substantial encouragement toward settlement will in fact have the desired effect.

B. Inter Partes Review

The inter partes review proceeding will replace the existing inter partes re-examination. Its applicability is more limited than the post-grant review in terms of substance, permits allegations of invalidity over patents or printed publications. Notably, a petition for inter partes review can only be filed after the date that is nine months from the patent's issuance.[189] Thus, two discrete windows for review are provided: within nine months of issue for the post-grant process, and when that period expires the inter partes process becomes available.

The person desiring inter partes review must file a petition that generally has the same requirements as for the post-grant review petition.[190] In the same way, the patent owner has the chance to make a response, and the director then decides whether to institute the proceeding.[191] The threshold for institution is subtly different from the post-grant threshold: if the unrebutted petition shows a "reasonable likelihood that petitioner would prevail with respect to at least [one] of the claims challenged."[192] The burden to prove that a claim is invalid under either proceeding is a "preponderance of the evidence."[193]

---

184. *Id.* (to be codified at 35 U.S.C. §§ 324(c), (e)).
185. *Id.* (to be codified at 35 U.S.C. § 326(e)).
186. *Id.* (to be codified at 35 U.S.C. § 326(a)(11)).
187. *Id.* (to be codified at 35 U.S.C. § 325(e)).
188. *Id.* (to be codified at 35 U.S.C. § 327).
189. *Id.* § 6(a) (to be codified at 35 U.S.C. § 311(c)(1)).
190. *See id.* (to be codified at 35 U.S.C. § 312).
191. *Id.* (to be codified at 35 U.S.C. § 314).
192. *Id.* (to be codified at 35 U.S.C. § 314(a)).
193. *See id.* §§ 6(a), (d) (to be codified at 35 U.S.C. §§ 316(e), 326(e)).

As with post-grant reviews, rules for inter partes reviews are not yet available, but it is reasonable to assume that the two sets of rules will be similar. Indeed, most of the inter partes review provisions in the statute (e.g., estoppel and settlement provisions, preponderance of the evidence standard, and overall duration goals) are essentially identical to those noted with respect to post-grant review. Perhaps with a nod to the origin of the inter partes review in the existing inter partes re-examination scheme, the statute permits the patent owner an opportunity to move to amend the patent to cancel claims or to provide a reasonable number of substitute claims.[194]

The statute provides restrictions on the filing of both types of review. For example, a petitioner cannot request a post-grant review or an inter partes review if she had previously filed a civil action challenging validity.[195] An invalidity counterclaim does not raise that bar.[196] A petitioner also cannot request either type of review more than one year after she was served a complaint alleging infringement.[197] Provisions for staying a lawsuit after filing a petition for review are also in the statute.[198]

C. Transitional Program for Business Method Patents

Section 18 of the AIA provides a transitional program for handling challenges to certain business method patents.[199] Like the post-grant and inter partes review proceedings, this transitional program becomes effective on September 16, 2012.[200] Its program only extends to patents for methods or corresponding apparatus for performing "data processing or other operations used in the practice, administration, or management of a financial product or service."[201]

The transitional program will be very similar to the post-grant review proceeding, except (a) the nine month post-issue deadline does not apply; (b) the ability to stay court proceedings is slightly broader; (c) the transitional program can be used against reissue patents; and, (d) the program can only be used by those charged with or sued for infringement.[202] Recognizing the changes in prior art law, one who challenges a covered business method patent under the versions of Section 102 or 103 as in effect before March 16, 2013, may only rely upon Section 102 prior art and prior art that discloses the subject matter more than a year before the patent's filing date.[203] The transitional program is of limited

194. *Id.* § 6(a) (to be codified at 35 U.S.C. § 316).
195. *Id.* § 6(d) (to be codified at 35 U.S.C. § 325).
196. *Id.* (to be codified at 35 U.S.C. § 325(a)(3)).
197. *Id.* (to be codified at 35 U.S.C. § 325(a)(2)).
198. *Id.*
199. *Id.* § 18 (to be codified at 35 U.S.C. § 321).
200. *AIA Effective Dates*, *supra* note 3, at 5.
201. America Invents Act § 18(d)(1) (to be codified at 35 U.S.C. § 321).
202. *Id.* § 18(a) (to be codified at 35 U.S.C. § 321).
203. *Id.*

duration, sunsetting on September 16, 2020.[204]

VIII. NEW PROVISIONS FOR SUBMISSION OF ART

The AIA provides new opportunities to submit art and patent-owner statements into an issued patent's file or during prosecution of a patent application. It also includes a provision for a patent owner to submit new information with a request for supplemental examination, without having to request re-examination of his own patent.[205] Each of these provisions is effective one year from the enactment date, or September 16, 2012.[206] Each applies to patents issued and patent applications filed before, on or after that date.[207]

Generally, these sections provide opportunities for citation of references to the PTO in pending applications or issued patents. One section permits citation of references and/or certain arguments made by a patent owner into the patent file, for use by the PTO or interested parties at a later date.[208] Another section provides a window for submission of references by a third party, with a description of their relevance, early in the pendency of an application.[209] The third section provides a mechanism for a patent owner to have references or other information considered or corrected, without taking the position that a substantial new question of patentability is created (as is needed for reexamination).[210] These sections may be used as vehicles to raise questions concerning patent applications or patents outside of litigation, or to eliminate potential inequitable conduct claims.

A. Citations to Issued Patent File

This new provision allows any person, at any time, to cite information to the PTO regarding an issued patent.[211] The citer may remain confidential if he or she requests in writing.[212] The information can be patents or printed publications that bear on patentability of one or more of the patent's claims, or the patent owner's statements concerning the scope of the claims filed in federal court or the PTO.[213] If the citer explains the pertinence or relevance of the information, the information and explanation will be included in the official file of the patent.[214] However, submissions of patent owner's statements under this section "shall include any other documents, pleadings, or evidence from the proceeding in

204. *Id.* § 18(a)(3) (to be codified at 35 U.S.C. § 321).
205. *Id.* §§ 6(g), 8, 12 (to be codified at scattered sections of 35 U.S.C.).
206. *AIA Effective Dates*, *supra* note 3, at 4-5.
207. *See* America Invents Act §§ 6(g), 8, 12 (to be codified in scattered sections of 35 U.S.C.).
208. *Id.* § 6(g) (to be codified at 35 U.S.C. § 301).
209. *Id.* § 8 (to be codified at 35 U.S.C. § 122).
210. *Id.* § 12 (to be codified at 35 U.S.C. § 257).
211. *Id.* § 6(g) (to be codified at 35 U.S.C. § 301).
212. *Id.* (to be codified at 35 U.S.C. § 301(e)).
213. *Id.* (to be codified at 35 U.S.C. § 301(a)).
214. *Id.* (to be codified at 35 U.S.C. § 301(b)).

which the statement was filed that addresses the written statement."[215] Thus, if one files a statement by a patent owner about the scope of a claim, context must also be given. Redactions pursuant to an applicable protective order are to be made to the statement(s) and/or contextual documents.[216]

The section limits the PTO's consideration of such patent owner's statements and any contextual information to use for determining proper meaning of a claim "in a proceeding . . . pursuant to section 304 [ex parte reexamination], 314 [inter partes review], or 324 [post-grant review]."[217] Others may presumably use such public-record information in litigation or for other uses.

B. Citations to Pending Applications

For pending applications, this amendment adds a provision for submission of art and discussion of its relevance to the application.[218] As background, there is a current mechanism of citation of art in a pending case within two months of publication,[219] but only references can be submitted. Any explanation of the references or other information is not entered into the file.

New Section 122(e) permits third parties to send in patents, published applications or other printed publications.[220] The references must be accompanied by a concise description of their relevance and a statement by the submitter "affirming that the submission was made in compliance with this section."[221] The submissions are considered and included in the application record.[222]

The timing window for such submissions is also broader than the current Rule 99 permits. There is no opening date, and the window closes on the earlier of (1) the date of a notice of allowance and (2) the later of six months after the publication date and the date of the first rejection of the application.[223] Accordingly, in cases where competitors' applications are monitored and documentary art that may be applicable is known, one has at least six months after the publication date to cite the art and provide the necessary explanation.[224]

Thus, as an example, assume that application A is published on January 1, 2013, and has a first office action rejecting claims on September 1, 2013. A

---

215. *Id.* (to be codified at 35 U.S.C. § 301(c)).

216. *Id.* (to be codified at 35 U.S.C. § 301(d)).

217. *Id.*

218. *Id.* § 8 (to be codified at 35 U.S.C. § 122).

219. Third-Party Submission in Published Application, 37 C.F.R. § 1.99 (2011); *see also* 35 U.S.C. § 301 (2006) (providing the statutory basis for "[a]ny person at any time [to] cite to the [PTO] in writing prior art consisting of patents or printed publications which that person believes to have a bearing on the patentability of any claim of a particular patent").

220. America Invents Act § 8 (to be codified at 35 U.S.C. § 122(e)).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id*.

submission under new Section 122(e) to cite publications and explain their relevance is timely if filed before September 1, 2013. If application B is published on January 1, 2013, and has a first office action rejecting claims on March 1, 2013, then a submission under new Section 122(e) to cite publications and explain their relevance is timely if filed before July 1, 2013 (six months after the publication).

C. Supplemental Examination

A patent owner faced with a new reference not cited before the PTO, and which might cast a shadow on the patent, has the option of either living with the shadow or requesting re-examination under the current law. A request for re-examination puts the owner in the initial position of arguing against his patent in a sense, as the request needs a showing that the reference raises a substantial new question of patentability of at least one claim. If the request is granted, the patent owner is then in the opposite position, arguing during the procedure that the claim(s) are in fact patentable over the reference.

The AIA adds a new Section 257, which provides an intermediate step between doing nothing and requesting re-examination.[225] The patent owner can request "supplemental examination . . . to consider, reconsider, or correct information believed to be relevant to the patent."[226] Specific rules will be adopted to handle the requests and the examination procedure, but the statute requires that the examination will be conducted within three months of the request.[227]

Following the supplemental examination, a certificate is issued indicating whether the submitted reference(s) raise a substantial new question of patentability.[228] If not, presumably the issue is concluded. If so, a re-examination begins, under usual ex parte procedure, but without an initial statement by the patent owner.[229] The reexamination will address every substantial new question of patentability raised by the supplemental examination.[230] If a re-examination is ordered, the patent owner will be required to pay the statutory fee for it.[231]

Of particular interest to patent owners and prosecutors, supplemental examination has the effect of curing potential unenforceability based on incorrect, non-considered, or inadequately considered information in the original prosecution. If the patent owner provides such information or corrections for supplemental examination, "conduct relating to [such] information" is not a basis for unenforceability.[232] This curing provision does not apply to particular

---

225. *Id.* § 12 (to be codified at 35 U.S.C. § 257).
226. *Id.* (to be codified at 35 U.S.C. § 257(a)).
227. *Id.*
228. *Id.*
229. *Id.* (to be codified at 35 U.S.C. § 257(b)).
230. *Id.*
231. *Id.* (to be codified at 35 U.S.C. § 257(d)(1)).
232. *Id*. (to be codified at 35 U.S.C. § 257(c)(1)).

allegations, made prior to the date of the supplemental examination request, in a civil action or in an abbreviated new drug application (ANDA).[233] It also does not apply to defenses raised in infringement or ITC (Section 337) actions unless the supplemental examination (and any resulting re-examination) is finished before such action is instituted.[234]

Suppose that owner O requests supplemental examination of her patent P on November 1, 2012 to consider reference R. The examination concludes on February 1, 2013 with a certificate indicating no substantial new question of patentability. Unenforceability allegations regarding P made in court or in an ANDA prior to November 1, 2012 and based on conduct relating to reference R may go forward. Later such allegations cannot be the basis for unenforceability. As another example, assume the same facts, but the supplemental examination concludes on February 1, 2013 with a certificate indicating a substantial new question of patentability. Re-examination is therefore ordered, which is completed on February 1, 2014. If the patent owner brings suit or a Section 337 action on P before February 1, 2014, a defendant may raise unenforceability defense(s) based on conduct relating to R.

When available, supplemental examination can be used to cure potential inequitable conduct, which has not been the case up until now. Nonetheless, one should not begin playing fast and loose with the duty of disclosure. The PTO is required to notify the Attorney General if it becomes aware "that a material fraud on the [PTO] may have been committed in connection with the patent."[235] Such a referral is confidential, and is not included in the patent file or disclosed to the public unless the United States charges a person with a criminal offense in connection with it.[236] Further, the section explicitly limits its curing effect, noting that it does not extend far enough to preclude sanctions under criminal or antitrust laws, or to limit investigations or sanctions for misconduct or regulations concerning misconduct by the PTO.[237]

D. AIA Summary

It is not too much to say that the America Invents Act is the broadest reconfiguration of U.S. patent law in a generation. The AIA will certainly change the language used by patent practitioners and litigators, but it remains to be seen what the full scope of the changes will be. In some respects, the system will be much the same as it always has been, while new proceedings in the PTO, and the necessary new rules that accompany them, will take some time for digestion.

---

233. *Id.* (to be codified at 35 U.S.C. § 257(c)(2)(A)); *see also* 21 U.S.C. § 355(j)(2)(B)(iv)(II) (2006) (proving information regarding ANDA actions).

234. America Invents Act § 12 (to be codified at 35 U.S.C. § 257(c)(2)(B)).

235. *Id.* (to be codified at 35 U.S.C. § 257(e)).

236. *Id.*

237. *Id.* (to be codified at 35 U.S.C. § 257(f)).

IX. *THERASENSE, INC. V. BECTON, DICKINSON & CO.*[238]

The topic of inequitable conduct before the PTO has received significant attention from the courts over the last several years, and the last year was no exception. Decisions like *McKesson Information Solutions, Inc. v. Bridge Medical, Inc.*[239] laid open to many practitioners the number of potential inequitable conduct pitfalls, and placed a heightened responsibility on practitioners in meeting the duty of disclosure[240] to the PTO.

The *Therasense* case involved contradictory statements made to different patent offices in related patent applications.[241] At its simplest, the applicant was faced with the same reference R in prosecuting cases before the PTO and the EPO. To the EPO, the applicant argued that R disclosed that the membrane it described was optional in its material.[242] To the PTO, however, the applicant argued that R required that same membrane, and that application issued as a patent.[243] When the patent was asserted in litigation, the defendant alleged inequitable conduct based on the failure of the applicant to disclose to the PTO his arguments to the EPO in the related case. The trial court held the patent unenforceable on that ground.[244]

The Federal Circuit panel hearing the appeal, in a 2-1 decision, upheld the finding of inequitable conduct.[245] "Recognizing the problems created by the expansion and overuse of the inequitable conduct doctrine," the court granted rehearing en banc.[246] With such a statement beginning the opinion, it would seem likely that inequitable conduct theory might be reined in, and that is precisely what happened.

The en banc *Therasense* opinion unquestionably raises the bar for proving inequitable conduct, and it is probable that it will limit allegations of inequitable conduct in the first instance. After tracing the history of the inequitable conduct doctrine, the court acknowledged that it has come to a determination of both the intent of the applicant (including inventors, attorneys, and others that are closely involved with a patent application)[247] and materiality of the statement, act or omission in question.[248] Having then reviewed the fluctuating standards for evaluating those factors over time, the court gave bright-line standards to be used going forward.

As to the intent prong, "To prevail on a claim of inequitable conduct, the

---

238. 649 F.3d 1276 (Fed. Cir. 2011) (en banc).

239. 487 F.3d 897 (Fed. Cir. 2007).

240. *See* Duty to Disclose Information Material to Patentability, 37 C.F.R. § 1.56 (2011).

241. *Therasense*, 649 F.3d at 1283-84.

242. *Id.*

243. *Id.* at 1283.

244. *Id*. at 1284-85.

245. *Id*. at 1286.

246. *Id*. at 1285.

247. *See* Duty to Disclose Information Material to Patentability, 37 C.F.R. § 1.56 (2011).

248. *Therasense*, 649 F.3d at 1287.

accused infringer must prove that the patentee acted with the *specific intent* to deceive the PTO."[249] Negligence, even gross negligence, does not meet the requirement.[250] Concerning the allegation of withholding a reference from the PTO, as in the underlying litigation, the court will require "clear and convincing evidence that the applicant knew of the reference, knew that it was material, and made a deliberate decision to withhold it."[251] The court recognized that indirect or circumstantial evidence may be all that is available, but even so, a "specific intent to deceive must be the single most reasonable inference able to be drawn from the evidence . . . . Indeed, the evidence must be sufficient to *require* a finding of deceitful intent in the light of all the circumstances."[252] So as to quash any doubt that might remain, the court posited the situation where multiple reasonable inferences that may be drawn concerning the evidence presented, and in those situations "intent to deceive cannot be found."[253]

The materiality standard was also addressed and changed, because "higher intent standard[s], standing alone, did not reduce the number of inequitable conduct cases before the courts and did not cure the problem of overdisclosure of marginally relevant prior art to the PTO."[254] To show inequitable conduct, a statement or omission must be shown material under a but-for standard. That is, "[w]hen an applicant fails to disclose prior art to the PTO, that prior art is but-for material if the PTO would not have allowed a claim had it been aware of the undisclosed prior art."[255] The PTO's standards of evaluating prior art under the preponderance of the evidence standard (as opposed to the clear and convincing standard in invalidity challenges in court) and of giving claims their broadest reasonable construction must be observed.[256]

Having raised the bar on materiality, the court noted an "exception in cases of affirmative egregious misconduct," such as filing an unmistakably false affidavit.[257] Such "egregious" falsification or other misconduct will be deemed material immediately.[258] Nonetheless, "neither mere nondisclosure of prior art references to the PTO nor failure to mention prior art references in an affidavit constitutes affirmative egregious misconduct."[259] The court justified its exception to the but-for materiality standard in "strik[ing] a necessary balance between encouraging honesty before the PTO and preventing unfounded accusations of inequitable conduct."[260]

---

249. *Id*. at 1290 (emphasis added) (citations omitted).
250. *Id*.
251. *Id*.
252. *Id*. (citations omitted) (internal quotation marks omitted).
253. *Id*. at 1290-91.
254. *Id*. at 1291.
255. *Id*.
256. *Id*. at 1292.
257. *Id*.
258. *Id.* at 1292-93.
259. *Id*.
260. *Id*. at 1293.

Applying these new standards, the en banc Federal Circuit vacated the inequitable conduct finding in the case before it. The standard used for materiality at trial was not the but-for standard announced in this opinion, necessitating vacation of the finding of materiality.[261] Further, the appellate court instructed the trial court to assess on remand whether the information not disclosed (i.e. the argument to the EPO concerning the membrane being optional) would have resulted in a PTO determination of unpatentability.[262] On intent, the Federal Circuit noted the trial court's reliance on "absence of a good faith explanation for failing to disclose"[263] the EPO arguments, but held that a "patentee need not offer any good faith explanation unless the accused infringer first . . . prove[s] a threshold level of intent to deceive by clear and convincing evidence."[264] The trial court's use of a negligence standard also tainted its finding of intent to deceive.[265] Once again, the trial court was instructed to use the new intent standards, particularly to "determine whether there is clear and convincing evidence demonstrating that . . . [applicant's representatives] knew of the EPO briefs, knew of their materiality, and made the conscious decision not to disclose them in order to deceive the PTO."[266]

It is likely that these new standards for assessing inequitable conduct will reduce not just findings of unenforceability, but also allegations of inequitable conduct. Given the strict requirements, anyone considering an allegation of inequitable conduct will need to have a clear idea and strong evidence even to make the change. The court's noted exception for affirmative egregious misconduct will undoubtedly be a focus for further argument and litigation. Even so, the manner in which the court framed the exception and its policy for doing so both suggest a limited range of conduct that will fall into the exception. As a general matter, *Therasense* is a relief for patent application prosecutors. While still responsible for good conduct, error or even gross negligence will not be imputed to inequitable conduct. The task for a defendant to allege and establish inequitable conduct and unenforceability of a patent has become much harder.

X. *MICROSOFT CORP. V. I4I LIMITED PARTNERSHIP*[267]

In June, the Supreme Court weighed in on arguments contesting the long-observed clear and convincing standard for showing invalidity of a patent claim, in *Microsoft Corp. v. i4i Limited Partnership*. One alleging invalidity has the burden to prove it by clear and convincing evidence, in light of the statutory presumption of validity[268] and the administrative presumption that the PTO did

---

261. *Id.* at 1296.
262. *Id.*
263. *Id.*
264. *Id*. (section alteration in original) (citation omitted) (internal quotation marks omitted).
265. *Id.*
266. *Id.*
267. 131 S. Ct. 2238 (2011).
268. 35 U.S.C. § 282 (2006).

its job correctly.[269] In i4i's patent infringement suit against Microsoft, Microsoft had offered evidence of an early sale that would invalidate claims at issue.[270] It had also requested a jury instruction in which its burden of proving invalidity on the basis of evidence not before the patent examiner would be by a preponderance of evidence.[271]

In a unanimous (8-0) decision, the Court refused to adopt a lower evidentiary standard as Microsoft requested.[272] Even if the evidence relating to invalidity was not before the PTO during examination, the validity presumption of Section 282 requires an invalidity defense to be proved by clear and convincing evidence.[273] The Court noted that "the presumption of patent validity had been a fixture of the common law," and codification of such a common-law presumption at least implicitly includes the heightened standard of proof attached to it.[274]

While the heavier burden of persuasion remains regardless of whether evidence was previously considered by the PTO, the Court noted that "new evidence" of validity can carry more weight than evidence that was considered during examination.[275] Thus, even if the overall standard remains the same, the fact that evidence presented was not before the examiner may make the standard somewhat easier to reach. In the Court's words, "if the PTO did not have all material facts before it, its considered judgment may lose significant force . . . [and] the challenger's burden to persuade the jury of its invalidity defense by clear and convincing evidence may be easier to sustain."[276] The opinion also endorsed appropriate jury instructions on the effect of new evidence, such as an instruction "to consider that [the jury] has heard evidence that the PTO had no opportunity to evaluate before granting the patent."[277]

XI. *IN RE KLEIN*[278]

The Federal Circuit also addressed the doctrine of analogous art in the context of obviousness determinations, in *In re Klein*. Klein had applied for a patent on a device for measuring and mixing sugar and water for bird feeders.[279] During examination and on appeal to the BPAI, the claims were determined to be obvious over one or more patent references, in light of sugar-to-water ratios noted in Klein's own application as recognized to be equivalent to the animals' natural

269. *i4i*, 131 S. Ct. at 2242.
270. *Id.* at 2243-44.
271. *Id.* at 2244.
272. *See id.* at 2242.
273. *Id.* at 2245.
274. *Id.* at 2246.
275. *Id.* at 2251.
276. *Id.*
277. *Id.*
278. 647 F.3d 1343 (Fed. Cir. 2011).
279. *Id.* at 1345.

food sources.[280]

Klein argued on appeal that the patent references relied on by the examiner were not "analogous art," and so should not have been considered in the obviousness analysis.[281] "A reference qualifies as prior art for an obviousness determination . . . only when it is analogous to the claimed invention."[282] A reference is analogous if it is in the same field of endeavor as the invention, or if not within such field, if it is "reasonably pertinent to the particular problem with which the inventor is involved."[283] Further, in determining whether a reference is pertinent to the inventor's problem, the question is whether the reference "because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem."[284] Klein took the position that each of the references addressed a different problem than his own; namely that while his invention was to contain and mix sugar and water, the references were dedicated to separating items, and none were for receiving or containing water.[285]

The references were clearly outside of the inventor's bird-feeder field, and the court focused entirely on whether the references were concerned with the inventor's particular problem.[286] It determined that the determination below that the art was analogous was not supported by substantial evidence, and reversed the rejection.[287] Three of the references had a purpose to separate solid objects, and so one focused on the inventor's problem of a feeder with movable divider to prepare different solutions for different animals would not have consulted the references.[288] The two other references did not address the multiple ratios of solute/solvent or have the movable divider that the inventor was concerned with, the court found, agreeing with inventor Klein.[289]

This case may be quite useful in prosecution, as the PTO has generally viewed the *KSR* opinion[290] as expanding the realm of what can be considered analogous art. The *Klein* opinion did not mention *KSR* at all. Naturally, whether a reference is pertinent to an inventor's particular problem will be a fact-sensitive determination, but the breadth of interpretation sometimes given to *KSR*, to look all over for pertinent art, is brought into question by this restatement of the idea that for obviousness analysis purposes, a reference must have the pertinence that the analogous art doctrine suggests. Further, patent practitioners should consider, in preparing and arguing client's applications, whether and how to define the

---

280. *Id.*
281. *Id.* at 1347.
282. *Id.* at 1348 (citation omitted).
283. *Id.*
284. *Id.* (citation omitted).
285. *Id.* at 1348-49.
286. *Id.* at 1348-50.
287. *Id.* at 1350.
288. *Id.* at 1350-51.
289. *Id.*
290. KSR Int'l Co. v. Teleflex, Inc., 550 U.S. 398 (2007).

"problem" faced by their inventors. By defining the problem relatively narrowly (e.g., not simply bird-feeders, but feeders with movable dividers for preparing different formulations of food), the set of analogous art may be narrowed. The concomitant risk, of course, is of overly limiting the scope of the resulting claims.

CONCLUSION

Certainly the passage of the AIA and promulgation of rules to implement it will be a major focus of the patent bar in the coming year. Time will tell whether its harmonization and streamlining goals will be met, and whether a better environment for innovation is created. In addition to opinions refining other parts of the patent law, as in *Therasense*, *i4i*, and *Klein*, the patent bar can also expect the courts and the new PTAB to weigh in on the AIA's provisions soon.

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

JOSEPH R. ALBERTS*
ROBERT B. THORNBURG**
HILARY G. BUTTRICK***

INTRODUCTION

The 2011 survey period[1] produced a handful of key decisions. As in previous years, this Survey addresses those cases and provides some relevant commentary and historical information where appropriate. The Survey follows the basic structure of the Indiana Product Liability Act (IPLA).[2] This Survey does not attempt to address in detail all of the cases decided during the Survey period that involve product liability issues.[3] Rather, it examines select cases that discuss the important substantive product liability concepts.

I. THE SCOPE OF THE IPLA[4]

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, "regardless of the substantive legal theory or theories upon which the action is brought."[5] When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold

---

* Senior Litigation Counsel, The Dow Chemical Company, Midland, Michigan and Dow AgroSciences LLC, Indianapolis. B.A., *cum laude*, 1991, Hanover College; J.D., *magna cum laude*, 1994, Indiana University Robert H. McKinney School of Law. The authors thank Dean Barnhard, Partner, Barnes & Thornburg LLP, for his thoughtful contributions to this Article.

** Member, Frost Brown Todd LLC, Indianapolis. B.S., *cum laude*, Ball State University; J.D., 1996, Indiana University Maurer School of Law.

*** Associate, Ice Miller LLP, Indianapolis. B.A., 1999, DePauw University; J.D., 2002, Indiana University Robert H. McKinney School of Law.

1. The survey period is October 1, 2010 to September 30, 2011.

2. IND. CODE §§ 34-20-1-1 to 9-1 (2011). This Article follows the lead of the Indiana General Assembly and employs the term "product liability" (not "products liability") when referring to actions governed by the IPLA.

3. Two examples of cases involving product liability theories that were decided on procedural or other substantive issues are *Stuhlmacher v. Home Depot U.S.A., Inc.*, No. 2:10-CV-467, 2011 WL 1792853 (N.D. Ind. May 11, 2011) (discussing the sufficiency of pleading requirements in a product liability case), and *Eli Lilly & Co. v. Valeant Pharmaceuticals International*, 781 F. Supp. 2d 809 (S.D. Ind. 2011) (discussing the ability to recover defense costs incurred in a product liability case).

4. The background information contained in Part I is based off previous survey article submissions. *See* Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 44 IND. L. REV. 1377, 1377-86 (2011) [hereinafter Alberts et al., *2010 Developments*].

5. IND. CODE § 34-20-1-1(3) (2011).

requirements for IPLA liability: (1) a claimant who is a user or consumer and is also "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition";[6] (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";[7] (3) "physical harm caused by a product";[8] (4) a product that is "in a defective condition unreasonably dangerous to [a] user or consumer" or to his property;[9] and (5) a product that "reach[ed] the user or consumer without substantial alteration in [its] condition."[10] Indiana Code section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements, "regardless of the substantive legal theory or theories upon which the action is brought."[11]

A. "User" or "Consumer"

The language the Indiana General Assembly employs in the IPLA is important for determining who qualifies as an IPLA claimant. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by "users" and "consumers."[12] For purposes of the IPLA, "consumer" means:

> (1) a purchaser;
> (2) any individual who uses or consumes the product;
> (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
> (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.[13]

"User" has the same meaning as "consumer."[14] There are several published

---

6. *Id.* § 34-20-1-1(1); *id.* § 34-20-2-1(1).

7. *Id.* § 34-20-1-1(2); § 34-20-2-1(2). The latter section excludes, for example, corner lemonade stand operators and garage sale sponsors from IPLA liability.

8. *Id.* § 34-20-1-1(3).

9. *Id.* § 34-20-2-1.

10. *Id.* § 34-20-2-1(3).

11. *Id.* § 34-20-1-1.

12. *Id.*

13. *Id.* § 34-6-2-29.

14. *Id.* § 34-6-2-147. A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined "user" or "consumer," he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA. *Id.* § 34-20-2-1(1). That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the "user" or "consumer" also be "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition." *Id.* Thus, the plain language of the statute assumes that a person or entity must already qualify as a "user" or a "consumer" *before* a separate "reasonable foreseeability" analysis is undertaken. In that regard, the IPLA does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject

decisions in the last ten years or so that construe the statutory definitions of "user" and "consumer."[15]

B. "Manufacturer" or "Seller"

For purposes of the IPLA, "'[m]anufacturer' . . . means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer."[16] The IPLA defines a seller as "a person engaged in the business of selling or leasing a product for resale, use, or consumption."[17]

Indiana Code section 34-20-2-1 adds three additional and clarifying requirements. First, it makes clear that an IPLA defendant must have sold, leased, or otherwise placed an allegedly defective product in the stream of commerce. Second, the seller must be engaged in the business of selling the product. And, third, the product must have been expected to reach and, in fact, reached the user or consumer without substantial alteration.[18]

Courts hold sellers liable as manufacturers in two ways. First, a seller can be held liable as a manufacturer if the seller fits within the definition of "manufacturer" found in Indiana Code section 34-6-2-77(a). Second, a seller can be deemed a statutory "manufacturer" and therefore can be held liable to the same extent as a manufacturer in one other limited circumstance.[19] Indiana Code section 34-20-2-4 provides that a seller may be deemed a manufacturer "[i]f a court is unable to hold jurisdiction over a particular manufacturer" and if the seller is the "manufacturer's principal distributor or seller."[20]

---

to the harm caused by a product's defective condition if that claimant falls outside of the IPLA's definition of "user" or "consumer."

15. *See, e.g.*, Pawlik v. Indus. Eng'g & Equip. Co., No. 2:07-cv-220, 2009 WL 857476, at *4-5 (N.D. Ind. Mar. 27, 2009); Vaughn v. Daniels Co. (W. Va.), 841 N.E.2d 1133, 1138-43 (Ind. 2006); Butler v. City of Peru, 733 N.E.2d 912, 918-19 (Ind. 2000); Estate of Shebel v. Yaskawa Elec. Am., Inc., 713 N.E.2d 275, 278-80 (Ind. 1999); *see also* Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 43 IND. L. REV. 873, 875-77 (2010) [hereinafter Alberts et al., *2009 Developments*]; Joseph R. Alberts & James Petersen, *Survey of Recent Developments in Indiana Product Liability Law*, 40 IND. L. REV. 1007, 1009-11 (2007); Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001); Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-37 (2000).

16. IND. CODE § 34-6-2-77(a) (2011).

17. *Id.* § 34-6-2-136.

18. *Id.* § 34-20-2-1; *see, e.g.*, Williams v. REP Corp., 302 F.3d 660, 662-64 (7th Cir. 2002); Del Signore v. Asphalt Drum Mixers, 182 F. Supp. 2d 730, 745-46 (N.D. Ind. 2002). *See also* Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1169-72 (2003).

19. IND. CODE § 34-20-2-4.

20. *Id. Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 782-87 (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressed the circumstances under

Practitioners also must be aware that when the theory of liability is based upon "strict liability in tort,"[21] Indiana Code section 34-20-2-3 provides that an entity that is merely a "seller" and cannot otherwise be deemed a "manufacturer" is not liable and is not a proper IPLA defendant.[22]

Indiana state and federal courts have been very active in recent years construing the statutory definitions of "manufacturer" and "seller."[23] The 2011 survey period witnessed a bit of a novelty in this area, having produced a federal district court opinion dealing with whether drugs administered during a clinical trial are placed into the stream of commerce. In *Watson v. Covance, Inc.*,[24] the plaintiff alleged that she was injured after taking a drug in a clinical research study.[25] She claimed that the drug manufacturer failed to warn about the dangers of consuming the drug.[26] The manufacturer moved to dismiss the complaint because the drug had been administered in a clinical test and had not been introduced into the stream of commerce. Because Indiana Code section 34-20-2-1 imposes liability only on a person who "sells, leases, or otherwise puts into the stream of commerce" a defective product, the court concluded that there could be no failure-to-warn claim under the IPLA for a drug administered solely in a

---

which entities may be considered "manufacturers" or "sellers" under the IPLA. *See* Goines v. Fed. Express Corp., No. 99-CV-4307-JPG, 2002 WL 33831, at *2-4 (S.D. Ill. Jan. 8, 2002).

21. The phrase "strict liability in tort," to the extent that it is intended to mean "liability without regard to reasonable care," appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that a negligence standard governs cases utilizing a design defect or a failure to warn theory, not a "strict liability" standard. IND. CODE § 34-20-2-2.

22. *Id.* § 34-20-2-3. The IPLA makes it clear that liability without regard to the exercise of reasonable care (strict liability) applies only to product liability claims alleging a manufacturing defect theory, and a negligence standard controls claims alleging design or warning defect theories. *See, e.g.*, Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002); *see also* Alberts & Boyers, *supra* note 18, at 1173-75.

23. *See* Mesman v. Crane Pro Servs., 512 F.3d 352, 356 (7th Cir. 2008); Kucik v. Yamaha Motor Corp., No. 2:08-CV-161-TS, 2010 WL 2694962, at *7-8 (N.D. Ind. July 2, 2010); State Farm Fire & Cas. v. Jarden Corp., No. 1:08-cv-1506-SEB-DML, 2010 WL 2541249, at *6-7 (S.D. Ind. June 16, 2010); Pawlik v. Indus. Eng'g & Equip. Co., No. 2:07-cv-220, 2009 WL 857476, at *5-7 (N.D. Ind. Mar. 27, 2009); Gibbs v. I-Flow, Inc., No. 1:08-cv-708-WTL-TAB, 2009 WL 482285, at *3-4 (S.D. Ind. Feb. 24, 2009); LaBonte v. Daimler-Chrysler, No. 3:07-CV-232, 2008 WL 513319, at *1-2 (N.D. Ind. Feb. 22, 2008); Fellner v. Phila. Toboggan Coasters, Inc., No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068, at *4 (S.D. Ind. Aug. 2, 2006); Thornburg v. Stryker Corp., No. 1:05-cv-1378-RLY-TAB, 2006 WL 1843351, at *3-4 (S.D. Ind. June 29, 2006); Duncan v. M & M Auto Serv., Inc., 898 N.E.2d 338, 342 (Ind. Ct. App. 2008); *see also* Alberts et al., *2010 Developments*, *supra* note 4, at 1379-81; Alberts et al., *2009 Developments*, *supra* note 15, at 879-82; Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 42 IND. L. REV. 1093, 1098-1102 (2009) [hereinafter Alberts et al., *2008 Developments*].

24. No. 3:10-cv-99-RLY-WGH, 2010 WL 5058391 (S.D. Ind. Dec. 6, 2010).

25. *Id*. at *1.

26. *Id*.

clinical trial.[27]

Another 2011 decision is worthy of a brief mention here although it did not deal directly with the statutory definitions. *Kolozsvari v. Doe*[28] provides a nice illustration of why a pharmacist's duty to warn is properly decided based upon Indiana common law negligence principles and is not within the scope of the IPLA. In *Kolozsvari*, the plaintiff sustained severe kidney damage after taking the drug OsmoPrep twice in preparation for a colonoscopy.[29] At the time she was prescribed OsmoPrep, she was also taking an ace inhibitor.[30] When the ace inhibitor and OsmoPrep are taken together, they can lead to kidney failure.[31] The plaintiff filled her prescriptions for OsmoPrep at a CVS pharmacy, which also routinely filled her prescription for the ace inhibitor.[32] Each time the pharmacist filled the prescription for OsmoPrep, he received a computerized warning stating that the use of OsmoPrep could lead to kidney failure.[33] He did not give these warnings to the plaintiff.[34] After taking the second dose of OsmoPrep, the plaintiff sustained kidney failure.[35] She sued the pharmacist and the pharmacy, alleging that the pharmacist had a duty to warn of the risks of OsmoPrep or withhold the medication.[36] The Indiana Court of Appeals agreed, finding that a pharmacist's duty of care arises as a matter of law out of the legislature's regulation of pharmacies and statutes requiring pharmacists to exercise professional judgment in the best interests of patients.[37] As such, the court concluded that the pharmacist had a duty to warn, and the plaintiff was thus entitled to pursue a negligence claim against him.[38]

C. Physical Harm Caused by a Product

For purposes of the IPLA, "'[p]hysical harm' . . . means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property."[39] It "does not include gradually evolving damage to property or economic losses from such damage."[40]

---

27. *Id*. at *2.
28. 943 N.E.2d 823 (Ind. Ct. App. 2011).
29. *Id*. at 824-25.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*. at 826.
37. *Id*. at 827-28.
38. *Id*. at 829.
39. IND. CODE § 34-6-2-105(a) (2011).
40. *Id.* § 34-6-2-105(b); *see, e.g.*, Miceli v. Ansell, Inc., 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998); Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492, 493 (Ind. 2001); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 486 (Ind. 2001); *see also* Great N. Ins.

One case decided during the 2011 survey period, *Guideone Insurance Co. v. U.S. Water Systems, Inc.*,[41] involved the application of the economic loss doctrine. In that case, two homeowners bought a reverse osmosis drinking water system at a Lowe's home improvement store.[42] A few hours after the system was installed, the water supply line became disengaged from the water system and water flowed onto the homeowners' kitchen floor, causing more than $100,000 in water damage.[43] The court determined that the economic loss doctrine precluded the homeowner's insurer from recovering in subrogation the value of the allegedly defective water filtration system itself.[44] The *Guideone* court also held that the "other property" exception to the economic loss doctrine would permit tort recovery for the flood damage to the home's floor and walls because they were separate and distinct from the water system and were not merely a component of the water system.[45]

For purposes of the IPLA, "'[p]roduct' . . . means any item or good that is personalty at the time it is conveyed by the seller to another party. . . . The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product."[46] Recent decisions have addressed situations in which courts were asked to decide whether "products" were involved.[47] Note that another reason why the defendant pharmacist in the *Kolozsvari* case discussed above is not within the purview of the IPLA is because he participated in a transaction that predominately involved the sale of a service rather than a product.

D. Defective and Unreasonably Dangerous

Only products that are in a "defective condition" are subject to IPLA liability.[48] For purposes of the IPLA, a product is in a "defective condition"

> if, at the time it is conveyed by the seller to another party, it is in a condition:

Co. v. Buddy Gregg Motor Homes, Inc., No. IP 00-1378-C-H/K, 2002 WL 826386, at *3 (S.D. Ind. Apr. 29, 2002).

41. 950 N.E.2d 1236 (Ind. Ct. App. 2011).

42. *Id*. at 1239-40.

43. *Id*. at 1240.

44. *Id*. at 1244-45.

45. *Id*.

46. IND. CODE § 34-6-2-114 (2011); *see also* Fincher v. Solar Sources, Inc., 868 N.E.2d 1223, at *6 (Ind. Ct. App. 2007) (unpublished table disposition).

47. *See* Chappey v. Ineos USA LLC, No. 2:08-CV-271, 2009 WL 790194 (N.D. Ind. Mar. 23, 2009); Carlson Rests. Worldwide, Inc. v. Hammond Prof'l Cleaning Servs., No. 2:06 cv 336, 2008 WL 4889687, at *3-4 (N.D. Ind. Nov. 12, 2008); *see also* Alberts et al., *2009 Developments*, *supra* note 15, at 882-84.

48. IND. CODE § 34-20-2-1 (2011); *see also* Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc., No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006).

(1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and

(2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.[49]

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.[50]

Claimants in Indiana may prove that a product is in a "defective condition" by asserting one or a combination of three theories: (1) the product has a defect in its design (a "design defect"); (2) the product lacks adequate or appropriate warnings (a "warning defect"); or (3) the product has a defect that is the result of a problem in the manufacturing process (a "manufacturing defect").[51]

Indiana law also defines when a product may be considered "unreasonably dangerous" for purposes of the IPLA. A product is "unreasonably dangerous" only if its use "exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary consumer who purchases [it] with the ordinary knowledge about the product's characteristics common to the community of consumers."[52] A product is not unreasonably dangerous as a matter of law if it injures in a fashion that, by objective measure, is known to the community of persons consuming the product.[53]

---

49. IND. CODE § 34-20-4-1.

50. *See* Baker v. Heye-Am., 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003) ("[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous." (citing Cole v. Lantis Corp., 714 N.E.2d 194, 198 (Ind. Ct. App. 1999))).

51. *See* First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 689 (7th Cir. 2004); *Westchester Fire Ins. Co.*, 2006 WL 3147710, at *5; *Baker*, 799 N.E.2d at 1140; Natural Gas Odorizing, Inc. v. Downs, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997); *see also* Troutner v. Great Dane Ltd. P'ship, No. 2:05-CV-040-PRC, 2006 WL 2873430, at *3 (N.D. Ind. Oct. 5, 2006). Although claimants are free to assert any of the three theories for proving that a product is in a "defective condition," the IPLA provides explicit statutory guidelines identifying when products are not defective as a matter of law. Indiana Code section 34-20-4-3 provides that "[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA]." IND. CODE § 34-20-4-3; *see also* Hunt v. Unknown Chem. Mfr. No. One, No. IP 02-389CMS, WL 23101798, at *9-11 (S.D. Ind. Nov. 5, 2003). In addition, Indiana Code section 34-20-4-4 provides that "[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly." IND. CODE § 34-20-4-4.

52. IND. CODE. § 34-6-2-146; *see also Baker*, 799 N.E.2d at 1140; Cole v. Lantis Corp., 714 N.E.2d 194, 199 (Ind. Ct. App. 1999).

53. *See Baker*, 799 N.E.2d at 1140; *see also* Moss v. Crosman Corp., 136 F.3d 1169, 1174 (7th Cir. 1998) (finding that a product may be "dangerous" in the colloquial sense but not

In recent cases alleging improper design or inadequate warnings as the theory for proving that a product is in a "defective condition," courts have recognized that the substantive defect analysis (i.e., whether a design was inappropriate or a warning was inadequate) should follow a threshold analysis that first examines whether, in fact, the product at issue is "unreasonably dangerous."[54]

The IPLA imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness and retains strict liability (liability despite the "exercise of all reasonable care") only for those claims relying upon a manufacturing defect theory.[55] Despite the IPLA's unambiguous language and several years' worth of authority recognizing that "strict liability" applies only in cases involving alleged manufacturing defects, some courts unfortunately continue to employ the term "strict liability" when referring generally to IPLA claims. Courts have discussed strict liability even when those claims allege warning and design defects and clearly accrued after the 1995 IPLA amendments took effect.[56] The IPLA makes clear that, just as in any other negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements: duty, breach, injury, and causation.[57]

"unreasonably dangerous" for purposes of IPLA liability). An open and obvious danger negates liability: "'To be unreasonably dangerous, a defective condition must be hidden or concealed.' Thus, 'evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff's prima facie case that the defect was hidden.'" Hughes v. Battenfeld Glouchester Eng'g Co., No. TH-01-0237-C-T/H, 2003 WL 22247195, at *2 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 199 (internal citations omitted)).

54. *See* Conley v. Lift-All Co., No. 1:03-cv-1200-DFH-TAB, 2005 WL 1799505, at *6 (S.D. Ind. July 25, 2005) (involving an alleged warning defect); Bourne v. Marty Gilman, Inc., No. 1:03-CV-01375-DFH-VSS, 2005 WL 1703201, at *3-7 (S.D. Ind. July 20, 2005), *aff'd*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect).

55. *See* Mesman v. Crane Pro Servs., 409 F.3d 846, 849 (2005); *Inlow II*, 378 F.3d at 689 n.4; *Conley*, 2005 WL 1799505, at *6; *Bourne*, 2005 WL 1703201, at *3; *see also* Miller v. Honeywell Int'l, Inc., No. 107 F. App'x 643, 645-46 (7th Cir. 2004); Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); Birch *ex rel.* Birch v. Midwest Garage Door Sys., 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

56. *See, e.g.*, Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995); Fellner v. Phila. Toboggan Coasters, Inc., No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068, at *1, *3-4 (S.D. Ind. Aug. 2, 2006); Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc., No. 4:05 CV 49, 2006 WL 299064, at *2-3 (N.D. Ind. Feb. 7, 2006); *Burt*, 212 F. Supp. 2d at 899-900; Vaughn v. Daniels Co. (W. Va.), 841 N.E.2d 1133, 1138-39 (Ind. 2006).

57. The 2009 Indiana Supreme Court decision in *Kovach v. Caligor Midwest*, 913 N.E.2d 193 (Ind. 2009), articulates very well the concept that plaintiffs must establish all negligence elements, including causation, as a matter of law in a product liability case to survive summary disposition. *See also* Kucik v. Yamaha Motor Corp., U.S.A., No. 2:08-CV-161-TS, 2010 WL 2694962, at *9 (N.D. Ind. July 2, 2010) (granting summary judgment because the plaintiff failed to demonstrate that a motorcycle contained a manufacturing or design defect that proximately caused the accident at issue or the plaintiff's injuries); *Conley*, 2005 WL 1799505, at *13-14; *see also* Alberts et al.,

There were two key cases decided during the 2011 survey period dealing with concepts of unreasonable danger and causation in the context of the IPLA. The first case, *Price v. Kuchaes*,[58] involved a legal malpractice claim that arose because the statute of limitations expired on a husband's state-law loss of consortium claim while his wife's underlying personal injury claim was pending in the federal court.[59] In order for the husband to prove that his former attorney committed malpractice, he first had to demonstrate that he would have achieved a favorable outcome with respect to the product liability claims against the vaccine manufacturers.[60] The husband had to prove, among other things that the vaccine administered to his wife was defective and unreasonably dangerous, and that a defect in the vaccine proximately caused his wife's injury.[61] The trial court held that the husband failed to meet his proof of burden under Indiana law and granted summary judgment.[62]

On appeal, the husband argued first that a Missouri decision[63] should be applied to compel a finding that the vaccine at issue was defective and

---

2010 Developments, *supra* note 4, at 1381.

58. 950 N.E.2d 1218 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 650 (Ind. 2011).

59. Price's wife contracted polio after she came in contact with a child recently vaccinated against the disease. Initially, Price and his wife sued the manufacturers of the polio vaccine in Indiana state court. *Id.* at 1222. After receiving a letter from the manager of the vaccine manufacturer's legal department, the Prices voluntarily dismissed their state court claims and re-filed them in the U.S. Court of Federal Claims after being informed that polio vaccine compensation claims had to be brought pursuant to the National Childhood Vaccine Injury Act, Pub. L. No. 99-660, § 301, 100 Stat. 3743 (1986). *Price*, 950 N.E.2d at 1222. Although his wife obtained a judgment in her underlying federal court action, Price had to dismiss his consortium claim after litigating it for five years because it was not compensable under the Vaccine Act. *Id.* Three days after voluntarily dismissing his claims in the Court of Federal Claims, Price reinstated his Indiana state court suit to pursue the consortium claims. *Id.* In the interim, the statute of limitations for the product liability based claims against the vaccine manufacturers had expired and summary judgment was eventually granted in favor of the vaccine manufacturers. *Id.* at 1222-24. The procedural history of the underlying suit has been omitted as these details are not germane to the resolution of the product liability issues discussed in the subsequent, malpractice case digested here. See *Price v. Wyeth Holdings Corp.*, 505 F.3d 624 (7th Cir. 2007), for a complete discussion and analysis of the procedural history of the underlying suit against the product manufacturers. Thereafter, Price filed suit against the attorney who represented him claiming the attorney had committed malpractice by mishandling his consortium claims against the manufacturers of the polio vaccine that had injured his spouse. *Price*, 950 N.E.2d at 1223. Motions for summary judgment and cross summary judgment were filed and the lower court granted Price's motion, finding Price's former attorney had committed malpractice. *Id*. at 1224-25.

60. *Price*, 950 N.E.2d at 1230-31.

61. *Id.* at 1232.

62. *Id.* at 1233.

63. In *Strong v. American Cyanamid Co.*, 261 S.W.3d 493 (Mo. Ct. App. 2007), the court determined that there was sufficient evidence to affirm a jury verdict against the same vaccine manufacturer that its polio vaccine was defective.

unreasonably dangerous.[64] The Indiana Court of Appeals in *Price* refused to apply the Missouri decision to require such a result under Indiana law because the parties were not identical, and there was no evidence in the record that the lot of the virus at issue in the Missouri decision was the same.[65] The husband also argued that summary judgment was improper because there was conflicting expert witness testimony.[66] Indeed, the husband's expert opined that the vaccine was defective and unreasonably dangerous to persons coming into contact with its recipients.[67] The vaccine manufacturers designated a competing expert, who believed that the vaccine was not defective and unreasonably dangerous because it was manufactured, tested, released and sold in a manner consistent with all applicable federal standards and regulations.[68] The *Price* court pointed out that neither the husband nor the manufactures had designated any evidence establishing that a defect in the vaccine proximately caused his spouse's injury, but neither had the manufacturers designated any evidence that a defect in the vaccine was *not* a proximate cause of his wife's injury.[69] Because there was conflicting evidence that the vaccine was defective and unreasonably dangerous and whether any such defect caused the wife's vaccine injury, the court reversed the summary judgment and remanded the case to the trial court.[70]

In the second case, *Roberts v. Menard, Inc*,[71] the plaintiff decided to ride his motorcycle through a cart corral in the parking lot of a Menard's store. The plaintiff was injured when he struck a horizontal metal bar attached across the end of the corral, and he subsequently sued the premises owner and the manufacturer of the cart corral.[72] A "human factors" opinion witness offered the view that it was reasonably foreseeable that people would "walk, run, skateboard, rollerblade or ride motorcycles or bicycles through the cart corral"[73] and that its design was unreasonably dangerous.[74]

The court concluded that there was no evidence that either the unassembled

---

64. *Price*, 950 N.E.2d at 1232.

65. *Id.* at 1232-33.

66. *Id.*

67. *Id.*

68. *Id.* (citing Indiana Code section 34-20-5-1, which provides a rebuttable presumption that a produce is not defective if, when sold, it complies with applicable federal or state standards or regulations).

69. *Id.*

70. *Id.* at 1233-34, 1236.

71. No. 4:09-CV-59-PRC, 2011 WL 1576896 (N.D. Ind. Apr. 25, 2011).

72. *Id.* at *1, *8.

73. *Id.* at *4. A significant portion of the district court's opinion analyzes the qualifications, reliability and relevance of Robert's proffered expert's opinions. *Id.* at *1-6. The court ultimately struck the expert's opinions because, despite his lengthy credentials, his expertise was not in the area of parking lots, cart corrals, motorcycles or consumer expectations in parking lots and/or related to cart corrals. *Id.* at *2-3. Further, his testimony was unreliable because he had not performed an appropriate level of testing and analysis. *Id.* at *4-6.

74. *Id.* at *4, *14.

or the assembled version of the cart corral was defective or unreasonably dangerous.[75] The court first recognized that the unassembled cart corral frame was in no way dangerous when it left the manufacturer's possession or that the unassembled cart corral exposed anyone to greater risk of physical harm than an ordinary cart corral user would be exposed.[76] Once assembled, the court likewise determined that the cart corral was neither dangerous nor defective.[77] Moreover, the court pointed out that the plaintiff was injured by using the cart corral in a manner and for a purpose not reasonably foreseeable as a matter of law.[78] The cart corral's purpose was to store used carts in a parking lot.[79] It was wholly contained within a parking space, and driving a motorcycle through it was not a normal or predictable way for it to be used.[80] In addition, because driving a motorcycle through the cart corral is not an intended or normal use, the manufacturer owed no duty to warn about the dangers of riding a motorcycle through it.[81]

We now address in detail a few cases in which plaintiffs attempted to demonstrate that products were defective and unreasonably dangerous by utilizing warning, design, and manufacturing defect theories.

1. Warning Defect Theory.—The IPLA contains a specific statutory provision covering the warning defect theory, which reads as follows:

> A product is defective . . . if the seller fails to:
>
> (1) properly package or label the product to give reasonable warnings of danger about the product; or
> (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.[82]

In failure to warn cases, the "unreasonably dangerous" inquiry is essentially the same as the requirement that the product's danger or its alleged defect be latent or hidden for that cause of action to attach.[83]

During the survey period, federal and state courts in Indiana addressed a

---

75. *Id.* at *14.

76. *Id.*

77. *Id.* at *15.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. IND. CODE § 34-20-4-2 (2011); *see also* Deaton v. Robison, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007) (noting the standard for proving a warning defect case); Coffman v. PSI Energy, Inc., 815 N.E.2d 522, 527 (Ind. Ct. App. 2004) (noting the standard for proving a warning defect case).

83. *See* First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 690 n.5 (7th Cir. 2004). For a more detailed analysis of *Inlow II*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1222-27 (2005).

number of cases that involved issues relating to allegedly defective warnings and instructions.[84] Three of those cases, *Schork v. Baxter Healthcare Corp.*,[85] *McGookin v. Guidant Corp.*,[86] and *James v. Diva International, Inc.*,[87] merit special attention because they addressed the recurring question of when federal law expressly or impliedly preempts state law. Two of them, *McGookin* and *James*, involved medical devices that were approved and registered by the federal Food and Drug Administration pursuant to the Medical Device Amendments of 1976 to the Food, Drug, and Cosmetic Act. Although the court in *McGookin* applied the statute's express preemption clause while the court in *James* did not, both courts appear to have reached the appropriate conclusions because the products under consideration in each case were registered and approved pursuant to different classifications and categories of regulation.[88]

We begin, however, with the U.S. Supreme Court's decision in *PLIVA, Inc. v. Mensing*.[89] In *PLIVA*, a sharply divided Court decided an implied conflict preemption case that may have broad implications in any case involving products that are subject to federal statutory or regulatory approval and control. The plaintiffs claimed that their long term use of metoclopramide, a generic form of the brand-name drug Reglan, caused them to develop tardive dyskinesia, a severe neurological disorder. Plaintiffs sued the generic manufacturers, claiming "that 'despite mounting evidence that long term metoclopramide use carries a risk of tardive dyskinesia far greater than that indicated on the label,' none of the manufacturers had changed their labels to adequately warn of that danger."[90]

Under the 1984 Drug Price Competition and Patent Term Restoration Act (commonly called the Hatch-Waxman Amendments), which amended the 1962 Drug Amendments to the Federal Food, Drug and Cosmetic Act,"[a] manufacturer seeking generic drug approval . . . is responsible for ensuring that its warning label is the same as the brand name's."[91] Generic manufacturers

---

84. *See, e.g.*, Colter v. Rockwell Automation Inc., No. 3:08-CV-527 JVB, 2010 WL 3894560 (N.D. Ind. Sept. 29, 2010); Gardner v. Tristar Sporting Arms, Ltd., No. 1:09-cv-0671-TWP-WGH, 2010 WL 3724190 (S.D. Ind. Sept. 15, 2010); Lapsley v. Xtek, Inc., No. 2:05-CV-174 JVB, 2010 WL 1189809 (S.D. Ind. Mar. 23, 2010); Meharg v. Iflow Corp., No. 1:08-cv-184-WTL-TAB, 2010 WL 711317 (S.D. Ind. Mar. 1, 2010); *see also* Alberts & Boyers, *supra* note 18, at 1183-85; Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L. REV. 1247, 1262-64 (2004); Alberts & Petersen, *supra* note 15, at 1028-33; Alberts et al., *2009 Developments*, *supra* note 15, at 881-82, 893-96; Alberts et al., *2008 Developments*, *supra* note 23, at 1110-14 & 1114-18; Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 41 IND. L. REV. 1165, 1184-87 (2008) [hereinafter Alberts et al., *2007 Developments*].

85. No. 4:10-cv-00005-RLY-WGH, 2011 WL 4402602 (S.D. Ind. Sept. 22, 2011).

86. 942 N.E.2d 831 (Ind. Ct. App. 2011).

87. 803 F. Supp. 2d 945 (S.D. Ind. 2011).

88. *See id.* at 947; *McGookin*, 942 N.E.2d at 833-34.

89. 131 S. Ct. 2567, *reh'g denied*, 132 S. Ct. 55 (2011).

90. *Id.* at 2573 (citations omitted).

91. *Id.* at 2574 (citations omitted).

could request the FDA to impose stronger warnings on the brand name label which, if implemented, would allow generic manufacturers to adopt in their own generic drug labeling, but they could not unilaterally or voluntarily adopt stronger warnings absent the FDA's permission.[92]

The Court noted that this limitation creates an impossible position for the manufacturers because compliance of their duty under state law would cause a violation under federal law and vice versa.[93] And, importantly, the Court held that the plaintiffs could not attempt to rebut the preemptive conflict by arguing that a manufacturer first must prove that it tried to obtain federal agency approval to make the label changes state law required and that the agency rejected that effort.[94] The Court's ultimate holding was:

> Before the [m]anufacturers could satisfy state law, the FDA—a federal agency—had to undertake special effort permitting them to do so. To decide these cases, it is enough to hold that when a party cannot satisfy its state duties without the [f]ederal [g]overnment's special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes.
>
> Here, state law imposed a duty on the [m]anufacturers to take a certain action, and federal law barred them from taking that action. The only action the [m]anufacturers could independently take—asking for the FDA's help—is not a matter of state-law concern. Mensing and Demahy's tort claims are pre-empted.[95]

Also important is that the *PLIVA* Court implicitly rejected the lower court's holding that the manufacturers could have simultaneously and voluntarily complied with both their federal and state law duties simply by stopping the sale of their products.[96] The plaintiffs petitioned for rehearing because the lower court did not address this theory, but their petition was summarily denied.[97] Thus, plaintiffs' "duty to stop sales" theory was preempted as well.[98]

The conclusion that the majority's decision is revolutionary, not merely evolutionary, is punctuated by Justice Sotomayor's four-vote dissent complaining that "[i]t invents new principles of pre-emption law out of thin air[,] rewrites our decision in *Wyeth v. Levine*,[99] [and] tosses aside our repeated admonition that courts should hesitate to conclude that Congress intended to pre-empt state laws

---

92. *Id.* at 2576-77.

93. *Id.* at 2578.

94. *Id.* at 2578-79.

95. *Id.* at 2580-81.

96. *Id.* at 2582.

97. 132 S. Ct. 55 (2011).

98. *See PLIVA*, 131 S. Ct. 2567; *see also* Fullington v. PLIVA, Inc., No. 4:10CV00236 JLH, 2011 WL 6153608, at *6 (E.D. Ark. Dec. 12, 2011); Gross v. Pfizer, Inc., 825 F. Supp. 2d 654, 659 (D. Md. 2011), *reh'g denied*.

99. 555 U.S. 555 (2009).

governing health and safety."[100]

Therefore, where a manufacturer must first obtain federal regulatory permission before altering a product's warnings, design, chemical composition or method of manufacture, *PLIVA* teaches that any state law duty to make any such product-related change to avoid liability is impliedly preempted if in conflict with federal law.

Shortly after *PLIVA* was decided, it was applied in an Indiana federal court case, *Schork v. Baxter Healthcare Corp.*[101] The plaintiff alleged that she was injured when she was given an injection of a generic version of Phenergan, allegedly manufactured by Baxter, and she sued Baxter for failure to warn.[102] Baxter filed a motion for summary judgment on two grounds. First, Baxter argued that plaintiff had no evidence that the generic Phenergan administered to her was made by Baxter, rather than by some other generic manufacturer.[103] Second, Baxter argued that despite the fact that failure to warn claims against brand name drug manufacturers were not impliedly preempted by conflict with federal law under the U.S. Supreme Court's decision in *Wyeth v. Levine*, which, coincidentally, involved brand name Phenergan and its manufacturer, all such claims against generic drug manufacturers were impliedly preempted nevertheless, an issue the *Wyeth* court did not address.[104]

The district court agreed with Baxter that the plaintiff was required by Indiana law to identify Baxter as the manufacturer of the accused product, but held that the plaintiff had produced sufficient evidence to create a jury question on that point.[105] On the preemption question, *PLIVA* was decided while Baxter's motion was pending and the district court held that it answered the question which *Wyeth* had not addressed.[106] Accordingly, the district court held that plaintiffs' failure to warn claims against Baxter, a manufacturer of generic Phenergan, were impliedly preempted according to *PLIVA*'s holdings, even though the same state law claims against brand name Phenergan and its manufacturer would not be impliedly preempted under *Wyeth*.[107]

In *McGookin*, Samantha McGookin was born with a heart disorder known as a complete heart block.[108] Three days after she was born, her doctors implanted a Guidant pacemaker to regulate her heartbeat.[109] The Guidant pacemaker was registered and approved by the FDA as a Class III medical device, the class of medical devices that receive the most stringent federal oversight and that must

---

100. *PLIVA*, 131 S. Ct. at 2582-83 (Sotomayor, J., dissenting).

101. No. 4:10-cv-00005-RLY-WGH, 2011 WL 4402602 (S.D. Ind. Sept. 22, 2011).

102. *Id.* at *2.

103. *Id.*

104. *Id.* at *2-3.

105. *Id.* at *3.

106. *Id.*

107. *Id.*

108. McGookin v. Guidant Corp., 942 N.E.2d 831, 833 (Ind. Ct. App. 2011).

109. *Id.*

survive a rigorous premarket approval process.[110]

Samantha died at the age of only fourteen months, and her parents sued Guidant under the IPLA along with a number of other theories.[111] After a partial summary judgment based upon the express preemption clause in the Medical Device Amendments of 1976 (MDA), followed by a jury verdict in Guidant's favor, her parents argued on appeal that Guidant could have voluntarily strengthened the warnings and precautions on the pacemaker's FDA-approved label without prior FDA approval. Because of this, they claimed the trial court erred in granting partial summary judgment applying the MDA's express preemption clause.[112]

In response to the plaintiff's claim that Guidant should be liable for its failure to add warnings that are permitted, but not required, by federal law,[113] the *McGookin* court relied on the U.S. Supreme Court's recent MDA express preemption decision in *Riegel v. Medtronic, Inc.*,[114] in noting that "[w]e cannot imagine a plainer example of an attempt to impose a standard of care in addition to the FDA's specific federal requirements."[115] The court, therefore, concluded that the trial court "properly held" that the parents' claims are preempted.[116]

In *James v. Diva International, Inc.*, the plaintiff claimed that her use of a menstrual product, the DivaCup®, caused her to develop toxic shock syndrome.[117] Unlike the Class III pacemaker considered in *McGookin*, the DivaCup® was registered and classified as a Class II medical device.[118] Moreover, the DivaCup® was registered through section 510(k) of the MDA, which requires the manufacturer to demonstrate to the FDA only that the produce is substantially equivalent in design and function to a preexisting device on the market prior to the effective date of the MDA.[119] Thus, the DivaCup® was registered and approved without being subject to the rigorous premarket approval process applicable to genuinely new medical devices that are generally applicable to Class III devices.[120]

The district court held that the regulations and FDA requirements applicable to the DivaCup® are of general applicability to all such devices and are insufficiently device-specific to trigger the MDA's express preemption clause.[121] Because there were no "special controls, performance standards, post-market surveillance, or guidelines" applicable to the particular device at issue, the court

---

110. *Id.* at 832, 835.
111. *Id.* at 833.
112. *Id.* at 835.
113. *Id.* at 838.
114. 522 U.S. 312 (2008).
115. *McGookin*, 942 N.E.2d at 838.
116. *Id.*
117. James v. Diva Int'l, Inc., 803 F. Supp. 2d 945, 946-47 (S.D. Ind. 2011).
118. *Id.* at 947.
119. *Id.*
120. *Id.*
121. *Id.* at 951.

refused to preempt the claim.[122]

2. Design Defect Theory.—State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.[123] During the 2011 Survey period, the Indiana Supreme Court once again reminded Indiana practitioners in *Green v. Ford Motor Co.*,[124] that Indiana recognizes a specific kind of design defect claim in the so-called "crashworthiness" context.[125] The crashworthiness doctrine[126] recognizes that because vehicle collisions are inevitable,[127] vehicle manufacturers must take care in designing a vehicle so as to not subject the user to an unreasonable risk of injury during a collision.[128] The doctrine expands the notion of proximate cause and allows a user to recover for injuries sustained in a collision that were caused or enhanced by a design defect in the vehicle, even though the design defect may not or did not cause the initial collision.[129]

In the design defect context, there is a lingering issue in the wake of the Indiana Supreme Court's decision in *TRW Vehicle Safety Systems, Inc. v. Moore*.[130] Although the *Moore* case was addressed in detail in last year's survey article,[131] that lingering issue merits a closer look here. The *Moore* decision recognizes that plaintiffs making substantive design defect allegations in Indiana are required to prove that "the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product."[132] Such a standard

---

122. *Id.* at 952.

123. *See, e.g.*, Mesman v. Crane Pro Servs., 512 F.3d 352 (7th Cir. 2008); Bourne v. Marty Gilman, Inc.,452 F.3d 632 (7th Cir. 2006); Myers v. Briggs & Stratton Corp., No. 1:09-cv-0020-SEB-TAB, 2010 WL 1579676 (S.D. Ind. Apr. 16, 2010); Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc., No. 2:03-CV-178-TS, 2006 WL 3147710 (N.D. Ind. Oct. 31, 2006); TRW Vehicle Safety Sys., Inc. v. Moore, 936 N.E.2d 201 (Ind. 2010); Fueger v. CNH Am. LLC, 893 N.E.2d 330 (Ind. Ct. App. 2008); Lytle v. Ford Motor Co., 814 N.E.2d 301 (Ind. Ct. App. 2004); Baker v. Heye-Am, 799 N.E.2d 1135 (Ind. Ct. App. 2003).

124. 942 N.E.2d 791 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 521 (June 20, 2011).

125. *Id.* at 795-96.

126. The Eighth Circuit Court of Appeals first enunciated the "crashworthiness doctrine" in *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968).

127. Stated differently, because statistically a certain number of motor vehicle collisions will occur, collisions are included in the expected use of a vehicle. *Green*, 942 N.E.2d at 793 (citing Miller v. Todd, 551 N.E.2d 1139, 1142 (Ind. 1990)).

128. *Id.* (citing *Larsen*, 391 F.2d at 503).

129. *Id.* (citing *Miller*, 551 N.E.2d at 1142); *see also* Montgomery Ward & Co. v. Gregg, 554 N.E.2d 1145, 1154 (Ind. Ct. App. 1990).

130. 936 N.E.2d 201 (Ind. 2010).

131. *See* Alberts et al., *2010 Developments*, *supra* note 4, at 1391-96. The 2009 survey article addressed the Indiana Court of Appeals decision in the same case, though there it was styled *Ford Motor Co. v. Moore*, 905 N.E.2d 418 (Ind. Ct. App. 2009), *rev'd in part*, 936 N.E.2d 201 (Ind. 2010). *See* Alberts et al., *2009 Developments*, *supra* note 15, at 899.

132. *TRW*, 936 N.E.2d at 209. Recall, however, that in cases alleging improper design to prove that a product is in a "defective condition," the substantive defect analysis may need to

merely repeats the statutory language of Indiana Code section 34-20-2-2. Curiously, the *Moore* court refused to specifically delineate additional proof requirements in design defect cases despite the fact that several recent decisions by federal courts interpreting Indiana law have required that plaintiffs espousing a design defect theory must demonstrate that another design not only could have prevented the injury, but was effective, safer, more practicable, and more cost-effective than the one at issue.[133] On that point, one panel of the Seventh Circuit (Judge Easterbrook writing) described "a design-defect claim in Indiana [as] a negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents."[134] Phrased in a slightly different way, "[t]he [p]laintiff bears the burden of proving a design to be unreasonable, and must do so by showing there are other safer alternatives, and that the costs and benefits of the safer design make it unreasonable to use the less safe design."[135]

In *Moore*, the court did not require proof of "any additional or more particular standard of care in product liability actions alleging a design defect," other than that quoted above in Indiana Code section 34-20-2-2.[136] The *Moore* court justifies its pronouncement in a footnote by pointing out that the American Law Institute's *Restatement (Third) of Torts* utilizes a variation of the alternative design model adopted by the Seventh Circuit as described above and the Indiana General Assembly did not specifically articulate such an "analytical framework" in the IPLA.[137] That line of thinking is interesting because five years earlier in *Schultz v. Ford Motor Co.*[138] the Indiana Supreme Court openly endorsed a description of the design defect standard that included proof of a feasible alternative.[139]

---

follow a threshold "unreasonably dangerous" analysis if one is appropriate. *See, e.g.*, Bourne v. Marty Gilman, Inc., No. 1:03-CV-01375-DFH-VSS, 2005 WL 1703201, at *3-7 (S.D. Ind. July 20, 2005), *aff'd*, 452 F.3d 632 (7th Cir. 2006).

133. *See* Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995); Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

134. McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 657 (7th Cir. 1998).

135. Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc., No. 2:03 CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006) (citing *Bourne*, 452 F.3d at 638). Another recent Seventh Circuit case postulated that a design defect claim under the IPLA requires applying the classic formulation of negligence: B [burden of avoiding the accident] < P [probability of the accident that the precaution would have prevented] multiplied by L [loss that the accident, if it occurred, would cause]. *See Bourne*, 452 F.3d at 637; *see also* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (explaining Judge Learned Hand's articulation of the "B < PL" negligence formula).

136. *TRW*, 936 N.E.2d at 209.

137. *Id.* at 209 n.2.

138. 857 N.E.2d 977 (Ind. 2006).

139. *Id.* at 985 n.12. There, the *Schultz* court cited with approval the summary of Indiana's proof requirements in design defect cases that was set forth in the 2006 product liability survey. *See* Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 39

Although the *Moore* court declined to do anything but recite the statutory language in Indiana Code section 34-20-2-2 when it comes to the proof required in design defect claims, the feasibility of an alternative design is implicit in the very statutory language that the *Moore* court cited. As addressed in detail in previous sections of this Survey, plaintiffs in an Indiana product liability case asserting a design defect must first show that the alleged defect in design caused the product to be unreasonably dangerous. They then must prove by a preponderance of the evidence that the product's manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product. Indiana courts have long recognized that the concept of an alternative design is central to that analysis. Moreover, Indiana courts have also long recognized that a plaintiff pursuing a design defect theory must prove that a manufacturer using reasonable care would have designed the product differently, that the different or alternative design would have eliminated the defect, and that the defect-eliminating alternative design would have reduced the product's risks below the "unreasonably dangerous" threshold.

Therefore, it is clear that a plaintiff attempting to prove a design defect claim under the IPLA must, in practical reality, prove a defect-eliminating alternative design. Otherwise, the IPLA would be read to reinstate the doctrine of strict liability for design defects and the IPLA clearly does not contemplate that. Indeed, the statute was drafted with the express purpose of replacing that obsolete doctrine in design defect theory cases with a negligence-based rule of reasonableness. Further, because the rule is one of reasonableness, the manufacturer's design decisions are on trial and the reasonableness of those design decisions must be measured against objective standards that necessarily involve the concept of "feasibility," such as how much an alternative design would cost, whether that alternative design would effectively perform the manufacturer's intended function and/or maintain the manufacturer's intended utility, and whether that alternative design would be accepted as a viable substitute in the relevant market.

In the final analysis, it would make little sense for practitioners or judges to read *Moore* as to require the fact-finder to disregard the feasibility of an alternative design in determining whether a manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product. Indeed, there is nothing in the IPLA or in the General Assembly's decision not to engraft portions of the *Restatement (Third) of Torts* that suggests it would be fair or appropriate to preclude a manufacturer or seller from offering evidence of

---

IND. L. REV. 1145 (2006). That article summarized those design defect proof requirements as follows:

> Decisions that address substantive design defect allegations in Indiana require plaintiffs to prove the existence of what practitioners and judges often refer to as a 'safer, feasible alternative' design. Plaintiffs must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.

Id. at 1158 (citations omitted).

the feasibility of alternative designs from an economic or efficacy standpoint in its effort to convince the fact-finder that its design was, in fact, reasonable under the circumstances.

3. Manufacturing Defect Theory.—There have been a handful of important manufacturing defect decisions in recent years,[140] but none during the 2011 survey period.

E. Regardless of the Substantive Legal Theory

Indiana Code section 34-20-1-1 provides that the IPLA "governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought*."[141] At the same time, however, Indiana Code section 34-20-1-2 provides that the IPLA "shall not be construed to limit any other action from being brought against a seller of a product."[142]

The IPLA is quite clear that for its purposes, "physical harm" means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property."[143] The definition of physical harm "does not include gradual property damage to property or economic losses from such damage."[144] Thus, reading the statutory language along with the relevant definitions, the Indiana General Assembly appears to have intended the IPLA to provide the exclusive remedy against an entity that the IPLA defines to be a product's "manufacturer" or a "seller" by a "user" or "consumer" of a product when that product has caused sudden and major damage to property, personal injury, or death.

The Indiana General Assembly seemingly has carved out an exception to the IPLA's exclusive remedy only when the defendant otherwise fits the definition of a "seller" under the IPLA[145] and when the type of harm suffered by the

---

140. *See, e.g.*, Gardner v. Tristar Sporting Arms, Ltd., No. 1:09-cv-0671-TWP-WGH, 2010 WL 3724190, at *4 (S.D. Ind. Sept. 15, 2010); Campbell v. Supervalu, Inc., 565 F. Supp. 2d 969, 980-81 (N.D. Ind. 2008) (holding that evidence was insufficient as a matter of law to allow jury to decide whether ground beef purchased at a local grocery store caused child's *E. coli* poisoning). For a more detailed discussion about *Campbell* in the manufacturing defect context, see Alberts et al., *2008 Developments*, *supra* note 23, at 1135-39; *see also* Gaskin v. Sharp Elec. Corp., No. 2:05-CV-303, 2007 WL 2819660 (N.D. Ind. Sept. 26, 2007) (addressing substantive issues raised in the context of an alleged manufacturing defect). For a detailed analysis of *Gaskin*, see Alberts et al., *2007 Developments*, *supra* note 84, at 1176-80.

141. IND. CODE § 34-20-1-1 (2011) (emphasis added).

142. *Id.* § 34-20-1-2.

143. *Id.* § 34-6-2-105(a).

144. *Id.* § 34-6-2-105(b).

145. Recall that for purposes of the IPLA, "'[m]anufacturer' . . . means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer." *Id.* § 34-6-2-

claimant is not sudden and major property damage, personal injury, or death.[146] Such theories of recovery appear to be the "other" actions the Indiana Code section 34-20-1-2 intended not to limit in the previous section, Indiana Code section 34-20-1-1. So what theories of recovery against "sellers" are intended by section 34-20-1-2 to escape the IPLA's exclusive remedy requirement?[147] The vast majority (if not all) of those claims would appear to consist of gradually-developing property damage and the type of economic losses typically authorized by the common law of contracts, warranty, or the Uniform Commercial Code (UCC). This seems like the logical interpretation of section 34-20-1-2 because this section seeks not to limit all "other" claims, which, by necessary implication, must mean all claims "other" than the ones identified in the previous section (claims for personal injury, death, and sudden, major property damage).[148]

Thus, when it comes to claims by users or consumers against manufacturers and sellers for physical harm caused by a product, the remedies provided by common law or the UCC should be "merged" into the IPLA-based cause of action.[149] Claims for economic losses or gradually developing property damage should not be merged into an IPLA claim so long as those actions are maintained

---

77(a). "'Seller' . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption." *Id.* § 34-6-2-136.

146. *See id.* § 34-20-1-2.

147. Indeed, the legal theories and claims to which Indiana Code section 34-20-1-2 appear to except from the IPLA's reach fall into one of three categories: (1) those that do not involve physical harm (i.e., economic losses that are otherwise covered by contract or warranty law); (2) those that do not involve a "product"; and (3) those that involve entities that are not "manufacturers" or "sellers" under the IPLA. *Id.* § 34-20-1-2.

148. Notwithstanding this conclusion, Indiana courts and some federal courts interpreting Indiana law have not interpreted the IPLA in that way. Indeed, the courts have allowed claimants in decisions such as *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), *Goines v. Federal Express Corp.*, No. 99-CV-4307-JPG, 2002 WL 338381, at *5-6 (S.D. Ill. Jan. 8, 2002); *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 784 (Ind. 2004), to pursue personal injury common law negligence claims against "sellers" outside the IPLA even when personal injuries were the only alleged harm. *Kennedy* allowed personal injury claims to proceed against the "seller" of a product under common law negligence and section 400 of the *Restatement (Second) of Torts*. *Kennedy*, 806 N.E.2d at 784. *Ritchie* allowed personal injury claims to proceed against the "seller" of a product under a negligence theory rooted in section 388 of the *Restatement (Second) of Torts*. *Ritchie*, 242 F.3d at 726-27. *Goines* allowed personal injury claims to proceed against the "seller" of a product under a common law negligence duty recognized by a 1993 Indiana decision. *Goines*, 200 WL 338381, at *5-6.

149. This concept is consistent with Indiana law insofar as Indiana courts have not allowed claims for economic losses to be merged into tort actions. Indeed, the economic loss doctrine precludes a claimant from maintaining a tort-based action against a defendant when the only loss sustained is an economic as opposed to a "physical" one. *See, e.g.*, Gunkel v. Renovations, Inc., 822 N.E.2d 150, 151 (Ind. 2005); Fleedwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492, 495-96 (Ind. 2001); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 488-89 (Ind. 2001).

against entities defined by the IPLA as "sellers."

Several recent Indiana cases have recognized that actions brought by users and consumers of products against manufacturers and sellers for physical harm caused by an allegedly defective product "merge" into the IPLA, and that the IPLA provides the exclusive remedy.[150] A trio of cases decided during the 2011 survey period continue that trend: *Atkinson v. P&G-Clairol, Inc.*,[151] *Hathaway v. Cintas Corporate Services*,[152] and *Ganahl v. Stryker Corp.*[153]

There have been some cases in recent years that have allowed personal injury common law negligence claims to proceed outside the scope of the IPLA, either because the plaintiff was not a "user" or "consumer" of a product, the defendant was not a "manufacturer" or a "seller" of a product, or because there was no "physical harm" as the IPLA defines those terms. In those cases, the particular facts presented essentially removed them from the IPLA's coverage in the first place, and there was, in effect, no real "merger" issue at all.[154]

---

150. *See* Myers v. Briggs & Stratton Corp., No. 1:09-cv-0020-SEB-TAB, 2010 WL 1579676 (S.D. Ind. Apr. 16, 2010); Ryan *ex rel.* Estate of Ryan v. Philip Morris USA, Inc., No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006); Fellner v. Phila. Toboggan Coasters, Inc., No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006); Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc., No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. 2006); N.H. Ins. Co. v. Farmer Boy AG, Inc., No. IP98-0030-C-T/G, 2001 WL 1385889 (S.D. Ind. Aug. 24, 2001).

151. 813 F. Supp. 2d 1021, 1025 (N.D. Ind. 2011) ("[T]he IPLA supplants breach of implied warranty claims" and "damage from a defective product . . . may be recoverable under a tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product . . . itself and purely economic loss arising from the failure of the product . . . to perform as expected.").

152. No. 1:10 CV 195, 2010 WL 4974117, at *1 (N.D. Ind. Dec. 1, 2010) (holding that the IPLA "supersedes" claims for breach of implied warranty of merchantability and implied warranty of fitness for a particular purpose).

153. No. 1:10-cv-1518-JMS-TAB, 2011 WL 693331, at *3 (S.D. Ind. Feb. 15, 2011) (choosing not to recognize plaintiffs' so-called "strict liability failure to warn" claim under Indiana law because a negligence standard applies to claims asserting a warning defect; Indiana law does not recognize separate "state-law negligence claims" in addition to an IPLA claim).

154. *See, e.g.*, Vaughn v. Daniels Co. (W. Va.), Inc., 841 N.E.2d 1133, 1141-42 (Ind. 2006) (allowing plaintiff's personal injury common law negligence claims after determining that Vaughn was not a "user" or "consumer" of the allegedly defective product, and therefore, the claims fell outside of the IPLA); Duncan v. M&M Auto Serv., Inc., 898 N.E.2d 338, 342-43 (Ind. Ct. App. 2008) (limiting allegations to negligent repair and maintenance of a product as opposed to a product defect); Dutchmen Mfg., Inc. v. Reynolds, 891 N.E.2d 1074, 1081 (Ind. Ct. App. 2008) (allowing plaintiff's personal injury "common law" negligence claim based upon section 388 of the *Restatement (Second) of Torts* after determining that the defendant was not a "manufacturer" or "seller" under the IPLA); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 426 (Ind. Ct. App. 2007) (allowing a common law public nuisance claim to proceed outside the scope of the IPLA because the harm at issue was not "physical" in the form of deaths or injuries suffered as a result of gun violence, but rather the increased availability or supply of handguns); Coffman v. PSI Energy, Inc., 815 N.E.2d 522, 536-37 (Ind. Ct. App. 2004) (allowing plaintiff's personal injury

There also have been a couple of peculiar decisions in recent years holding that claimants who have suffered sudden and major damage to property and/or personal injury nevertheless may maintain actions against product manufacturers and sellers based upon legal theories derived from authority outside the IPLA.[155] At least one of those decisions, however, is probably of limited value because the court relied on a case decided four years before the Indiana General Assembly enacted the 1995 amendments to the IPLA to add the "regardless of the substantive legal theory" language.[156]

II. FAULT ALLOCATION

Indiana Code section 34-20-8-1(a) provides that "[i]n a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with . . . [the Indiana Comparative Fault Act]."[157] The Indiana Comparative Fault Act (ICFA) requires the finder of fact in an action based upon fault to determine the percentage of fault of the claimant, the defendant, and any non-party.[158] To determine the percentage of fault," the ICFA states that the fact-finder must "consider the fault of all persons who caused or

---

common law negligence claims under section 392 of the *Restatement (Second) of Torts* after finding that the defendant at issue was neither a "manufacturer" nor a "seller" as the IPLA defines the terms).

155. Those decisions are *Deaton v. Robison*, 878 N.E.2d 499 (Ind. Ct. App. 2007), and *American International Insurance Co. v. Gastite*, No. 1:08-cv-1360-RLY-DML, 2009 WL 1383277 (S.D. Ind. May 14, 2009). The *Deaton* court held that liability could be imposed in a personal injury case against the manufacturer of an allegedly defective black powder rifle pursuant to both the IPLA and section 388 of the *Restatement (Second) of Torts*. *Deaton*, 878 N.E.2d at 501-03. In *Gastite*, the court refused to merge separate breach of express and implied warranty claims with IPLA-based claims against a manufacturer even though the harm suffered was property damage caused by a house fire. *Gastite*, 2009 WL 1383277, at *3-4. Both decisions, in effect, refused to "merge" the claims into the IPLA in factual situations clearly governed by the IPLA, thereby placing them at odds with cases such as *Myers*, *Ryan*, *Fellner*, *Cincinnati Insurance*, and *New Hampshire Insurance*.

156. In a footnote, the *Gastite* court wrote that "[a]lthough the IPLA provides a single cause of action for a user seeking to recover in tort from a manufacturer for harm caused by a defective product, a plaintiff may maintain a separate cause of action under a breach of warranty theory." *Gastite*, 2009 WL 1383277, at *3 n.1 (internal citation omitted) (citing Hitachi Constr. Mach. Co. v. AMAX Coal Co., 737 N.E.2d 460, 465 (Ind. Ct. App. 2000)). Reliance on *Hitachi* to support that point is tenuous at best, though, because the authority cited in *Hitachi* on that point is from 1991, four years before the Indiana General Assembly changed the law when it enacted the 1995 amendments to the IPLA to add the "regardless of the substantive legal theory" language. The case upon which the *Hitachi* panel relied is *B&B Paint Corp. v. Shrock Manufacturing, Inc.*, 568 N.E.2d 1017, 1020 (Ind. Ct. App. 1991).

157. IND. CODE § 34-20-8-1(a) (2011).

158. *Id.* § 34-51-2-7(b)(1).

contributed to cause the alleged injury."[159]

The Indiana Supreme Court issued a key decision during the 2011 survey period in the context of fault allocation in a crashworthiness design defect case. In *Green v. Ford Motor Co*.,[160] a 1999 Ford Explorer operated by plaintiff Green hit a guardrail and went off the road before rolling down an embankment and landing upside down.[161] Green sustained severe and permanent injuries in the collision.[162] Green claimed his injuries were substantially enhanced because of defects in the vehicle's restraint system.[163] Green filed suit in federal district court, and sought to exclude evidence of his own fault in the federal court proceedings.[164] According to the express statutory language of the IPLA,[165] Ford countered that the action was subject to comparative fault principles and, therefore, the fact-finder should consider Green's fault in causing the collision.[166] The federal district court requested, via the "certified question" process pursuant to Indiana Appellate Rule 64, that the Indiana Supreme Court provide guidance about how to resolve the issue, which was posed as follows: "Whether, in a crashworthiness case alleging enhanced injuries under the [IPLA], the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault relates to the cause of the underlying accident."[167]

After discussing the origin of the crashworthiness doctrine and acknowledging its intent to allow injured users to recover for physical injury when a defect in the design of the product did not cause the initial collision but rather enhanced the injuries the user sustained in the collision, the Indiana Supreme Court found two statutory schemes enacted by the General Assembly that led it to the conclusion that a plaintiff's fault must be considered.[168] First, earlier crashworthiness decisions were decided under common law or statutory product liability law that imposed strict liability and, when these earlier decisions were promulgated, contributory negligence was not available as a defense.[169] As a result, earlier decisions were not particularly helpful.[170] Second, product liability claims in Indiana are governed by the IPLA.[171] Since the 1995 amendments to the IPLA, product liability claims in Indiana are to be determined in accordance with comparative fault principles.[172]

---

159. *Id.*
160. 942 N.E.2d 791 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 521 (June 20, 2011).
161. *Id.* at 793.
162. *Id.*
163. *Id.*
164. *Id*.
165. IND. CODE § 34-20-8-1 (2011).
166. *Green*, 942 N.E.2d at 793.
167. *Id.* at 792.
168. *Id*. at 793-95.
169. *Id*. at 794.
170. *Id.*
171. *Id.*
172. *Id.*

The Indiana Supreme Court analyzed the language contained in the Indiana Comparative Fault Act[173] and the IPLA, concluding that Indiana's statutory scheme provides for a diverse array of factors to be considered in allocating comparative fault.[174] The IPLA and Indiana's Comparative Fault Act[175] define fault with expansive language, describing many forms of conduct which can and should be considered "fault."[176] "Both enactments require consideration of the fault of all persons 'who caused or contributed to cause' the harm."[177] Nonetheless, the legislature preserved the requirement of proximate cause to establish liability.[178] Consequently, the finder of fact must "consider and evaluate the conduct of all relevant actors" whom it is alleged caused or contributed to cause the harm, but the jury can only allocate comparative fault to those actors whose fault was also a proximate cause of the claimed injury.[179]

When a claimant limits his or her claim to "enhanced injuries" caused by a "second collision," the fact finder must consider evidence of all relevant fault-related conduct, which includes the fault of the plaintiff alleged to have contributed to cause the injuries.[180] The jury must then determine whether the claimant's fault was a proximate cause.[181] The Indiana Supreme Court, therefore, rewrote the originally-posed question, re-casting it as follows and answering it in the affirmative: "Whether, in a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault ~~relates to the~~ *is a proximate* cause of the ~~underlying accident~~ *harm for which damages are being sought*."[182]

The *Green* case is noteworthy because it makes clear that under both the IPLA and Indiana's Comparative Fault Act, a trier of fact is to consider a broad range of fault and allocate it when deciding whether a manufacturer will be held legally responsible for user's injury through an award of monetary damages. As provided in the express language in the IPLA, therefore, strict liability does not apply in Indiana product liability cases involving claims of design and warning defects.[183] These causes of actions are to be decided using Indiana's comparative fault scheme.[184]

---

173. IND. CODE § 34-6-2-45 (2011).

174. *Green*, 942 N.E.2d at 794-95.

175. IND. CODE § 34-20-8-1.

176. *Green*, 942 N.E.2d at 795.

177. *Id.* (citing IND. CODE §§ 34-20-8-1(a), 34-51-2-79(b)(1), and 34-51-2-8(b)(1)).

178. *Id.* (citing IND. CODE § 34-51-2-3 and *Techniques v. Johnson*, 762 N.E.2d 104, 109 (Ind. 2002)).

179. *Id.*

180. *Id.* at 795-96.

181. *Id.* at 796.

182. *Id.*

183. IND. CODE § 34-20-2-3.

184. *Green*, 942 N.E.2d at 796.

CONCLUSION

The 1995 and 1998 amendments to the IPLA have been in effect now for several years. The 2011 survey period has added a few more cases to what is becoming a fairly robust body of case law interpreting the current version of the IPLA. Although there are some issues about which courts continue to disagree, the statute and the case law have combined in most areas to provide Indiana judges and practitioners with a solid basis to guide their decisions, shape their arguments, and advise their clients.

SURVEY OF RECENT DEVELOPMENTS IN REAL PROPERTY LAW

CHARLES B. DAUGHERTY*
COLIN E. FLORA**

INTRODUCTION

This Article addresses recent developments in Indiana real property law by describing and analyzing Indiana Supreme Court and Indiana Court of Appeals cases handed down during the survey period.[1] Rather than relate an exhaustive list of all cases decided during the period, this Article highlights those cases most worthy of notation for legal professionals.

I. CONVEYANCES AND PURCHASE AGREEMENTS

A. Sales Disclosure Form

The survey period began with a monumental decision from the Indiana Court of Appeals which chose to abrogate portions of Indiana common law dating back to 1881.[2] In *Hizer v. Holt*, the court was asked to determine the relationship between the Sales Disclosure Form requirements set out in Indiana Code chapter 32-21-5 and the common law doctrine of caveat emptor.[3] Dating back to the 1881 Indiana Supreme Court decision in *Cagney v. Cuson*, Indiana law definitively "held that a purchaser has no right to rely upon the representations of the vendor as to the quality of the property, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities."[4]

The Hizers entered into an agreement to purchase the Holts' home in the summer of 2008.[5] At the closing, the Holts completed the Sales Disclosure Form required by Indiana Code section 32-21-5-7.[6] The Holts disclosed "that the microwave oven and ice maker in the refrigerator did not work."[7] The Hizers later discovered numerous problems with the home, including extensive mold

---

* Associate Attorney, McNeely Stephenson Thopy & Harrold, Shelbyville, Indiana. B.A., 2007 Purdue University; J.D., 2011, *summa cum laude*, Indiana University Robert H. McKinney School of Law.

** Associate Attorney, Pavlack Law LLC. B.A., 2008, *with high distinction*, Indiana University South Bend; J.D., 2011, *cum laude*, Indiana University Robert H. McKinney School of Law.

1. The survey period runs from October 1, 2010 to September 30, 2011.

2. *See* Hizer v. Holt, 937 N.E.2d 1 (Ind. Ct. App. 2010).

3. *Id.*

4. *Id.* at 4 (quoting Cagney v. Cuson, 77 Ind. 494, 497 (1881)) (internal quotations and further citations omitted).

5. *Id.* at 2.

6. *Id.*

7. *Id.*

and polybutal water supply pipes in the house that were subject to recall.[8] While seeking a quote for the mold problem, the Hizers contacted James Johnson, a home inspector hired by a prior prospective purchaser to inspect the Holts' home.[9] Johnson informed the Hizers that he had disclosed the mold problem and the polybutal pipes to the Holts at the time of his inspection. The Hizers filed a complaint against the Holts "alleging that the Holts had committed fraud in misrepresenting the condition of the house and breach of contract."[10] The trial court granted summary judgment in favor of the Holts on both counts and the Hizers appealed.[11]

On appeal, the court faced a dilemma—how to rectify the Sales Disclosure Form requirements with existing case law.[12] The court noted that earlier cases setting out the rule that a purchaser cannot rely upon a seller's representations where the purchaser has an opportunity to examine the property were the product of a time in which "Indiana was almost exclusively an agrarian state, and pertain[ed] to the quality of farm land."[13] The court also recognized that the state has become more urban with residential real estate transactions now including "unsophisticated" buyers.[14] It was in light of this shift in the Hoosier lifestyle that the court examined Indiana Code chapter 32-21-5.[15]

The Indiana Code requires that "sellers of certain residential real estate"[16] must provide prospective purchasers with a Sales Disclosure Form intended to "disclos[e] . . . the kinds of defects that will most significantly affect the value and use of a home."[17] The code also provides:

> The owner is *not liable* for any error, inaccuracy, or omission of any information required to be delivered to the prospective buyer under this chapter if:
> (1) the error, inaccuracy, or omission was not within the actual knowledge of the owner or was based on information provided by a public agency or by another person with a professional license or special knowledge who provided a written or oral report or opinion that the owner reasonably believed to be correct; and
> (2) the owner was not negligent in obtaining information from a third party and transmitting the information.[18]

---

8. *Id.* There were several other issues with the house but are not important to the holding.
9. *Id.*
10. *Id.* at 2-3.
11. *Id.* at 3.
12. *Id.* at 3-4.
13. *Id.* at 4.
14. *Id.*
15. *Id.*
16. *Id.* (quoting IND. CODE § 32-21-5-7(1) (2011)).
17. *Id.* (quoting Dickerson v. Strand, 904 N.E.2d 711, 717 (Ind. Ct. App. 2009) (Vaidik, J., dissenting)).
18. *Id.* at 5 (quoting IND. CODE § 32-21-5-11)).

Though Indiana Code has required a Sales Disclosure Form since 1993, in 2009 the Indiana Court of Appeals, in a 2-1 decision, held that the common law approach of the caveat emptor doctrine was still binding.[19] However, the majority in the *Dickerson v. Strand* opinion did not address the impact of Indiana Code chapter 32-21-5.[20] While the majority remained silent on the role of the Sales Disclosure Form, Judge Vaidik in her dissenting opinion determined that the "General Assembly 'expressly contemplated that the disclosure form statute would create liability for sellers under certain circumstances.'"[21]

The Indiana Court of Appeals, now with the issue of chapter 32-21-5 squarely before it, agreed with Judge Vaidik's dissent.[22] The court found no reason for the existence of the Sales Disclosure Form absent an intention to hold sellers liable for fraudulent misrepresentations.[23] As such, the court held that "chapter 32-21-5 abrogates any interpretation of the common law that might allow sellers to make written misrepresentations with impunity regarding the items that must be disclosed to the buyer on the Sales Disclosure Form."[24] In applying this new view of the law, the court reversed the grant of summary judgment and remanded the case to the trial court.[25]

Although it is natural to fear uncertainty about the present state of Indiana law, as the court of appeals reversed itself in just over a year, the matter appears now to be a fairly settled issue. *Hizer* provided the basis for two other decisions in the survey period and thus appears to be firmly entrenched.[26]

Hizer and its progeny were not the only development in chapter 32-21-5 case law.[27] The court of appeals also weighed in on a more technical aspect of the chapter's applicability. In *Breeden Revocable Trust v. Hoffmesiter-Repp*, the court, as a matter of first impression, sought to determine whether chapter 32-21-5 applies to transfers to a living trust.[28] The crux of the issue was that Indiana Code section 32-21-5-1(b) provides: "This chapter does not apply to the

---

19. *See id.* at 3-4, 6.

20. *Id.* at 7.

21. *Id.* (quoting *Dickerson*, 904 N.E.2d at 717 (Vaidik, J., dissenting)).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 8.

26. *See* Wise v. Hayes, 943 N.E.2d 835, 839-44 (Ind. Ct. App. 2011) (the majority opinion was authored by Judge Vaidik, whose dissenting opinion from *Dickerson* was adopted by the majority in *Hizer*, and was briefed prior to the decision in *Hizer*); Vanderwier v. Baker, 937 N.E.2d 396, 400-01 (Ind. Ct. App. 2010) (the majority opinion, like *Hizer*, was written by Judge Mathias and was decided only nineteen days after *Hizer*).

27. *See* Breeden Revocable Trust v. Hoffmeister-Repp, 941 N.E.2d 1045 (Ind. Ct. App. 2010).

28. *Id.* at 1050-52.

following: . . . (9) Transfers to a living trust."[29]

In *Hoffmesiter-Repp*, the purchaser, a living trust, contended that by plain meaning of the language in the statute chapter 32-21-5 did not apply to the seller.[30] The seller argued that the language of the statute was ambiguous and to find otherwise "would permit purchasers of Indiana real estate to avoid the terms of the statute simply by creating a living trust and having that trust act as the purchaser."[31] The court agreed with the seller and determined that the language of the statute was ambiguous.[32] Ultimately, the court settled upon an interpretation which would give meaning to the exception without permitting a gigantic loophole. The court held that the living trust exception "only applies when the transfer occurs between a seller and the seller's own living trust."[33]

B. Escrow

In addition to the Sales Disclosure Form cases, the Indiana Court of Appeals was required to conduct a foray into uncharted waters in the realm of escrows.[34] As an issue of first impression the court was asked to determine whether an escrow can be created absent an escrow agreement and fee.[35] In *Meridian Title Corp. v. Pilgrim Financing, LLC*, Meridian Title Corporation sought to overturn a decision in favor of Pilgrim Financing, finding Meridian liable for negligent failure to transmit the closing proceeds balance.[36] On appeal Meridian argued that it did not owe a duty to Pilgrim because there was no existing relationship between the parties that would impose such a duty.[37] Pilgrim contended that Meridian assumed a duty in escrow despite the lack of either an escrow agreement or an escrow fee.[38] In answering this issue, the court first looked to whether an escrow arrangement existed between the parties and second whether such an arrangement would impose "a duty between the parties to the escrow."[39]

To determine whether an escrow can be created absent an escrow agreement or fee, the court looked to the factual circumstances of prior cases.[40] Based on

---

29. *Id.* at 1050-51.

30. *Id.* at 1051. The Trust argued that the chapter did not apply so as to avoid the requirement of establishing that the seller had actual knowledge of any error or inaccuracy in the Sales Disclosure Form.

31. *Id.*

32. *Id.*

33. *Id.* at 1052.

34. *See* Meridian Title Corp. v. Pilgrim Fin., LLC, 947 N.E.2d 987, 990-93 (Ind. Ct. App. 2011).

35. *Id.*

36. *Id.* at 990.

37. *Id.* at 991.

38. *Id.*

39. *Id.*

40. *Id.*

an analysis of two prior cases,[41] the court determined that "Indiana has not traditionally required an escrow agreement or fee to establish an escrow, and we do not see a reason to adopt such a requirement here . . . ."[42] After determining that Indiana did not require an escrow agreement and fee to create an escrow, based on the specifics of the case, the court found that Meridian held an escrow on behalf of Pilgrim.[43]

In further expanding the realm of escrow case law, the court also determined that "parties to an escrow bear a duty towards one another to act with due care."[44] The court noted that in previous decisions it has been established that "one who assumes 'to act as a depositary in escrow occupies a fiduciary relationship to each of the parties.'"[45] Looking to other jurisdictions, the court determined that such duties "include the responsibilities to comply with the instructions of the principals and to exercise ordinary skill and diligence."[46] The court also held, in response to Meridian's argument, that an escrow holder can be an agent of both parties to the escrow.[47]

II. LAND USE

Land use encompasses a variety of topics. The more complex our society becomes, the more we look to land use controls to help shape our living arrangements. Because of the breadth of this topic, it has been divided and subdivided into several categories.

A. Servitudes

Indiana appellate courts decided only a handful of cases dealing with servitudes during the survey period. None of the decisions radically moved Indiana law in a new direction, but a few are worthy of brief attention.

1. Covenants.—In *City of Indianapolis v. Kahlo*,[48] the Indiana Court of Appeals, interpreting restrictive covenants contained in a project agreement for

---

41. *See* Freeland v. Charnley, 80 Ind. 132 (1881); Yost v. Miller, 129 N.E. 487, 488 (Ind. App. 1921).

42. *Meridian*, 947 N.E.2d at 992.

43. *Id.*

44. *Id.*

45. *Id.* (quoting *In re* Marriage of Glendenning, 684 N.E.2d 1175, 1178 (Ind. Ct. App. 1997)).

46. *Id.* (citing Webster v. US Life Title Co., 598 P.2d 108 (Ariz. Ct. App. 1979); Kirk Corp. v. First Am. Title Co., 270 Cal. Rptr. 24 (Ct. App. 1990)).

47. *Id.* at 992-93 (citing *In re Marriage of Glendenning*, 684 N.E.2d at 1178).

48. 938 N.E.2d 734 (Ind. Ct. App. 2010), *reh'g denied*, 2011 Ind. App. LEXIS 399 (Feb. 23, 2011), *trans. denied*, 462 N.E.2d 641 (Ind. 2011). *Kahlo* is not limited to a discussion of restrictive covenants. The court also addressed conveyance issues and statutory requirements for redevelopment plans as opposed to project agreements. Only the aspects of the case targeting covenants are included in this survey Article. Readers interested in the other aspects of this case are encouraged to read pages 744 through 749 of the opinion.

the redevelopment of property in downtown Indianapolis, held that the covenants conferred third-party beneficiary status on the public to enforce the agreement and that the covenants did not terminate upon amendment to the underlying agreement.[49] In 1981, the Metropolitan Development Commission ("Commission") adopted a plan that targeted portions of the southern half of downtown Indianapolis for revitalization.[50] In 1985, the Commission authorized Indianapolis's Department of Economic and Housing Development to purchase a block known as Square 88.[51] Shortly thereafter, the Commission authorized the transfer of that property by warranty deed to a private entity—the Indiana Sports Corporation (ISC). Along with the transfer of the property, the City of Indianapolis, acting through the Commission, entered into a project agreement with the ISC for the private redevelopment of Square 88.[52] The agreement required the ISC to build a plaza of at least 88,000 square feet along with an underground parking facility and offices above the plaza spanning at least 100,000 square feet. The agreement contained restrictive covenants.

> 2.8 *Plaza Restrictive Covenants*. Upon closing, [the ISC] shall subject not less [than] 88,000 square feet of the Project Area located above the plane of the top of the parking garage to the Restrictive Covenant. The Restrictive Covenant shall be for a term of thirty (30) years . . . . The Redeveloper and its successors and assigns shall retain title, possession, use, control and responsibility for such portion of the Project Area, but *the use of such area by the public . . . shall not be unreasonably withheld or delayed*.[53]

The covenant also included a buyout provision for termination of the restrictions after twenty years. If ISC wished to terminate the restrictions after twenty years but before thirty years, ISC was obligated to pay Indianapolis three million dollars.[54]

In 2007, twenty-two years after the execution of the agreement, the City of Indianapolis, through the Commission, negotiated with ISC to amend the agreement. The City agreed to reduce the plaza area subject to unrestricted public access from 88,000 square feet to 10,000 square feet in exchange for ISC agreeing that the 10,000 square feet of public space would not terminate automatically in any period of time and would only terminate upon ISC paying the City three million dollars.[55] Two citizens filed suit against the City, the Commission, and the ISC on behalf of themselves and others similarly situated challenging the amended agreement on several grounds. Defendants pursued a motion for judgment on the pleadings. The trial court, treating the motion as one

---

49. *Id.* at 749-50.
50. *Id.* at 738.
51. *Id.*
52. *Id.*
53. *Id.* (first alteration in original).
54. *Id.*
55. *Id.* at 739-40.

for summary judgment, determined, among other things, that the restrictive covenants gave plaintiffs standing to sue and that a genuine issue of fact existed—whether the amendment triggered the buyout provision of the restrictive covenant.[56]

On interlocutory appeal, the court of appeals agreed with the trial court's standing analysis but denied that there was any issue of the amendment triggering the buyout provision of the restrictive covenant.[57] As for the standing issue, the court considered the language of the covenant and the recitals in order to determine whether the contracting parties intended to benefit third parties such that they could enforce the contract.[58] Looking to the covenants, the court held that "the contracting parties intended to create rights in favor of the public, namely, the right to reasonable use of the plaza for no fee excepting reasonable fees for maintenance, security, and insurance."[59] Defendants contended that the covenant language was passive, creating no affirmative duty on the ISC to benefit the public. The court disagreed and held "[t]hat the obligation is written in passive rather than active voice is of no moment. The meaning of the restrictive covenant is clear: the City and the ISC agreed that 88,000 square feet of the project area would be set aside for a plaza to be 'accessible to the public.'"[60]

In considering whether the restrictive covenant was terminated upon amendment to the underlying agreement, the court again looked to the language of the covenant itself. The court noted that "the covenant provides for a buyout in the event of early termination, but not in the event of a modification."[61] Although the court could "envision a scenario where the reduction in plaza size might create a question of fact as to whether the restrictive covenant had been effectively terminated,"[62] there were no facts to indicate that the amendment was anything more than a material alteration to the covenant. According to the court, a material alternation is not a termination.[63]

2. Easements.—The Indiana Court of Appeals revisited easement by necessity in *William C. Haak Trust v. Wilusz*.[64] In that case, the Trust possessed a landlocked parcel of land.[65] In its quiet title action, the Trust sought an easement by necessity.[66] The trial court denied the easement, reasoning that the Trust failed to take advantage of opportunities to arrange for an easement in the past.[67] On appeal, the Trust argued that the trial court misapplied Indiana law on

---

56. *Id.* at 740-41.
57. *Id.* at 750.
58. *Id.* at 742-43.
59. *Id.* at 743.
60. *Id.*
61. *Id.* at 749.
62. *Id.*
63. *Id.* at 749-50.
64. 949 N.E.2d 833 (Ind. Ct. App. 2011).
65. *Id.* at 835.
66. *Id.*
67. *Id.*

easement by necessity. The Indiana Court of Appeals began by reiterating the standard for an easement by necessity:

> An easement of necessity will be implied only when there has been a severance of the unity of ownership of a tract of land in such a way as to leave one part without any access to a public road. On the other hand, an easement of prior use will be implied "where, during the unity of title, an owner imposes an apparently permanent and obvious servitude on one part of the land in favor of another part and the servitude is in use when the parts are severed . . . if the servitude is reasonably necessary for the fair enjoyment of the part benefited." Unlike a landowner requesting an easement by necessity, a landowner requesting an easement by prior use does not need to show absolute necessity. The focus of a claim for an easement by prior use is the intention for continuous use, while the focus of a claim for an easement by necessity is the fact of absolute necessity.[68]

The court further noted that transfer of ownership, even if involuntary, does not constitute a loss of a landowner's right to assert an easement by necessity.[69]

Applying the facts to the law, the court of appeals reversed the trial court's decision.[70] The court held that the Trust possessed a parcel of land that had been in unity of ownership at the time it was separated from a route of ingress and egress.[71] As the successor in interest, the Trust could validly assert an easement by necessity.[72]

In *Kwolek v. Swickard*,[73] the Indiana Court of Appeals reaffirmed that an easement for ingress and egress does not give the easement holder a right to park vehicles in the easement.[74] The Kwoleks had previously granted the Swickards an easement that was explicitly "non-exclusive and [was] intended to grant to the [Swickards] an ingress and egress to their property jointly with the [the Kwoleks]."[75] The Swickards built a garage on their property along with a concrete apron and gravel parking area next to the garage. A portion of the gravel parking area was located within the easement.[76] The Kwoleks used the gravel portion of the easement to turn their vehicles around after retrieving their mail. When the Swickards had visitors who parked in the gravel, the Kwoleks were unable to use the easement. Agitated, the Kwoleks erected no parking signs, metal posts, landscape timbers, and several evergreen trees to stop the

---

68. *Id.* at 836 (citing Hysell v. Kimmel, 834 N.E.2d 1111, 1114-15 (Ind. Ct. App. 2005); Wolfe v. Gregory, 800 N.E.2d 237, 241 (Ind. Ct. App. 2003)).

69. *Id.*

70. *Id.* at 839.

71. *Id.* at 838-39.

72. *Id.*

73. 944 N.E.2d 564 (Ind. App. 2011).

74. *Id.* at 574.

75. *Id.* at 572 (second and third alterations in original).

76. *Id.* at 568.

Swickards from parking in the gravel portion of the easement.[77]

The Swickards filed a declaratory judgment action against the Kwoleks in attempt to have the parking barriers removed. The trial court awarded relief to the Swickards, finding that the Swickards had been parking in the easement for several years and the Kwoleks had acquiesced.[78] Additionally, the trial court held that the Kwoleks, by erecting barriers, had materially interfered with the Swickards' enjoyment of the easement.[79]

On appeal, the Kwoleks argued that the plain language of the easement allows only for ingress and egress, which does not include parking.[80] After considering the language of the easement, the court of appeals agreed with the Kwoleks.[81]

B. Annexation

As municipalities continue to search for ways to expand their tax bases and increase revenue, annexation continues to be an extremely important topic. While the number of annexation cases handed down during the survey period is limited, the cases are chock-full of important issues.

In *City of Kokomo ex. rel. Goodnight v. Pogue*,[82] the Indiana Court of Appeals held that remonstrators who sought to stop Kokomo's proposed annexation failed to obtain the appropriate number of signatures.[83] In 2008, the City of Kokomo passed an ordinance to annex 3742 parcels of land.[84] In opposition to the annexation, remonstrators obtained 2543 landowners' signatures—approximately sixty-eight percent of the parcels.[85] Kokomo filed a motion to dismiss the remonstrators' petition, contending that in fact several of the signatories had waived their right to remonstrate in exchange for the benefit of hooking up to the city's sewer system. Subtracting these signatures would leave the remonstrators with less than the statutorily required sixty-five percent[86] needed to challenge Kokomo's proposed annexation.[87] More specifically Kokomo made two alternative arguments. First, 375 of the signatures came from landowners whose property had been owned previously by different landowners who had signed a remonstrance waiver. Second, 137 of the signatures were provided by landowners who were also parties to contracts waiving their right to

77. *Id.* at 569.
78. *Id.*
79. *Id.* at 570.
80. *Id.* at 572.
81. *Id.*
82. 940 N.E.2d 833 (Ind. Ct. App. 2010).
83. *Id.* at 841.
84. *Id.* at 835.
85. *Id.*
86. IND. CODE § 36-4-3-11(a)(1) (2011).
87. *Pogue*, 940 N.E.2d at 835.

remonstrate.[88] The remonstrators made several counterarguments. First, though the statute required service of notice by certified mail,[89] Kokomo used the United States Postal Service's "signature confirmation" service.[90] Second, for the 375 landowners whose predecessors in interest had signed the remonstrance waiver, the waivers were not properly recorded in the chain of title.[91] Third, for the 137 landowners who were parties to a contract with Kokomo, they either lacked proper notice or the language of the contracts referred broadly to "city services" rather than specifically sewer services, rendering those signatures valid.[92] The trial court denied Kokomo's motion to dismiss.

In reversing the trial court, the court of appeals addressed two of the remonstrators' three arguments. First, the court of appeals held that using the United States Postal Service's "signature confirmation" service sufficiently satisfied the statute.[93] An affidavit signed by the Kokomo City Engineer indicated that "signature confirmation" provides better service than certified mail.[94] The remonstrators also argued that, as roughly 800 notices were returned undelivered, the notice was insufficient and they should have been remailed.[95] The court of appeals disagreed. According to the court, Indiana Code section 36-4-3-2.2(e) "clearly states that a landowner's failure to receive actual notice of a proposed annexation is not fatal, so long as the statute's provisions regarding mailing were followed" and "[t]he statute also contains no requirement that undelivered notices be remailed."[96]

The court of appeals declined to decide the chain of title issue for the 375 parcels whose landowners were not directly parties to a contract with Kokomo.[97] Instead, the court focused on the issue of the 137 signatures of landowners who were direct parties to a contract that included a remonstrance waiver.[98] The court looked to *Doan v. City of Fort Wayne*[99] for the proposition that, while generally landowners may not prospectively waive their right to remonstrate against future annexation, contracts exchanging sewer services for remonstrance waivers are acceptable.[100] The remonstrators argued that sixty-four of the 137 signatures by landowners directly contracting with Kokomo were not specifically for sewer services because the contracts were for "city services."[101] The court disagreed

88. *Id.* at 936.
89. IND. CODE § 36-4-3-2.2(b).
90. *Pogue*, 940 N.E.2d at 837.
91. *Id.* at 839.
92. *Id.* at 840.
93. *Id.* at 838.
94. *Id.* at 837-38.
95. *Id.* at 838.
96. *Id.*
97. *Id.* at 839.
98. *Id.* at 840.
99. 252 N.E.2d 415 (Ind. 1969).
100. *Pogue*, 940 N.E.2d at 838-39.
101. *Id.* at 840.

and held that the evidence indicated the only services contracted for were in fact sewer services.[102] "The language of the waivers in that regard is clear and unambiguous; that is, the signatories were clearly advised and had actual knowledge of the fact that they were waiving their right to remonstrate in exchange for connecting to the Kokomo sewer system."[103] Because of this, the remonstrators did not have the required sixty-five percent of parcels represented and the city's motion to dismiss should have been granted.[104]

In an equally important annexation case,[105] the Indiana Court of Appeals addressed three issues: (1) Whether, when determining if sixty-five percent of parcels object to annexation, tax-exempt parcels should be included in the count; (2) Whether the landowners of targeted parcels had standing to bring a declaratory judgment action; and (3) Whether, when determining if sixty-five percent of parcels object to annexation, parcels abutting public roadways but not specifically included in the targeted territory should be included in the count.[106] This Article focuses on the first and third issues.

On July 7, 2008, Boonville passed an ordinance annexing 1165 acres of real estate. The annexed area was bordered by two public roadways.[107] Remonstrators filed a complaint and declaratory judgment action against Boonville, arguing that well over sixty-five percent of the owners of parcels in the proposed annexed area objected to the annexation.[108] Boonville filed a motion to dismiss, arguing that the remonstrators failed to meet the sixty-five percent requirement.[109] In support of its argument, Boonville contended that tax-exempt parcels should be counted in determining the total parcels in the proposed area, landowners of property abutting roadways that border the annexed property should not be counted,[110] and a declaratory judgment action is not appropriate if Boonville wins its motion to dismiss.[111] The trial court found in favor of the landowners on the tax-exempt and declaratory judgment issues and in favor of Boonville on the public highway issue.[112] Boonville sought, and the court of appeals granted, an interlocutory appeal.[113]

The court of appeals first addressed the tax-exempt parcel issue. Indiana Code section 36-4-3-11 states:

---

102. *Id.* at 840-41.

103. *Id.* at 841.

104. *Id.*

105. City of Boonville v. Am. Cold Storage, 950 N.E.2d 764 (Ind. App. 2011), *reh'g denied* (Aug. 25, 2011).

106. *Id.* at 765.

107. *Id.* at 766.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (quoting IND. CODE § 36-4-3-11 (2011)).

112. *Id.*

113. *Id.*

> (a) Except as provided in section 5.1(i) of this chapter and subsections (d) and (e), whenever territory is annexed by a municipality under this chapter, the annexation may be appealed by filing with the circuit or superior court of a county in which the annexed territory is located a written remonstrance signed by:
>
> (1) at least sixty-five percent (65%) of the owners of land in the annexed territory; or
>
> (2) the owners of more than seventy-five percent (75%) in assessed valuation of land in the annexed territory.
>
> . . .
>
> (b) On receipt of the remonstrance, the court shall determine whether the remonstrance has the necessary signatures. In determining the total number of landowners of the annexed territory and whether signers of the remonstrance are landowners, the names appearing on the tax duplicate for that territory constitute prima facie evidence of ownership. Only one (1) person having an interest in each single property, as evidence by the tax duplicate, is considered a landowner for purposes of this section.[114]

The landowners argued that "owners of land" in section (a)(1) should be limited to owners of taxable property in light of the language in section (b) regarding tax duplicates.[115] The landowners reasoned that only taxed parcels of land are listed on the tax duplicate and therefore only taxed parcels should be tallied for determining whether sixty-five percent of parcels object.[116] The court of appeals disagreed for two reasons: (1) Tax duplicates show the value of all parcels of property, not just taxed parcels; and (2) Tax duplicate listing is only prima facie evidence of ownership, not the only source of evidence of ownership.[117] Further, the court of appeals declined to read the word taxable before land in section (a)(1) because the legislature could have included that language had it wished.[118]

On the third issue, the landowners argued that property abutting public highways, but outside of the annexed area, should be included in the sixty-five percent count. The landowners based their argument on the premise that landowners abutting public roadways have fee simple ownership of the land under the roadway.[119] The court of appeals agreed that the landowners technically do have a fee simple interest to the center of the road, but disagreed that fee simple ownership translates into owning the roadways themselves.[120]

---

114. *Id.*
115. *Id.* at 768.
116. *Id.*
117. *Id.*
118. *Id.* at 768-69.
119. *Id.* at 771.
120. *Id.*

According to the court, the landowners "do not have the right to construct, lay out, alter, vacate, maintain, or otherwise control the roadways."[121] Because the focus of Boonville's annexation is on the roadways rather than the property supporting them, the court held that the landowners should not be counted in the sixty-five percent.[122]

C. Zoning

Several interesting zoning cases were handed down during the survey period. This Article, in the interest of brevity, focuses on three of those cases.

In the first case of focus, *Lightpoint Impressions, LLC v. Metropolitan Development Commission of Marion County*,[123] the court of appeals confronted a clash of jurisdiction between the Marion County Metropolitan Development Commission (MDC) and the Lawrence Board of Zoning Appeals ("Lawrence BZA"). On November 17, 2003, the Indianapolis-Marion County City-County Council enacted an ordinance prohibiting advertising signs that display video or emitting graphics.[124] Lightpoint petitioned the City of Lawrence for a variance in order to convert billboards along Interstate 465 to digital displays. Lawrence is located wholly within Marion County. The Lawrence BZA granted the requested variance. Subsequently, the Administrator of the Division of Planning of the Indianapolis Department of Metropolitan Development appealed the Lawrence BZA's decision to the MDC, arguing that the BZA had set a poor precedent.[125] After the MDC denied Lightpoint's request to dismiss the action for lack of jurisdiction, Lightpoint brought the matter to the attention of a trial court. Lightpoint argued that the MDC lacked jurisdiction to review the Lawrence BZA and that the Administrator's decision to appeal was arbitrary and capricious.[126] The trial court granted summary judgment in favor of the MDC and Lightpoint appealed.

On appeal, the court acknowledged that Lawrence is an "excluded city" under Indiana law and, as such, its BZA has "exclusive territorial jurisdiction within [its] corporate boundaries."[127] Though a straightforward application of statutory language favored Lightpoint's argument, the court of appeals relied instead on the intent of Indiana's lawmakers to hold that the MDC did have jurisdiction to review the Lawrence BZA.[128] The court reviewed Indiana Code section 36-7-4-201(d), which explains that

> [e]xpanding urbanization in each county having a consolidated city [*e.g.*, Marion County] has created problems that have made the unification of

---

121. *Id.*
122. *Id.*
123. 941 N.E.2d 1055 (Ind. Ct. App. 2010).
124. *Id.* at 1057 (citing INDIANAPOLIS REV. CODE § 734-306(a)(6) (2012)).
125. *Id.* at 1058.
126. *Id.*
127. *Id.* at 1060.
128. *Id.*

> planning and zoning functions a necessity to insure the health, safety, morals, economic development, and general welfare of the county. To accomplish this unification a single planning and zoning authority is established for the county.[129]

The court of appeals reasoned that the MDC could not fulfill its function as a single planning and zoning authority if it could not review decisions of BZA's within its planning territory.[130] Further, the court noted how the general assembly had the power and means to exempt these types of BZAs from review if it wished to do so.[131] The court held that the "exclusive territorial jurisdiction" language must be read to only include initial zoning determinations in Lawrence and not appeals of those decisions.[132]

In the second case of focus, *Siwinski v. Town of Ogden Dunes*,[133] Steven and Lauren Siwinski ("Siwinskis") owned a house in Ogden Dunes, Indiana, located in a district zoned R-Residential.[134] The Siwinskis rented out their home on five occasions in 2007 for periods ranging from two to eleven days. In August 2007, the town sued the Siwinskis for violating section 152.032 of the Town Code.[135] After the trial court found against the Siwinskis and instituted a hefty fine, the Indiana Court of Appeals reversed. The Indiana Supreme Court granted transfer, reversed the court of appeals, and decreased the fine from $40,000 to no more than $32,500.[136]

In order to decide the issue, the Indiana Supreme Court had to construe Town Code section 152.032, which states:

> In a R District, no building or premises shall be used and no building shall be erected which is arranged, designed or intended to be used for other than one or more of the following specified uses: (1) single-family dwellings; (2) accessory buildings or uses; (3) public utility buildings; (4) semi-public uses; (5) essential services; (6) special exception uses permitted by this Zoning Code.[137]

Further, "[a] single-family dwelling is defined as, 'A separate detached building designed for and occupied exclusively as a residence by one family.'"[138] The Siwinskis argued that in renting their home, it was not used for things other than those normally associated with a family residence.[139] Also, the Siwinskis

---

129. *Id.* (alterations in original) (citing IND. CODE § 36-7-4-201(d) (2011)).
130. *Id.*
131. *Id.*
132. *Id.* at 1060-61.
133. 949 N.E.2d 825 (Ind. 2011).
134. *Id.* at 827.
135. *Id.*
136. *Id.*
137. *Id.* at 828 (quoting OGDEN DUNES, IND., CODE § 152.032 (2008)).
138. *Id.* (quoting OGDEN DUNES, IND., CODE § 152.002).
139. *Id.* at 829.

contended that they only rented their home to one family at a time, as opposed to multiple families living in the residence at once. The Town, on the other hand, argued that the court should look to the intent of the ordinance—that intent being to prohibit renting to other families for profit.[140]

The court ultimately agreed with the Town, reasoning that both the plain language of the ordinance and the intent of its drafters lead to the conclusion that single-family dwellings may not be rented.[141] As for the plain language, the court looked to the definition of "dwelling" and "multiple dwelling" in other sections of the ordinance.[142] The court explained that a dwelling was defined as "a building which is to be occupied exclusively for living purposes," and a multiple dwelling was defined as "an apartment house or apartment building."[143] Accordingly, the court determined that the plain language of the ordinance indicated that single-family dwellings are not to be rented.[144] As for the intent of the drafters, the court reasoned that "[i]t makes sense that Ogden Dunes, a small, quiet, lakeshore town on Lake Michigan, would not want renters overwhelming its residential district during the summer lake season . . . . [T]he Town has made a conscious decision to forbid its residents from renting their homes."[145]

In the third case of focus, *Wastewater One, LLC v. Floyd County Board of Zoning Appeals*,[146] the Indiana Court of Appeals upheld the Floyd County Board of Zoning Appeals (BZA) denial of a conditional use permit for expansion of a sewage treatment facility.[147] In anticipation of the need to serve a new subdivision in the community, the sewage treatment facility ("Wastewater") submitted a conditional use application to the BZA in 2007 to expand its capacity from 37,000 gallons per day to 100,000 gallons per day.[148] The BZA conducted a public hearing in which remonstrators protested the expansion. They argued that increased plant size would lead to increased odor and, because the larger plant would allow more subdivisions to be built, increased traffic congestion.[149] In accordance with section 15.09(C)(1) of the Floyd County Zoning Ordinance, the BZA considered five factors and ultimately denied the application finding:

> (1) The conditional use WILL NOT be injurious to the public health, safety, moral, and general welfare of the community because: It will provide an essential service to the community.

---

140. *Id.*
141. *Id.* at 829-30.
142. *Id.*
143. *Id.* at 829 (quoting OGDEN DUNES, IND., CODE § 152.002).
144. *Id.* at 830.
145. *Id.*
146. 947 N.E.2d 1040 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 645 (Ind. 2011).
147. *Id.* at 1054.
148. *Id.* at 1042.
149. *Id.* at 1043.

(2) The use and value of the area adjacent to the property WILL be adversely affected because: Expansion of this capacity within the area now available will impact adjacent residences.

(3) The need for the conditional use DOES NOT result from any conditions, unusual or peculiar to the subject property itself because: This is an expanded use of a public facility.

(4) Strict application of the terms of the Floyd County Zoning Ordinance WILL result in an unnecessary hardship in the use of the property because: It will eliminate necessary facilities for 123 residences.

(5) Approval of the conditional use WILL contradict the goals and objectives of the Floyd County Comprehensive Plan because: This will allow continued service to Highlander Village then seven additional square miles of undeveloped land which will compound present congestion of the roadways.[150]

Wastewater filed a petition for review of the denial of the application. Wastewater made three arguments: (1) The BZA did not have jurisdiction to decide whether the expansion was proper; (2) The Floyd County Ordinance is contrary to Indiana Law because it conflates the requirements for conditional uses and the requirements for variances; and (3) Two of the BZA's findings were not based upon evidence presented at the hearing.[151] The trial court affirmed the BZA's denial of Wastewater's application. Wastewater appealed.[152] This Article focuses on Wastewater's second argument.

After agreeing with the trial court that the BZA did have jurisdiction to consider Wastewater's application, the court of appeals considered Wastewater's second argument.[153] Wastewater argued that section 15.09(C)(1) violated Indiana Code sections 36-7-4-918.2 and 36-7-4-918.4, which govern conditional uses and variances respectively.[154] Essentially Wastewater argued that the ordinance's five factors for consideration are the same five factors set out in Indiana's variance statute. Wastewater contended that this was problematic because conditional use applications do not allow BZAs to exercise discretion—they require automatic approval or denial according to objective criteria.[155] Variances, on the other hand, allow discretion according to a consideration of the five factors.[156] The BZA countered by arguing that the conditional use application

150. *Id.*
151. *Id.* at 1044.
152. *Id.*
153. *See id.* at 1047.
154. IND. CODE §§ 36-7-4-918.2, -918.4 (2011).
155. *Wastewater*, 947 N.E.2d at 1047.
156. *Id.*

can be objective or subjective, depending on how a given zoning ordinance is structured.

Looking to a recent case,[157] the court of appeals agreed with the BZA.[158] The court noted that in many instances zoning boards are required to follow objective criteria, but that Indiana does not require all conditional uses to work in this manner.[159] Local governments are free to adopt zoning ordinances that grant discretion to their zoning boards in deciding whether to approve conditional use permits.[160] According to the court's reasoning, variances and special uses can be treated identically, despite the requirement for each being laid out in separate Indiana statutes.

D. Nuisance

Of several nuisance cases handed down during the survey period, one case is particularly noteworthy. In *B & B, LLC v. Lake Erie Land Co.*,[161] the Indiana Court of Appeals decided a case of first impression involving wetlands and the common enemy doctrine. The court held that a landowner, having raised the water table on his land to create a federally regulated wetland, may not invoke the common enemy doctrine to shield himself from liability for drowning neighboring properties.[162]

Robert Pruim and his business partner purchased 280 acres of land in Lake Station.[163] At one time, the land had been a swamp, but the parcel had been dewatered by field tiles and a ditch and subsequently used for farming.[164] Pruim and his partner planned to build an industrial park on the parcel, including a waste transfer station in the northwest corner. During the planning phases, the parcel fell subject to scrutiny by the Army Corps. of Engineers. Pruim hired an environmental consultant to give an opinion regarding suitability for development. The consultant determined that only an upward sloping portion of the property was suitable for development. Rather than develop the property, Pruim ultimately sold the upland portion to B & B and the wetland portion to Lake Erie Land Company (LEL). LEL had been working with the same environmental consultant to develop a wetland mitigation bank.[165] Pruim's property, with its wetland characteristics, fit LEL's mitigation bank plans. B & B planned on using its parcel as a concrete crushing plant. LEL, knowing that raising the water table could negatively impact neighboring properties, built

---

157. *See* Midwest Minerals, Inc. v. Bd. of Zoning Appeals of the Area Plan Dep't/Comm'n of Vigo Cnty., 880 N.E.2d 1264 (Ind. Ct. App. 2008).

158. *Wastewater*, 947 N.E.2d at 1048.

159. *Id.* at 1048-49.

160. *Id.* at 1049.

161. 943 N.E.2d 917 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 641 (Ind. 2011).

162. *Id.* at 919.

163. *Id.*

164. *Id.*

165. *Id.* at 920.

berms, destroyed drainage tiles, and plugged the drainage ditch running through the property. As a result, the water table rose and submerged the southernmost portion of B & B's property.[166] B & B had been piling concrete on the property, but was ordered to cease and desist when the Army Corps. of Engineers inspected the southern portion of the property and determined it was a wetland.

B & B sued LEL using theories of negligence, trespass, and nuisance.[167] The trial court held in favor of LEL reasoning that the common enemy doctrine precluded B & B from prevailing on any of its theories. B & B appealed the decision.[168]

The court of appeals reviewed the common enemy doctrine. In *Argyelan v. Haviland*,[169] the Indiana Supreme Court described the common enemy doctrine.

> In its most simplistic and pure form the rule known as the "common enemy doctrine," declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.[170]

The court then explained that the common enemy doctrine only applies to water classified as surface water.[171] The court looked to *Trowbridge v. Torabi*[172] for a definition of surface water.

> As distinguished from the waters of a natural stream, lake, or pond, surface waters are such as diffuse themselves over the surface of the ground, following no defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh. They generally originate in rains and melting snows . . . . Water derived from rains and melting snows is diffused over surface of the ground [is surface water], and it continues to be such and may be impounded by the owner of the land until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, or until it reaches some permanent lake or pond, whereupon it ceases to be "surface water" and becomes a "water course" or a "lake" or "pond," as the case may be.[173]

The *B & B* court ultimately determined that LEL's actions in creating a mitigation bank did not invoke the common enemy doctrine.[174] For one thing, all

166. *Id.* at 921.
167. *Id.* at 921-22.
168. *Id.* at 922-23.
169. 435 N.E.2d 973 (Ind. 1982).
170. *Id.* at 975.
171. *B&B, LLC*, 943 N.E.2d at 924.
172. 693 N.E.2d 622 (Ind. Ct. App. 1998).
173. *B & B, LLC*, 943 N.E.2d at 924-25 (quoting *Trowbridge*, 693 N.E.2d at 627).
174. *Id.* at 925.

experts involved in the case agreed that the water was subterranean.[175] Additionally, the court was impressed by the reason for which LEL was diverting the water.[176]

> In our view, the common enemy doctrine does not permit the creation of a wetland because that type of action simply does not qualify as "water diversion." Moreover, the parties cite to no authority—and we have found none—that permits a party to stop the free flow of subterranean waters in order to raise the water table not only upon its land but on adjoining land to create a federally regulated wetland. In our view, neither the principles applicable to subterranean waters nor the common enemy doctrine would permit a defendant to stop the free flow of underground waters so that adjoining properties become flooded.[177]

Ultimately, the court held that the common enemy doctrine did not preclude B & B's nuisance or trespass action.[178]

III. LIENS AND FORECLOSURES

A. Indiana Supreme Court Decisions

During the survey period, the Indiana Supreme Court granted transfer for two cases addressing foreclosures.[179] In *Citizens State Bank of New Castle v. Countrywide Home Loans, Inc.*, the court sought to shed some light on the complex area of law that is the doctrine of merger.[180] Countrywide Home Loans, Inc. took and duly recorded a mortgage in a piece of real estate in April 2005.[181] In August of the following year, Countrywide foreclosed on the property which resulted in a sheriff's sale in February 2007. Countrywide purchased the property at the sheriff's sale and recorded the deed in March 2007.[182] In April, Countrywide conveyed the property by a limited warranty deed to the Federal National Mortgage Association (FNMA).[183] The problems giving rise to the case arose because Countrywide failed to discover and list Citizens State Bank of New Castle ("Citizens Bank") as a defendant in its foreclosure action.[184] The

---

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 926-27.

179. *See* Lucas v. U.S. Bank, N.A., 953 N.E.2d 457 (Ind. 2011), *reh'g denied*, 2012 Ind. LEXIS 6 (Jan. 19, 2012); Citizens State Bank of New Castle v. Countrywide Home Loans, Inc., 949 N.E.2d 1195 (Ind. 2011).

180. *Citizens*, 949 N.E.2d 1195.

181. *Id.* at 1196.

182. *Id.*

183. *Id.*

184. *Id.*

mortgagor had issued a promissory note to Citizens Bank in January 2003.[185] In June 2006, two months prior to Countrywide's foreclosure action, Citizens Bank was granted default judgment on the note and recorded its judgment, resulting in a lien on the property.[186] After discovering Citizens Bank's judgment lien, Countrywide filed a complaint seeking to foreclose any interest or equity of redemption Citizens's Bank may have held in the real estate.[187] Citizens Bank filed an answer and its own complaint to foreclose FNMA's lien.[188] The trial court consolidated the two actions and granted Countrywide's motion, directing Citizens Bank to redeem the mortgage or be "forever barred from asserting its judgment lien against the subject property."[189] The court of appeals reversed, finding Countrywide's lien to be extinguished by the doctrine of merger, anti-merger, and an exception to anti-merger.[190] The Indiana Supreme Court granted transfer.

Pursuant to the doctrine of merger, a merger occurs when a single entity acquires both the lien and legal title to the real estate.[191] If merger occurs, the mortgagee's lien is extinguished and loses priority over "any undisclosed junior liens."[192] Application of the merger doctrine in this case would mean that Countrywide's lien is extinguished and Citizens Bank's lien would not only remain intact but actually be advanced to senior lien status.[193] However, "[w]here there is no merger, then the mortgagee's original lien remains intact and thereby maintains a priority position over any undisclosed junior liens."[194] The court acknowledged that the *Restatement (Third) of Property* holds the view that the doctrine of merger as applied to mortgages ought to be eliminated but specifically declined to adopt the Restatement approach.[195] The court instead looked to standing Indiana case law.[196]

> Whether the conveyance of the fee to the mortgagee results in a merger of the mortgage and the fee depends primarily upon the intention of the parties, particularly that of the mortgagee. If that intention has not been expressed it will be sought for and ascertained from all of the circumstances of the transaction. If it appears from all of the circumstances to be for the benefit of the party acquiring both interests

185. *Id.*

186. *Id.*

187. *Id.* at 1197. Though the case does discuss the concept and role of strict foreclosure, it is ultimately not dispositive and thus is not discussed in depth here.

188. *Id.*

189. *Id*.

190. *Id.*

191. *Id.*

192. *Id.* at 1198.

193. *Id.*; *see also id*. at 1203 (Sullivan, J., dissenting).

194. *Id.* at 1198.

195. *Id.* at 1197-98.

196. *Id.* at 1198.

> that merger shall not take place, but that the mortgage should be kept alive, then his intention that such result should follow will be presumed.[197]

The presumption is rebuttable upon evidence "that a merger had been expressly agreed to, or that the mortgagee's conduct and action were such as could fairly be ascribed only to an intention to merge."[198]

The court found that despite the presumption, there was sufficient evidence to rebut.[199] In the limited warranty deed used to transfer the property to FNMA was the language stating that Countrywide "'grants and conveys' the same and 'warrants the title . . . against the acts of the Grantor and all persons claiming lawfully by, through or under Grantor.'"[200] Under Indiana statutory law, such language grants a transfer in fee simple and as such "guarantees that the premises are free from all encumbrances."[201] The court recognized that without a merger, the transfer to FNMA could not have occurred.[202] As the court summarized, "by conveying title to a third party by way of warranty deed, albeit limited, Countrywide demonstrated that it intended a merger of its interests."[203]

As the lone dissenter, Justice Sullivan disagreed with the majority and provided a dissenting opinion.[204] He viewed the case as being one of an "omitted party" and that as an "omitted party" Citizens Bank's interest was not foreclosed.[205] He believed that the appropriate result was "that the senior lienholder and the omitted party get the practical equivalent of a 'do-over'—a second foreclosure—in which the omitted party would be entitled to redeem its (subordinate) interest in the property and if it does not redeem, have its interest foreclosed."[206] Put simply, Justice Sullivan believed that the trial court accurately applied precedent to come to its original decision.[207]

In the second case, *Lucas v. U.S. Bank, N.A.*, the court once more probed the issue of the jury trial right.[208] In a 3-2 decision the court held that mortgagor, the Lucases, did not have a right to a trial by jury on their defenses and claims against the mortgage holder and loan servicer, U.S. Bank and Litton Loan

---

197. *Id.* (quoting Ellsworth v. Homemakers Fin. Serv., Inc., 424 N.E.2d 166, 168 (Ind. Ct. App. 1981) (citations omitted)).

198. *Id.* at 1200-01 (quoting Barton v. Cannon, 489 P.2d 1021, 1022 (Idaho 1971)).

199. *Id.* at 1201.

200. *Id.* (citation omitted).

201. *Id.* (quoting IND. CODE § 32-17-1-2 (2011)).

202. *Id.*

203. *Id.*

204. *Id.* at 1202 (Sullivan, J., dissenting).

205. *Id.* at 1202-03.

206. *Id.* at 1203.

207. *Id.*

208. Lucas v. U.S. Bank, N.A., 953 N.E.2d 457 (Ind. 2011), *reh'g denied*, 2012 Ind. LEXIS 6 (Jan. 19, 2012).

Servicing respectively.[209] In 2009, U.S. Bank filed a complaint seeking to foreclose on the Lucases' property.[210] The Lucases, in their answer, made a demand for a jury trial.[211] U.S. Bank sought to strike the Lucases' jury request. The trial court granted U.S. Bank's motion to strike the jury trial, concluding that because U.S. Bank was seeking a foreclosure—"an 'essentially equitable' cause of action"—the defenses and claims by the Lucases were also drawn into equity.[212] On appeal, the court applied the Indiana Supreme Court's decision in *Songer v. Civitas Bank*[213] and reversed.[214] "[T]he [c]ourt of [a]ppeals could not conclude that the essential features of th[e] case were equitable."[215]

While article 1, section 20 of the Indiana Constitution guarantees the right of trial by jury in civil cases, the right only extends to the claims that existed at common law.[216] In *Songer*, the supreme court sought to "comprehensively [analyze] one hundred and twenty years of Indiana jurisprudence related to the joining of law and equity claims" in order to determine when the jury trial right attaches.[217] The rule derived from *Songer* is:

> If the essential features of a suit as a whole are equitable and the individual causes of action are not *distinct or severable*, the entitlement to a jury trial is extinguished. The opposite is also true. If a single cause of action in a multi-count complaint is plainly equitable and the other causes of action assert purely legal claims that are sufficiently *distinct and severable*, Trial Rule 38(A) requires a jury trial on the legal claims.[218]

In order to determine the "essential features of a suit," the court must "evaluate the nature of the underlying substantive claim" by "look[ing] to the substance and central character of the complaint, the rights and interests involved, and the relief demanded."[219]

After analyzing each of the Lucases defenses, claims, and remedies, the court determined that the Indiana Court of Appeals was correct in categorizing most of them as legal in nature.[220] However, the court did not determine this finding alone to be sufficient to determine that the jury trial right had attached.[221] The

---

209. *Id.* at 459.
210. *Id.*
211. *Id.*
212. *Id.*
213. 771 N.E.2d 61 (Ind. 2002).
214. *Lucas*, 953 N.E.2d at 459-60.
215. *Id.*
216. *Id.* at 460.
217. *Id*. at 467 (Dickson, J., dissenting) (citing *Songer*, 771 N.E.2d at 61).
218. *Id.* (quoting *Songer*, 771 N.E.2d at 68); *see also id*. at 460-61.
219. *Id.* at 461 (majority opinion) (quoting *Songer*, 771 N.E.2d at 68).
220. *Id.* at 464-65.
221. *Id.* at 465.

court once more looked to *Songer* for guidance.[222] In *Songer*, a suit which "[a]t its heart . . . was a suit to foreclose a lien on property," the court found "that considerable precedent holds that foreclosure actions are equitable, '[a]nd being essentially equitable, the whole of the claim is drawn into equity, including *related* legal claims and counterclaims.'"[223] Applying that reasoning from *Songer*, the court determined that the analysis depended upon the meaning of "related."[224] After looking to cases preceding *Songer*, the court concluded that to determine whether a suit is essentially equitable, a trial court must conduct a multi-pronged inquiry.[225] The court described that inquiry as follows:

> If equitable and legal causes of action or defenses are present in the same lawsuit, the court must examine several factors of each joined claim—its substance and character, the rights and interests involved, and the relief requested. After that examination, the trial court must decide whether core questions presented in any of the joined legal claims significantly overlap with the subject matter that invokes the equitable jurisdiction of the court. If so, equity subsumes those particular legal claims to obtain more final and effectual relief for the parties despite the presence of peripheral questions of a legal nature. Conversely, the unrelated legal claims are entitled to a trial by jury.[226]

The court applied its multi-pronged inquiry and concluded that in the present case "the core legal issues overlap with the foreclosure issues to a significant degree" and as such the essential features of the suit were equitable.[227] Thus, the court affirmed the trial court's denial of a jury trial.[228]

Justice Dickson, with whom Justice Rucker joined, authored a dissenting opinion.[229] Justice Dickson believed that the majority opinion failed to pay due respect to the teachings of *Songer* by further complicating the analysis.[230] He contended that the focus of *Songer* was "whether multiple causes of action are 'distinct and severable."[231] He described the majority opinion as creating a new test requiring courts to determine "whether the legal claims 'significantly overlap' with the subject matter of the original equitable claim."[232] As such, Justice Dickson feared that the "significantly overlap" test may deprive defendants of a jury trial on "purely legal claims that are sufficiently distinct and

---

222. *Id.*
223. *Id.* (quoting *Songer*, 771 N.E.2d at 69).
224. *Id.*
225. *Id.*
226. *Id.* at 465-66.
227. *Id.* at 466-67.
228. *Id.* at 467.
229. *Id.* (Dickson, J., dissenting).
230. *Id.*
231. *Id.*
232. *Id.*

severable from the equitable foreclosure action."[233]

B. Procedure

In the area of procedural law the Indiana Court of Appeals was presented with numerous issues of first impression. In the realm of tax sales, the court of appeals held as an issue of first impression that a property owner's appeal of a civil penalty is not rendered moot where the owner pays the penalty under protest so as to avoid a tax sale.[234]

In *Gee v. Green Tree Servicing, LLC*,[235] the court was asked to review an appeal seeking to set aside a sheriff's sale as procedurally deficient. The challenge hinged on the fact that due to construction on the Grant County courthouse, three of the four courts were temporarily relocated.[236] In attempting to comply with Indiana Code section 32-29-7-3(e) "requir[ing] the sheriff to post notice of the sale 'at the door of the courthouse,'" the Grant County Sheriff's department posted notice of the sheriff's sale of the mortgagor's property at the temporary court location.[237] The mortgagor challenged the sale on the grounds that the notice was not posted at the permanent courthouse and thus the sale was procedurally deficient.[238] The trial court denied the mortgagor's motion.[239] On appeal, the court looked to *Black's Law Dictionary* for a definition of courthouse and concluded that the posting was reasonable and did not run afoul of the requirements of section 32-29-7-3(e).[240]

In another instance of the court addressing an issue of first impression, the court, in *Lacy-McKinney v. Taylor Bean & Whitaker Mortgage Corp.*, held that noncompliance with HUD regulations prior to foreclosure of a HUD-insured mortgage is an affirmative defense to foreclosure.[241] Lacy-McKinney contended that Taylor-Bean did not comply with HUD regulations when it commenced its foreclosure action.[242] Lacy-McKinney argued that Taylor Bean:

> (1) did not engage in loss mitigation in a timely fashion as required by 24 C.F.R. § 203.605(a); (2) did not have a face-to-face meeting or make a reasonable effort to have a face-to-face meeting "before three full monthly installments due on the [M]ortgage [were] unpaid" as required by 24 C.F.R. § 203.604(b); and [(3)] did not accept partial payments as

---

233. *Id.*

234. *See* Dempsey v. Dep't of Metro. Dev. of City of Indianapolis, 953 N.E.2d 1132, 1133-36 (Ind. Ct. App. 2011).

235. 934 N.E.2d 1260 (Ind. Ct. App. 2010).

236. *Id.* at 1261.

237. *Id.* at 1261-62.

238. *Id.*

239. *Id.* at 1261.

240. *Id.* at 1262.

241. Lacy-McKinney v. Taylor, Bean & Whitaker Mortg. Corp., 937 N.E.2d 853 (Ind. Ct. App. 2010).

242. *Id.* at 859.

required by 24 C.F.R. § 203.556.[243]

To aid in its decision, the court looked to an Illinois case, *Bankers Life Co. v. Denton*,[244] to provide insight into the rationale for recognizing noncompliance with HUD requirements to be used as an affirmative defense.[245] In *Denton*, the Illinois Appellate Court held that "in order to effectively insure that the interests of the primary beneficiaries of the H.U.D. mortgage servicing requirements are being protected, mortgagors must be allowed to raise noncompliance with the servicing requirements as a defense to a foreclosure action."[246] The Indiana Court of Appeals also found persuasive the holdings by courts in Florida, Maryland, and New York which came to the same conclusion as the *Denton* court.[247]

The court did not find persuasive the views of courts in New Jersey and Pennsylvania that found noncompliance with HUD regulations to be an equitable defense as opposed to an affirmative defense.[248] The court feared that cases might arise in which the requirements to exercise an equitable defense, such as the clean hands doctrine, would prove a bar to mortgagors.[249] After looking to the flaws with determining noncompliance to be an equitable defense and finding the reasoning in *Denton* to be quite persuasive, the court held that compliance with HUD servicing responsibilities, such as the ones at issue in this case, are a binding condition precedent to foreclosure.[250] As such, noncompliance with such regulations is an affirmative defense to a foreclosure action.[251]

In yet another case, *Citimortgage, Inc. v. Barabas*,[252] dealing with issues of first impression, the Indiana Court of Appeals sought to determine the relationship of Mortgage Electronic Registration Systems, Inc. (MERS) in a foreclosure action. The result was a split decision with Judge Riley authoring the majority opinion to which Chief Judge Robb concurred and Judge Brown authored a dissent.[253] In 2005 Barabas executed a mortgage on property in Madison County which was duly recorded.[254] "The mortgage state[d] in pertinent

---

243. *Id.* (first and second alterations in original).

244. 458 N.E.2d 203 (Ill. App. Ct. 1983).

245. *Id.* at 861-62.

246. *Id.* at 862 (quoting *Denton*, 458 N.E.2d at 205).

247. *Id.* at 862-63 (citing Cross v. Fed. Nat'l Mortg. Ass'n, 359 So. 2d 464 (Fla. Dist. Ct. App. 1978); Wells Fargo Home Mortg., Inc. v. Neal, 922 A.2d 538, 547 (Md. 2007); Fed. Nat'l Mortg. Ass'n v. Ricks, 372 N.Y.S.2d 485, 497 (Sup. Ct. 1975)).

248. *Id.* at 863 (citing Heritage Bank, N.A. v. Ruh, 465 A.2d 547 (N.J. Super. Ct. Ch. Div. 1983); Fleet Real Estate Funding Corp. v. Smith, 530 A.2d 919 (Pa. Super. Ct. 1987)).

249. *Id.*

250. *Id.* at 864.

251. *Id.*

252. 950 N.E.2d 12 (Ind. Ct. App. 2011), *aff'd on reh'g*, 955 N.E.2d 260 (Ind. Ct. App. 2011), *trans. granted*, 2012 Ind. LEXIS 153 (Apr. 10, 2012).

253. *Id.* at 18-19 (Brown, J., dissenting)).

254. *Id.* at 13 (majority opinion).

part: This Security Instrument is given to [MERS], (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns), as mortgagee."[255] The mortgage listed the lender as Irwin Mortgage Corporation.[256] In 2007, Barabas entered into a second mortgage on the property with ReCasa Financial Group, Inc.[257] A year later, after the second mortgage was recorded, Barabas defaulted on the ReCasa mortgage.[258] As a result of the default, in 2008, ReCasa foreclosed and named Irwin Mortgage as a defendant.[259] Irwin Mortgage responded by filing a disclaimer of interest in the property.[260] The trial court entered default judgment in favor of ReCasa and the property was sold at a sheriff's sale to ReCasa on March 4, 2009.[261]

One month after the sale of the property at sheriff's sale and after the recording of the sheriff's deed, on March 20, 2009, ReCasa sold the real estate to Sanders. A month after, MERS assigned the mortgage to Citimortgage, Inc. ("Citi").[262] The MERS assignment was recorded on April 20, 2009.[263] On October 23, 2009, Citi attempted to intervene, seeking relief from default judgment.[264] The trial court allowed Citi to intervene and vacated the default judgment.[265] After several additional filings and a hearing, the trial court issued an order vacating its prior order and reinstating the default judgment.[266]

Citi appealed, arguing that the trial court erred in not setting aside the default judgment.[267] Citi's principal contention was that "ReCasa's failure to name MERS as a party defendant rendered its foreclosure judgment ineffective as to MERS and its assignee, Citi."[268] In order to determine whether MERS was required to be specifically named as a defendant to ReCasa's foreclosure action, the court needed to determine the relationship between MERS and the lender, Irwin Mortgage.[269] The court looked to the Kansas decision in *Landmark National Bank v. Kesler*,[270] a case with extremely similar facts to the case at bar.[271] In *Landmark*, the Kansas Supreme Court determined that "MERS was

---

255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 13-14.
261. *Id.* at 14.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 14-15.
267. *Id.* at 15.
268. *Id.*
269. *Id.* at 16.
270. 216 P.3d 158 (Kan. 2009).
271. *See id.*

little more than a 'straw man' for [the lender.]"[272] The Indiana Court of Appeals found the reasoning of *Landmark* to be persuasive given the factual similarities to the case before the court.[273] In keeping with the reasoning of *Landmark*, the court held that:

> when Irwin Mortgage filed a petition and disclaimed its interest in the foreclosure, MERS, as mere nominee and holder of nothing more than bare legal title to the mortgage, did not have an enforceable right under the mortgage separate from the interest held by Irwin Mortgage.[274]

Thus, the trial court did not abuse its discretion by declining to set aside the default judgment.[275]

In her dissenting opinion, Judge Brown found that one fact differed substantially between the case at bar and *Landmark*.[276] In *Landmark*, the mortgage listed MERS as acting "'solely as the nominee' for the lender."[277] However, in the case at bar, the mortgage listed MERS as both nominee and mortgagee.[278] Judge Brown also noted that while the notice provisions of the mortgage list Irwin Mortgage's address, the section of the mortgage listing MERS as mortgagee also lists MERS address.[279] As a result of these differences between *Landmark* and the case at bar, Judge Brown concluded that MERS was more than a mere "straw man" and had an enforceable right.[280] This case has been granted transfer but has not been decided prior to the publication deadline of this Survey.[281]

C. Drafting

Drafters of mortgage agreements would be wise to heed the Indiana Court of

---

272. *Barabas*, 950 N.E.2d at 17 (citing *Landmark*, 216 P.3d at 165-66).

273. *Id.*

274. *Id.* at 17-18 (citation omitted).

275. *Id.*

276. *Id.* at 18-19 (Brown, J., dissenting). Judge Brown also found that the majority opinion misinterpreted the language of Indiana Code section 32-29-8-3, which requires an interested party to redeem the property within one year of the sale. *Id.* at 18. The majority held that Citi failed to comply with this section as Citi sought to have the default judgment set aside more than a year after the foreclosure and was not absolved due to failure to name MERS. *Id.* at 17-18 (majority opinion). Judge Brown noted that the majority's use of the foreclosure date was in error as the statute specifically lists the one year period beginning on the date of sale. *Id.* at 18 (Brown, J., dissenting). On rehearing the majority agreed with Judge Brown on this point. *See* Citimortgage, Inc. v. Barabas, 955 N.E.2d 260 (Ind. Ct. App. 2011), *trans. granted*, 2012 Ind. LEXIS 153 (Apr. 10, 2012)).

277. *Barabas*, 950 N.E.2d at 18 (Brown, J., dissenting).

278. *Id.* at 19.

279. *Id.*

280. *Id.*

281. *Barabas*, 955 N.E.2d 260.

Appeals decision in *U.S. Bank National Ass'n v. Seeley*.[282] The mortgage agreement in the case had choice-of-law language that provided that "Ohio and Federal law govern the Lender's interest and charges."[283] Despite the choice-of-law language in the agreement, the court held that Indiana law, not Ohio law, governed.[284] The court found the following factors relevant to determining the applicable law that the agreement: (1) is entitled "Indiana Open-End Mortgage;" (2) was executed in Indiana; (3) "specifically refers to Indiana Code section 31-1-2-16 (now Indiana Code section 32-21-4-1)"; and (4) makes no reference to specific Ohio law while citing an Indiana statute.[285] The court determined that the only applicability of the choice-of-law language is to govern "interest and charges" where interest does not mean "a right, claim, title or legal share in something" but specifically to "the compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money."[286] The court noted that the lender "could have easily made it clear in any number of ways that it intended Ohio law to govern the [m]ortgage and the entirety of the [a]greement, but it did not."[287] The court did not indicate specifically what the lender could have done to show its intent that Ohio law should govern the entire agreement.

IV. PROPERTY USE AND NEGLIGENCE

During the survey period, the Indiana Court of Appeals decided a case that follows and expands upon a case decided during the previous survey period.[288] In *Marshall v. Erie Insurance Exchange*,[289] a case with issues of first impression, the Indiana Court of Appeals held that urban property owners must affirmatively inspect trees on their property and take reasonable actions to prevent trees from falling on neighboring property.[290] Prior to *Marshall*, Indiana property owners, urban or rural, generally were not responsible when a tree on the property owner's land fell on neighboring land causing damage.[291]

In another tree case decided during this survey period, *Scheckel v. NLI, Inc.*,[292] the Indiana Court of Appeals extended the reasoning of *Marshall* to allow liability to attach when tree roots cause damage to neighboring properties.[293] In

---

282. 953 N.E.2d 486 (Ind. Ct. App. 2011).

283. *Id.* at 488.

284. *Id.* at 488-89.

285. *Id.* at 488.

286. *Id.* at 489 (quoting BLACK'S LAW DICTIONARY 812 (6th ed. 1990)) (internal quotations omitted).

287. *Id.*

288. *See* Marci A. Reddick, *Recent Developments in Real Property Law: October 1, 2009-September 30, 2010*, 44 IND. L. REV. 1429, 1463 (2011).

289. 923 N.E.2d 18 (Ind. Ct. App. 2010).

290. *Id.* at 26.

291. *See id.* at 23.

292. 953 N.E.2d 133 (Ind. Ct. App. 2011).

293. *Id.* at 137-38.

Scheckel, Stephen Scheckel and NLI owned adjacent lots in Fort Wayne. Scheckel had owned the NLI property prior to transferring it to NLI. A tree stood on NLI's property near a fence marking the boundary line. Scheckel had a sidewalk on his side of the fence.[294] The tree grew into the fence and its roots grew under the sidewalk, causing the fence to buckle and the sidewalk to crack.

Scheckel sued NLI under negligence and nuisance theories. The trial court, relying on the old view that a landowner is not responsible for damage caused by the natural conditions of his or her land, denied Sheckel any relief.[295]

In reversing the trial court's decision, the Indiana Court of Appeals cited *Marshall*, noting that Indiana has expanded the duty of urban or residential property owners to guard against potentially dead or dangerous falling trees.[296] The trial court had distinguished Scheckel's situation because the tree was not dead or dying.[297] The court of appeals rejected that reasoning:

> [W]e see no meaningful difference between the two situations. Indeed, it may be difficult to determine whether a tree is decayed to such an extent that it poses an unreasonable risk of harm to an adjoining property owner, but a tree upon one's property that is growing into a structure on an adjoining property is readily observable. Similarly, a decayed tree falling into a structure on adjoining property may occur instantaneously and without warning, but a tree growing into such structure occurs over an extended period of time.[298]

Accordingly, property owners in urban or residential areas owe a duty to neighboring property owners to reasonably inspect trees growing on their property and guard against any potential damage that may result, whether resulting from the tree being dead or overreaching its bounds.

V. LANDLORD-TENANT

Continuing in the vein of premises liability while shifting into the specifics of the landlord-tenant relationship, the Indiana Court of Appeals, in *McCraney v. Gibson*,[299] addressed a landlord's liability when a third party was injured by a tenant's dog. In *McCraney*, the landlords, the Calows, lived in a house on an adjacent lot to the tenant, Gibson, and were aware of and permitted Gibson to own a dog on the property.[300] After occupying the property, Gibson informed the Calows that the existing fence on the property was insufficient to contain his dog.[301] The Calows were unaware that the dog had escaped the yard on several

---

294. *Id.* at 135.
295. *Id.*
296. *Id.* at 136-37.
297. *Id.* at 137.
298. *Id.*
299. 952 N.E.2d 284 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 654 (Ind. 2011).
300. *Id.* at 286.
301. *Id.*

occasions. On one occasion, the dog escaped the fence and injured a third party, McCraney. McCraney filed a complaint against both the Calows and Gibson for damages suffered after being knocked down by Gibson's dog.[302] The Calows moved for summary judgment, claiming that because they did not control the property they had no duty.[303] The trial court granted the Calows' summary judgment motion finding no evidence that either defendant had "actual knowledge of [the dog]'s dangerous propensities prior to the incident at issue in this case."[304]

On appeal, McCraney argued that her action was not governed by the litany of dog bite cases, including *Morehead v. Deitrich*,[305] but rather that the case was governed by either premises liability or assumed liability law.[306] The court in *Morehead* held "that in order to prevail against a landowner for the acts of a tenant's dog, the plaintiff must 'demonstrate both that the landowner . . . retained control over the property and had actual knowledge that the [dog] had dangerous propensities.'"[307] Despite McCraney's argument against the two-prong test applied in *Morehead*, the court chose to apply the two-prong test.[308] As a result, the court held that because there was no evidence in the record that the Calows knew of the dog's violent propensity, there was no genuine issue of material fact.[309] Accordingly, the appellate court upheld the trial court's grant of summary judgment for defendants.[310]

Moving into more common scenarios in the realm of landlord-tenant relations, the court of appeals in *Eppl v. DiGiacomo*[311] addressed the termination of a rental agreement for the purposes of Indiana Code chapter 32-31-3.[312] The tenant, DiGiacomo, entered into a lease agreement for an apartment owned by Eppl that was set to terminate on December 31, 2008.[313] Shortly before the end of the lease term DiGiacomo asked Eppl for permission to remain in the apartment for "a couple more months" because her next residence was not yet available.[314] Eppl consented, creating "an extended month-to-month tenancy" beginning on January 1, 2009.[315] DiGiacomo timely paid all rent due for the months of January and February. In February, DiGiacomo informed Eppl that she intended to vacate the apartment on February 13 and asked Eppl about the

---

302. *Id.*
303. *Id.*
304. *Id.* at 287.
305. 932 N.E.2d 1272, 1276 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1202 (Ind. 2011).
306. *McCraney*, 952 N.E.2d at 288.
307. *Id.* at 287 (quoting *Morehead*, 932 N.E.2d at 1276 (internal quotation marks omitted).
308. *Id.* at 289.
309. *Id.*
310. *Id.*
311. 946 N.E.2d 646 (Ind. Ct. App. 2011).
312. This chapter of the code pertains to security deposits relating to lease agreements.
313. *Id.* at 647.
314. *Id.*
315. *Id.*

appropriate location to return the keys.[316] At no point during the parties' discussions was there any mention of proration of the previously paid February rent or the effect of DiGiacomo's vacating the apartment prior to the end of the month.[317] On February 13, DiGiacomo vacated the apartment, dropped off the keys, and provided a forwarding address.[318]

DiGiacomo had no further contact with Eppl until April 10 when she "received an itemization of alleged damages . . . indicating that she had forfeited her security deposit and owed a balance of $87.50 for additional damages."[319] DiGiacomo filed a complaint in small claims court seeking both a refund of her security deposit as well as attorney's fees. Eppl filed an answer contending that he was entitled to the security deposit due to damages to the apartment and filed a counterclaim for the outstanding balance of $87.50.[320] After conducting a bench trial, the small claims court found that DiGiacomo was not liable for the damages and was entitled to a return of her security deposit plus attorney's fees and court costs.[321] The court's decision was based on a finding that: (1) The date of surrender was February 13, which made the reception of the itemization on April 10 beyond the forty-five-day window required by statute;[322] and (2) that the itemization was defective, because it listed fifty-three nail holes when the court found evidence to support the presence of only eight nail holes.[323]

Eppl appealed the judgment on two grounds: (1) The determination that the date of surrender was February 13—alleging that as a matter of law the actual date of surrender was February 28;[324] and (2) that the itemization was not defective.[325] The court of appeals looked to existing case law to determine the actual date of surrender. "Surrender arises by operation of law when the parties to a lease 'take an action that is so inconsistent with the subsisting landlord-tenant relationship as to imply they have both agreed to deem the surrender to

---

316. *Id.*

317. *Id.*

318. *Id.* Note that the 45-day requirement discussed below does not begin until the tenant has supplied an address in writing to which the itemization might be sent. IND. CODE § 32-31-3-12(a) (2011).

319. *Eppl*, 946 N.E.2d at 648.

320. *Id.*

321. *Id.* at 648-49.

322. *See* IND. CODE § 32-31-3-14 (requiring that an itemization be sent to a former tenant within 45 days of termination of occupancy of the premises); *see also Eppl*, 946 N.E.2d at 650 ("[I]t is the termination of the lease agreement which triggers the 45-day notice provision." (citation omitted)); *id.* at 650-51 (quoting Floyd v. Rolling Ridge Apartments, 68 N.E.2d 951, 955 (Ind. Ct. App. 2002) ("Termination of a lease agreement occurs when the tenant surrenders the tenancy and the landlord accepts the tenant's surrender." (citation omitted)).

323. *Eppl*, 946 N.E.2d at 648.

324. Meaning that the April 10 date of receipt for the itemization was within the forty-five-day window.

325. *Eppl*, 946 N.E.2d at 648-50.

have taken effect."[326] In order to determine when a surrender has occurred, the court of appeals looked to *Grueninger Travel Service of Ft. Wayne, Indiana, Inc. v. Lake County Trust Co.*,[327] *Floyd v. Rolling Ridge Apartments*,[328] and *Figg v. Bryan Rental Inc*.[329]

In *Grueninger*, the court of appeals held that "the mere delivery of the keys to the landlord *without other acts* to show the landlord accepted the keys as surrender of the premises, [wa]s not sufficient to release [the tenant] from [] liability."[330] In *Floyd*, the tenant had entered into a renewal lease and vacated the premises days before the close of the renewal lease period.[331] The landlord delivered an itemization to the tenant within one month of the tenant vacating the premises.[332] The tenant filed suit claiming that the itemization was untimely and should have been delivered at the end of the original lease period.[333] The trial court found that the itemization was not required at the end of the original lease period.[334] On appeal, the court held that the tenant's actions were inconsistent with surrender and, based upon the tenant's actions, surrender could not occur until the end of the renewal lease term.[335] In *Figg*, the tenant's attorney returned the keys to the landlord, stating that the tenant left the apartment.[336] The landlord ordered the tenant to continue paying rent "until the end of the lease term or until a [new tenant] was found."[337] The tenant agreed to pay a month's rent for the last month of the term.[338] The tenant then sought the return of his security deposit and the rental payments after he vacated the premises.[339] In affirming the trial court judgment for the landlord, the court of appeals in *Figg* "found that the landlord's conversation with [the tenant] . . . 'was not a decisive, unequivocal act . . . which manifest[ed] [his] acceptance of [the tenant's] surrender.'"[340]

Here, the court of appeals held that because DiGiacomo paid rent through the end of February and never sought a pro rata refund of rent for February after the 13th, she did not indicate a desire to end the lease prior to February 28.[341]

---

326. *Id.* at 651 (quoting Mileusnich v. Novogroder Co., 643 N.E.2d 937, 939 (Ind. Ct. App. 1994)).

327. 413 N.E.2d 1034 (Ind. Ct. App. 1980).

328. 768 N.E.2d 951 (Ind. Ct. App. 2002).

329. 646 N.E.2d 69 (Ind. Ct. App. 1995).

330. *Eppl*, 946 N.E.2d at 651 (quoting *Grueninger*, 413 N.E.2d at 1039) (alterations in original).

331. *Id.* (citing *Floyd*, 768 N.E.2d at 955-56).

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 651-52 (citing Figg v. Bryan Rental Inc., 646 N.E.2d 69, 74 (Ind. Ct. App. 1995)).

337. *Id.*

338. *Id.* at 652.

339. *Id.*

340. *Id.* (quoting *Figg*, 646 N.E.2d at 74) (second, third and fourth alterations in original).

341. *Id.*

Additionally, DiGiacomo could not demonstrate "any decisive, unequivocal action on February 13, 2009, that manifested [Eppl's] acceptance of her surrender of the premises."[342] DiGiacomo had to have provided more evidence than the mere delivery of the keys to "demonstrate that Eppl actually accepted the surrender of the premises."[343] The court of appeals held that the small claims court was in error in determining that the itemization was untimely and reversed the trial court judgment.[344]

As to the second part of Eppl's appeal, whether the itemization of damages was defective, the court of appeals held that, in light of the "particularly deferential" standard of review used for small claims judgments,[345] there was sufficient evidence from which the trial court could conclude that there were no more than eight nail holes.[346] At trial DiGiacomo asserted, with no further evidence, that there were only eight nail holes.[347] Eppl asserted that his calculation of fifty-three nail holes was accurate but lacked any corroborating evidence.[348] Eppl had the burden to establish that there were in fact fifty-three nail holes; he did not carry his burden.[349] The appellate court affirmed the small claims court's decision, holding that Eppl was "not entitled to prevail in whole on his counterclaim."[350]

The Indiana Court of Appeals was not alone in addressing landlord-tenant relations. In *Cedar Farm, Harrison County, Inc. v. Louisville Gas & Electric Co.*,[351] the Seventh Circuit was asked to determine under what circumstances Indiana law entitles a landowner in an oil and gas lease to the lessee. Cedar Farm was the owner of a 2485 acre plot of land along the Ohio River.[352] About 2000 acres of the property were considered a "classified forest" by the Indiana Department of Natural Resources.[353] Louisville Gas & Electric Company ("LG&E") acquired a series of leases on portions of the property in 1947 for the storage and extraction of oil and natural gas. In 1996, after acquiring all parcels of the property, Cedar Farm entered into a consolidated lease with LG&E, encumbering 2176 acres of the property.[354]

In 2008, Cedar Farm filed a complaint in state court seeking damages and

---

342. *Id.*

343. *Id.*

344. *Id.* at 653.

345. *See id.* at 649 (quoting Mayflower Transit, Inc. v. Davenport, 714 N.E.2d 794, 797 (Ind. Ct. App. 1999)) (internal citations omitted).

346. *Id.* at 653-54.

347. *Id.*

348. *Id.* at 654.

349. *Id.*

350. *Id.*

351. 658 F.3d 807 (7th Cir. 2011).

352. *Id.* at 809.

353. *Id.*

354. *Id.*

eviction of LG&E from the property and termination of the lease.[355] The complaint alleged that

> LG&E: (a) . . . "hack[ed] down trees needlessly and indiscriminately"; (b) removed tree limbs in . . . classified-forest areas, without proper notice to Cedar Farm; (c) installed . . . large, above-ground pumping units . . . on elevated platforms in the middle of a scenic vista overlooking the Ohio River . . . and painted them bright yellow; (d) has tossed concrete rubbish into the brush adjacent to the pump jacks and dumped . . . construction and scrap materials on the property; (e) allowed ruts and other impediments to render some road areas . . . nearly impassable; and (f) installed . . . storage tanks that appear to be leaking unidentified fluids.[356]

LG&E moved for and was awarded partial summary judgment on the claim seeking ejectment, with the court "finding that a disagreement about the use of land was not an expressly provided for rationale for termination, and that the lease specifically provided that damages were the proper remedy for such a disagreement."[357] The district court also believed Cedar Farm did not show how damages would be an insufficient remedy.[358]

On appeal to the Seventh Circuit, Cedar Farm sought review of the summary judgment order and, alternatively, "certification to the Indiana Supreme Court on the question of 'whether Indiana would allow a lessor to terminate an oil-and-gas lease where recurring breaches of the lease threaten to inflict intangible, irreparable harm on the subject property.'"[359] The court noted that Indiana law generally permits the enforcement of "forfeiture or termination . . . in oil and gas leases before the lessee has begun drilling."[360] However, after drilling has begun "courts are reluctant to enforce even explicit forfeiture provisions if damages can adequately compensate the lessor."[361] Furthermore, the burden is upon the plaintiff to demonstrate that damages are inadequate compensation.[362]

The court held that the lease provided for money damages as the prescribed remedy and that in order to overcome the terms of the lease, Cedar Farm was required to provide specific evidence of irreparable harm upon which a trier of fact can find for Cedar Farm.[363] The court recognized that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages."[364]

---

355. *Id.* at 810.

356. *Id.* at 809-10.

357. *Id.* at 810.

358. *Id.*

359. *Id.* at 812.

360. *Id.* at 811 (citing Risch v. Burch, 95 N.E. 123, 126 (Ind. 1911)).

361. *Id.* (citing Barrett v. Dorr, 1 212 N.E.2d 29, 35 (Ind. App. 1965); Rembarger v. Losch, 118 N.E. 831, 833 (Ind. App. 1918)).

362. *Id.* (citing *Rembarger*, 118 N.E. at 834).

363. *Id.* at 812.

364. *Id.* (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987)) (alteration

However, due to the lack of any evidence by Cedar Farm to support such a finding, outside of allegations in the complaint and filings, the court affirmed the trial court's grant of summary judgment.[365] The court also declined to exercise its power to certify a question to the Indiana Supreme Court because Indiana law is clear that forfeiture is disfavored unless money damages are inadequate.[366]

VI. BOUNDARY DISPUTES

In *McAllister v. Sanders*,[367] the Indiana Court of Appeals addressed common law dedication. In 1905, Loretta Sanders subdivided property along Crooked Lake, creating fifty-eight lots and three alleys in Stueben County, Indiana.[368] The alleys were each fifteen feet wide and sixty-five feet long extending from Shady Side Road to Crooked Lake. McAllister and Zirkle owned property across Shady Side Road. Their access to Crooked Lake was relegated to the alley between lots eighteen and nineteen, owned by Williamson and the Grays.[369] In December 2008, Zirkle and the McAllisters filed a complaint to quiet title to the alley by adverse possession and eventually amended the complaint to also include a prescriptive easement claim.[370] Williamson and the Grays argued that Sanders had made a common law dedication of the alley, making the alley immune from arguments of adverse possession and prescriptive easement.[371] The trial court found that Sanders had intended to make a common law dedication and the public had accepted the dedication.[372] The McAllisters and Zirkles appealed.

The court of appeals first set out the requirements for common law dedication: "(1) The intent of the owner to dedicate and (2) the acceptance of the public of the dedication."[373] The court quickly affirmed the trial court on the first element.[374] The court of appeals reasoned that Sanders' intent must have been to dedicate the land for public use because all private lots adjacent to the lake had access to the lake without use of the alleys.[375] The thrust of McAllister and the Zirkle's argument was that the second element for public dedication, acceptance by the public, was lacking.[376] At trial, McAllister and the Zirkles called witnesses who testified that Williamson and the Grays were the only other people

---

in original).

365. *Id.*

366. *Id.* at 813.

367. 937 N.E.2d 378 (Ind. Ct. App. 2010).

368. *Id.* at 380-81.

369. *Id.* at 381.

370. *Id.*

371. *Id.*

372. *Id.* at 381-82.

373. *Id.* at 383.

374. *Id.*

375. *Id.* at 384.

376. *Id.* at 383.

who used the alley, and they used it very sparingly.[377] Again, the court of appeals affirmed the trial court holding that even sparse use qualifies as public use.[378] Quoting *Chaja v. Smith*,[379]

> the frequency and number of users of a street is not significant, so long as the street remained free to those members of the public who had occasion to use it. In addition, the term "public" has been interpreted to mean "all those who have occasion to use" the road. Finally, a road can be a public road even if the road is only open at one end and only provides access to one landowner.[380]

Affirming the trial court decision that Sanders had made a common law dedication of the disputed alley, the court of appeals denied McAllister and the Zirkles' adverse possession claim.[381]

CONCLUSION

While this Article is not an exercise in blanket coverage of Indiana cases dealing with all aspects of property law, it has endeavored to highlight the most important decisions handed down during the survey period. Indiana property law continues to evolve each year. This survey period marked yet another year of movement, with several cases of first impression, clarifications of previous decisions, and reiterations of prior case law. Even in areas of law that have been reestablished for well over a century, Indiana property law continues to provide interesting new developments. These developments have potential to impact property owners, practitioners, and the general public for years to come.

377. *Id.* at 384.

378. *Id.* at 384-85.

379. 755 N.E.2d 611 (Ind. Ct. App. 2001).

380. *Id.* at 615.

381. *McAllister*, 937 N.E.2d at 385.

RECENT DEVELOPMENTS IN INDIANA TAXATION SURVEY 2011

LAWRENCE A. JEGEN, III*
THERESA A. SEARLES**
JAMES R. SMERBECK***

INTRODUCTION: SOME REFERENCES USED IN THIS ARTICLE

This Article highlights the major tax developments that occurred during the calendar year of 2011. Whenever the term "GA" is used in this Article, the term refers only to the 117th Indiana General Assembly. Whenever the term "Tax Court" is referred to, such term refers only to the Indiana Tax Court. Whenever the term "Court of Appeals" is referred to, the term refers only to the Indiana Court of Appeals. Whenever the term "DLGF" is used, the term refers only to the Indiana Department of Local Government Finance. Whenever the term "IBTR" is used, the terms refers only to the Indiana Board of Tax Review. Whenever the terms "Department" or "DOR" are used, these terms refers only to the Indiana Department of State Revenue. Whenever the terms "IC" or "Indiana Code" are used in this Article, these terms refer only to the Indiana Code in effect at time of the publication of this Article, unless otherwise explicitly stated. Whenever the term "ERA" is used, the term refers only to an Indiana Economic Revitalization Area. Whenever the term "CAGIT" is used, the term refers only to the Indiana County Adjusted Gross Income Tax. Whenever the term "COIT" is used, the term refers only to the Indiana County Option Income Tax. Whenever the term "LOIT" is used, the term refers only to the Local Option Income Tax. Whenever the term "IEDC" is used, the term refers only to the Indiana Economic Development Corporation. Whenever the term "CEDIT" is used, the term refers only to the Indiana County Economic Development Income Taxes. Whenever the terms "IRC" or "Code" are used, these terms refer only to the Internal Revenue Code in effect at the time of the publication of this Article. Whenever the term "section" is used in this Article, the term only refers to a section of the Indiana Code, unless it is a reference to the Internal Revenue Code. Whenever the term "Public Law" is used, the term only refers to legislation passed by the Indiana General Assembly and assigned a Public Law number. Whenever the term "PTABOA" is used, the term refers only to a Property Tax Assessment Board of Appeals.

---

* Thomas F. Sheehan Professor of Tax Law and Policy, Indiana University Robert H. McKinney School of Law. L.L.M., 1963, New York University; M.B.A., J.D., 1959, University of Michigan; B.A., 1956, Beloit College.

** J.D. Candidate, 2012, Indiana University Robert H. McKinney School of Law; B.A., 2007, Purdue University.

*** J.D. Candidate, 2012, Indiana University Robert H. McKinney School of Law; M.A., 2007, University of North Carolina-Chapel Hill; B.A., 2005, University of Dayton.

I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 117th General Assembly passed several pieces of legislation affecting various areas of state and local taxation. The most significant changes were in the area of property taxes. This section highlights the majority of the GA's changes from 2011 in the areas of local finance, tax procedure, sales and other excise taxes, income tax, and inheritance tax.

A. Property Taxes

Unlike previous years, where the amendments were esoteric and technical,[1] in 2011 there were many legislative amendments with wide-ranging implications for taxpayers. Indiana Code section 6-1.1-2-8 is a new code section applying to all property taxes due and payable starting in 2002. It requires that for any levy, distribution, or budget appropriation based on property taxes, the assessed value must be increased from 33.33% to 100% of true tax value (TTV).[2] However, the IBTR and DLGF must adjust the tax rates of all jurisdictions so as to make the change from partial to full TTV neutral, both in terms of payments by taxpayers[3] and revenue collected by government units.[4] Similar changes will be made to neutralize any assessed value limitations on the amount of aggregate bonds a taxing jurisdiction may issue.[5]

Indiana Code section 6-1.1-2-10 makes most actions taken by a county or the DLGF to stop collecting taxes, among other things before November 21, 2007, retroactively valid.[6] It also validates the same actions after November 21, 2007.[7] To help adjustment with the transition to full TTV and the property tax caps now existing in the Indiana Constitution,[8] the time to file an amended property tax return was extended from six to twelve months beginning on May 15, 2011.[9]

Noting northern Indiana's reliance on the petrochemical and steel industries, the GA devised an alternative scheme for property tax assessment of petrochemical and steel properties by amending Indiana Code section 6-1.1-3-23.[10] The 2003 laws allowing abnormal reporting for severely obsolete property had the effect of drastically reducing northern Indiana's tax base, and absent statutory modification, would have continued to do so for the foreseeable future.[11] To compensate for this, the GA developed an alternative valuation scheme for

---

1. *See generally* Lawrence A. Jegen III et al., *Recent Developments in Indiana Taxation*, 42 IND. L. REV. 1215, 1216-19 (2010).
2. IND. CODE § 6-1.1-2-8(b)(2) (2011).
3. *Id.* § 6-1.1-2-8(d).
4. *Id.* § 6-1.1-2-8(g).
5. *Id.* § 6-1.1-2-8(h).
6. *Id.* § 6-1.1-2-10(a).
7. *Id.* § 6-1.1-2-10(d).
8. IND. CONST. art. 10, § 1.
9. IND. CODE § 6-1.1-3-7.5(a).
10. *Id.* § 6-1.1-3-23(a).
11. *Id.* § 6-1.1-3-23(a)(6).

any steel mill owned at least 50% by an integrated steel mill.[12] This method recognizes that obsolescence of steel and petrochemical plants is caused by different forces than those causing normal obsolescence.[13] The goal of the statute is to eliminate abnormal obsolescence deduction claims, which can deprive counties of needed revenue and increase uncertainty.[14] This plan gives the taxpayer the option of taking a set depreciation schedule for their equipment, accounting for all types of depreciation and obsolescence, including abnormal obsolescence.[15] If the taxpayer elected this scheme, it would be precluded from adopting any other schedule.[16]

There were also changes in the statutes regarding the distribution of funds. Indiana Code section 6-1.1-8-35.2 removed the restrictions on commuter transportation district's allocation of funds received between July 1, 1999 and December 31, 2000.[17] Also, houses for fraternities and sororities that are tax exempt under Internal Revenue Code §§ 501(c)(2), (c)(3), or (c)(7) may now have their property exempt greater than one acre in size.[18] It also makes it more flexible because the definition of being used for fraternity or sorority purposes may now include land that is used for headquarters or to support the administrative or executive functions of the Greek organization.[19] Moreover, it allows for multiple exempt fraternities and sororities to share the same property, and the property will still be tax exempt.[20] Any tangible property owned by an exempt fraternity or sorority does not require an exemption application to be exempt for property tax purposes.[21]

The GA provided added flexibility for taking the homestead deduction. It amended Indiana Code section 6-1.1-12-37 so that a married couple, in which each spouse has a separate primary residence, may now take two homestead deductions so long as the non-resident spouse does not have an ownership interest in the resident spouse's homestead.[22] It also added Indiana Code section 6-1.1-12-46 for enhanced deduction schedules for the rehabilitation or redevelopment of real property in economic development areas.[23] If the property is at least 50,000 square feet, is in an area where the county unemployment rate exceeds the state unemployment rate by at least 2%, and the total investment by the taxpayer exceeds $10 million, the taxpayer can take a 100% property tax deduction for three (3) years on the gross assessed value of any tangible personal property

12. *Id.* § 6-1.1-3-23(a)(7).
13. *Id.* § 6-1.1-3-23(a)(7)(B).
14. *Id.* § 6-1.1-3-23(a)(9).
15. *Id.* § 6-1.1-3-23(a)(8).
16. *Id.* § 6-1.1-3-23(a)(8).
17. *Id.* § 6-1.1-8-35.2.
18. *Id.* § 6-1.1-10-24(a)(1).
19. *Id.* § 6-1.1-10-24(c).
20. *Id.* § 6-1.1-10-24(d).
21. *Id.* § 6-1.1-11-4(d)(1)(D).
22. *Id.* § 6-1.1-12-37(n).
23. *Id.* § 6-1.1-12-46.

located on the redevelopment site.[24] The GA also modified section 6-1.1-12-17(a) and established an alternative schedule for property owners taking a tax abatement for economic development properties. This schedule is based on the amount of the investment, the number of full time equivalent jobs created, average wages for those employees, and the infrastructure investment in the property.[25]

Due to the housing bust, there are many completed or partially completed residential properties unsold. Therefore, the GA passed a new tax code section for property builders to take deductions on these properties, termed residence in inventory.[26] These are single-family residences (homes, condominiums, or townhouses) that are either fully or partially completed,[27] which have never been inhabited and are not model homes.[28] An owner is allowed a deduction of 50% of assessed value, depending on whether the residence is fully or partially completed.[29]

The GA has made provisions for tax credits during the years in which the property tax caps had been passed by the GA but had not yet been enshrined in the Indiana Constitution.[30] For taxes due and payable in 2008, assessed on March 1, 2006 or January 15, 2007, homeowners can get a tax credit of up to $2500. There is also a new chapter added to the Indiana Code for property tax credits applying to taxes due and payable in 2010, assessed on March 1, 2008 and January 15, 2009.[31] The GA allotted $140,000,000 in homestead tax credits to be distributed *pro rata* to the counties based on pre-2008 total property tax levies.[32] The distributions are determined by the DLGF through a complex formula.[33] An additional $80,000,000 is allocated for property taxes due and payable on March 1, 2009 and January 15, 2010, using the same formula.[34]

B. Local Finance

The GA also provided for specific flexibility for one county and one township in their property tax levies to ensure that each has adequate revenue. This has taken on heightened importance since implementing the property tax caps.[35] Jefferson County is allowed to increase its levy up to $300,000 "if the [DLGF] finds that the county experienced a property tax revenue shortfall that

---

24. *Id.* §§ 6-1.1-12.1-16(a)-(b).
25. *Id.* § 6-1.1-12.1-17(a).
26. *Id.* § 6-1.1-12.8-1.
27. *Id.* § 6-1.1-12.8-3(b).
28. *Id.* § 6-1.1-12.8-1(a).
29. *Id.* § 6-1.1-12.8-3(b).
30. *Id.* § 6-3-2-25(c).
31. *Id.* § 6-1.1-20.1.
32. *Id.* §§ 6-1.1-20.1-1(e)-(f).
33. *Id.* §§ 6-1.1-20.1-1(g)-(h).
34. *Id.* § 6-1.1-20.1-2.
35. IND. CONST. art. 10, § 1.

resulted from an erroneous estimate of the effect of the supplemental deduction under [Indiana Code section] 6-1.1-12-37.5 on the county's assessed valuation."[36] The legislature also amended Indiana Code section 6-1.1-18.5-13.7.[37] Fairfield Township in Tippecanoe County is allowed to petition the DLGF for the right to increase its levy, but it must have done so by September 1, 2011.[38] This amount is capped at $130,000 per year, but its levy may be increased annually for up to four years, or until July 1, 2016, whichever is the lesser.[39] Finally, the GA amended Perry County's income tax structure under Indiana Code section 6-3.5-7-27.5.[40] While Perry County is allowed to impose a CEDIT, capped at 0.5%,[41] the sum of that tax and its COIT must be capped at 1.75%.[42]

C. Tax Procedure

One of the most important developments in tax procedure has been in citizen appeals of property tax assessments. The GA eliminated subsection (p) from Indiana Code section 6-1.1-15-1, moved the material to later in the chapter, and gave it its own section: Indiana Code section 6-1.1-15-17.[43] This provision shifts the burden on an appeal from the taxpayer to the county assessor if there was an increase of more than 5% in the assessed value of the property.[44] There has also been a change to Indiana Code section 6-1.1-20-3.6(e), the procedure for governments seeking to put a bond issuance before voters in a referendum.[45] Beginning May 1, 2011, the DLGF must review and approve the ballot language for it to be placed on the ballot.[46] The DLGF must respond to the local government agency within ten days, either approving the language or making changes.[47] If the DLGF makes changes, the local government agency must revise and resubmit its ballot language to the DLGF.[48] Only upon DLGF approval may it be approved by the county auditor and go on the ballot.[49]

Through Indiana Code section 6-1.1-22.5-8(e)(1), DLGF has also received new oversight responsibilities over the county auditors' adjustment authority.[50] The DLGF may now authorize the following types of adjustments:

---

36. IND. CODE § 6-1.1-18.5-14.
37. *Id.* § 6-1.1-18.5-13.7.
38. *Id.* § 6-1.1-18.5-13.7(a).
39. *Id.* §§ 6-1.1-18.5-13.7(b)-(d).
40. *Id.* § 6-3.5-7-27.5(d).
41. *Id.*
42. *Id.* § 6-3.5-7-5(z).
43. *Id.* § 6-1.1-15-17 (Version a).
44. 2011 Ind. Acts 1969, 2014.
45. IND. CODE § 6-1.1-20-3.6(e).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* § 6-1.1-22.5-8(e)(1).

(C) adjustments to include current year special assessments or exclude special assessments payable in the year of the assessment date but not payable in the current year;
(D) adjustments to include delinquent:
(i) taxes; and
(ii) special assessments;
(E) adjustments to include penalties that are due and owing; and
(F) adjustments to include interest that is due and owing.[51]

The GA now requires DOR to publish a notification informing taxpayers of their obligation to remit use tax on their state income tax returns.[52] DOR is also now prohibited from renewing the retail merchant certificate for any entity delinquent on its taxes.[53]

The GA authorized counties to impose COITs, retroactive to 2009[54] and changed the filing deadline for such taxes from October 1 to December 1 of the taxable year.[55] Counties now also have additional flexibility of when to pass ordinances affecting tax rates, specifically when those ordinances take effect. Previously, an ordinance raising taxes, lowering taxes, or rescinding an ordinance doing either of the first two had to be passed between March 31 and August 1 to be effective that taxable year.[56] This restriction has been removed for all three circumstances.[57] Additionally, the statutory provisions mandating an effective date of the increase, decrease, or rescission of October 1 of that year has been removed.[58] Presumably, since no alternative date was included, an ordinance will become effective immediately upon passage.

Motor carrier fuel tax returns now must be filed electronically,[59] and DOR can revoke a taxpayer's license to operate if the taxpayer fails to file the electronic return.[60]

For a CEDIT, the deadline for a change in the tax to be effective on January 1 of the next calendar year has been extended from July 1 to August 2.[61] The deadline for paying DOR's assessment or filing a written tax protest has been extended from forty-five to sixty days.[62] If a tax warrant issued is erroneous, the circuit court clerk is now responsible for expunging the warrant from the

---

51. *Id.*
52. *Id.* § 6-2.5-3-10.
53. *Id.* § 6-2.5-8-1(g).
54. *Id.* § 6-3.5-0.8.
55. *Id.* § 6-3.5-1.1-2(a).
56. 2011 Ind. Acts 699, 703-05 (2011).
57. IND. CODE §§ 6-3.5-1.1-3(a); 6-3.5-1.1-3.1(a); 6-3.5-1.1-4(b).
58. 2011 Ind. Acts 699, 703-05.
59. IND. CODE § 6-6-4.1-10(e)-(f) (Version b).
60. *Id.* § 6-6-4.1-17(5)-(6) (Version b).
61. *Id.* § 6-3.5-7-12(c)(1).
62. *Id.* § 6-8.1-5-1(d).

taxpayer's record.[63]

Finally, there have been changes in the jurisdiction and procedure for appeals made to the Tax Court. Under Indiana Code section 6-8.1-8-16, no levy or other court-approved action may be taken by DOR against a taxpayer until after the appeal period has expired or there is a final decision made by the Indiana Tax Court (Tax Court).[64] Additionally, the Tax Court loses jurisdiction for an appeal if a taxpayer does not appeal within ninety days of the later of a denial of claim by DOR or a final DOR decision.[65]

D. Sales and Other Excise Taxes

The GA passed Indiana Code chapter 6-2.3-0.1 for the Utility Receipts Tax, making it retroactively effective for taxable years starting after 2002.[66] It provides for a short taxable year for some entities for the first year of the tax credit, starting January 1, 2003 and ending at the end of the fiscal year, as registered with the Internal Revenue Service (IRS).[67] The $1,000 deduction and resource recovery system depreciation will be prorated retroactively from January 1, 2003 to the end of the entity's fiscal year.[68] Modifying section 6-6-4.1-2, nine-passenger vans are now exempt from the motor carrier fuel tax.[69] Also, the additional excise tax for the purchase of a boat has been reduced from 10% to 8.33%, pursuant to new language in section 6-6-11-17(a).[70]

The GA also took steps to expand the definition of what constitutes a retail transaction subject to sales tax. A vendor selling prepaid phone cards is now considered a retail merchant and thus, must collect and remit sales tax.[71] Additionally, the exemption for sales of durable medical equipment has been repealed.[72] Finally, the GA amended Indiana Code section 6-2.5-10-10(a)(2) and increased the percentage of sales and other excise taxes going into the state general fund. The percentage of sales tax revenue going into the state general fund has increased from 99.178% to 99.848%,[73] and the 0.67% contribution into the state mass transit revenue fund has been eliminated.[74]

The GA made several changes to the hotel and innkeeper's taxes as well by amending Indiana Code sections 6-9-7-7(a)(1) and 6-9-10.5-6(b). Normally, 30% of the innkeeper's tax is allotted to the Department of Natural Resources (DNR)

---

63. *Id.* § 6-8.1-8-2(h) (Version a).
64. *Id.* § 6-8.1-8-16(b).
65. *Id.* § 6-8.1-9-1(c)(2).
66. *Id.* § 6-2.3-0.1-1.
67. *Id.* § 6-2.3-0.1-2(c).
68. *Id.* § 6-2.3-0.1-2(d).
69. 2011 Ind. Acts 492.
70. IND. CODE § 6-6-11-17(a) (2011).
71. *Id.* § 6-2.5-4-13.
72. *Id.* § 6-2.5-5-18(a).
73. 2011 Ind. Acts 3316, 3618.
74. IND. CODE § 6-2.5-10-10(a)(2).

"for the development of projects in the state park on the county's largest river, including its tributaries."[75] However, from July 1, 2015 until June 30, 2017, this 30% is to go in the county's general fund.[76] The maximum hotel tax a county may levy was increased from 3% to 5% as of July 1, 2011.[77] If the rate increases during the middle of the year, this increase shall be applied *pro rata* to the lake fund for the rest of the year;[78] in other words, it would not be a retroactive increase in the deposit of funds. Also, any increase in the hotel and innkeeper's tax must be accompanied by the establishment of a county promotion fund[79] and economic development commission.[80]

The Nashville (Indiana) food and beverage tax was extended ten years, until January 1, 2022.[81] Also, the sunset provision for the Allen County Supplemental Food and Beverage Tax was modified. Whereas before it was to terminate two years after the debt incurred was retired, it now terminates on the later of that date or two years after the retirement of the debt by the Capital Improvement Board of Directors.[82]

Finally, the GA modified section 6-9-39-9 to create a narrow exception for any county that enacted an ordinance authorizing a dog licensing system—but without a county option dog tax—in January 2007.[83] The ordinance is retroactively valid.[84]

E. Income Taxes

There have been several significant changes to the calculation of Indiana corporate adjusted gross income (AGI). Many of these changes are due to the implementation of the E-Verify program, in which employers must ensure the workers they hire are legally authorized to work in the United States. Indiana Code chapter 6-3-1 has been amended such that employers who do not participate in E-Verify are prohibited from deducting the reasonable wages of undocumented immigrant employees as a business expense to arrive at AGI.[85] Employers are also similarly prohibited from claiming Economic Development for a Growing Economy Tax Credits on the wages of undocumented immigrants, for which the employers would otherwise be eligible, unless they participated in E-Verify.[86] An employer who deducted these wages on its federal income tax returns as a

---

75. *Id.* § 6-9-7-7(a)(1)(A) (Version b).
76. *Id.* § 6-9-7-7(a)(1)(B).
77. *Id.* § 6-9-10.5-6(b).
78. *Id.* § 6-9-10.5-7(c).
79. *Id.* § 6-9-10.5-8(a).
80. *Id.* § 6-9-10.5-9(a)(1).
81. *Id.* §§ 6-9-24-9(a)-(b).
82. *Id.* § 6-9-33-3(d).
83. *Id.* §§ 6-9-39-9(a)-(b).
84. *Id*.
85. *Id.* § 6-3-1-3.5(a)(35) (Version b).
86. *Id.* §§ 6-3.1-13-5(b)(1)-(2).

business expense must add them back for Indiana tax purposes unless the employer participated in E-Verify.[87] In addition to these sanctions, the GA also provided an important incentive for businesses; if they willingly participated in E-Verify, the ten-year limit on the above-mentioned tax credits would not apply to their businesses.[88]

There were also other changes to the calculation of individual AGI. The required addback of IRC § 221, the federal tax deduction for married couples, for taxable years 1986 and prior has been eliminated.[89] Interest income under IRC § 128 has been eliminated for taxable years prior to and including 1984 has been eliminated.[90] However, out-of-state state or municipal bond income is now added to AGI.[91] Eighteen additional addbacks have been added to the AGI calculation[92]:

> (35) Add the amount deducted from gross income under Section 198 of the Internal Revenue Code for the expensing of environmental remediation costs.
> (36) Add the amount excluded from gross income under Section 408(d)(8) of the Internal Revenue Code for a charitable distribution from an individual retirement plan.
> (37) Add the amount deducted from gross income under Section 222 of the Internal Revenue Code for qualified tuition and related expenses.
> (38) Add the amount deducted from gross income under Section 62(2)(D) of the Internal Revenue Code for certain expenses of elementary and secondary school teachers.
> (39) Add the amount excluded from gross income under Section 127 of the Internal Revenue Code as annual employer provided education expenses.
> (40) Add the amount deducted from gross income under Section 179E of the Internal Revenue Code for any qualified advanced mine safety equipment property.
> (41) Add the monthly amount excluded from gross income under Section 132(f)(1)(A) and 132(f)(1)(B) that exceeds one hundred dollars ($100) a month for a qualified transportation fringe.
> (42) Add the amount deducted from gross income under Section 221 of the Internal Revenue Code that exceeds the amount the taxpayer could deduct under Section 221 of the Internal Revenue Code before it was amended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312).
> (43) Add the amount necessary to make the adjusted gross income of any

87. *Id.* § 6-5.5-1-2(a)(2)(H) (Version b).

88. *Id.* § 6-3.1-13-18(c).

89. *Id.* § 6-3-1-3.5(a)(10) (Version a).

90. *Compare id.* § 6-3-1-3.5(a)(11) (Version c), *with id.* § 6-3-1-3.5(a)(10) (Versions a & b).

91. *Compare id.* § 6-5.5-1-2(c) (Version c), *with id.* § 6-5.5-1-2(c) (Version a & b).

92. Unless explicitly stated otherwise, "section" in this list refers to the Internal Revenue Code section, and "P.L." refers to the federal Public Law number, not Indiana.

taxpayer that placed any qualified leasehold improvement property in service during the taxable year and that was classified as 15-year property under Section 168(e)(3)(E)(iv) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed into service.
(44) Add the amount necessary to make the adjusted gross income of any taxpayer that placed a motorsports entertainment complex in service during the taxable year and that was classified as 7-year property under Section 168(e)(3)(C)(ii) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed into service.
(45) Add the amount deducted under Section 195 of the Internal Revenue Code for start-up expenditures that exceeds the amount the taxpayer could deduct under Section 195 of the Internal Revenue Code before it was amended by the Small Business Jobs Act of 2010 (P.L. 111-240).
(46) Add the amount necessary to make the adjusted gross income of any taxpayer for which tax was not imposed on the net recognized built-in gain of an S corporation under Section 1374(d)(7) of the Internal Revenue Code as amended by the Small Business Jobs Act of 2010 (P.L. 111-240) equal to the amount of adjusted gross income that would have been computed before Section 1374(d)(7) of the Internal Revenue Code as amended by the Small Business Jobs Act of 2010 (P.L. 111-240).[93]

(R) Add the amount necessary to make the adjusted gross income of any taxpayer that placed any qualified leasehold improvement property in service during the taxable year and that was classified as 15-year property under Section 168(e)(3)(E)(iv) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed into service.
(S) Add the amount deducted from gross income under Section 198 of the Internal Revenue Code for the expensing of environmental remediation costs.
(T) Add the amount deducted from gross income under Section 179E of the Internal Revenue Code for any qualified advanced mine safety equipment property.
(U) Add the amount necessary to make the adjusted gross income of any taxpayer that placed a motorsports entertainment complex in service during the taxable year and that was classified as 7-year property under Section 168(e)(3)(C)(ii) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed

93. IND. CODE §§ 6-3-1-3.5(a)(35)-(46) (Version a).

into service.
(V) Add the amount deducted under Section 195 of the Internal Revenue Code for start-up expenditures that exceeds the amount the taxpayer could deduct under Section 195 of the Internal Revenue Code before it was amended by the Small Business Jobs Act of 2010 (P.L. 111-240).
(W) Add the amount necessary to make the adjusted gross income of any taxpayer for which tax was not imposed on the net recognized built-in gain of an S corporation under Section 1374(d)(7) of the Internal Revenue Code as amended by the Small Business Jobs Act of 2010 (P.L. 111-240) equal to the amount of adjusted gross income that would have been computed before Section 1374(d)(7) of the Internal Revenue Code as amended by the Small Business Jobs Act of 2010 (P.L. 111-240).[94]

There were also five new addback provisions in computing taxable income. As with computing AGI, these changes are made retroactive to January 1, 2011:

(19) Add the amount deducted from gross income under Section 198 of the Internal Revenue Code for the expensing of environmental remediation costs.
(20) Add the amount deducted from gross income under Section 179E of the Internal Revenue Code for any qualified advanced mine safety equipment property.
(21) Add the amount necessary to make the adjusted gross income of any taxpayer that placed any qualified leasehold improvement property in service during the taxable year and that was classified as 15-year property under Section 168(e)(3)(E)(iv) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed into service.
(22) Add the amount necessary to make the adjusted gross income of any taxpayer that placed a motorsports entertainment complex in service during the taxable year and that was classified as 7-year property under Section 168(e)(3)(C)(ii) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed into service.
(23) Add the amount deducted under Section 195 of the Internal Revenue Code for start-up expenditures that exceeds the amount the taxpayer could deduct under Section 195 of the Internal Revenue Code before it was amended by the Small Business Jobs Act of 2010 (P.L. 111-240).[95]

For life insurance companies, there are five new addbacks in computing AGI:

(18) Add the amount necessary to make the adjusted gross income of any taxpayer that placed any qualified leasehold improvement property in

94. *Id.* §§ 6-5.5-1-2(c)(1)(R)-(W) (Version a).
95. *Id.* §§ 6-3-1-3.5(b)(19)-(23) (Versions a & c).

service during the taxable year and that was classified as 15-year property under Section 168(e)(3)(E)(iv) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed into service.
(19) Add the amount necessary to make the adjusted gross income of any taxpayer that placed a motorsports entertainment complex in service during the taxable year and that was classified as 7-year property under Section 168(e)(3)(C)(ii) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed into service.
(20) Add the amount deducted under Section 195 of the Internal Revenue Code for start-up expenditures that exceeds the amount the taxpayer could deduct under Section 195 of the Internal Revenue Code before it was amended by the Small Business Jobs Act of 2010 (P.L. 111-240).
(21) Add the amount deducted from gross income under Section 198 of the Internal Revenue Code for the expensing of environmental remediation costs.
(22) Add the amount deducted from gross income under Section 179E of the Internal Revenue Code for any qualified advanced mine safety equipment property.[96]

Finally, six new addbacks were added to compute AGI for trusts and estates:

(16) Add the amount necessary to make the adjusted gross income of any taxpayer that placed any qualified leasehold improvement property in service during the taxable year and that was classified as 15-year property under Section 168(e)(3)(E)(iv) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed into service.
(17) Add the amount necessary to make the adjusted gross income of any taxpayer that placed a motorsports entertainment complex in service during the taxable year and that was classified as 7-year property under Section 168(e)(3)(C)(ii) of the Internal Revenue Code equal to the amount of adjusted gross income that would have been computed had the classification not applied to the property in the year that it was placed into service.
(18) Add the amount deducted under Section 195 of the Internal Revenue Code for start-up expenditures that exceeds the amount the taxpayer could deduct under Section 195 of the Internal Revenue Code before it was amended by the Small Business Jobs Act of 2010 (P.L. 111-240).
(19) Add the amount deducted from gross income under Section 198 of the Internal Revenue Code for the expensing of environmental

96. *Id.* §§ 6-3-1-3.5(c)(18)-(22) (Versions a & c).

remediation costs.
(20) Add the amount deducted from gross income under Section 179E of the Internal Revenue Code for any qualified advanced mine safety equipment property.
(21) Add the amount necessary to make the adjusted gross income of any taxpayer for which tax was not imposed on the net recognized built-in gain of an S corporation under Section 1374(d)(7) of the Internal Revenue Code as amended by the Small Business Jobs Act of 2010 (P.L. 111-240) equal to the amount of adjusted gross income that would have been computed before Section 1374(d)(7) of the Internal Revenue Code as amended by the Small Business Jobs Act of 2010 (P.L. 111-240).[97]

While the above addbacks were, in many cases, attempts by the GA to keep Indiana in compliance with changes to the Internal Revenue Code, the GA did make several exceptions to 2010 changes to the Code:

(d) The following provisions of the Internal Revenue Code that were amended by the Tax Relief Act, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312) are treated as though they were not amended by the Tax Relief Act, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312):
(1) Section 1367(a)(2) of the Internal Revenue Code pertaining to an adjustment of basis of the stock of shareholders.
(2) Section 871(k)(1)(c) and 871(k)(2)(C) of the Internal Revenue Code pertaining the treatment of certain dividends of regulated investment companies.
(3) Section 897(h)(4)(A)(ii) of the Internal Revenue Code pertaining to regulated investment companies qualified entity treatment.
(4) Section 512(b)(13)(E)(iv) of the Internal Revenue Code pertaining to the modification of tax treatment of certain payments to controlling exempt organizations.
(5) Section 613A(c)(6)(H)(ii) of the Internal Revenue Code pertaining to the limitations on percentage depletion in the case of oil and gas wells.
(6) Section 451(i)(3) of the Internal Revenue Code pertaining to special rule for sales or dispositions to implement Federal Energy Regulatory Commission or state electric restructuring policy for qualified electric utilities.
(7) Section 954(c)(6) of the Internal Revenue Code pertaining to the look-through treatment of payments between related controlled foreign corporation under foreign personal holding company rules.[98]

---

97. *Id.* §§ 6-3-1-3.5(e)(16)-(21) (Versions a & c).
98. *Id.* §§ 6-3-1-11(d)(1)-(7).

Despite the property tax caps being implemented—and the uncertainty of how the caps will affect county, township, and municipality revenues—the GA also passed a gradual reduction in the Indiana corporate income tax through an amendment to Indiana Code section 6-3-2-1(b). Starting July 1, 2012, the income tax will be reduced by 0.5% annually until it reaches 6.5% on July 1, 2015.[99] However, with this reduction comes an expansion of the scope of AGI through several amendments to Indiana code chapter 6-3-2. Intangible personal property that can be sourced or apportioned to Indiana is now included in AGI,[100] and the net operating loss carryback for both individuals[101] and corporations[102] has been eliminated, effective January 1, 2012. Also, employers are no longer exempt from withholding taxes from employees simply because the employee qualifies for the Earned Income Tax Credit.[103]

In addition to these state-level changes, there have been several changes to the county income and COITs via amendments to Code chapter 6-3.5-6. The county option income tax a county may impose is now capped at 1% *per annum*, up from 0.6%.[104] However, this must be increased by increments of no more than 0.1% annually.[105] Additionally, if both a CAGIT and COIT are in effect by ordinance, the COIT will take effect and the CAGIT will not.[106] Counties also have the option to permanently freeze their COIT rates as of December 1 of a particular tax year.[107] If a county chooses not to freeze its COIT rate, it will automatically increase by 0.1% annually until it reaches 1%.[108]

The legislature greatly modified Code article 6-3.1. An eight-year moratorium has also been placed on the tax credits for teachers' summer employment.[109] Also, the tax credit for operating a maternity home was altered under Code chapter 6-3.1-9. It may not be awarded for a period beginning on January 1, 2012 and ending December 31, 2019,[110] but a taxpayer may carry forward any awarded but unclaimed credits and use them in the 2014 and 2015 tax years.[111] Eligibility for the Indiana Earned Income Tax Credit (EITC) is based on eligibility for the federal EITC before the passage of the federal Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, which

99. *Id.* §§ 6-3-2-1(b)(1)-(5).
100. *Id.* § 6-3-2-2(a)(5).
101. *Id.* §§ 6-3-2-2.5(b), (f).
102. *Id.* §§ 6-3-2-2.6(b), (f).
103. 2011 Ind. Acts 1969, 2092-2096.
104. IND. CODE § 6-3.5-6-9(a) (2011).
105. *Id.*
106. *Id.* § 6-3.5-6-10.
107. *Id.* § 6-3.5-6-11(b).
108. *Id.* § 6-3.5-6-11(e).
109. *Id.* § 6-3.1-2-8.
110. *Id.* §§ 6-3.1-14 to -10.
111. *Id.* § 6-3.1-14-9.

altered the eligibility for the federal EITC.[112]

There have been several other important changes to the law surrounding tax credits as well. The cap on funds for the venture capital investment tax credit has increased from the lesser of 20% of all qualifying venture capital or $500,000, to the lesser of 20% of all qualifying venture capital or $1,000,000.[113] The tax credits are also extended for an additional two years, through the end of the 2014 taxable year.[114] Funds for the school scholarship tax credit have similarly been doubled to $5,000,000.[115] On the other hand, the GA imposed an eight-year moratorium on employers receiving new tax credits for their employee health benefit plans.[116] It also imposes a moratorium for 2012 on awarded but unclaimed credits; these must be carried forward to tax years between 2013 and 2016.[117] Similarly, an eight-year moratorium has been imposed on the Small Employer Qualified Wellness Program Tax Credit.[118]

The GA added new sections to Code chapter 6-3.5-9. Among them, it created a new hiring incentive, in which qualifying entities can receive a credit on their COIT or LOIT.[119] This incentive may last for up to ten years[120] and applies only to jobs either newly created or relocated from outside Indiana.[121] An annual compliance report must be submitted to the IEDC for a taxpayer to continue receiving the tax incentive.[122] The amount allowed to be withheld may be stated as either a percentage of the payroll taxes withheld or as a fixed dollar amount, but it may not exceed the total amount of payroll taxes withheld on behalf of employees.[123]

For the EDIT, counties now have additional flexibility in how they spend revenue generated from the tax as a result of modifications to Indiana Code chapter 6-3.5-7. At any time, the counties may transfer money from the economic development fund to the county general fund or the fund of any county, township, or municipality in the county.[124] However, there is an additional requirement: if the revenues collected exceed 150% of projected revenues, and there are no mandatory distributions to a rainy day fund, the county must distribute the funds exceeding 150%.[125] All counties and municipalities that have already imposed an economic development income tax may impose an additional

---

112. *Id.* § 6-3.1-21-6(a).
113. *Id.* §§ 6-3.1-24-8(b)-(c).
114. *Id.* § 6-3.1-24-9(b).
115. *Id.* § 6-3.1-30.5-13.
116. *Id.* §§ 6-3.1-31-14(a) to -15.
117. *Id.*
118. *Id.* §§ 6-3.1-31.2-11 to -12.
119. *Id.* § 6-3.5-9-1.
120. *Id.* § 6-3.5-9-13(a).
121. *Id.* § 6-3.5-9-12.
122. *Id.* § 6-3.5-9-17(a).
123. *Id.* §§ 6-3.5-9-13(b)-(c).
124. *Id.* § 6-3.5-7-12.7.
125. *Id.* § 6-3.5-7-17.3(a).

tax of 0.05%.[126] However, if "a county or municipality that becomes a member of a development authority after June 30, 2011, and before July 1, 2013,"[127] it may only impose a tax of 0.025%.[128]

The legislature expanded the scope of its cigarette and tobacco taxes through amendments to Code chapter 6-7-2. Moist snuff is now included under the scope of cigarette and tobacco taxes,[129] but it will be taxed by weight, rather than by a percentage of the sale price.[130] For cigarette taxes in general, there is a two-year moratorium on distributions to the state retiree health benefit fund due to changes to Indiana Code subsection 6-7-1-28.1.[131] Instead, that revenue will go into the state's general fund.

F. Inheritance Taxes

The most significant change in Indiana inheritance tax law is a modification to Indiana Code section 6-4-1-3. This provision relating to stepchildren is now made retroactively valid for the estate of any decedent who died after June 30, 2004.[132] A stepchild of a decedent is now classified as a Class A beneficiary, regardless of whether the decedent legally adopted the stepchild before his or her death.[133] There are also additional clarifications on the effective dates of previous statutory modifications.[134]

II. INDIANA TAX COURT DECISIONS

The Tax Court rendered a variety of opinions from January 1, 2011 to December 31, 2011. Specifically, the Tax Court issued sixteen published opinions and decisions: five concerned the Indiana real property tax, two concerned the Indiana inheritance tax, two concerned the Indiana sales and use tax, one concerned the Indiana personal property tax, three concerned the Indiana personal income tax, and three concerned the Indiana corporate income tax. A summary of each opinion and decision appears below.

A. Real Property Tax

1. Truedell-Bell v. Marion County Treasurer.[135]—Brenda Truedell-Bell owned real property in Marion County.[136] Truedell-Bell filed four petitions with

126. *Id.* § 6-3.5-7-28(b)(2) (Version b).
127. *Id.* § 36-7.6-4-2(b)(2).
128. *Id.* § 6-3.5-7-28(b)(1) (Version b).
129. *Id.* § 6-7-2-5(a)(2) (Version b).
130. *Id.* § 6-7-2-7(a)(2) (Version b).
131. *Id.* §§ 6-7-1-28.1(3), (7).
132. *Id.* § 6-4.1-1-3(a)(3).
133. *Id.*
134. 2011 Ind. Acts 3316, 3735-53.
135. 955 N.E.2d 872 (Ind. T.C. 2011).
136. *Id.* at 873.

the Marion County Assessor which challenged her real property assessment for 2007.[137] The Marion County PTABOA never scheduled a hearing on her appeal, and Truedell-Bell did not pay the tax liability to keep the property out of the tax sale while her appeals were pending.[138] Because Truedell-Bell did not pay the taxes, the Marion County Treasurer and Auditor listed the property in the 2009 tax sale for delinquent taxes.[139] On March 8, 2010, Truedell-Bell filed a petition for an injunction to prevent her property from being sold prior to the resolution of her appeals.[140] The Circuit Court conducted a hearing and "denied Truedell-Bell's petition on the basis that it did not have subject matter jurisdiction."[141] Truedell-Bell appealed to the Court of Appeals, which affirmed the Circuit Court's denial of her petition.[142] The Court of Appeals explained that the Tax Court possessed "exclusive jurisdiction to grant the type of relief [Truedell-Bell] sought."[143] Truedell-Bell filed her petition with the Tax Court, stated that her property had been sold in the Marion County tax sale, and asked "the Court to enjoin the issuance of the tax deed on the property pending the PTABOA's determination an her appeal."[144]

Indiana Code section 33-26-3-1 provides that "[t]he [T]ax [C]ourt has exclusive jurisdiction over any case that arises under the tax laws of Indiana and that is an initial appeal of a final determination made by" either the Department or the IBTR.[145] Truedell-Bell argued that the Tax Court had jurisdiction because the Indiana Court of Appeals had explicitly made this determination,[146] but the Tax Court disagreed. The Court of Appeals stated that the "petition for injunctive relief met the first of the Tax Court's jurisdictional requirements," that is, the issue arises under Indiana's tax laws.[147] The Court of Appeals, however, stated that a final determination from the IBTR was required before the Tax Court had jurisdiction.[148] The legislature has provided that if the PTABOA fails to timely conduct a hearing, the taxpayer may "bypass the PTABOA and go directly to the [IBTR] for resolution."[149] Because the statute uses "may" instead of "shall,"[150] Truedell-Bell argued she was not required to remove her case to the IBTR. However, a taxpayer "cannot circumvent the IBTR final determination

137. *Id.*
138. *Id*.
139. *Id*.
140. *Id*.
141. *Id*.
142. *Id.*
143. *Id.*
144. *Id.* at 874.
145. IND. CODE § 33-26-3-1 (2011).
146. *Truedell-Bell*, 955 N.E.2d at 874.
147. *Id*.
148. *Id*.
149. *Id*. at 875 (citing IND. CODE § 6-1.1-15-1(o) (2008)).
150. *Id*.

requirement that is a basis for [the Tax] Court's exclusive jurisdiction."[151] The Tax Court held that the Indiana statute did, in fact, mandate that Truedell-Bell obtain a final determination from the [IBTR] before she appealed to the Tax Court.[152] Thus, the Tax Court ruled that it lacked subject matter jurisdiction to hear the case.[153]

2. Grant County Assessor v. Kerasotes Showplace Theatres, LLC.[154]—Kerasotes Showplace 12 ("Kerasotes") owned real property in Grant County consisting of a twelve-screen multiplex movie theater situated on seven acres of land.[155] Kerasotes built the facility in 2000 at a cost of $6,487,110.[156] In 2005, it sold the property in a portfolio transaction for $7,821,835.[157] In 2006, the Assessor assigned the property an assessed value of $6,137,800.[158] Kerasotes appealed to the Grant County PTABOA, alleging that the assessed value was too high.[159] The PTABOA, however, further increased the assessment to $7,821,000[160] causing Kerasotes to file an appeal with the IBTR.[161]

On appeal, the IBTR conducted an administrative hearing, and Kerasotes and the Assessor each presented appraisals[162] which consisted of significantly discrepant values.[163] Each appraisal arrived at substantially different values. The cause of the variation was attributed to "how much their appraisers relied on the subject property's allocated sales price and contract rent in their income approach analyses."[164] According to Kerasotes' appraisal, the property had a "market value-in-use" of $4,200,000 and accorded little weight to the "property's allocated sale's price and contractment."[165] The Assessor's appraisal, which was reliant on the "property's allocated sales price and contractual rent," estimated the market value-in-use of the subject property at $7,450,000.[166] The IBTR issued its final determination and stated "that based on what the evidence did, and did not, show, it could not conclude that the subject property's allocated sales price [or] contract rent reflected the value of the subject's real property alone."[167] The IBTR concluded that the Kerasotes' appraisal was more probative as to the

151. *Id.*
152. *Id*. at 876.
153. *Id*.
154. 955 N.E.2d 876 (Ind. T.C. 2011).
155. *Id.*
156. *Id*.
157. *Id*.
158. *Id*.
159. *Id.*
160. *Id*.
161. *Id.*
162. *Id.*
163. *Id.* at 878.
164. *Id.*
165. *Id*.
166. *Id.*
167. *Id*. at 880.

subject property's market value-in-use than the Assessor's appraisal"[168] and thus reduced the 2006 assessment to $4,200,000.[169] The Assessor subsequently initiated a tax appeal with the Tax Court.[170]

On appeal, the Assessor argued that the IBTR failed to value the property in accordance with Indiana's statutory mandate, Kerasotes' appraisal "ignored the data representing the 'realities' of the movie-theater industry . . . [and] failed to consider and value the actual utility gained from the use of the subject property."[171] The Tax Court disagreed with the Assessor and stated that the issue presented to the IBTR was whether the "property should be valued according to the terms of its lease . . . or according to what other similar properties would garner in rent."[172] Furthermore, the IBTR "explained that one should approach the rental data from such transactions with caution, taking care to ascertain whether the sales prices/contract rents reflect real property value alone or whether they include the value of certain other economic interests."[173] The Tax Court agreed with the IBTR that by using the income approach Kerasotes' appraiser exercised caution, unlike the Assessor's appraiser.[174] Additionally, the Assessor assumed that "sale was an arm's length transaction," but this conclusion was not supported by any facts.[175]

The IBTR is responsible for deciding which of the appraiser's values "is more probative."[176] Here, the IBTR concluded that Kerasotes' appraisal was more probative.[177] The Assessor's claim on appeal hinged on the Tax Court reweighing the evidence, which the court refused to do.[178] The Tax Court upheld the IBTR determination.[179]

3. Idris v. Marion County Assessor.[180]—After the IBTR upheld the Jaklin Idris and assessment of Dariana Kamenova's (collectively "Idris") real property, they initiated an appeal of the final determination in the office of the Clerk of the Tax Court.[181] The Marion County Assessor moved to dismiss Idris' appeal claiming that IC 33-26-6-2 and 6-1.1-15-5(b) and Tax Court Rule 16(C) bar the appeal.[182]

Indiana Code section 33-26-6-2 requires a taxpayer to file a petition asking

---

168. *Id.*
169. *Id*. at 880-81.
170. *Id.* at 880.
171. *Id*.
172. *Id*. at 881.
173. *Id*. at 882.
174. *Id.*
175. *Id.*
176. *Id.* at 882-83.
177. *Id.* at 882.
178. *Id*. at 883.
179. *Id.*
180. 956 N.E.2d 783 (Ind. T.C. 2011).
181. *Id*. at 784.
182. *Id*.

the Tax Court to set aside the final determination of the IBTR.[183] According to the statute, "If a taxpayer fails to comply with any statutory requirement for the imitation of an original tax appeal, the tax court does not have jurisdiction to hear the appeal."[184] Furthermore, Indiana Code section 6-1.1-15-5(b) specifies that a "party must: (1) file a petition with the Indiana tax court; (2) serve a copy of the petition on (A) the county assessor; (B) attorney general; and (C) any entity that filed an amicus curiae brief with the [IBTR]; and (3) file a written notice of appeal with the [IBTR] informing the [IBTR] of the party's intent to obtain judicial review."[185] Although the above statutes do not say how a party must serve the petition, Indiana Tax Court Rule 16 specifies the manner of service required. Tax Court Rule 16 states that "[a] copy of the notice of claim shall be served upon the Attorney General by registered or certified mail, return receipt requested."[186]

The Marion County Assessor argued that Idris failed to comply with the statutory requirements because "the Clerk served a copy of the Petition on the Attorney General when Idris was required to do so."[187] In response, Idris maintained that she left four copies of the Petition, IBTR final determination, letter from the Assessor, and other relevant documents with the Clerk's office.[188] Idris argued that the Clerk's office that it would distribute the documents, and the Clerk mailed a copy of the Petition to the Attorney General on the same day.[189] The Tax Court held that Idris compiled with the requirements of IC 6-1.1-15-5.[190] Although the statute does not specify how a party is to serve the Attorney General, the Court concluded that "the statute's silence as to the method of service indicates its concern is not how service is accomplished, but rather that it is made."[191] Furthermore, the Tax Court held that dismissal is not appropriate under Tax Court Rule 16 because "[t]he purpose of [the] Rule is to ensure that there is evidence of both service and receipt. This evidence is present here in both the Transmittal Letter and the Assessor's own acknowledgement."[192] Therefore, Idris' method of service was within the purpose of the rule, and the Assessor's motion to dismiss was denied.[193]

4. Fuller v. Cass County Assessor.[194]—Maurice and Craig Fuller (the "Fullers") owned real property in Cass County, Indiana.[195] The Fullers 2008

183. IND. CODE § 33-26-6-2(1) (2011).
184. *Id*.
185. *Id.* § 6-1.1-15-5(b).
186. Ind. T.C. R. 16(C) (2011).
187. Idris v. Marion Cnty. Assessor, 956 N.E.2d 783, 785-86 (Ind. T.C. 2011).
188. *Id*. at 786.
189. *Id.*
190. *Id.*
191. *Id*. (citing Whetzel v. Dep't of Local Gov't Fin., 761 N.E.2d 904, 908 (Ind. T.C. 2002)).
192. *Id*. at 787.
193. *Id.*
194. No. 49T10-1011-TA-68, 2011 WL 5431823 (Ind. T.C. Nov. 9, 2011).
195. *Id.* at *1.

property tax bill was higher than any of the prior property owner's was required to pay.[196] The Cass County Assessor valued the Fullers' property at $101,800.[197] The Fullers claimed tax liability was too high because the homestead credit, homestead standard deduction, and mortgage deduction were not applied.[198] Although the Fullers attempted to have them reinstated, the Auditor's office informed them that they had missed the application deadline.[199] The Fullers filed an appeal with the Cass County PTABOA, seeking a review of both the assessment and their eligibility for the credits and deductions.[200] The PTABOA reduced the assessment to $79,100 but failed to address the Fullers' claims concerning credits and deductions.[201] The Fullers timely filed an appeal with the IBTR, seeking a determination regarding the credits and deductions.[202] In its final determination, the IBTR concluded that the Fullers "failed to establish that [they] met the statutory requirements for the credits and deductions."[203] The Fullers then filed an original tax appeal.[204]

On appeal, the Fullers argued that it was inequitable to require them to pay higher taxes because they had purchased the home "after the statutorily imposed deadlines" for the credits and deduction had passed.[205] In order to prove that they qualified for the homestead credit and the homestead standard deduction, the Fullers were required to establish ownership of the property on the assessment date.[206] The Tax Court held that the Fullers failed to establish that they were entitled to the credit or the deductions.[207] Furthermore, to be eligible for the mortgage deduction, the Fullers had to have a mortgage and "file the requisite application for the deduction on or before October 15, 2007."[208] Although the certified administrative record indicates that the Fullers had a mortgage, they could not comply with the application deadline because the deadline had lapsed before the Fullers even purchased the home.[209] Therefore, the Tax Court affirmed the IBTR's final determination that the Fullers "did not establish that [they were] entitled to the homestead credit, the homestead standard deduction, or the mortgage deduction."[210]

Furthermore, the Fullers argued that the invested a "great deal of time, effort,

---

196. *Id.*
197. *Id*.
198. *Id.*
199. *Id*.
200. *Id.*
201. *Id*.
202. *Id.* at *2.
203. *Id*.
204. *Id.*
205. *Id.*
206. *Id.* at *3.
207. *Id*.
208. *Id*.
209. *Id.*
210. *Id*.

and money" in representing themselves, and they were thus entitled to the same compensation an attorney would have received.[211] The Tax Court held that, "in the absence of a statute [or] rule . . . providing otherwise, litigants must pay their own fees and costs."[212] Therefore, the Fullers' claim for fees and costs was denied.[213]

5. Metropolitan School District of Pike Township v. Department of Local Government Finance.[214]—The Metropolitan School District of Pike Township ("the School District"), a public school corporation in Marion County, adopted its annual budget for 2011, in which it "estimated the property tax rate necessary to generate its [capital projects fund (CPF)] levy."[215] The School District submitted its proposed budget to the DLGF for approval.[216] The DLGF made a decision to reduce, and subsequently certified it as a final order, the School District's "estimated CPF levy property tax rate" according to IC 6-1.1-18-12.[217] In March 2011, the School District appealed to the Tax Court.[218]

By statute, public schools' CPF levy rates are "capped at $0.4167 per each $100 of assessed valuation within the taxing district."[219] The legislature codified a formula for the DLGF to use in determining the annual adjustments of assessed values. IC 6-1.1-18-12(e) provides:

> STEP ONE: Determine the maximum rate for the political subdivision levying a property tax . . . under the statute for the year preceding the year in which the annual adjustment or general reassessment takes effect.
> STEP TWO: . . . [D]etermine the actual percentage (rounded to the nearest one-hundredth percent (0.01%)) in the assessed value . . . of the taxable property from the year preceding the year the annual adjustment or general reassessment takes effect to the year that the annual adjustment or general reassessment takes effect.
> STEP THREE: Determine the three (3) calendar years that immediately precede the ensuing calendar year and in which a statewide general reassessment of real property does not first take effect.
> STEP FOUR: . . . [C]ompute separately, for each of the calendar years determined in STEP THREE, the actual percentage change . . . in the assessed value . . . of the taxable property from the preceding year.
> STEP FIVE: Divide the sum of the three (3) quotients computed in STEP FOUR by three (3).
> STEP SIX: Determine the greater of the following:

---

211. *Id.*
212. *Id.*
213. *Id.* at *4.
214. 962 N.E.2d 705 (Ind. T.C. 2011).
215. *Id.* at 706.
216. *Id.* at 705.
217. *Id.*
218. *Id.*
219. *Id.* (citing IND. CODE § 20-46-6-5 (2010)).

> (A) Zero (0).
> (B) The result of the STEP TWO percentage minus the STEP FIVE percentage.
> STEP SEVEN: Determine the quotient of the STEP ONE tax rate divided by the sum of one (1) plus the step six percentage increase.[220]

The Tax Court determined "that steps two and four . . . require the use of a zero value when there is no increase in a school district's assessed value from one year to the next."[221] The DLGF used zeros in Steps Two and Four of the formula when it calculated the 2011 CPF levy property tax rate.[222] The School District argued

> that because a CPF levy property tax rate calculation . . . is necessarily affected by previous years' rate calculations, the DLGF should have accounted for its [improper] use of negative numbers in [steps two and four of] its calculations for 2007-2010 by re-running those calculations. . . . This w[ould have] . . . produce[d] a rate of .3100 for Step 1 for 2011.[223]

The DLGF countered that because the School District only protested the 2011 budget, it would have been "improper to go back and recalculate step seven rates for prior 'closed' years."[224] Further, the DLGF argued that the School District's appeal asked the court to "determine the accuracy of [its] CPF tax rate calculations" for 2007-2010.[225] Because the School District never protested the rate calculations for earlier years, the DLGF never made any final determinations regarding the accuracy of the calculations.[226] Accordingly, the DLGF argued that the tax court lacked subject matter jurisdiction and did not possess the authority to modify DLGF valuations and did not have discretion to "order the DLGF to provide the retroactive cumulative relief" the School District sought.[227] The DLGF argued that the School District sought retroactive application of *DeKalb*'s zero value formula for years that were not in dispute.[228] The Tax Court disagreed.[229]

The Tax Court held that "when the 2010 *DeKalb* decision explained why steps two and four of the formula . . . required zero values as opposed to negative values, that meant that the DLGF should have been using those zero values since

---

220. IND. CODE § 6-1.1-18-12(e) (2011).

221. *Metro Sch. Dist. of Pike Twp.*, 962 N.E.2d at 706-07 (citing DeKalb Cnty. E. Cmty. Sch. Dist. v. Dep't of Local Gov't Fin., 930 N.E.2d 1257, 1260-62 (Ind. T.C. 2010)).

222. *Id.* at 707.

223. *Id.* at 707-08 (alterations in original).

224. *Id*. at 708.

225. *Id*. (internal citation omitted).

226. *Id.*

227. *Id*.

228. *Id.*

229. *Id.*

2007 when Indiana Code § 6-1.1-18-12(e) first became applicable to public school corporations."[230] The Tax Court added that DLGF's argument did not comport with "the plain and ordinary meaning of the statute" and would produce an absurd result.[231] Relying on a logical interpretation, the Tax Court determined that any errors in previous CPF levy property calculations "should not be allowed to corrupt [the] accuracy of current and future years' calculations."[232] The Tax Court held that "the DLGF's use of negative numbers in steps two and four . . . to produce a CPF levy property tax rate calculation for 2011 [was] wrong" because it should have, instead, used zeros according to the statutory requirements.[233]

B. Inheritance Tax

1. Indiana Department of State Revenue v. Estate of Biddle.[234]—In March 2005, Deloras Biddle died intestate, survived by her son and sole heir, Curtis Biddle, who was appointed the personal representative of her estate (the "Estate").[235] The Estate "filed an inventory, a final accounting, and a verified closing statement"[236] but because the sole heir "received a distribution that was less than [the] statutory exemption,"[237] the Estate did not file an inheritance tax return. After the probate court approved the closing statement in April 2006, it released Curtis Biddle from his personal representative responsibilities.[238]

In 2008, the Department discovered that the insurance company paid death claim proceeds from Deloras' annuity contract to her brother, Richard Fine.[239] The Department stated that the "annuity proceeds paid to Fine were subject to Indiana's inheritance tax."[240] Thus, the Department argued that the Estate was "required to file an inheritance tax return" because the payments were life insurance proceeds—not annuity payments.[241] The probate court ruled that the statute did not require Richard Fine or the Estate's Personal Representative to file an Indiana Inheritance Tax Return.[242] When the probate court denied the Department's motion to correct the error, the Department filed an appeal with the Tax Court.[243]

---

230. *Id*.
231. *Id.*
232. *Id*. at 709 (citing IND. CODE 6-1.1-18-12(e) (2008)).
233. *Id*.
234. 943 N.E.2d 932 (Ind. T.C. 2011).
235. *Id*.
236. *Id*.
237. *Id*.
238. *Id*.
239. *Id.* at 932-33.
240. *Id*. at 933.
241. *Id*. at 934.
242. *Id*. at 933.
243. *Id.*

Indiana law provides "[a]n inheritance tax is imposed at the time of the decedent's death on certain property interest transfers made by him."[244] Not all property transfers are subject to the inheritance tax, such as life insurance proceeds and annuity payments.[245] Annuity payments are exempt "only 'to the same extent that the annuity . . . is excluded from the decedent's federal gross estate under [IRC §] 2039.'"[246] Therefore, the annuity payment is subject to Indiana's inheritance tax if:

> (1) the annuity contract was entered into after March 3, 1931; and
> (2) the annuity was payable to the decedent, or the decedent possessed the right to receive the payment either for his life, for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death.[247]

The Tax Court held that "[t]he probate court erred when it determined that the Estate was not required to file an inheritance tax return because the Metlife payments were life insurance proceeds and therefore not subject to Indiana's inheritance tax."[248]

2. Estate Neterer v. Indiana Department of State Revenue.[249]—Christine Neterer ("Neterer") died testate in September 2006.[250] When she died, Neterer owned an undivided one-half interest in real property in Elkhart County (the "Subject Property") as a tenant in common with her sister.[251] A month after Neterer's death "an unsupervised estate was opened, Neterer's will was admitted to probate, and her nieces, Deborah Pollock and Marilyn Humbarger, were appointed as co-personal representatives."[252] A year later, Pollock filed the Estate's Inheritance Tax Return, which included an appraisal estimating the fair market value of the property to be $855,250, "and a document titled 'Valuation of Decedent's Interest in Real Estate'" with the probate court, which "stated that it was necessary to reduce the subject property's appraised value by one-half, and then apply an aggregated discount of 30 percent (30%) to account for both a lack of marketability and a lack of control."[253] Therefore, the fair market value of the subject property was only $300,000.[254] In her Report of Appraiser, the County Assessor stated that "the return 'correctly' valued the subject property."[255] Pollock subsequently submitted an amended return, and the Assessor accepted all

---

244. *Id.* at 933-34 (alteration in original) (quoting IND. CODE § 6-4.1-2-1 (2011)).
245. *Id.* at 934.
246. *Id.* (quoting IND. CODE § 6-4.1-3-6.5 (2005)).
247. *Id*. (citing IRC § 2039 (2005)).
248. *Id*. at 934-35.
249. 956 N.E.2d 1214 (Ind. T.C. 2011).
250. *Id*. at 1215.
251. *Id.*
252. *Id*.
253. *Id.*
254. *Id*. at 1215-16.
255. *Id*. at 1216.

of the valuations reported therein.[256] Based on these accepted valuations, the probate court entered an order establishing that "the Estate's inheritance tax liability was $31,937.98."[257] However, a month later the Department provided the Estate with a "Notice of Additional Tax Due," which stated

> [t]he value of the subject property was $427,625 and the Estate's actual inheritance tax liability was actually $45,224.48 because:
> 1. it had not reported the value of a life insurance policy in the return;
> 2. its deduction for monument expenses exceeded the statutory allowance for such deductions; and
> 3. it had not substantiated the propriety of the 30% discount.[258]

Based on these assertions, the Department informed the Estate that it owed another $13,278.64 in inheritance taxes plus interest.[259]

In January 2008, the Estate responded to the Department and explained that while there was no dispute regarding the life insurance and monument deduction adjustments, "it disagreed with the disallowance of the 30% discount . . . [but] offered to reduce the 30% discount by five percent."[260] The Department rejected the Estate's offer, and in February 2008, the Estate paid the requested amount in full.[261] Approximately a year and a half later, "the Estate filed a claim with the Department contending that it was entitled to a refund of the additional inheritance tax it paid. . . . The Department denied the Estate's refund claim."[262] The Estate next filed a Complaint with the probate court "challenging the Department's denial of its refund claim."[263] The Estate argued that the Department "was required to timely file with the probate court either a petition for rehearing or a petition for reappraisal" if it disagreed with the tax liability imposed by the probate court.[264] Because the Department did not follow the established procedure, the Estate argued the Department had "no authority to disallow the 30% discount because the probate court's [o]rder . . . established 'for all time' the amount of tax owed by the Estate."[265] The Department countered that the probate court's order was only an estimate of the taxes owed, which the Department could accept or reject.[266] The Department also explained that the Estate's appraisal was the best indicator of the subject property's fair market value because the Valuation of Decedent's Interest in Real Estate was unverified, unsigned, prepared by an anonymous person, and failed to disclose how the 30%

---

256. *Id*.
257. *Id*.
258. *Id.*
259. *Id.*
260. *Id*.
261. *Id.*
262. *Id*.
263. *Id*.
264. *Id*.
265. *Id.*
266. *Id.* at 1217.

discount was even calculated.[267] The probate court held a hearing and entered an order of summary judgment in favor of the Department.[268] The Estate appealed to the Tax Court.[269]

Indiana Code section 6-4.1-10-4 provides that "a person who files a claim for the refund of inheritance . . . tax may appeal any refund order which the [Department] enters with respect to his claim."[270] In order to originate an "appeal, the person must, within ninety (90) days after the department enters the order, file a complaint in which the department is named as the defendant."[271] After an appeal has been initiated, "the probate court shall determine the amount of any tax refund due."[272]

On appeal, the Estate contended that "the Department had but only two avenues by which it could challenge the subject property's valuation: a petition for rehearing . . . or a petition for reappraisal."[273] The Estate argued that the Department's failure to utilize either method of challenge "within the statutorily prescribed time period, its collection of the additional inheritance tax from the Estate was *per se* erroneous or illegal as a matter of law."[274] The Tax Court disagreed.[275] The Tax Court explained that "[t]he Department supervises the enforcement *and* collection of Indiana's death taxes. . . . Under this grant of authority, it may investigate any facts or circumstances relevant to the imposition of inheritance tax."[276] Additionally, when the Department sent its notice to the Estate:

> [I]t was still well within the prescribed statutory period for filing a petition for reappraisal. . . . At that point, the Estate was free to either pay the tax or not, and it elected to pay the tax. . . . Given that the Estate paid the tax in full, just two days after receiving the Department's second notice, it would have been both improper and absurd for the Department to file a petition for reappraisal at that point.[277]

The Tax Court held that it was not an error for the probate court to reconsider "the subject property's valuation."[278]

Furthermore, the Estate claimed that the probate court erred in also determining that the 30% discount was not applicable to the subject property.[279]

---

267. *Id*.
268. *Id.*
269. *Id.*
270. *Id*. at 1218 (quoting IND. CODE § 6-4.1-10-4(a) (2011)).
271. *Id*. (quoting IND. CODE § 6-4.1-10-4(a)).
272. *Id*. (quoting IND. CODE § 6-4.1-10-5).
273. *Id.*
274. *Id*.
275. *Id.* at 1219.
276. *Id*. (internal citations omitted).
277. *Id*. (internal citations omitted).
278. *Id.*
279. *Id.*

The Department, in contrast, asserted that the probate court was correct to disallow the discount "because the personal representatives did not establish that they qualified to determine whether the application of the 30% discount to the subject property was proper and, as a result, that the Valuation of the Decedent's Interest in Real Estate was unreliable."[280] The Tax Court explained that "experts initially determined whether the application of marketability or control discounts was proper and then quantified the applicable discount."[281] In this case, Pollock, one of the personal representatives possessed the knowledge of a layperson, not an expert, regarding the valuation of the discount.[282] Additionally, Pollock signed a verification clause for each return, where she declared that to the best of her knowledge, everything in the return was correct and complete.[283] Pollack's attestation did "not establish that the information provided in the Valuation of Interest in Real Estate was based on her personal knowledge."[284] The Estate also failed to establish that Pollock possessed the competency "to render an opinion concerning the application and quantification of the 30% discount for lack of marketability."[285] Therefore, the Tax Court upheld the probate court's order of summary judgment favoring the Department.[286]

C. Sales and Use Tax: Garwood v. Indiana Department of State Revenue[287]

In 2009, the Indiana Attorney General and the Department investigated the business activities of Virginia and Kristin Garwood (the "Garwoods") and found that they were selling puppies without remitting Indiana sales and income tax.[288] Upon this finding, the Department executed a warrant to search the Garwoods' residence and commercial properties in Harrison County to "seize certain items related to the puppy sales."[289] The Department "generated . . . jeopardy tax assessments for the Garwoods' purported" income and sales tax liabilities, and after the Garwoods failed to immediately pay the liabilities, the Department seized approximately 240 dogs and puppies from their property and sold them to the Humane Society for a total of $300.[290] The Department applied the money to the Garwoods' outstanding tax liabilities.[291] The Garwoods timely filed a written

---

280. *Id*. at 1220.

281. *Id.*

282. *Id*.

283. *Id.*

284. *Id*. at 1221.

285. *Id*.

286. *Id.*

287. 939 N.E.2d 1150 (Ind. T.C. 2010). This is the first of two related cases between Garwood and the Indiana Department of State Revenue. The second is discussed *infra* at notes 293-308 and accompanying text.

288. *Id*. at 1151.

289. *Id.*

290. *Id.* at 1151-52.

291. *Id*.

protest with the Department.[292] The Department did not hold a hearing on the protest and advised the Garwoods to seek relief through the Harrison Circuit Court.[293] The Garwoods subsequently initiated an appeal with the Tax Court.[294]

On appeal, the Department argued that it properly exercised its statutory authority in issuing jeopardy assessments to the Garwoods.[295] Indiana Code section 6-8.1-5-3 provides that one of four circumstances must exist for the Department to issue a jeopardy assessment. If at any time the Department:

> [f]inds that a person owing taxes intends to quickly leave the state, remove his property from the state, conceal his property in the state, or do any other act that would jeopardize the collection of those taxes, . . . the Department may declare the person's tax period at an end, may immediately make an assessment for the taxes owing, and may demand immediate payment of the amount due, without providing the notice required in IC 6-8.1-8-2.[296]

The Tax Court held that it had subject matter jurisdiction to hear the appeal.[297] On the appeal, the Garwoods maintained that the Department "exceeded statutory authority" by applying the jeopardy assessment procedure.[298]

The Indiana Code permits the Department to "issue a jeopardy assessment when it determines a person owing taxes intends to quickly leave the state thereby avoiding tax collection."[299] The Tax Court stated that "the Department [did] not claim that the Garwoods were flight risks. In fact, the Garwoods were community fixtures, having lived in Harrison County their entire lives."[300] Therefore, the Department could not rely on this argument as a basis for its "use of jeopardy assessments."[301] Also, the Tax Court stated that "the Department [did] not claim that the Garwoods intended to remove property from the state, [and] the nature of the Garwoods' Indiana property" was not of the type that was easily moved.[302] Therefore, this was not a justifiable basis for the Department's jeopardy assessments.

Furthermore, the "Department claim[ed] its investigation revealed evidence of this intent that is documented in its designated sales and income tax

---

292. *Id.* at 1152 (citing 45 IAC 15-5-8(c) (2007)).

293. *Id.* at 1152-53.

294. *Id.* at 1153.

295. *Id.* at 1153-54.

296. *Id*. at 1151 n.3 (internal citations omitted) (quoting IND. CODE §§ 6-8.1-5-3(a), -8-2 (2010)).

297. *Id*. at 1155-56.

298. *See* Garwood v. Ind. Dep't of State Revenue, 933 N.E.2d 682, 687 (Ind. T.C. 2011), *reviewed*, 963 N.E.2d 682 (Ind. 2012), *vacated*, 966 N.E.2d 1258 (Ind. 2012).

299. *Id*. (citing IND. CODE § 6-8.1-5-3(a) (2011)).

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

301. *Id.*

302. *Id*.

Investigative Summaries."[303] The Garwoods did not permit the officers from Animal Control to access their property, but the Tax Court determined that this refusal was not "evidence of [an] attempt to conceal property in the state" under the statute.[304] The Department also argued that by selling the dogs in bulk, the Garwoods could conceal them, and thus the jeopardy assessments were proper.[305] The Tax Court found this assertion speculative because "there [was] no evidence that indicate[d] the Garwoods would sell all their dogs or release them to avoid paying tax."[306] Therefore, the Department could not justify using the jeopardy assessments on this basis.[307]

Finally, the Department argued that the Garwoods' actions (breeding and advertising dogs for sale, failing to register as retail merchant, failing to file sales tax returns, and failing to report income) indicated that the Garwoods intended to act in a way "that would jeopardize the collection of taxes."[308] The Tax Court, however, determined that the Garwoods' actions indicated that they "were not properly reporting and paying taxes, . . . not that they intended not to pay . . . their taxes."[309] Supporting this argument, the Tax Court articulated that the Garwoods filed professionally prepared tax returns, which "included income from the sales of dogs."[310] Therefore, this was also not a basis for the Department's use of jeopardy assessments.[311]

The Tax Court held that it could not "reasonably be inferred that the jeopardy assessment procedure was used in this case to protect the State's fiscal interests."[312] Otherwise, the Department would not have sold the seized dogs for only $300 when "logic dictate[d] that the dogs had a value far greater than just over $1.00 each."[313] Additionally, the fact that there was much media hype regarding this case suggests that the Department was using the jeopardy assessments "to eliminate a socially undesirable activity," not to collect the tax liabilities owed to the State.[314] Therefore, the Tax Court held that the jeopardy assessments were "void as a matter of law."[315]

---

303. *Id.*
304. *Id.* at 687-88.
305. *Id.*
306. *Id*.
307. *Id.*
308. *Id*. at 689.
309. *Id*.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id*. at 689-90.
314. *Id.* at 690.
315. *Id.*

D. Personal Property Tax: Etzler v. Indiana Department of State Revenue[316]

In 2010, Dale Dodson was indebted to his attorney, Gordon Etzler, fees for legal services previously rendered. In order to pay his liability, "Dodson assigned to Etzler his right to the money he expected to receive in November 2011 from the Indiana Horse Racing Commission" (the "Commission").[317] Etzler filed a UCC financing statement to perfect the assignment, but the State Auditor notified Dodson that the funds were being "withheld to satisfy a Department tax levy."[318] Etzler made repeated attempts to the Department to have the funds released to him.[319] Etzler claimed that the Department failed to provide documentation to "justify" the levy.[320] Etzler asked for an administrative hearing, but the Department declined, so Etzler appealed to the Tax Court.[321]

On appeal, the Department argued that because it was not an original tax appeal, the Tax Court did not have subject matter jurisdiction to hear Etzler's case.[322] Furthermore, the Department claimed that tax laws were not even applicable because the case did "not principally involve the collection of a tax . . . [but was] . . . a collection matter arising from a final judgment."[323] The Department also added another argument: that there was "no tax statute that creates Etzler's right to sue the Department in th[e] [Tax] Court regarding the validity of the . . . judgments against Dodson."[324] Additionally, the Department posited "that if Etzler's appeal does indeed arise under Indiana's tax laws, Etzler has not received, and therefore does not appeal from, a final determination of the Department."[325] In his response, Etzler claimed that "by seizing the funds deposited in Dodson's account," the Department "sought to collect a tax" and thus the case did fall within the scope of Indiana's tax laws and qualified as an original appeal.[326] Etzler also argued that he was "appealing from a final determination of the Department . . . that took form in the Department's denial of his request for an administrative hearing."[327]

Although Dodson had stopped filing state income tax returns in the 1990s, the Department continued to issue assessments, which Dodson never protested.[328] When the Department began sending demand notices to Dodson, "he neither paid

316. 957 N.E.2d 706 (Ind. T.C. 2011).
317. *Id*. at 707.
318. *Id*.
319. *Id.*
320. *Id*.
321. *Id.*
322. *Id.* at 708.
323. *Id*.
324. *Id*. at 709.
325. *Id*. at 708.
326. *Id*.
327. *Id.*
328. *Id.*

the assessments nor came forward to show reasonable cause for non-payment."[329] By then recording the tax warrants with the count court, the Department caused the warrants to "bec[o]me final judgments of that court," thus creating property liens.[330] The Department had authority "to levy upon Dodson's bank accounts, garnish his wages, or levy upon and sell his property."[331] Because "Dodson never protested his tax liability, any case that could be theoretically advanced to Dodson *now* no longer involves the collection of a tax, rather, it . . . involve[s] the collection and enforcement of a judgment."[332] The Tax Court determined that Etzler's appeal "attack[ed] the validity of the . . . judgment against Dodson" and did not pertain to a tax collection.[333] Furthermore, there is no tax statute that allowed Etzler to challenge the validity of a judgment in the Tax Court.[334] The Tax Court therefore held that Etzler's appeal did "not 'arise under' the tax laws of Indiana."[335]

According to the Indiana Supreme Court, a taxpayer may receive "a final determination [from the Department] in one of two ways."[336] A "taxpayer can pay the tax, request a refund, and sue in the Tax Court if the request is denied. Alternatively, the taxpayer can protest the listed tax at the assessment stage and appeal to the Tax Court from a letter of findings denying the protest."[337] The Tax Court stated that Etzler did not receive "a final determination from the Department in either one of these ways."[338] Therefore, Etzler's appeal was not an original tax appeal, and the court lacked subject matter jurisdiction over the case.[339]

E. Personal Income Tax

1. Lacey v. Indiana Department of State Revenue.[340]—In 2009, Lyle Lacey ("Lacey"), according to the Department's final determination, "owed Indiana adjusted gross income tax [(AGIT)] for the 2007 tax year,"[341] and Lacey appealed.[342] Lacey's 2007 W-2 statement "indicate[d] that Adecco paid him a substantial amount in wages,"[343] Lacey did not attach the W-2 at the time he filed

329. *Id*. at 708-09.
330. *Id*. at 709.
331. *Id*.
332. *Id*.
333. *Id.*
334. *Id.*
335. *Id*.
336. *Id.* (quoting State v. Sproles, 672 N.E.2d 1353, 1357 (Ind. 1996)).
337. *Id*.
338. *Id*.
339. *Id.*
340. 948 N.E.2d 878 (Ind. T.C. 2011).
341. *Id*. at 878.
342. *Id.*
343. *Id*.

his 2007 taxes. Lacy instead attached a federal Form 4852 to his federal and state returns, stating "that his wages were zero."[344] Additionally, Lacey claimed a refund for "$5,034.98 in state and county income taxes that had been withheld by Adecco."[345] The Department, however, concluded "that Lacey was not entitled to a refund and that he actually owed another $1,113.21 in state income tax."[346] Lacey protested the determination, and the Department conducted a hearing in which it denied Lacey's protest.[347] Lacey subsequently appealed.[348]

Lacey argued his 2007 tax year compensation was "not income within the meaning of the Sixteenth Amendment to the United States Constitution or the Internal Revenue Code,"[349] and "because Indiana's adjusted gross income tax 'piggybacks' the federal income tax," Lacey contended his income was not subject to the State's income tax, and he had no state tax liability.[350] Lacey maintained that only "gain or profit" constitutes income, thus excluding the "equal exchange" of his services for compensation, the Tax Court disagreed. The Supreme Court has considered the issue and has "repeatedly rejected the argument that income is limited to gain or profit."[351] Finding Lacey's argument that income is defined by gain or loss irrelevant, the Tax Court applied the definition of gross income from the Internal Revenue Code, which includes wages as gross income.[352] Therefore, the Tax Court held that Lacey's argument, excluding the compensation from the definition of income was "incorrect as a matter of law."[353]

Lacey also set for the claim that because the federal income tax "runs counter to the Supreme Court's holding in *Brushaber v. Union Pacific Railroad Co.*"[354] because it "'is 'an un-apportioned direct tax.'"[355] Lacey proffered that *Brushaber*'s holding exempting a tax from apportionment "conflict[s] with the general [constitutional] requirement that all direct taxes be apportioned,"[356] but the Tax Court explained that "Congressional power to tax is articulated in Article 1, Section 8 of the Constitution and 'embraces every conceivable power of taxation,' including the power to levy and collect income taxes."[357] Furthermore:

> there is no escape from the conclusion that the Amendment was drawn

---

344. *Id*.
345. *Id*. at 879.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id*. at 879-80.
350. *Id*. at 880.
351. *Id.* at 881.
352. *Id.*
353. *Id.*
354. *Id.* (quoting Brushaber v. Union P. R.R. Co., 240 U.S. 1, 12-13 (1916)).
355. *Id.*
356. *Id*.
357. *Id*.

> for the purpose of doing away . . . with the principle . . . of determining whether a tax on income was direct [or] not . . . since, in express terms, the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment.[358]

Therefore, the Tax Court held that Lacey's employment compensation was subject to Indiana's adjusted gross income tax. [359]

2. Lacey v. Indiana Department of State Revenue.[360]—Lyle Lacey ("Lacey") after unsuccessfully launching two tax appeals where he argued that he did not owe Indiana AGIT, he again petitioned the Tax Court regarding his 2008 AGIT liability.[361] The Department moved to dismiss pursuant to Indiana Trial Rule 12(B)(6). Lacey argued in his previous appeals that "he had a constitutionally guaranteed right to trial by jury, that the judge of the tax court was biased, and that the Department had violated the Distribution of Powers Clause of the Indiana Constitution."[362] Lacey asserted that he owed no Indiana AGIT because the compensation he received in 2007 as a result of his employment was "not income within the meaning of the Sixteenth Amendment to the United States Constitution or the Internal Revenue Code."[363]

The Tax Court dismissed Lacey's first three claims of the Interim Order pursuant to Indiana Trial Rule 12(B)(6).[364] The court held a trial and oral argument and ruled in favor of the Department.[365] Lacey immediately filed a motion where he requested that the court take judicial notice of several authorities, including *Miles v. Department of Treasury*.[366] The court granted Lacey's motion to take judicial notice, but denied his petition for rehearing.[367] While Lacey's prior claim was pending, he filed an appeal.[368]

On appeal, the Department argued that Lacey failed "to state any claim upon which relief may be granted because it presents the same four claims and theories for relief as presented in [Lacey's previous appeal.]"[369] Lacey, however, maintained that his cases were substantively distinctive "because his theory of

---

358. *Id*. at 881-82 (alterations in original).

359. *Id*. at 882.

360. 954 N.E.2d 536 (Ind. T.C. 2011).

361. *Id.* at 536.

362. *Id.* at 537 (citing Lacey v. Ind. Dep't of State Revenue, No. 49T10-0906-TA-25, slip op. *3-4, 2009 WL 3426348 (Ind. T.C. Oct. 26, 2009)).

363. *Id*. (quoting Lacey v. Ind. Dep't of State Rev. (*Lacey II*), 948 N.E.2d 878 (Ind. T.C. 2011)).

364. *Id.*

365. *Id*.

366. *Id.* (citing Miles v. Dep't of Treasury, 199 N.E. 372 (Ind. 1935)).

367. *Id.*

368. *Id.*

369. *Id*. at 537-38.

non-taxability in this case . . . hinges upon the *Miles* case."[370] The Tax Court disagreed, finding "Lacey's arguments and new authorities unpersuasive." The Tax Court thus determined that Lacey's arguments from *Miles* did "not create a new substantive issue for [the Tax] Court's review."[371] The court held that the issues in the current action were "substantially the same as those decided in [Lacey's previous appeal]" and dismissed the case.[372] Therefore, the Tax Court upheld its prior decisions and granted the Department's motion to dismiss.[373]

3. Lacey v. Indiana Department of State Revenue.[374]—Lacey filed an original tax appeal asserting that Indiana's adjusted gross income tax (AGIT) did not apply to his 2008 income.[375] Lacey had previously filed three similar appeals, setting forth numerous arguments about why his employment compensation was not subject to AGI.[376] He had also "received five written determinations" explaining that his income was subject to the AGIT.[377] In August 2011, the Tax Court dismissed his appeal "because the facts, issues, and arguments that Lacey asserted were substantially the same as those presented and resolved in [a previous case]."[378] The Department sought attorney fees under IC 34-52-1-1.[379] In its opinion regarding Lacey's second appeal, the Tax Court noted that it "marked the third time the Court had rejected the claim that one's employment compensation does not constitute income subject to AGIT and that both the federal courts and the Internal Revenue Service have deemed claims similar to Lacey's as frivolous and sanctionable."[380] In dealing with Lacey's repetitive claims, the court stated that "in the future, when a taxpayer advances the same . . . argument, the Court will not hesitate to consider whether an award of attorney fees is appropriate."[381] Then, on June 15, 2011, Lacey filed two motions in response to which "the Court took judicial notice of *Miles*, but denied Lacey's petition for rehearing."[382] Four months later, the Department filed a Motion for Attorney's Fees.[383]

During the hearing, the Department argued it was "entitled to an award of attorney fees because Lacey continued to pursue his claim . . . , reiterating the same arguments that proved unsuccessful [previously]."[384] Indiana Code section

---

370. *Id*. at 538.
371. *Id*.
372. *Id.* at 537.
373. *Id*.
374. 959 N.E.2d 936 (Ind. T.C. 2011).
375. *Id.* at 937.
376. *Id.* at 938.
377. *Id.* at 937.
378. *Id*.
379. *Id*. at 939.
380. *Id*. at 938.
381. *Id.* (quoting Lacey v. Ind. Dep't of State Rev., 949 N.E.2d 878, 882 (Ind. T.C. 2011)).
382. *See supra* notes 354-66 and accompanying text.
383. *Lacey*, 959 N.E.2d at 939.
384. *Id.* at 939-40.

34-52-1-1(b) provides that:

> [I]n any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
> 1. brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> 2. continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> 3. litigated the action in bad faith.[385]

The Department stated that:

> Lacey should have known that his continued pursuit of this claim was improper for three reasons: (1) the same rationale was argued and resolved in [previous case], (2) the Court cautioned [in the previous case] that advancing substantially similar arguments could trigger an award of attorneys' fees, and (3) the Court reminded Lacey of the possible consequences of pursuing previously resolved arguments during the hearing on the motion to dismiss.[386]

Lacey responded that his final claim, which relied upon *Miles*, was substantially different from that advanced by him previously.[387] Furthermore, Lacey argued that an "award [of] attorney fees to the State [would] put[] a chilling effect on anybody else wanting to make the claim using that case or using Indiana Supreme Court rulings as a basis for their claim because the Department never addressed why [his claim] was frivolous."[388] The Tax Court disagreed.[389] The court stated that Lacey admitted that his claim was "substantially similar to that presented in his [prior cases]."[390] Thus, taking judicial notice of *Miles*, and determining that the prior decisions would stand, the Tax Court stated that it would have been the "reasonable" decision for Lacey to have dismissed his case.[391] Rather, "Lacey chose to pursue the same claim and advance the same arguments as he [previously] did."[392] In conclusion, the Tax Court held that "Lacey's original tax appeals have advanced classic tax protestor arguments" and granted the Department attorney fees.[393]

---

385. IND. CODE § 34-52-1-1(b) (2011).
386. *Lacey*, 959 N.E.2d at 940.
387. *Id.*
388. *Id*.
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.* at 940-41.
393. *Id*. at 941-42.

F. Corporate Income Tax

1. Miller Brewing Co. v. Indiana Department of State Revenue.[394]—Miller Brewing Company ("Miller") "manufactures and sells malt beverages" to customers throughout the country, including customers in Indiana.[395] Indiana customers submitted their purchase orders to Miller's headquarters in Milwaukee, Wisconsin, and Miller then produced and prepared the order for pick up in Trenton, Ohio.[396] Indiana customers then had to arrange for "third-party common carriers to pick up the products at the brewery" and transport them.[397] Miller filed tax returns in Indiana, but when it calculated its adjusted gross income tax liabilities, "Miller did not allocate the income it received from the carrier-pickup sales to Indiana."[398] The Department audited Miller's tax returns and determined the income from the carrier-pickup sales should have been allocated to Indiana.[399] After paying the proposed assessments, Miller filed a refund claim with the Department.[400] The Department conducted an administrative hearing and denied Miller's claim.[401] Miller initiated a tax appeal with the Tax Court.[402]

Indiana requires corporations to pay taxes on a portion of their AGI "that is 'derived from sources within Indiana.'"[403] For the tax years in dispute, "income was allocated to Indiana on the basis of a three-factor formula, reflecting a corporation's payroll, property, and sales attributed to this state, with the sales factor receiving the greater percentage of weight."[404] To determine whether a corporation's sales should be attributed to Indiana under this formula, IC 6-3-2-2(e)(1) states that "sales of tangible personal property are in this state if: (1) the property is delivered or shipped to a purchaser that is within Indiana, other than the United States government . . . regardless of the [free on board] point or other conditions of the sale."[405] The Department asserted that the language of the Indiana Code mandates the application of the destination rule because:

> (1) the legislature adopted statutory language that tracks the language of section 16 of the Uniform Division of Income for Tax Purposes Act ("UDITPA"), which incorporates the destination rule;
> (2) Indiana rejoined the Multistate Tax Commission ("MTC") in 2007 after a thirty year absence; and
> (3) other states with statutory language similar to [Indiana's code] have

---

394. 955 N.E.2d 865 (Ind. T.C. 2011), *reviewed by* 963 N.E.2d 1120 (Ind. Feb. 29, 2012).
395. *Id.* at 866.
396. *Id.*
397. *Id*.
398. *Id*.
399. *Id*.
400. *Id.* at 866-67.
401. *Id.* at 867.
402. *Id.*
403. *Id*. (quoting IND. CODE § 6-3-2-1(b) (2011)).
404. *Id.* (citing IND. CODE § 6-3-2-2(b) (amended 2006)).
405. *Id*. (citing IND. CODE § 6-3-2-2(e)(1)).

construed their statutes as requiring the destination rule.[406]

Miller, however, argued that the legislature drafted the Indiana Code with "language that can reasonably be construed in two different ways."[407] First, Miller explained, "the statutory language can be construed to mean that a sale is an Indiana sale if the property's purchaser is domiciled or has a business situs in Indiana, no matter where the merchandise is shipped or delivered."[408] Alternatively, "the statutory language can be construed to mean that sale is an Indiana sale if the property is delivered or shipped to this state, whether or not the purchaser has an Indiana domicile or business situs."[409] Miller argued that the Department's regulation for interpreting the legislature's intent regarding the statute should govern, rather than UDITPA, the MTC, or other states.[410] Therefore, sales would not be considered in Indiana "if the purchaser picks up the goods at an out-of-state location and brings them back into Indiana in his own conveyance."[411]

The Tax Court "will construe and interpret a statute only if it is unclear and ambiguous," to interpret an ambiguity, "it is appropriate for the Court to look to a clarifying regulation or one indicating the method of [the statute's] application."[412] In determining how the legislature intended IC 6-3-2-2 to be applied, the court found "the Department's interpretation . . . to be more persuasive than UDITPA, Indiana's membership in the MTC, or how other states construe their statutory language."[413] The court reasoned that although the language of Indiana Code section 6-3-2-2(e)(1) does track the language of the UDITPA, Indiana has not adopted UDITPA."[414] Similarly, the Tax Court did not "impute the MTC's goal of uniform taxation of multistate businesses . . . to the legislature's intent in enacting [IC] 6-3-2-2(e)(1)."[415] Even though other state courts have established "that statutory language similar to that contained in Indiana Code § 6-3-2-2(e)(1) requires the application of the destination rule, the holdings from those jurisdictions are not binding on [the Tax] Court."[416]

The Department, meanwhile, argued "that if the carrier-pickup sales are not deemed Indiana sales, not only will Miller be excused from complying with Indiana law requiring the consistent apportionment of income between states, but inequity will prevail."[417] The Department explained that "a taxpayer's

406. *Id*. at 867-68.
407. *Id.* at 868.
408. *Id*.
409. *Id*. at 868-69.
410. *Id.* at 869.
411. *Id*.
412. *Id*. (alteration in original).
413. *Id*. at 870.
414. *Id*. (internal citation omitted).
415. *Id.*
416. *Id*.
417. *Id*. at 871.

apportionment of sales income between Indiana and other states must be consistent."[418] Furthermore, the Department stated that because both the Ohio and Wisconsin statutes "are substantially similar to Indiana's in that they apply the destination rule, those states would apportion Miller's carrier-pickup sales to Indiana."[419] The Department claimed that by avoiding sales tax in Indiana, Miller had an advantage over his competitors, who were taxed in Ohio and Wisconsin.[420] The Tax Court disagreed and stated that an "inconsistency by the Department with respect to how Miller reported its income from the carrier-pickup sales to Indiana as compared to Ohio and Wisconsin is irrelevant."[421] The court held Miller's carrier-pickup sales were not Indiana sales and were thus not allocable to Indiana.[422]

2. Rent-A-Center East, Inc. v. Indiana Department of State Revenue.[423]—Rent-A-Center East, Inc. ("RAC East") appealed the Department's final determination requiring RAC East to use a combined income tax return with two affiliates for reporting its AGI tax liability.[424] Rent-A-Center, Inc. ("RAC Inc."), formerly Renter's Choice, acquired its largest competitor and transferred the Rent-A-Center trademarks "to its new affiliate, Advantage Companies, Inc. ("Advantage")."[425] In 2003, the RAC family reorganized its corporate structure with RAC Inc., assuming the name RAC East and Advantage changing its name to Rent-A-Center West, Inc. ("RAC West").[426] Additionally, Rent-A-Center Holdings, Inc. ("RAC Holdings") and Rent-A-Center Texas, LP ("RAC Texas").[427] The matter before the Tax Court arose because:

> In 2003, RAC East filed its 2003 Indiana corporate AGI tax return on a separate company basis reporting that it owed no tax. The Department audited RAC East for the 2001, 2002, and 2003 tax years, proposing an additional $513,272.60 in AGI tax liability, penalties, and interest for the 2003 tax year based on its determination that RAC East should have filed a combined AGI tax return with RAC West and RAC Texas.[428]

RAC East disputed the determination, but the Department upheld its original finding.[429] RAC East subsequently filed an original tax appeal.[430]

In Indiana, corporations must pay taxes on their "AGI that is derived from

---

418. *Id*.
419. *Id*.
420. *Id.*
421. *Id*.
422. *Id.* at 872.
423. 952 N.E.2d 387 (Ind. T.C. 2011), *rev'd*, 963 N.E.2d 463 (Ind. 2012).
424. *Id*. at 388.
425. *Id*.
426. *Id*.
427. *Id*.
428. *Id.*
429. *Id.*
430. *Id.*

sources within Indiana."[431] Generally, "[e]ach corporation . . . must report on a separate company basis."[432] There is a limited exception, however, which gives "the Department discretionary authority to grant prospectively or require retroactively that a taxpayer determine its Indiana source income using an alternative method."[433] According to the statute:

> If the allocation and apportionment provisions . . . *do not fairly represent the taxpayer's income derived from sources within the state of Indiana*, the taxpayer may petition for or the [D]epartment may require, in respect to all or any part of the taxpayer's business activity, if *reasonable*:
> (1) separate accounting;
> (2) the exclusion of any one (1) or more factors;
> (3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or
> (4) the employment of any other method to effectuate an *equitable* allocation and apportionment of the taxpayer's income.[434]

The Department argued "that requiring a combined filing was a reasonable and fair alternative."[435] To require a combined filing, the Department must "designate[] facts to show that RAC East's separate return did not fairly represent its income from Indiana sources" and that mandating that RAC East file a combined return was "reasonable and equitable."[436] The Department claimed that it disallowed using separate company basis reporting because it would actually have "increase[d] RAC East's Indiana tax liability."[437] The Tax Court stated, however, that the "information provided [was] insufficient to establish that the Department considered alternatives to assessing tax based on a combined return."[438] The Court held that the Department failed to make "a *prima facie* case that it [was] entitled to judgment as a matter of law . . . the Court . . . . grant[ed] summary judgment in favor of RAC East."[439]

3. AE Outfitters Retail Co. v. Indiana Department of State Revenue.[440]—AE Outfitters Retail Co. ("AE Outfitters"), assessed with adjusted gross income (AGI) tax liability for the tax years 2004 through 2007, appealed the Department's final determination.[441] After AE Outfitters filed its corporate AGI

---

431. *Id.*
432. *Id*. at 389 (citing IND. CODE §§ 6-3-2-2(a)-(k) (2011)).
433. *Id*.
434. *Id.* (quoting IND. CODE § 6-3-2-2(l) (2011)).
435. *Id.* at 390.
436. *Id.* at 390-91.
437. *Id.* at 391.
438. *Id*.
439. *Id*. at 392.
440. No. 49T10-1012-TA-66, 2011 WL 5059896 (Ind. T.C. Oct. 25, 2011).
441. *Id*. at *1.

tax returns, the Department audited AE Outfitters.[442] The Department concluded that AE Outfitters' "separate returns did not fairly reflect its Indiana income," and therefore it needed to report its Indiana "AGI liability via a combined income tax return."[443] Proposing eight assessments, the Department determined that AE Outfitters' total tax liability was $2,060,239.41, in addition to penalties and interest.[444] AE Outfitters filed its protest of the proposed assessments, and the Department affirmed the assessments and required AE Outfitters to use the combined return.[445] AE Outfitters subsequently filed an original tax appeal with the Tax Court.[446]

AE Outfitters argued that before the Department can compel the use of a combined tax return to report AGI liability it "must apply each of the methodologies listed in" IC 6-3-2-2(l)-(m).[447] Indiana Code section 6-3-2-2(p) provides:

> The [D]epartment may not require that income, deductions, and credits attributable to a taxpayer and another entity not described in subsection (o)(1) or (o)(2) be reported in a combined income tax return for any taxable year, unless the [D]epartment is unable to fairly reflect the taxpayer's adjusted gross income for the taxable year through use of other powers granted to the [D]epartment by subsections (l) and (m).[448]

AE Outfitters argued that the statute curtained "the Department's ability to mandate the filing of combined income tax returns" because it first had to "determine whether a taxpayer's income could be fairly reflected through use of all of the other methodologies listed in Indiana Code section 6-3-2-2(l) and (m)."[449] The Department replied that it was only required to "apply any one of the methodologies . . . before issuing a combined return mandate."[450] The Tax Court ambiguity in the statute because it "plainly conveys that the Department may not require a taxpayer to file a combined income tax return *unless* [it] is unable to fairly reflect the taxpayer's adjusted gross income for the taxable year through use of other powers granted to [it]."[451] Therefore, prior to demanding that a taxpayer file a combined tax return, the Department "must ascertain whether application of *each* of the . . . methodologies would result in an equitable allocation and apportionment of the taxpayer's income."[452] The Indiana Code provides:

---

442. *Id.*
443. *Id*.
444. *Id*.
445. *Id.*
446. *Id.*
447. *Id*. at *2; *see also* IND. CODE § 6-3-2-2(p) (2011).
448. *AE Outfitters Retail Co.*, 2011 WL 5059896, at *1 (quoting IND. CODE § 6-3-2-2(p)).
449. *Id*. at *2 (citing IND. CODE § 6-3-2-2(p)).
450. *Id*.
451. *Id*. (alterations in original).
452. *Id*.

> When two (2) or more organizations, trades, or businesses are owned or controlled directly or indirectly by the same interests, however, "the [D]epartment [must] distribute, apportion, or allocate the income derived from [Indiana] sources . . . between and among those organizations, trades, or businesses in order to fairly reflect and report the income derived from [Indiana] sources . . . by various taxpayers."[453]

Thus, the Tax Court held that the Department was required to "apply all of the methodologies . . . before it may require a taxpayer to report its AGI liability *via* a combined income tax return."[454]

453. *Id.* (second, third, and fourth alterations in original) (quoting IND. CODE § 6-3-2-2(*l*)).

454. *Id*. at *3.