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SURVEY

BE ADVISED: SWEAT THE SMALL STUFF

JUSTICE MARK S. MASSA*

A couple of decades ago, one of the best-selling books of the era was a little paperback self-help volume scarcely thicker than a Sunday Missal. Entitled *Don't Sweat the Small Stuff . . . and It's All Small Stuff*,[1] it was readily found on coffee tables and powder room vanities, providing transient readers with easily digestible bite-sized morsels of advice on how to keep little things from driving them crazy, one two-page chapter at a time. It was good guidance for life, but perhaps not for practicing lawyers. Indeed, recent decisions by Indiana appellate courts seem to send the opposite message: "Better Sweat the Small Stuff . . . Because It Can Turn Out to Be Big Stuff."

As I have been given the honor of introducing this year's Survey Issue of the *Indiana Law Review*—a collection of legal scholarship by practitioners offering practical advice—this is the most obvious and practical observation that I can offer after two years on the appellate bench. Coming from a practice background that was mostly criminal, it has been sobering to see how often access to civil justice is denied, or at least delayed, by a failure to sweat the small stuff.

Imagine a person injured in a slip and fall denied her day in court because the postage on the envelope containing her lawsuit was seventeen cents short when it arrived at the clerk's office.[2] Or an injured motorist's case bounced because the check with the filing fee was two dollars light.[3] How about a medical malpractice

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The author wishes to publicly acknowledge and thank his law clerk, Lara Langeneckert (J.D. 2012, Indiana University Robert H. McKinney School of Law), a former editor of the Indiana Law Review, for her assistance and contributions to this Article.

1. RICHARD CARLSON, DON'T SWEAT THE SMALL STUFF . . . AND IT'S ALL SMALL STUFF: SIMPLE WAYS TO KEEP THE LITTLE THINGS FROM TAKING OVER YOUR LIFE (1st ed. 1997).

2. Webster v. Walgreen Co., 966 N.E.2d 689, 691 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 476 (Ind. 2012).

3. Hortenberry v. Palmer, 992 N.E.2d 921, 923 (Ind. Ct. App. 2013), *trans. denied*, 4 N.E.3d

plaintiff losing on summary judgment in the trial court because a seven-dollar filing and processing fee was not mailed with the complaint to the Department of Insurance?[4] Or a malpractice plaintiff losing in the trial court because she used FedEx instead of the U.S. Mail?[5]

Believe it or not, my colleagues and I have wrestled with each of these scenarios over the past two years with varied outcomes but a common theme: the need to pay attention to even the smallest details. Appellate tribunals spent countless hours in oral arguments, reviewed piles of briefs, drafted, circulated, and published opinions parsing the language of our rules and precedents, all because a postage meter was perhaps not properly calibrated, a clerk wouldn't reach for two dimes in her pocket, or a paralegal wrote the wrong amount on a check just weeks after a two-dollar fee increase went into effect. These things really happened,[6] and in some cases, parties paid a dreadful price.[7]

Of course, I am hardly the first to note that the devil is often in the details. Benjamin Franklin expressed the same concept in his characteristic folksy style: "For want of a Nail the Shoe was lost; for want of a Shoe the Horse was lost; and for want of a Horse the Rider was lost, being overtaken and slain by the Enemy, all for want of Care about a Horse-shoe Nail."[8] In this article, I discuss four cases in which some procedural horse-shoe nail was wanting. In two cases, Poor Richard's wisdom proved true, and the kingdom—the substantive claim—was lost. In the other two, the omission was not ultimately fatal to the claim, but it did waste a great deal of time, energy, and money.

I. LOST KINGDOMS

Webster and *Hortenberry* illustrate the importance of strict compliance with Trial Rule 3, which provides: "A civil action is commenced by *filing with the court a complaint* or such equivalent pleading or document as may be specified by statute, *by payment of the prescribed filing fee* or filing an order waiving the 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."[9] As these two

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1188 (Ind. 2014).

4. Miller v. Dobbs, 991 N.E.2d 562, 563 (Ind. 2013).

5. Moryl v. Ransone, 4 N.E.3d 1133 (Ind. 2014).

6. Or at least, some seemingly minor error or omission occurred—otherwise, the case would not have come before us as it did. It matters not whether, for instance, the postage meter was not properly calibrated or the attorney simply misread it; the important thing is that the deadline was missed.

7. *See also* Am. Cas. Co. of Reading, Pa. v. Dep't of Licensing & Regulation, Ins. Div., 447 A.2d 484, 485 (Md. App. 1982) ("The colloquialism, 'a day late and a dollar short' took on a special significance to appellants when the Insurance Commissioner imposed a penalty of $25,736.44 on them for filing one day late.").

8. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC (U.S. Gov't Printing Office, facsimile ed. 2006) (1758).

9. IND. R. TR. PROC. 3 (emphasis added).

cases demonstrate, the lawsuit is not "commenced" until the requirements of Trial Rule 3 are satisfied. Thus, a plaintiff who makes any error or omission in the fulfillment of those requirements risks running afoul of the statute of limitations.

A. Webster v. Walgreens[10]

Melanie Webster alleged that she slipped and fell in front of a Walgreen's store in Mooresville on December 17, 2008. Nearly two years later (just four days before the statute of limitations was to run), Webster's lawyer placed a complaint, summons, appearance, and filing fee in an envelope to mail to the Morgan County Clerk for filing. He weighed the envelope himself on his postage scale, which indicated that the package weighed six ounces. The lawyer then used Stamps.com to determine that the appropriate amount of postage to send the lawsuit by certified mail was $6.83. He printed the stamp in that amount and put the envelope in the mail. It reached the Clerk's office within the statute of limitations.

A postal worker, however, must have reweighed the package and found it slightly heavier than six ounces, because when it arrived at the Clerk's office, there was seventeen cents postage due. *Seventeen cents!* The clerk declined to cover the shortfall,[11] so the envelope was returned to the plaintiff's lawyer on December 21, four days *after* the two-year statute ran. This time, the lawyer affixed sufficient postage and re-mailed the package on the same day. The clerk stamped the complaint filed when it arrived on December 22. Defendant Walgreens later moved for judgment on the pleadings, asserting the complaint was filed beyond the statute of limitations. The trial court agreed, the court of appeals affirmed, and we denied transfer.

The result in *Webster*, albeit harsh and unforgiving, was largely dictated by our precedent in *Boostrom v. Bach*, in which we held that a small claims action was not "filed" unless and until the filing fee was paid.[12] *Boostrom* predates the current version of Trial Rule 3, which was amended in 2001.[13] But even before we amended our rules to reflect its holding,[14] *Boostrom* established a bright line rule, at least in tort cases outside the scope of the Medical Malpractice Act. (More on this distinction in a moment.) The court of appeals found a lack of postage analogous to a delinquent fee, concluded both were within the plaintiff's control, and thus held against Webster, a holding we declined to disturb.[15]

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10. 974 N.E.2d 476 (Ind. 2012).

11. Of course, the clerk was under no obligation to pay the deficiency out of her own pocket, although another civil servant might have done so.

12. Boostrom v. Bach, 622 N.E.2d 175 (Ind. 1993).

13. *See* Order Amending Rules of Trial Procedure (Ind. Dec. 21, 2001), *available at* http://www.in.gov/judiciary/files/rule-amends-2001-trial.pdf, *archived at* http://perma.cc/8Z6P-L584.

14. Hortenberry v. Palmer, 992 N.E.2d 921, 925 (Ind. Ct. App. 2013), *trans. denied*, 4 N.E.3d 1188 (Ind. 2014) ("Trial Rule 3 was later amended to reflect the holding of *Boostrom*.").

15. *Webster*, 974 N.E.2d 476.

B. Hortenberry v. Palmer[16]

The rough justice of the *Boostrom*/*Webster* rule in common law torts prevailed again in *Hortenberry v. Palmer*, based upon an omission some might find equally trivial. Palmer and Hortenberry were involved in a car accident in Clark County on August 23, 2010. On August 10, 2012—thirteen days before the two-year statute would run—counsel for Palmer mailed the complete lawsuit package to the Clark Circuit Court for filing. A cover letter described the contents, including reference to a check for $139, the filing fee as of July 1, 2012. However, the check was actually for only $137, the fee amount prior to July 1.

On August 22—one day before the statute ran—the clerk's office called Palmer's counsel to inform him that another two dollars was due. Instead of bringing two dollars to the clerk's office, Palmer's counsel mailed the $2 check the next day. The complaint was file-stamped on August 27, 2012. By now, the reader can predict what ultimately occurred: following a series of motions and arguments, the trial court ruled that the complaint was timely filed. An interlocutory appeal ensued, however, and the court of appeals reversed. Just as in *Webster*, the Supreme Court denied transfer, this time by a 3-2 vote.

The court of appeals' opinion specifically rejected Palmer's argument that he had "substantially complied" with the filing requirement, noting the difficulty in fashioning a predictable and replicable standard if "substantial" compliance was all that was needed to satisfy the rule. Judge Crone summarized the competing interests in the opinion's final paragraph:

> While we recognize that following Boostrom produces a harsh result in this case, Boostrom thoroughly considered the competing policy arguments. Boostrom acknowledged our preference to decide cases on their merits, yet concluded that that preference "does not displace the legislative policy which undergirds the statute of limitations," that is, to spare courts from stale claims and insure that parties are given seasonable notice that a claim is being asserted against them. As in Boostrom, payment of the applicable fee was wholly within the plaintiff's hands. Although Palmer asserts that substantial compliance can be judged on a case-by-case basis, *he does not suggest any sort of workable standard for clerks or courts to determine what constitutes substantial compliance*. We think that our supreme court intended to create a bright-line rule for determining when an action has been commenced and has left us with no discretion in the matter.[17]

Judge Crone's observation on substantial compliance goes to the heart of the matter: should courts decide cases like this using a "bright-line rule" or "on a case-by-case basis"? As he read *Boostrom*, it prescribed the former approach—at least for cases governed by Trial Rule 3.

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16. *Hortenberry*, 992 N.E.2d at 923.

17. *Id.* at 926 (emphasis added) (internal citation omitted).

II. NARROW ESCAPES

Miller and *Moryl*, in contrast, deal not with Trial Rule 3 but rather with the administrative filing requirements of the Medical Malpractice Act.[18] Based on the language of that statute, we concluded the procedural defects in these two cases were not fatal to the plaintiffs' claims. Nevertheless, all parties to the litigation expended significant resources on this non-substantive issue.

A. Miller v. Dobbs[19]

In *Miller*, our more forgiving attitude toward failure to sweat the small stuff was grounded in statutory construction and our conclusion that the administrative filing fee requirements of the Medical Malpractice Act do not pack the same jurisdictional punch as those in Trial Rule 3. Before getting to this razor-thin parsing, we summarized the picayune realities of the case in the opening paragraph, saying, "In this case, the parties have spent five years disputing an issue which boils down to a seven-dollar fee paid three days late. The trial court found this delinquency fatal to the plaintiffs' claim. We reverse."[20]

These are the facts in greater detail: In late March 2006, Dr. Dobbs performed a cesarean section and tubal ligation on Mrs. Miller. Two weeks later, on April 3, she suffered a stroke resulting in permanent injury. Nearly two years later, on March 18, 2008, the Millers' attorney sent a proposed medical malpractice complaint to the Indiana Department of Insurance by certified mail.[21] The seven dollars in statutory filing and processing fees were omitted from this mailing, but the proposed complaint was nevertheless file-stamped (by the *Department*) "March 18." On March 31, 2008, the Millers then filed their lawsuit against Dr. Dobbs in the Dearborn Superior Court.

Ironically, on the same day the lawsuit was filed in the trial court, the Department of Insurance discovered the fee omission and sent the Millers' attorney a letter stating the mandatory seven dollars needed to be sent within thirty days and that the complaint would "not be considered filed with the Department until the filing fees were received."[22] The Millers' attorney promptly sent a seven-dollar check that arrived on April 7; three days after the statute of limitations would have run. The Department re-file-stamped the proposed complaint "April 7, 2008."

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18. IND. CODE art. 34-18.

19. 991 N.E.2d 562 (2013).

20. *Id.* at 563.

21. Indiana's Medical Malpractice Act includes a pre-screening procedure; before they may file a complaint in the trial court, prospective plaintiffs must submit the complaint to the Indiana Department of Insurance for presentation to a medical review panel. IND. CODE § 34-18-8-4. That panel then issues an "expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care as charged in the complaint." *Id.* § 34-18-10-22(a).

22. *Miller*, 991 N.E.2d at 563 (quoting Appellant's App. at 234).

The defendants raised the statute of limitations as an affirmative defense and won summary judgment in the trial court. That outcome seemed to be consistent with the draconian results in *Boostrom* and *Webster*. But we reversed. And we did so without undermining those precedents, focusing on the plain language of the Medical Malpractice Act's statute of limitations chapter, which, unlike Trial Rule 3, does not include fee payment in the definition of filing commencement. The Act provides that "a proposed complaint . . . is considered filed when a copy . . . is delivered or mailed . . . to the Commissioner."[23] The Millers' complaint was delivered to the Commissioner by certified mail on March 18, 2008; thus, according to the statute, it was considered filed on that date.

Our decision also noted that the filing and processing fees are located in a different chapter of the statute from which we inferred (perhaps most importantly), that "there are numerous methods by which to enforce effectively the payment of filing fees other than by couching such enforcement in jurisdictional terms."[24] In other words, the Department of Insurance might on occasion be forced to find another way to collect a delinquent fee, but denying a trial court jurisdiction to adjudicate the merits is not a deterrent sanction we will read into the statutory law.

B. Moryl v. Ransone[25]

In *Moryl*, the plaintiff sued the doctors who were caring for her husband upon his death on April 20, 2007. She sent her proposed complaint to the Department on April 19, 2009 via FedEx Priority Overnight service. It arrived on April 21, and the Department file-stamped it that day—one day after the statute of limitation had run.[26] The defendants successfully moved for summary judgment, and the plaintiff's appeal was unavailing.

We granted transfer to consider whether, as the plaintiff argued, the grant of summary judgment conflicted with Indiana Code section 1-1-7-1(a) regarding the use of private delivery services. That statute provides, in pertinent part:

> If a statute enacted by the general assembly or a rule . . . requires that notice or other matter be given or sent by registered mail or certified mail, a person may use: (1) any service of the United States Postal Service or any service of a designated private delivery service (as defined by the United States Internal Revenue Service) that: (A) tracks the delivery of mail; and (B) requires a signature upon delivery . . . to

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23. IND. CODE § 34-18-7-3(b).

24. *Miller*, 991 N.E.2d at 565 (quoting Boostrom v. Bach, 622 N.E.2d 175, 176 (Ind. 1993)).

25. 4 N.E.3d 1133 (2014).

26. "A proposed complaint under IC 34-18-8 is considered filed when a copy of the proposed complaint is *delivered or mailed by registered or certified mail* to the commissioner." IND. CODE § 34-18-7-3(b) (2012)(emphasis added). Thus, a proposed complaint sent by registered or certified mail is considered filed on the date of mailing, but a proposed complaint sent by any other means—such as FedEx—is considered filed on the date of delivery.

comply with the statute or rule.[27]

We ultimately reversed the trial court, reasoning: "We see no substantive difference between a proposed medical malpractice complaint mailed via FedEx Priority Overnight, tracking and return receipt requested, and a proposed complaint mailed via USPS registered and certified mail. And neither does the Indiana General Assembly, as evident by their adoption of Indiana Code section 1-1-7-1."[28] Thus, because Indiana Code section 34-18-7-3(b) provides a complaint is considered filed with the Department upon mailing, we harmonized that provision with Indiana Code section 1-1-7-1(a). As in *Miller*, Trial Rule 3 simply was not in the score.

III. THE TAKEAWAY

So, in light of this issue's practical purpose, what lesson should practicing lawyers take away from this line of case law? Some might argue the results are absurd and unfair: a common law negligence plaintiff's seventeen-cent postage deficiency was fatal to the claim, but a medical malpractice plaintiff's failure to remit seven-dollar fee was not. But the reason for this apparent inconsistency becomes clear upon a consideration of the statutory texts. Trial Rule 3 and the Medical Malpractice Act simply impose different procedural obligations upon plaintiffs. Others might suggest we adopt a more liberal interpretation of Trial Rule 3, so as to avoid the harsh results of *Webster* and *Hortenberry*. Such liberality, however, would be inconsistent with the plain text of the rule, and it would disserve two of the most important policies underlying our civil justice system: predictability and fairness.

Throughout history, "uncertainty has been regarded as incompatible with the Rule of Law."[29] In the criminal context, it is clear that no citizen can hope to conform his conduct to the law if he cannot determine what the law is.[30] Our founding fathers enshrined this concept in our Constitution; our federal colleagues have said a statute offends the Due Process Clause of the Fifth Amendment if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[31] And we have done the same in our turn.[32]

This principle is no less applicable to the civil context. Assuming a statute is not vague in its language, courts have a responsibility to enforce it as written;

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27. IND. CODE § 1-1-7-1(a).

28. *Moryl*, 4 N.E.3d at 1139.

29. Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

30. United States v. Brewer, 139 U.S. 278, 288 (1891) ("Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.").

31. United States v. Williams, 553 U.S. 285, 304 (2008).

32. *See, e.g.*, Bleeke v. Lemmon, 6 N.E.3d 907, 921 (Ind. 2014) (finding certain parole conditions so vague that they violated the Fourteenth Amendment of the United States Constitution).

otherwise, it will become vague by application. "In fact, should a court confound . . . legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest."[33] Justice Markman of the Michigan Supreme Court expressed this concept colorfully:

> When, to use a mundane illustration, the law requires that a person must file a certain type of lien within "thirty days," and when "thirty days" means thirty days, that law remains relatively accessible to the ordinary citizen. He or she can read the law and more or less understand their rights and responsibilities under this law. When, on the other hand, "thirty days" means "thirty-one days" if there has been an intervening holiday, "thirty-two days" if your car has broken down on your way to the registration office, "thirty-three days" if you have been in the hospital, and "thirty-four days" if you are a particularly sympathetic character, then the only way to understand this law and its various unwritten exceptions is to consult an attorney. That is, to read the law consistently with its language, rather than with its judicial gloss, is not to be "harsh" or "crabbed" or "Dickensian," but is to give the people at least a fighting chance to comprehend the rules by which they are governed.[34]

As the above illustrates, "unless judges are prepared to announce these rules in advance and apply them in a *consistent* fashion, it is something other than the rule of law that they are administering."[35]

Courts cannot foster predictability in the law without applying it consistently.[36] Only "by assuring that equivalently situated persons are treated in a reasonably equivalent manner" can we, "promote the equal rule of law."[37] Indeed, both the federal and state constitutions require us to do so.[38] Thus, even when a plaintiff is particularly sympathetic, or when the procedural failure seems particularly minor, it is important that we apply the law the same way we would if the plaintiff were unsympathetic or the default more significant—thirty days should mean the same thing for each.[39]

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33. Robinson v. City of Detroit, 613 N.W.2d 307, 321-22 (Mich. 2000).

34. Stephen J. Markman, *Resisting the Ratchet*, 31 HARV. J.L. & PUB. POL'Y 983, 985 (2008).

35. *Id.*

36. Stephen Markman, *Precedent: Tension Between Continuity in the Law and the Perpetuation of Wrong Decisions*, 8 TEX. REV. L. & POL. 283, 283 (2004) ("The law must be applied consistently, for it is only in this way that the law is applied fairly.").

37. Stephen Markman, *Originalism and Stare Decisis*, 34 HARV. J.L. & PUB. POL'Y 111, 113 (2011).

38. *See* U.S. CONST. amend. XIV; IND. CONST. art. 1, § 23.

39. Markman, *supra* note 36, at 285 ("If a statute, for example, states that some legal action, say filing a lawsuit, must be undertaken within sixty days in order to be in compliance with the statute of limitations, there is considerable virtue in sixty days meaning sixty days, even if in the past—in the interest of preserving the lawsuits of "sympathetic" parties—a court has insisted on reading the statute to mean sixty days with a grace period so long as you tried very hard to file it within sixty days.").

In light of these two principles, the take-away for practitioners becomes "always sweat the small stuff—and do it early."[40] Read the rules, follow them scrupulously, and you will never have to worry that your client's kingdom will be lost for want of a horse-shoe nail.

40. It is significant that all four of the cases I discuss herein could have been avoided had the lawyers involved filed even one week further in advance of the deadline.

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2013*

MARK J. CRANDLEY**
JEFF PEABODY***

Change continues to impact the Indiana Supreme Court, as 2013 was the first full year for the current alignment of the court's five justices. The court continues to evolve after Justices Massa and Rush joined the court in 2012 and Chief Justice Dickson assumed that mantle the same year. So much change naturally begs the question of how much—or how little—the current court resembles its predecessors. If 2013 is any indication, the court has retained important characteristics it has long demonstrated but has also changed in fundamental ways.

One feature the court appears to have retained is the ability to reach consensus. The court continues to show unity in its decision-making and the ability to avoid the fractious process of dissent that divides other courts of last resort. The percentage of unanimous opinions rose significantly in 2013 to 84%, nearly 20% higher than in 2012 and 2011. Of the court's 74 opinions, only nine drew a dissent. The level of agreement between the justices was most pronounced in civil cases, with only one separate concurrence and only five dissents out of the entire civil workload. In civil cases, almost all of the justices agreed with one another more than 90 percent of the time and no obvious voting blocs were evident, as has traditionally been the case. Only one pair of justices—Justices David and Rush—agreed with each other less than 90% of civil cases, and even then their level of agreement reached 87%. Three other pairs of justices—Justices Massa and Rush; the Chief Justice and Justice Massa; and the Chief Justice and Justice Rucker—agreed with each other in 95% of civil cases. Demonstrating how consensus-building sweeps across the entire Court, two of these pairs represent the two most recently added justices (Justices Massa and Rush) as well as the two most senior justices (the Chief Justice and Justice

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* 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: Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 301-02 (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. We also thank P. Jason Stephenson, Vice President, General Counsel Vectren Utility Holdings, Inc., for his time and effort shepherding this project over the last several years. As is appropriate, credit for the idea for this project goes to former Chief Justice Shepard.

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Rucker).

Moreover, only five of the court's 74 opinions were 3-2 decisions. In other words, only 6.7% of the court's cases were decided by a single vote. Interestingly, Justice David was in the majority in all five cases, and Chief Justice Dickson was in the majority for four of them.

Although the court has retained its cohesiveness, some developments in 2013 are worthy of note in analyzing potential new trends as the court moves into the future. Critically, while it used to be a maxim that the court was likely to reverse if it granted transfer, one can no longer assume that is the case with the new supreme court membership. For cases coming to the court on transfer, the court reversed in only 56% of its civil cases and in 55% of its criminal cases in 2013. This reversal rate in civil cases is the lowest in the last three years. Indeed, just a few years ago—in 2011—the court reversed in 70% of its civil transfer cases and 61.5% of criminal transfer cases. In 2010, it reversed in 70.8% of civil cases and in 71.0% of criminal cases. These numbers were consistent with the court's prior practice. Going back a decade to 2004, it reversed 84% of the time in civil transfer cases and in 75.8% of criminal transfer cases. In 2005, the court affirmed only *one* civil case that came before it on transfer, and reversed in 97.8% of its civil cases. Whether the results in 2013 are the start of a trend away from reversals or an anomaly warrants close watching in future years.

Moreover, criminal law continues to grow as an area of importance for the court. Through a constitutional amendment, the court's jurisdiction changed in 2001 to allow the court greater discretion over the cases that came before it.[1] That initially meant a spike in the number of civil cases the court accepted on transfer. However, criminal law remains a central and critical focus of the court's work. Of the 74 cases in 2013, 46% arose in the criminal law context. In 2012, the court's criminal cases were 41% of its work. The future should see the court continue to engage in its role in overseeing the State's criminal justice system, as 41% of the transfers granted in 2013 arose in the criminal law context. These cases are in addition to the mandatory criminal appeals that automatically come before the court without the need for transfer.

Although still showing overall alignment in their voting, the justices proved more likely to deviate from one another in criminal cases. While the lowest amount of agreement between justices was 87% for civil cases, it was down to 83% (between Chief Justice Dickson and Justice Massa) in criminal cases. Justice Massa was involved in the next two lowest levels of agreement, as he agreed with Justices David and Rucker in 86% of criminal cases. This is consistent with 2012, his first year on the bench, as he agreed with then-Justice Sullivan in only 58% of the court's criminal cases and only 68% of the time with Justice Rucker. Moreover, dissents were almost evenly split between criminal cases and civil cases, with four and five dissents, respectively. In prior years, civil cases were far more likely to draw a dissent. For instance, in 2011 there were eleven criminal dissents versus 15 dissents in civil cases, while in 2010 there were more than two times as many dissents in civil cases. Justice Massa's

1. IND. CONST. art. 7, § 4 (amended 2000).

presence was felt here as well, as he wrote nearly half of the 11 separate opinions (concurring or dissenting) in criminal cases during 2013. Prior to being elevated to the court, Justice Massa developed an extensive background in criminal law. It is hardly surprising that he has developed a unique voice on the court in criminal law matters.

Finally, a potential quirk in 2013 arose in the number of per curiam opinions. More than 15% of the court's cases went without an author in 2013, by far the highest percentage over the past 10 years. Previously, it was rare for more than 10% of the court's cases to be per curiam, and in 2007 only 3% of its cases were per curiam. In 2012, only 9.7% of the court's cases were per curiam. While this jump in the percentage of the court's cases that went unsigned might be a factor of the new justices joining the court or the particular issues presented in those cases, it is a development worthy of watching for future years.

Table A. The court handed down a total of 74 opinions in 2013, down from the 103 opinions handed down in 2012 and the lowest in more than 10 years. That dip in the total number of opinions is not surprising, however, when considering the turnover on the court and that multiple justices were still coming up to speed in 2013. Indeed, in 2011—Justice David's first year on the court—the raw number of the court's opinions also dropped from the previous year, but the court returned to its customary level of approximately 100 opinions in 2012. The court again handed down more civil cases than criminal cases, but the division remains close. About 53% of the opinions came in civil cases. The opinions were fairly evenly distributed among the justices, with Justice David writing the most opinions with 16. Justices Massa and Rush—the two newest justices—handed down 10 each.

Table B-1. In 2013, Justice Massa agreed with Chief Justice Dickson and Justice Rush in 95% of the civil cases the court handed down. Justices Dickson and Rucker were also aligned 95% of the time, the highest level of agreement for those two justices at any point in the last decade.

Table B-2. Overall agreement remains high in criminal cases. The highest level of agreement was between Justices David and Rucker, who agreed in 97% of criminal cases, up from their 81% agreement in 2012 and their agreement of only 79.5% in 2011. Indeed, Chief Justice Dickson, Justice Rucker, Justice David, and Justice Rush agreed with at least three other justices in more than 94% of the court's criminal cases. While Justice Massa agreed with each of his colleagues more than 90% of the time in civil cases, he tended to be less aligned in criminal cases. In fact, he did not agree with any of the other four justices more than 89% of the time in criminal cases.

Table B-3. The justices most aligned in 2013 were Chief Justice Dickson and Justice Rucker, as they agreed in 95% of all cases in 2013. Reflecting the higher level of alignment in civil cases, the lowest overall alignment between justices was still quite high, at 89%, between Justice Massa and Chief Justice Dickson, Justice David and Justice Rucker.

Table C. The percentage of unanimous opinions rose significantly in 2013 to 84%, nearly 20% higher than in 2012 and 2011. Of the 12 separate opinions in 2013, only three were concurrences. The total percentage of cases drawing a dissent dropped to 12%. In 2012, 34% of the cases had at least one dissent and in 2011 there were dissents in 28.6% of cases. The number of dissents were almost evenly split between criminal cases and civil cases, with four and five dissents, respectively.

Table D. The percentage of the court's decisions that were split 3-2 dropped to just under 7% from the 16% level in 2012, reaching a three year low.

Table E-1. For cases coming to the court on transfer, the court reversed in only 56% of its civil cases and in 55% of its criminal cases. This reversal rate in civil cases is the lowest in the last three years.

Table E-2. The number of petitions to transfer in 2013 remained higher than the level seen in prior years, although it was still lower than the 920 petitions filed in 2011. The percentage of petitions that the court granted dropped only a tenth of a percentage point from last year's rate, to 9.8%. This is the lowest percentage since 2009, when only 8.4% of petitions were granted.

Table F. The court's cases continue to cover a broad scope of topics, including 16 different areas of law in 2013. After handing down only three opinions on divorce or child support in 2012, the court handed down nine such opinions in 2013. The court also handed down considerably more opinions in the areas of Fourth Amendment, search and seizure, and Indiana Tort Claims Act than in 2012.

TABLE A
OPINIONS[a]

	OPINIONS OF COURT[b]			CONCURRENCES[c]			DISSENTS[d]		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Dickson, C.J.	5	9	14	2	0	2	3	0	3
David, J.	9	7	16	0	0	0	0	2	2
Rucker, J.	7	6	13	0	0	0	1	2	3
Massa, J.	4	6	10	2	0	2	3	0	3
Rush, J.	4	6	10	0	1	1	0	2	2
Per Curiam	6	5	11						
Total	35	39	74	4	1	5	7	6	13

[a] These are opinions and votes on opinions by each justice and in per curiam in the 2013 term. The Indiana Supreme Court is unique as 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 direct or 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]

		Massa	Dickson	David	Rucker	Rush
Massa, J.	O		37	36	36	36
	S		0	0	0	1
	D	---	37	36	36	37
	N		39	39	39	39
	P		95%	92%	92%	95%
Dickson, C.J.	O	37		36	37	35
	S	0		0	0	0
	D	37	---	36	37	35
	N	39		39	39	39
	P	95%		92%	95%	90%
David, J.	O	36	36		35	34
	S	0	0		0	0
	D	36	36	---	35	34
	N	39	39		39	39
	P	92%	92%		90%	87%
Rucker, J.	O	36	37	35		35
	S	0	0	0		0
	D	36	37	35	---	35
	N	39	39	39		39
	P	92%	95%	90%		90%
Rush, J.	O	36	35	34	35	
	S	1	0	0	0	
	D	37	35	34	35	---
	N	39	39	39	39	
	P	95%	90%	87%	90%	

[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 Justice Massa, 37 is the number of times Justice Massa and Chief 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]

		Massa	Dickson	David	Rucker	Rush
Massa, J.	O		29	30	30	30
	S		0	0	0	1
	D	---	29	30	30	31
	N		35	35	35	35
	P		83%	86%	86%	89%
Dickson, C.J.	O	29		33	33	32
	S	0		0	0	1
	D	29	---	33	33	33
	N	35		35	35	35
	P	83%		94%	94%	94%
David, J.	O	30	33		34	33
	S	0	0		0	0
	D	30	33	---	34	33
	N	35	35		35	35
	P	86%	94%		97%	94%
Rucker, J.	O	30	33	34		33
	S	0	0	0		0
	D	30	33	34	---	33
	N	35	35	35		35
	P	86%	94%	97%		94%
Rush, J.	O	30	32	33	33	
	S	1	1	0	0	
	D	31	33	33	33	---
	N	35	35	35	35	
	P	89%	94%	94%	94%	

[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 Justice Massa, 29 is the number of times former Justice Massa and Chief 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]

		Massa	Dickson	David	Rucker	Rush
Massa, J.	O		66	66	66	66
	S		0	0	0	2
	D	---	66	66	66	68
	N		74	74	74	74
	P		89%	89%	89%	92%
Dickson, C.J.	O	66		69	70	67
	S	0		0	0	1
	D	66	---	69	70	68
	N	74		74	74	74
	P	89%		93%	95%	92%
David, J.	O	66	69		69	67
	S	0	0		0	0
	D	66	69	---	69	67
	N	74	74		74	74
	P	89%	93%		93%	91%
Rucker, J.	O	66	70	69		68
	S	0	0	0		0
	D	66	70	69	---	68
	N	74	74	74		74
	P	89%	95%	93%		92%
Rush, J.	O	66	67	67	68	
	S	2	1	0	0	
	D	68	68	67	68	---
	N	74	74	74	74	
	P	92%	92%	91%	92%	

[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 former Justice Massa, 66 is the total number of times former Justice Massa and Chief Justice Dickson agreed in all full majority opinions written by the court in 2013. 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	
29	33	62 (84%)	2	1	3 (4%)	4	5	9 (12%)	74

[h] This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participated and all concurred, 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. Dickson, C.J., David, J., Rucker, J.	2
2. Dickson, C.J., David, J., Rush, J.	1
3. Dickson, C.J., David, J., Massa, J.	1
4. Massa, J., David, J., Rush, J.	1
Total[m]	5

[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 2013 term's split decisions were:

1. Dickson, C.J., David, J., Rucker, J.: F.D. v. Ind. Dep't of Family Servs., 2013 Ind. LEXIS 330 (Ind. 2013) (Dickson, C.J.); VanPatten v. State, 986 N.E.2d 255 (Ind. 2013) (David, J.).

2. Dickson, C.J., David, J., Rush, J.: Fry v. State, 990 N.E.2d 429 (Ind. 2013) (David, J.).

3. Dickson, C.J., David, J., Massa, J.: Berry v. Crawford, 990 N.E.2d 410 (Ind. 2013) (Dickson, C.J.).

4. Massa, J., David, J., Rush, J.: Holiday Hospitality Franchising, Inc. v. AMCO Ins. Co., 983 N.E.2d 574 (Ind. 2013) (David, J.).

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

	Reversed or Vacated[o]	Affirmed	Total
Civil Appeals Accepted for Transfer	19 (56%)	15 (44%)	34
Direct Civil Appeals	0 (0%)	1 (100%)	1
Criminal Appeals Accepted for Transfer	17 (55%)	14 (45%)	31
Direct Criminal Appeals	0 (0%)	3 (100%)	3
Total	36 (52%)	33 (48%)	69[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, R. 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 Indiana Supreme Court uses the term "vacate" when it is reviewing a court of appeals opinion, and the term "reverse" 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 3 attorney discipline opinions and 2original 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 2013[q]

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil[r]	206 (84.8%)	37 (15.2%)	243
Criminal[s]	479 (93.6%)	33 (6.4%)	512
Juvenile	52 (83.9%)	10 (16.1%)	62
Total	737 (90.2%)	80 (9.8%)	817

[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	0
• Writs of Mandamus or Prohibition	2[u]
• Attorney Discipline	3[v]
• Judicial Discipline	0
Criminal	
• Death Penalty	1[w]
• Fourth Amendment or Search and Seizure	5[x]
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	1[y]
Real Estate or Real Property	4[z]
Personal Property	0
Landlord-Tenant	0
Divorce or Child Support	9[aa]
Children in Need of Services (CHINS)	2[bb]
Paternity	0
Product Liability or Strict Liability	0
Negligence or Personal Injury	2[cc]
Invasion of Privacy	0
Medical Malpractice	4[dd]
Indiana Tort Claims Act	3[ee]
Statute of Limitations or Statute of Repose	0
Tax, Department of State Revenue, or State Board of Tax Commissioners	0
Contracts	2[ff]
Corporate Law or the Indiana Business Corporation Law	0
Uniform Commercial Code	0
Banking Law	0
Employment Law	2[gg]
Insurance Law	2[hh]
Environmental Law	0
Consumer Law	0
Worker's Compensation	0
Arbitration	0
Administrative Law	1[ii]
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	0
Indiana Constitution	6[jj]

[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 2013. 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] *In re* Mandate of Funds for Ctr. Twp. of Marion Cnty. Small Claims Court, 989 N.E.2d 1237 (Ind. 2013); State *ex rel.* Commons v. Pera, 987 N.E.2d 1074 (Ind. 2013).

[v] *In re* Dixon, 994 N.E.2d 1129 (Ind. 2013); *In re* Smith, 991 N.E.2d 106 (Ind. 2013); *In re* Usher, IV, 987 N.E.2d 1080 (Ind. 2013).

[w] Wilkes v. State, 984 N.E.2d 1236 (Ind. 2013).

[x] Kelly v. State, 997 N.E.2d 1045 (Ind. 2013); Austin v. State, 997 N.E.2d 1027 (Ind. 2013); Clark v. State, 994 N.E.2d 252 (Ind. 2013); Sanders v. State, 989 N.E.2d 332 (Ind. 2013); Hartman v. State, 2013 Ind. LEXIS 417 (Ind. 2013).

[y] Fulp v. Gilliland, 998 N.E.2d 204 (Ind. 2013).

[z] Fulp v. Gilliland, 998 N.E.2d 204 (Ind. 2013); M & M Investment Group, LLC v. Ahlemeyer Farms, Inc., 994 N.E.2d 1108 (Ind. 2013); Johnson v. Wysocki, 990 N.E.2d 456 (Ind. 2013); Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc., 988 N.E.2d 250 (Ind. 2013).

[aa] Johnson v. Johnson, 999 N.E.2d 56 (Ind. 2013); Wilson v. Myers, 997 N.E.2d 338 (Ind. 2013); Schwartz v. Heeter, 2013 Ind. LEXIS 725 (Ind. 2013); C.A.B. v. J.D.M. (*In re* C.B.M. and C.R.M.), 992 N.E.2d 687 (Ind. 2013); J.C. v. J.B. (*In re* A.J.A.), 991 N.E.2d 110 (Ind. 2013); Perkinson v. Perkinson, 989 N.E.2d 758 (Ind. 2013); M.L.B. v. M.A.B., 983 N.E.2d 583 (Ind. 2013); Sickels v. State, 982 N.E.2d 1010 (Ind. 2013); Horner v. Carter, 981 N.E.2d 1210 (Ind. 2013).

[bb] F.D. v. Ind. Dep't of Family Servs., 2013 Ind. LEXIS 930 (Ind. 2013); T.K. v. Ind. Dep't of Child Servs., 989 N.E.2d 1225 (Ind. 2013).

[cc] Santelli v. Rahmatullah, 993 N.E.2d 167 (Ind. 2013); Holiday Hospitality Franchising, Inc. v. AMCO Ins. Co., 983 N.E.2d 574 (Ind. 2013).

[dd] Manley v. Sherer, 992 N.E.2d 670 (Ind. 2013); Miller v. Dobbs, 991 N.E.2d 562 (Ind. 2013); Wright v. Miller, 989 N.E.2d 324 (Ind. 2013); Plank v. Cmty. Hosps. of Ind., 981 N.E.2d 49 (Ind. 2013).

[ee] F.D. v. Ind. Dep't of Family Servs., 2013 Ind. LEXIS 930 (Ind. 2013); Schoettmer v. Wright, 992 N.E.2d 702 (Ind. 2013); City of Indianapolis v. Buschman, 988 N.E.2d 791 (Ind. 2013).

[ff] Ind. Gas Co. v. Ind. Fin. Auth., 999 N.E.2d 63 (Ind. 2013); Kesling v. Hubler Nissan, Inc., 997 N.E.2d 327 (Ind. 2013).

[gg] Comm'r of Labor *ex rel.* Shofstall v. Int'l Union of Painters & Allied Trades AFL-CIO, 991 N.E.2d 100 (Ind. 2013); Walczak v. Labor Works-Fort Wayne, LLC, 983 N.E.2d 1146 (Ind. 2013).

[hh] Schoettmer v. Wright, 992 N.E.2d 702 (Ind. 2013); Holiday Hospitality Franchising, Inc. v. AMCO Ins. Co., 983 N.E.2d 574 (Ind. 2013); Dodd v. Am. Family Mut. Ins. Co., 983 N.E.2d 568 (Ind. 2013).

[ii] Ind. Gas Co. v. Ind. Fin. Auth., 999 N.E.2d 63 (Ind. 2013).

[jj] Austin v. State, 997 N.E.2d 1027 (Ind. 2013); Fry v. State, 990 N.E.2d 429 (Ind. 2013); Berry v. Crawford, 990 N.E.2d 410 (Ind. 2013); State v. Doe, 987 N.E.2d 1066 (Ind. 2013); Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc., 988 N.E.2d 250 (Ind. 2013); Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013).

SURVEY OF INDIANA ADMINISTRATIVE LAW

JOSEPH P. ROMPALA*

There is a growing trend in American political discourse that gives voice to questions regarding the appropriate reach of the regulatory state into society at large. Such a debate is unquestionably important, but as it is carried out, all sides should bear in mind that administrative agencies already play a substantial role in shaping the relationship between the average citizen and the government. Indeed, whether determining a person's eligibility for a driver's license, protecting the rights of workers and the unemployed, or setting the retail price of electricity, the work of the State's administrative agencies frequently has a direct and profound impact on the daily life of the average Hoosier.

Administrative agencies are legislatively enabled executive branch bodies and often operate in executive, legislative and quasi-judicial capacities. The Indiana legislature and courts have developed a specialized body of law to review and assess the actions of Indiana administrative agencies, often acting in a complex and unique role that straddles all three branches of government. This survey article examines some of the decisions issued by Indiana's appellate courts as they conduct that review and considers how that review safeguards the interests of Indiana's citizens.

I. JUDICIAL REVIEW

With few exceptions, the decisions of Indiana's administrative agencies are ultimately subject to review by the State's courts.[1] Statutory and common law requirements limit judicial review by controlling the review process, restricting who may seek review, what a court may review, and the standard the court is to apply while undertaking the review. The section below examines how Indiana's courts address these, and other, questions related to the judiciary's review of agency actions.

A. Standard and Scope of Review

In general, Indiana courts take a deferential stance when reviewing agency actions.[2] This deference flows from the doctrine of the separation of powers, and is the result of the status of administrative agencies as executive bodies acting in

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1. The Indiana Supreme Court long ago held there is a constitutional right to judicial review of agency actions. *See* State *ex rel.* State Bd. of Tax Comm'rs v. Marion Superior Court, Civil Div., Room No. 5, 392 N.E.2d 1161, 1165 (Ind. 1979). The General Assembly also has enacted the Administrative Orders and Procedures Act ("AOPA"), which sets out the method and means by which such review, in most instances, is undertaken. *See infra* note 4. Judicial review of other agency actions, such as decisions by the Indiana Utility Regulatory Commission, do not proceed under AOPA, but rather through a separate statutory process. *See* IND. CODE §§ 8-1-3-1 to -12. Only certain agency actions, such as actions taken "related to an offender within the jurisdiction of the department of correction" are explicitly exempt from judicial review. *Id.* § 4-21.5-2-5(6).

2. Ind. Horse Racing Comm'n v. Martin, 990 N.E.2d 498, 503 (Ind. Ct. App. 2013).

legislative or executive capacities. The Administrative Orders and Procedures Act ("AOPA"),[3] although not applicable to all agency actions, reflects the basic limitations the judicial branch exercises when reviewing the decision of an administrative body. Specifically, AOPA provides that a court may only overturn an administrative agency's decision if it is

> (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.[4]

Although AOPA establishes the general standard applied by courts, the actual degree of deference a court owes an administrative agency's decision varies according to a number of different factors.[5]

1. Judicial Deference to Agency Statutory Interpretation.—Courts generally have the sole responsibility of statutory interpretation. Nevertheless, administrative agencies often must engage in statutory interpretation when rendering a decision. In such instances, a reviewing court can be placed in a difficult position, needing to balance its judicial role in resolving questions of law against the deference owed to the other branches of government.

The court of appeals, in *Indiana Horse Racing Commission v. Martin*, illustrates how courts strike that balance when the statute subject to interpretation is one which the agency has a role in defining and enforcing. *Martin* addresses whether an individual needed a license from the Indiana Horse Racing Commission ("IHRC") due to his position and work with the Indiana Thoroughbred Owners and Breeders Association ("ITOBA").[6] More specifically, the decision in *Martin* focuses on the proper interpretation of Indiana Code section 4-31-6-1, which requires that "[a] person must be a licensee in order to . . . participate in racing at a racetrack or at a satellite facility."[7] At the heart of the case, then, was whether the IHRC properly interpreted the phrase "participation in racing" to encompass a wide range of activities.

Edmund Martin served as the executive director and was a paid employee of ITOBA and performed a number of functions for the association, including attending meetings, lobbying on its behalf, planning and directing programs, and executing decisions of the board.[8] The specific activities he undertook, included, among others, attending meetings at racetracks, participating in a horse sale, and "'covering' the ITOBA's booth space at the Hoosier Horse Fair."[9]

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3. IND. CODE §§ 4-21.5-1-1 to -9 (2013).

4. *Id.* § 4-21.5-5-14(d).

5. *See Ind. Horse Racing Comm'n*, 990 N.E.2d at 503 (discussing the process a reviewing court uses to decide the amount of deference to accord an agency's interpretation of statutes).

6. *Id*. at 499.

7. IND. CODE § 4-31-6-1 (2013).

8. *Ind. Horse Racing Comm'n*, 990 N.E.2d at 500.

9. *Id*.

In April 2010, the IHRC contacted Martin, indicating that he needed to apply for a license if "he intended to participate in horse racing activities."[10] At the time, Martin declined, telling the IHRC that he would not "have access to gaming funds and would not be handling ITOBA business" at racetracks.[11] Subsequently, in November 2010, the IHRC banned Martin from IHRC grounds until he obtained a valid license from the IHRC.[12] Martin sought administrative review of that decision, which was ultimately approved as a final order by the IHRC.[13] He then sought judicial review of the IHRC's decision, and the trial court overturned the agency determination. [14] The trial court concluded that the activities Martin performed on behalf of the ITOBA did not require him to obtain a license from the IHRC because he was not participating in racing or "pari-mutuel racing," or providing pari-mutuel related services under Indiana law.[15]

In reversing the trial court, the court of appeals began its analysis by reviewing the deference courts afford to agencies "in their interpretation of the statutes and regulations they are required to enforce."[16] Specifically, the court noted that 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."[17] The court further explained that this deference "becomes a consideration when a statute is ambiguous and susceptible of more than one reasonable interpretation" such that a court "is faced with two reasonable interpretations of a statute, one which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency."[18]

The court noted that the "Pari-Mutuel Wagering Act does not define the phrase 'participate in racing,'" but considered the IHRC's argument that its interpretation of the phrase "participate in racing" found in Indiana Code section 4-31-6-1 was reasonable in light of the "statutory requirement to conduct" horse racing "with the highest of standards and the greatest level of integrity."[19] Although both the court and the IHRC acknowledged that the definition of "participate in racing" used by the agency is broad, the court rejected Martin's argument that the agency's interpretation was "unreasonable, contrary to the law" and inconsistent with legislative intent.[20] Rather, the court, noting the unsavory

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10. *Id*.
11. *Id.*
12. *Id*.
13. *Id*.
14. *Id*. at 502.
15. *Id*.
16. *Id*. at 503.
17. *Id.* (quoting Dev. Servs. Alts. Inc. v. Ind. Family & Soc. Servs. Admin., 915 N.E.2d 169, 181 (Ind. Ct. App. 2009)).
18. *Id*.
19. *Id*. at 504 (quoting IND. CODE § 4-31-1-2 (2013)).
20. *Id*. at 505-06.

reputation accompanying horse racing,[21] found Martin's narrower interpretation to be "inconsistent with the General Assembly's decision to give the IHRC broad authority to promulgate rules to enforce the Pari-Mutuel Wagering Act."[22]

The court of appeals thus concluded that "within the context of its charge by the General Assembly, the IHRC reasonably interpreted Indiana Code section 4-31-6-1" when it promulgated rules defining the persons that participate in racing and must, therefore, be licensed.[23]

Although the court of appeals found the IHRC's interpretation of Indiana Code section 4-31-6-1 reasonable, the court did not defer to an administrative interpretation in *Indiana Public Employee Retirement Fund v. Bryson*.[24] *Bryson* involved a dispute over the proper interpretation of Indiana Code section 36-8-8-12.3(b), which defines various levels of impairment that qualify public employees for disability benefits.[25]

Paul Bryson challenged the Public Employee Retirement Fund's ("PERF") determination that he suffered "Class 2 impairment" rather than "Class 1 impairment" under the statute.[26] This determination hinged on PERF's conclusion that the statutory language defining a Class 1 impairment as "the direct result of . . . [a] personal injury that occurs while the fund member is on duty," requiring "that the work injury be the 'sole and independent cause of the impairment.'"[27] Although PERF argued that this interpretation was reasonable and, therefore, subject to a high degree of deference, the court of appeals concluded otherwise.[28]

Unlike the decision in *Martin*, the court of appeals in *Bryson* made a special note that, as a question of law, the judicial standard of review for an issue of statutory interpretation is de novo.[29] The *Bryson* court also cited several cases acknowledging the court's obligation to give deference to an agency's interpretation of a statute unless the interpretation is inconsistent with the statute or otherwise misconstrues the statute.[30] Without expressly stating so, the *Bryson* court concluded PERF's interpretation was in error, as it would produce a seemingly absurd result by "necessitat[ing] that the fund member [must be] perfectly healthy and without any pre-existing conditions . . . in order to qualify as [a] Class 1 impairment."[31]

Determining that PERF had misinterpreted the statute, the *Bryson* court held

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21. *Id.* at 506.

22. *Id*.

23. *Id*.

24. 977 N.E.2d 374 (Ind. Ct. App.), *reh'g denied*, 983 N.E.2d 172 (2012).

25. *Id*. at 378-79.

26. *Id*. at 378.

27. *Id*.

28. *Id*. at 379.

29. *Id.* at 377-78.

30. *Id*. at 379 (quoting Pierce v. State Dept. of Corr., 885 N.E.2d 77 (Ind. Ct. App. 2008); LTV Steel Co. v. Griffin, 730 N.E.2d 1251 (Ind. 2000)).

31. *Id*.

that so long as the pre-existing condition did not prevent an individual from performing his job, and the individual becomes unable to perform the duties following an on the job injury, the impairment is a "direct result" of the on the job injury.[32] Thus, the court concluded that Bryson, although suffering from a pre-existing degenerative back condition, nevertheless suffered Class 1 impairment because it was not until injuries occurred as a direct result of his work, that he became unable to perform his job.[33]

2. Defining the Scope of Judicial Review.—In *Martin* and *Bryson*, we can see how the level of deference afforded an agency's interpretation of a statute is greater, or lesser, depending on the reasonableness of the agency's interpretation and the interpretation's consistency within the overall statutory scheme. Courts, however, may also exercise greater, or lesser, deference to an agency action by defining the attendant scope of review.

For example, in *J.M. v. Review Board of the Indiana Department of Workforce Development*, the Indiana Supreme Court examined whether a court can look beyond the legal justification given by an agency to affirm the agency's decision on other grounds.[34] *J.M.* involved an employee who was terminated "for his failure to follow the instructions of his supervisor regarding missed work time."[35] Specifically, J.M. took a college class during normal work hours and, against the instruction of his supervisor, attempted to "make up" the time by working additional hours rather than using compensatory time, personal days, or vacation time.[36] The Review Board ultimately concluded that J.M. was terminated for just cause and, therefore, ineligible for unemployment benefits under Indiana Code section 22-4-15-1(d)(2) for violating a reasonable and "uniformly enforce rule of an employer."[37] The court of appeals, reversed, concluding that there was no such violation.[38]

The Indiana Supreme Court, however, pointed out that the court of appeals did not consider another section "because it was not named in the conclusions of law by the Review Board."[39] Indiana Code section 22-4-15-1(d)(5) provides that a person is terminated for just cause if she is discharged for "refusing to obey instructions." The Indiana Supreme Court noted that the court of appeals determined that it could not rely on that statutory grounds because, citing to prior authority, the scope of judicial review is "limited to determining whether the Board made sufficient findings to support the definition it selected to apply."[40]

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32. *Id*.

33. *Id*. 379-80.

34. 975 N.E.2d 1283 (Ind. 2012).

35. *Id*. at 1285.

36. *Id*. at 1285-86.

37. *Id*. at 1286-87.

38. *Id*. at 1287.

39. *Id.*

40. *Id.* Here, the Indiana Supreme Court indicates that the court of appeals relied on *Ryan v. Review Board of the Indiana Department of Workforce Development*, 560 N.E.2d 112, 114 (Ind. Ct. App. 1990) (citing *Trigg v. Review Board of the Indiana Employment Security Division*, 445

The Indiana Supreme Court disagreed with the court of appeals' interpretation of the prior authority, citing to a concurrence in the underlying decision specifically rejecting the interpretation adopted by the court of appeals.[41]

Because the court concluded that the Review Board's findings of "basic fact" were based on substantial evidence and the Board's "ultimate finding" that "'[J.M] is not entitled to unemployment benefits' was reasonable," the court ultimately affirmed the Review Board's determination.[42] Summarizing its conclusion succinctly, the Indiana Supreme Court stated that a court may "rely on a different statutory ground of a just cause finding than the one relied upon by the Review Board when, as here, the Review Board's findings of fact clearly establish the alternate subsection's applicability."[43] Interestingly, the court then drew a direct correlation between review of an agency action and a court decision when it likened the scope of review to the "deferential standard given to the trial courts of this state" by appellate courts which will affirm a judgment "if sustainable on any theory or basis found in the record."[44]

In *Utility Center Inc. v. City of Fort Wayne*, the Indiana Supreme Court addressed the breadth of judicial review of a board's exercise of eminent domain.[45] Specifically, the court was asked to addressed what it means for a trial court to "rehear the matter of the assessment de novo," as required by Indiana Code section 32-24-2-11(a)[46] and, therefore, to consider the "method of procedure . . . whereby the authority must be exercised so as to protect the rights of property owners."[47]

The Indiana Supreme Court began its analysis by noting that the condemnation procedures consist of two parts: first, the legislative decision to exercise eminent domain and, second, the "judicial determination of just compensation for the taking."[48] The court then poised the salient question, under Indiana Code section 32-24.2-11(a) "[w]hat does the Legislature intend" when it provided that the "court shall hear the matter de novo?"[49] The court suggested that "[a]t first blush it would appear that this case is a 'no brainer'" given the common meaning assigned to de novo review.[50]

The court dismissed this notion, however, acknowledging that in the context of judicial review of administrative decisions, Indiana courts have "essentially determined that de novo review does not" carry with it the sense of a completely

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N.E.2d 1010, 1013 (Ind. Ct. App. 1983) in reaching this conclusion).

41. *J.M.*, 975 N.E.2d at 1287 (citing *Trigg*, 445 N.E.2d at 1014-15 (Garrand, J., concurring)).
42. *Id*. at 1288.
43. *Id*. at 1289.
44. *Id*.
45. 985 N.E.2d 731 (Ind. 2013).
46. *Id.* at 734.
47. *Id*. at 733 (quoting Vickery v. City of Carmel, 424 N.E.2d 147, 148 (Ind. Ct. App. 1981)).
48. *Id*.
49. *Id*. at 734.
50. *Id*.

new hearing.[51] Rather, the court noted that a large body of Indiana law has "confirmed the propriety of limited review of administrative decisions" even when a statute may call for de novo review.[52] As the court put it, "our courts have long held that judicial review of administrative decisions is restrained and limited, even where statutory language suggests otherwise."[53] Even as it reaffirmed this basic principle of administrative law governing judicial review, however, the Indiana Supreme Court recognized the need to dig further, choosing to consider "whether the Legislature intended this limited review under the facts presented here."[54]

In considering that issue, the court noted that the exercise of the State's power of eminent domain has long been restricted, as the "inviolability of private property has been a central tenet of American life since before this country's founding."[55] Stating that "[b]ecause the determination of just compensation is a judicial rather than a legislative function" and that "the extent to which protecting the ownership of private property is woven into the fabric of our jurisprudence," the court concluded that it was "not persuaded the Legislature intended a limited role of the judiciary" in conducting review under Section 11(a).[56]

The court thus concluded that "the opposite is true"[57] and found further support for its conclusion after reviewing the general eminent domain statute which includes numerous additional procedural safeguards, including a full "'trial and judgment as in civil actions.'"[58] The court found that to provide those safeguards, and a "full trial" under the more general eminent domain statute, while also disallowing a "new hearing with trial and judgment as in all other civil actions" under the truncated procedure contained in Indiana Code sections 32-24-2-1 to -17, would be "inconsistent" on the part of the General Assembly.[59]

The Indiana Supreme Court's decisions in *J.M.* and *Utility Center* arguably expand the scope of judicial review over administrative decisions, to the extent the cases confirm the freedom of courts to assess not only the agency record, but in the case of *Utility Center*, to conduct an entire trial. These decisions serve as reminders that, while the judiciary remains deferential to agency actions, deference does not extend so far as to deprive Hoosiers of meaningful recourse when those actions impact them or their property.

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51. *Id*.

52. *Id*. (quoting City of Mishawaka v. Stewart, 310 N.E.2d 65 (Ind. 1974) (concluding that although statute called for "de novo review" this was "not literally true")).

53. *Id*. at 735.

54. *Id*.

55. *Id*. (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 933, at 663-64 (1833)).

56. *Id.* at 736.

57. *Id*.

58. *Id*. at 736-37.

59. *Id*.

B. Access to Judicial Review

Parties seeking judicial review must, however, follow certain procedural steps to secure their right to judicial review. Indeed, AOPA establishes detailed statutory requirements parties must follow in order to have an agency action reviewed by a court.[60] Section B of this Article reviews cases addressing parties' compliance, or lack thereof, with such requirements.

1. The Exhaustion Requirement.—One general rule that governs a party's access to judicial review of an agency action is that before seeking relief from the courts, she must exhaust her available administrative remedies. The doctrine is

> intended to defer judicial review until controversies have been channeled through the complete administrative process. The exhaustion requirement serves to avoid collateral, dilatory action . . . and to ensure the efficient, uninterrupted progression of administrative proceedings and the effective application of judicial review. It provides an agency with an opportunity "to correct its own errors, to afford the parties and the courts the benefit of [the agency's] experience and expertise, and to compile a [factual] record which is adequate for judicial review."[61]

Like almost every rule, however, there are exceptions to the exhaustion requirement. One such exception is the claim that pursuing available administrative processes would be futile, which requires a party to "show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances."[62] Although this presents a high bar, it is not impossible to overcome, as the following case illustrates.

In *Scheub v. Van Kalker Family Limited Partnership*,[63] the court of appeals addressed whether a trial court had properly denied a motion to dismiss based on lack of subject matter jurisdiction when a party had not exhausted their available administrative remedies.[64] In *Scheub*, a group, including the company Singleton Stone, LLC, (and therefore collectively referred to by the court as "Singleton") sought to construct a stone quarry in Lake County.[65] During Singleton's request for a zoning change to allow for the quarry, Gerry Scheub, who served as a member of the Plan Commission and the Drainage Board, "was a vocal opponent of Singleton's petition" and "organized the opposition to the petition" ultimately "persuading the Plan Commission to issue an unfavorable recommendation to

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60. *See* IND. CODE §§ 4-21.5-3-1 to -37 (2013).

61. Johnson v. Celebration Fireworks, 829 N.E.2d 979, 982 (Ind. 2005) (internal citations omitted).

62. M-Plan, Inc. v. Ind. Comprehensive Health Ins. Ass'n, 809 N.E. 2d 834, 840 (Ind. 2004) (quoting Smith v. State Lottery Comm'n, 701 N.E.2d 926, 931 (Ind. Ct. App. 1998) (external quotation marks omitted).

63. 991 N.E.2d 952 (Ind. Ct. App. 2013).

64. *Id.* at 954.

65. *Id*.

Singleton's project."[66] After the Lake County Council approved the rezoning request, however, Singleton still needed to obtain a permit from the Drainage Board.[67]

Expecting resistance from Scheub due to his opposition to the rezoning request, Singleton requested that Scheub recuse himself from considering the drainage permit.[68] Scheub declined, and Singleton filed a declaratory judgment action seeking a declaration that would prevent Scheub from being involved in the Drainage Board's decision-making process.[69] What followed was a twisted series of legal maneuvering that resulted in a settlement agreement whereby Scheub agreed to recuse himself from the Drainage Board's consideration of the permit application following a primary election in which he was seeking re-nomination as Lake County Commissioner.[70] Once the election was over, however, "Scheub's counsel announced that there was 'no deal' because Scheub had 'changed his mind.'"[71]

Singleton then filed a motion to enforce the settlement agreement. Following a hearing, the trial court granted that motion and denied a motion to dismiss filed by Scheub.[72] Scheub then appealed, arguing that the trial court lacked subject matter jurisdiction to hear the case because Singleton had failed to exhaust its administrative remedies before the Drainage Board.[73] Singleton raised several arguments in opposition. First, it argued that the trial court had subject matter jurisdiction to enforce the settlement agreement as a contract.[74] Next, it claimed that Scheub had acquiesced to the court's subject matter jurisdiction.[75] Finally, Singleton argued that it was not required to exhaust its administrative remedies, in part because Scheub's bias made such an effort futile.[76]

The court of appeals quickly dismissed Singleton's first two arguments, noting that parties cannot confer subject matter jurisdiction on the court.[77] The court concluded that unless the trial court had subject matter jurisdiction over the complaint in the first place, the trial court could not enforce the settlement agreement that arose out of the declaratory judgment action.[78] The court thus turned to the question of whether Singleton was required to exhaust its

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66. *Id*.

67. *Id*.

68. *Id.* at 954-55.

69. *Id*. More specifically, Singleton sought a declaration that "Scheub's participation in or attempts to influence the Drainage Board's consideration of Singleton's permit application would deprive Singleton of due process and should be enjoined." *Id*. at 955.

70. *Id.*

71. *Id*.

72. *Id.*

73. *Id*. at 956.

74. *Id.*

75. *Id.*

76. *Id*.

77. *Id*. at 957.

78. *Id*. at 956-57.

administrative remedies.[79] In support of its position, Singleton argued that the question before the trial court, as a declaratory judgment action, did not need to be resolved by the administrative agency.[80] Moreover, any further action before the Drainage Board would be futile in light of its refusal to grant "the relief [Singleton] requested, *i.e.*, Scheub's recusal due to bias."[81]

The court of appeals readily acknowledged that in a number of cases, even when there was an allegation of bias, the State's appellate courts had required a party to exhaust its administrative remedies.[82] The court also rejected Singleton's argument that the exhaustion requirement should be excused because the question presented to the trial court was one of law, noting that "whether Singleton can have a fair proceeding due to Scheub's alleged bias is a mixed question of law and fact, and, quite likely, a pure question of fact."[83] Nevertheless, the court examined the question of Scheub's alleged bias, and found "that the record is replete with instances where Scheub interfered" with Singleton's efforts to obtain the necessary permits and rezoning.[84]

This, the court reasoned, made a case for the existence of actual bias, a ground that will otherwise serve to vacate an administrative decision.[85] The court then noted that Singleton had taken steps to secure the disqualification of Scheub based on that bias, but was denied.[86] At that point, the court concluded, "[A]ny further action by the Drainage Board became futile and of no value under the circumstances because any decision in which a biased Board Member participates will be vacated."[87] Thus, the court of appeals found the exhaustion requirement excused and concluded that the trial court had subject matter jurisdiction over the declaratory judgment action.[88]

As discussed above, one of the arguments raised in support of the trial court's subject matter jurisdiction in *Scheub* was that the trial court was asked to address

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79. *Id*. at 957.

80. *Id.*

81. *Id.* at 957-58.

82. *Id*. at 958-95.

83. *Id.* at 959-60 (distinguishing Ind. Dep't of Envtl. Mgmt. v. Twin Eagle LLC, 798 N.E.2d 839 (Ind. 2003)). As the court noted, the question in *Twin Eagle* was one of pure law, namely, whether the agency had statutory authority over the matter in the first place. *Id*. at 960. The application of this legal principle will be discussed in greater detail *infra*.

84. *Id.*

85. *Id.* (citing Ripley Cnty. Bd. of Zoning Appeals v. Rumpke of Ind., Inc., 663 N.E.2d 198 (Ind. Ct. App. 1996), *trans. denied*). The court had earlier acknowledged the decision in *Rumpke*, noting that while the actual bias of a member of the administrative body would result in vacating the decision, it chose not to remand the case because the litigant had failed to request recusal of the biased individual from the decision-making process, "and thus had waived the error." *Id.* at 959 (quoting *Rumpke*, 663 N.E.2d at 210).

86. *Id.* at 960.

87. *Id*.

88. *Id*.

a question of law.[89] Although the court of appeals rejected that argument, in another case during the survey period, *Walczak v. Labor Works-Fort Wayne, LLC*, the Indiana Supreme Court tackled the matter head on.[90] In doing so, the court focused on another exception to the exhaustion requirement, relying on the principle that when presented with certain jurisdictional questions, a court may make the legal determination as to whether it has subject matter jurisdiction over a case without first requiring a party to exhaust potential, alternative, administrative remedies.[91]

Walczak involved a dispute between Brenda Walczak, a day laborer, and Labor Works, a "day labor service" that assigns jobs to individuals like Walczak according to the number of positions it has been asked to fill on a daily basis.[92] Walczak worked for Labor Works, sometimes receiving a work assignment, and sometimes not. She eventually filed a suit against the company under the Indiana Wage Payment Act.[93] Labor Works, however, sought summary judgment, arguing that the trial court lacked subject matter jurisdiction to hear her claim because she was "separated from employment" at the time she brought the suit.[94] This, Labor Works argued, meant Walczak had to proceed under the Indiana Wage Claims Act, not the Wage Payment Act, and was required to first submit her grievance to the Indiana Department of Labor for administrative review.[95]

The Indiana Supreme Court explained the difference between the Wage Payment Act and Wage Claim Act, summarizing, "[I]t fairly can be said that the Wage Payment Act applies to, among others, those who keep or quit their jobs, while the Wage Claims Act applies to those who are fired, laid off, or on strike."[96] Thus, for purposes of resolving whether the trial court had subject matter jurisdiction to hear the complaint, the "threshold matter" became whether Walczak had been "involuntar[ily] separated from the payroll and thus . . . required to bring her claim under the Wage Claims Act."[97]

The court likened the situation to that in *Twin Eagle*, in which the jurisdictional question was "whether IDEM had the authority to regulate 'waters of the state.'"[98] This presented an issue of statutory construction, making the question of "whether an agency possesses jurisdiction over a matter . . . a question of law for the courts."[99] As the court noted, whether Walczak was required to

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89. *Id.*

90. 983 N.E.2d 1146 (Ind. 2013).

91. *Id.* at 1151-52.

92. *See id*. at 1150.

93. *Id*.

94. *Id*.

95. *Id*.

96. *Id*. at 1149 (citing J Squared, Inc. v. Herndon, 822 N.E.2d 633, 640 n.4 (Ind. Ct. App. 2005)).

97. *Id*. at 1152.

98. *Id.* at 1152-53 (quoting Ind. Dep't of Envtl. Mgmt. v. Twin Eagle LLC, 798 N.E.2d 849 (Ind. 2003)).

99. *Id.* at 1152 (quoting *Twin Eagle*, 798 N.E.2d at 844).

proceed under the Wage Claims Act or could proceed under the Wage Payment Act was jurisdictional, and hinged on the "what the drafters of the two statutes meant when they used the language 'voluntarily leave employment' [as in the Wage Payment Act] and 'separates any employee from the pay-roll [as in the Wage Claims Act].'"[100] The court held that this was an "issue of statutory construction" that "therefore lies squarely within the judicial bailiwick," making it entirely appropriate for the trial court to hear the matter in order to resolve the dispositive jurisdictional question.[101]

Having reached this conclusion, the Court examined the nature of Walczak's employment with Labor Works and, determining that she was not separated from her employment, concluded that she could proceed under the Wage Payment Act without exhausting any administrative remedies required by the Wage Claims Act.[102]

2. Statutory Compliance as a Requisite to Review.—Scheub and *Walczak* both address exceptions to the exhaustion requirement and more broadly provide insight into how courts assess their subject matter jurisdiction to hear a case that might first be addressed before an administrative body. However, exhausting available administrative remedies is not the only pre-requisite to obtaining judicial review. Under AOPA, a party is required to file the record of proceedings before the agency within thirty days of filing a petition for judicial review.[103] Several cases during the survey period explored whether non-compliance with this requirement precluded a party's access to judicial review.

One such case is *Lebamoff Enterprises, Inc. v. Indiana Alcohol & Tobacco Commission*.[104] In that case, Lebamoff, a corporation that operates liquor stores in Indiana, sought judicial review of a number of citations issued by the Alcohol & Tobacco Commission (ATC).[105] Although Lebamoff filed its petition for judicial review on February 29, 2012, it had not filed the agency record by April 10, 2012, when the ATC filed a motion to dismiss based on the failure to file the agency record.[106]

The court of appeals began by noting that while a petitioner can seek an extension of time to file the record, that motion must be made within the thirty day window to file the record itself.[107] The court also noted, however, that AOPA allows for extensions when good cause is shown, including the "[i]nability to obtain the record from the responsible agency within the time permitted."[108] The court then turned to the circumstances surrounding Lebamoff's failure to file the

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100. *Id.* at 1153 (quoting IND. CODE §§ 22-2-5-1(b); 22-2-9-2(a) (2007)).

101. *Id*.

102. *Id*. at 1154-56.

103. IND. CODE § 4-21.5-5-13(a) (2007).

104. 987 N.E.2d 525 (Ind. Ct. App. 2013), *reh'g denied*.

105. *Id*. at 526-27.

106. *Id*. at 527.

107. *Id.* (citing Ind. Family & Soc. Servs. Admin. v. Meyer, 927 N.E.2d 367, 370-71 (Ind. 2010)).

108. *Id.* (quoting IND. CODE § 4-21.5-5-13(b) (2013)) (alteration in original).

record and its justification for not seeking an extension. The court first addressed Lebamoff's claim that it had "followed the spirit of the statute" by stating in its petition for judicial review that it intended to submit the record within thirty days of it becoming available.[109] This, Lebamoff argued, "advance[d] judicial efficiency" by avoiding the need to file repeated motions for extensions.[110]

The court rejected this argument, however, concluding that the "more efficient tactic is to simply request an extension," which would "provide[] a record for the court and all parties as to what has been requested, what has been granted, and what deadlines have been set."[111] Adopting Lebamoff's position, the court of appeals explained further, stating it would be, "neither efficient nor fair to require the court and other parties to sift through the petition and other filings and guess at how they might be substituting for various other requests and motions."[112] The court of appeals was, however, equally "unimpressed" with the ATC's delay in preparing the record and in seeking a motion to dismiss for the failure to timely submit the record.[113] This, the court stated, was the sort of action "that would begin to lend support to concerns that the AOPA could in some cases be a 'trap' for unwary litigants."[114]

Despite having determined that Lebamoff had failed to comply with statutory requirement to timely file the record, the court of appeals noted that dismissal was not a necessary result as "the filing of the record in an administrative review case is not jurisdictional."[115] Thus the court considered whether review was still possible despite the lack of an agency record, or more precisely, whether the material submitted by Lebamoff was sufficient to permit judicial review of the agency's action.[116] It ultimately concluded that such review was possible because the argument presented by Lebamoff was "a pure question of law," and that "[t]o the extent any facts are necessary [for review], they were included in the sparse findings of fact and conclusions of law written by the ALJ, which were submitted by Lebamoff with its petition."[117] In reaching this conclusion, the court rejected the ATC's argument that the submission was insufficient, noting that the ATC "points to nothing in the record that would be required for review."[118]

This led the court to state that it was a "best practice to timely file the record." While the failure to file the record may subject a petition to dismissal, that "does not mean the case must be dismissed, especially where, as here, the

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109. *Id*.

110. *Id.*

111. *Id*. at 528.

112. *Id*.

113. *Id*. at 528-29.

114. *Id*. at 529 (citing Mosco v. Ind. Dep't of Child Servs., 916 N.E.2d 731, 735 (Ind. Ct. App. 2009)).

115. *Id.* (citing Wayne Cnty. Prop. Tax Assessment Bd. of Appeals v. United Ancient Order of Druids-Grove No. 29, 847 N.E.2d 924, 926 (Ind. 2006)).

116. *Id.* at 529.

117. *Id*. at 530.

118. *Id*.

record was not required for a ruling."[119]

The question of whether the record was sufficient to permit judicial review was also at issue in *Howard v. Allen County Board of Zoning*.[120] In that case, Howard sought review of a decision by the Board of Zoning Appeals (BZA) to grant a zoning variance that would allow his neighbor to operate a tire business.[121] Howard filed a petition for review pursuant to Indiana Code section 36-7-4-918.4 and, shortly after filing the petition, requested a certified record from the BZA.[122] Although the BZA undertook steps to prepare the record, it was not ready within thirty days of the filing of the petition, and Howard did not seek an extension.[123] The party who had been granted the variance thus filed a motion to dismiss for failing to timely file the extension, which the BZA eventually joined.[124] After the motion to dismiss was filed, Howard sought an extension to file the record, and then filed an amended petition for review, incorporating a request for a thirty-day extension to file the record.[125] Although the record was eventually filed, the trial court dismissed the petition finding that it lacked jurisdiction because Howard had failed to timely file the record or to seek an extension.[126]

Howard appealed and the court of appeals agreed that the failure to timely file the record was not jurisdictional, as described by the trial court, and thus the court found that portion of the trial court's order to be in error.[127] The court, however, dismissed Howard's contention that the decision in *Lebamoff* excused his untimely filing on the theory that he had submitted sufficient material to permit judicial review.[128] In doing so, the court took note that the materials submitted with Howard's petition consisted only of "a list of individuals who presented evidence at the board hearing."[129] This, the court held, was insufficient to permit review, because Howard challenged the "sufficiency of the evidence supporting the Board's decision" and, thus, affirmed the dismissal.[130]

Lebamoff illustrates that in some cases, non-compliance with the statutory requirements to access judicial review can be forgiven. *Howard*, however, reminds us that the "best practice" is to comply with those requirements in order to secure the right to review of an agency action.

3. Nature of Agency Action Determinative of Right to Review.—To this point, the cases in this section have addressed the steps a party must take in order

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119. *Id*.

120. 991 N.E.2d 128 (Ind. Ct. App. 2013).

121. *Id*. at 129.

122. *Id*.

123. *Id*.

124. *Id*. In this instance, the requirement to file the record is established by Indiana Code section 36-7-4-1613 (2013), which is not materially different from AOPA's requirement.

125. *Id.* at 129-30.

126. *Id*. at 130.

127. *Id*. at 130-31.

128. *Id*. at 131.

129. *Id*.

130. *Id*.

to secure judicial review. In some situations, however, whether judicial review is available depends on the nature of the agency action.

One such case is *Fayette County Board of Commissioners v. Price*.[131] This case involved review of the Fayette County Commissioners' decision to terminate Price as the Director of Highway Operations.[132] The decision came after the Board conducted two days of meetings in executive session to review Price's performance and after several motions to reappoint him as Director failed for lack of a second to the motion.[133] Price subsequently sought review of the Board's decision, and the Board sought to have the complaint dismissed.[134] The trial court, however, denied the motion on the grounds that the actions of the Board were "quasi-judicial in nature" and therefore subject to review.[135]

The court of appeals began its analysis by noting that although Indiana Code section 36-2-2-27 provides a process for a party aggrieved by a county executive's decision to seek judicial review, that review is only available when the executive is acting in a "judicial" or "quasi-judicial" capacity.[136] The court acknowledged that it was "difficult to define quasi-judicial power" but stated that it is the "nature, quality, and purpose of the act performed, rather than the name or character of the officer or board which performs it that determines its character as judicial."[137] The court then noted that the "judicial function" has key characteristics, notably "(1) the presence of the parties upon notice; (2) the ascertainment of facts; (3) the determination of the issues; and (4) the rendition of a judgment or final order regarding the parties' rights, duties, or liabilities."[138]

The court of appeals indicated that these characteristics were present in the Board's decision to terminate Price, as the Board had notified the parties of the executive sessions, held hearings and took evidence, ascertained facts, and ultimately "rendered a judgment regarding Price's position."[139] Consequently, the court determined that the trial court had not erred in concluding that the Board's actions were quasi-judicial in nature, and subject to review.[140]

On transfer, however, the Indiana Supreme Court disagreed with the conclusion reached by the court of appeals.[141] Although the Court examined the same four factors to determine whether the Board's action were quasi-judicial in nature,[142] it found as a matter of law that the "nature, quality and purpose" of the

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131. 988 N.E.2d 268 (Ind. Ct. App.), *vacated*, 992 N.E.2d 207 (Ind. 2013).

132. *Id*. at 268-69.

133. *Id*. at 269-70.

134. *Id*. at 270.

135. *Id*. at 270-71.

136. *Id.* at 271 (quoting Great Lakes Transfer, LLC v. Porter Cnty. Highway Dep't, 952 N.E.2d 235, 241 (Ind. Ct. App. 2011)).

137. *Id*.

138. *Id*.

139. *Id*.

140. *Id.*

141. 9 N.E.3d 640 (Ind. 2014).

142. *Id.* at 642.

Board's process of selecting a Director of Highway Operations was not "'equivalent to a court's adjudication of issues between opposing parties.'"[143] In this light, the Supreme Court concluded that the decision was neither a determination of issues nor a judgment or final order as the court of appeals concluded. Lacking those two "critical factors," the Supreme Court decided that the Board's decision was "administrative and ministerial, not quasi-judicial" and therefore not subject to judicial review.[144]

II. JUDGING AGENCY ACTIONS: DUE PROCESS AND EQUITY IN ADMINISTRATIVE DECISIONMAKING

Although procedural and jurisdictional questions are often at issue during judicial review of agency actions, it is also clear that judicial review encompasses the substantive determinations made by an administrative agency. The cases in this section focus on how courts address those legal questions arising out of an agency's actions.

As decision-making bodies that issue orders affecting the rights of parties, administrative agencies are required to provide those who come before them with basic due process, including notice and an opportunity to be heard. Agencies may also, in some cases, be subject to equitable restraints that bar action which would produce unduly harsh results.

In *Hamilton Heights School Corp. v. Review Board of the Indiana Department of Workforce Development*,[145] the court considered whether notice of an administrative hearing was sufficient to comport with due process.[146] The case arose after the Hamilton Heights School Corporation ("School Corporation") terminated Sherri Stepp "following an on-the-job argument between Stepp and a co-worker."[147] Stepp sought unemployment benefits but was denied on the grounds that she was "terminated for just cause."[148] Stepp ultimately appealed the decision to the Review Board, which vacated the original decision because the record had been "inadvertently destroyed" prior to the review.[149] In vacating the decision, the Review Board indicated that a new hearing would be held, and an ALJ notified the parties that a new, in person hearing, would be held.[150]

The notice, however, also included information suggesting that the hearing would be telephonic, not in person.[151] As a result, on the date of the hearing, the School Corporation did not attend in person, but attempted to participate by

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143. *Id.* (quoting Great Lakes Transfer, LLC v. Porter Cnty. Highway Dep't, 952 N.E.2d 235, 243 (Ind. Ct. App. 2011)).

144. *Id.* at 642-43.

145. 989 N.E.2d 1275 (Ind. Ct. App. 2013).

146. *Id.* at 1276.

147. *Id*.

148. *Id*.

149. *Id*. at 1277.

150. *Id.*

151. *Id*.

phone.[152] Following the hearing, the ALJ concluded that Stepp was entitled to unemployment benefits because the School Corporation had failed participate and, thus, failed to "meet its burden to prove that Stepp's employment was terminated for just cause."[153]

The School Corporation appealed that decision to the Review Board, indicating that the School Corporation was fully prepared to participate in the hearing by telephone, and it took steps to contact the ALJ during the hearing, only to be told that the hearing was already underway.[154] The Review Board, nevertheless, affirmed the decision of the ALJ, and the School Corporation sought judicial review.[155]

The crux of the School Corporation's argument was that the Review Board's decision was erroneous, as the "deficient nature of the notice of the second hearing" was a violation of its due process rights.[156] In considering this argument, the court of appeals examined closely the form used by the Department to notify the parties of the second hearing.[157] This review led the court to the conclusion that "these documents are, at the very least, confusing as they include conflicting information. While on one hand, the documents state that the hearing will be conducted in-person . . . , they also suggest that the hearing will be conducted telephonically."[158] The court then determined that when a prior hearing had been conducted telephonically "and no party has requested an in-person hearing, the conflicting nature of the information [in the notice] could lead a reasonable person to believe that the hearing would be conducted telephonically."[159]

The court then considered the procedural history that led to the confusion, noting that it was "especially troublesome" that the School Corporation could receive a favorable ruling after participating in the initial hearing only to have that decision "vacated through no fault of its own" and have the ALJ make an unfavorable determination against the school despite its reasonable efforts to participate in the hearing.[160] The court of appeals concluded that the procedural history and the confusing nature of the second notice violated the School Corporation's due process rights through a denial of its opportunity to be heard.[161]

Judge Riley, however, issued a dissent, disagreeing with the majority's reasoning leading to the conclusion that the ALJ's determination violated the School Corporation's that a due process rights.[162] Specifically, she found it troubling that the majority's opinion concluded "a simple failure to read [is]

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152. *Id*.
153. *Id*.
154. *Id*.
155. *Id.*
156. *Id.* at 1277-78.
157. *Id*. at 1278-80.
158. *Id*. at 1280.
159. *Id*.
160. *Id*. at 1280-81.
161. *Id*. at 1281.
162. *Id.* (Riley, J., dissenting).

tantamount to a due process violation."[163] In reaching that assessment, Judge Riley noted that the second notice "was sufficiently obvious to dispel any notion that the [hearing] was to be held by telephone."[164] Unlike the majority, she found no confusion in the nature of the notice, as it clearly separated the applicable "in person" portion from more "general information pertaining to both telephone and in person hearings."[165]

Judge Riley also suggested that the majority's decision was contrary to precedent, as "when matters coming within the control of a party prevent its participation in a hearing, this court has consistently found no denial of due process."[166] She then reviewed a number of cases in which the court had found that a party, otherwise prepared to participate in an unemployment hearing, was not denied due process when its own actions prevented that participation.[167] As she stated, these cases "illustrate that matters within the control of the party that prevent them from participation in a hearing do not deprive that party of a fair hearing."[168] Finally, Judge Riley addressed the equity of the situation.[169] She stated that while the School Corporation challenged the fairness of the decision to rule against it, it was actually inequitable to rule against Stepp[170] reasoning the School Corporation's own "inattentiveness" resulted in its non-appearance, which effectively waived its right to a hearing.[171]

The question of fairness and the equity of an administrative decision were at the forefront of another case during the survey period. *Orndorff v. BMV*[172] involved the review of an Indiana Bureau of Motor Vehicles (BMV) decision to suspend a person's driver's license for ten years, following an eight year delay in imposing the sanction.[173] The facts of *Orndorff* are fairly straightforward. Between 2002 and 2004, Leslee Orndorff committed sufficient driving offenses to qualify as a habitual traffic violator (HTV).[174] Despite this, the BMV issued her a driver's license in 2008, but, four years later, and eight years after qualifying as an HTV, the BMV notified her that driving privileges would be suspended based on her status as an HTV.[175] Orndorff filed a complaint against the BMV seeking to apply laches to prevent the suspension of her license, and

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163. *Id*.

164. *Id*.

165. *Id*. at 1282.

166. *Id*.

167. *Id.* at 1282-83 (summarizing cases).

168. *Id*. at 1283.

169. *Id*.

170. *Id*.

171. *Id*.

172. 982 N.E.2d 312 (Ind. Ct. App. 2012), *trans. denied*, 986 N.E.2d 819 (Ind. 2013).

173. *Id.* at 315.

174. *Id*. at 315-16. In fact, she had seventeen convictions, and had her driving privileges suspended eighteen times in that period. Among her convictions, three were for driving without a valid license, which qualified her as an HTV. *Id.* at 316.

175. *Id*. at 315-16.

requesting a preliminary injunction to stop the suspension.[176] The trial court denied the motion for a preliminary injunction, finding that she "did not have a reasonable likelihood of prevailing on the merits of her laches defense," and that the BMV's delay in acting to impose the sanction was "understandable."[177]

Orndorff appealed, arguing that laches should apply because the suspension would cause her to lose her employment, drive her and her family into poverty, and "threaten[] the public interest."[178] In support of these claims, the record indicates that Orndorff was employed as a personal care attendant, a job which requires her to have a license to drive her clients, and for which she earns $9.75 per hour.[179] On this income, she supports herself and two children, while receiving no child support and food stamps.[180] She also lives in subsidized housing, and is required to pay a portion of rent or face eviction.[181] She also participates in a "five-year program designed to assist individuals in establishing financial independence and homeownership." [182] One of the requirements of remaining in the program is that she maintains her residency, which is only possible if she retains her job.[183] She would, however, lose her job without her driver's license.[184]

The court noted that, in addition to the ordinary requirements associated with laches, when asserting the defense against the government, a party has to "satisfy an additional requirement" because laches is applicable to the government "only under the clearest and most compelling circumstances." [185] Such circumstances include when "extreme unfairness is shown," which occurs "where the public interest would be threatened by the governments' conduct."[186] The court of appeals then considered what constitutes "the public interest" for the purpose of applying laches to the government. Ultimately, the court settled on a definition which requires "an articulable public policy reason which the court determines outweighs the public policy that supports" denying the application of an equitable defense to restrain government activity.[187]

Although the court acknowledged that the impact of suspending her license would be "undeniably personal," it also noted that "public policy interests are materially impacted" by the BMV's decision to suspend Ms. Orndorff's

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176. *Id*. at 317.
177. *Id*. at 315.
178. *Id*.
179. *Id.* at 316.
180. *Id*.
181. *Id*.
182. *Id*.
183. *Id*.
184. *Id*. .
185. *Id*. at 320 (internal citations omitted).
186. *Id*.
187. *See id*. at 321-23 (quotation from Samplawski v. City of Portage, 512 N.E.2d 456 (Ind. Ct. App. 1987)).

license.[188] Specifically, the court focused on the fact that "government agencies have been providing financial and structural support to Orndorff and her family" which "evidence a real and tangible public interest in reducing poverty."[189] The court then found that if Orndorff had her license suspended now, the suspension would "derail" both her and the government's efforts to "lift her family out of poverty" so that "instead of climbing out of poverty, she will be thrust back into poverty, and such event threatens the public interest."[190]

The court of appeals then weighed the "public interest in reducing poverty" against the "public interest in denying laches."[191] In conducting this assessment, the court noted that the "purpose of suspending driving privileges of an HTV is to protect the public from unsafe driver."[192] The court made a point of noting, however, that Orndorff's qualifying convictions were for operating a vehicle without a license which poses a danger because a driver without a license "has not proven to the satisfaction of the BMV that he or she has mastered the rules of the road and knows how to safely operate a vehicle."[193] That danger, however, had been "remedied in this case," as Orndorff had, in fact, received a license from the BMV and had not received any violations since doing so.[194] The court concluded that "the public interest in keeping unsafe drivers off the road will not be served by suspending Orndorff's driving privileges" thus establishing a "prima facie case of an articulable public policy interest that outweighs the public policy that supports denying laches."[195] Based on this conclusion, and the finding that the BMV's delay in suspending Orndorff's license was inexcusable, the Court ultimately reversed the denial of the preliminary injunction.[196]

Hamilton Heights and *Orndorff* thus illustrate how constitutional, as well as equitable, principles drive the course of review and serve to regulate the actions of administrative agencies.

III. TRANSPARENCY OF ADMINISTRATIVE ACTIONS

Underlying much of the work of administrative agencies is the basic principle that their work, or the "business of the State of Indiana and its political subdivisions be conducted openly so that the general public may be fully informed."[197] The Open Door Law,[198] and the Access to Public Records Act

188. *Id.* at 323.
189. *Id*.
190. *Id*. at 324.
191. *Id*.
192. *Id*.
193. *Id*.
194. *Id*.
195. *Id*.
196. *Id*. at 324-26.
197. City of Gary v. McCrady, 851 N.E.2d 359, 365 (Ind. Ct. App. 2006); *see also* IND. CODE § 5-14-1.5-1 (2013).
198. IND. CODE §§ 5-14-1.5-1 to -8 (2013).

("APRA"),[199] help ensure transparency by making government meetings and records available to the public. This section reviews several cases during the survey period that not only look at issues arising out of those statutes, but also evaluate the protection that should be given to certain public records.

A. Open Door and Access to Public Records

One case of note during the survey period is *Kreilein v. Common Council of the City of Jasper*.[200] This case involved review of a declaratory judgment action by the group "Healthy Dubois County" ("HDC") against the Common Council of the City of Jasper and the Jasper Utility Board (collectively, "Jasper"), seeking relief for alleged violations of the Indiana Open Door Law.[201] The case grew out of HDC's opposition to Jasper's plans to convert a "now-defunct coal-burning power plant"[202] in order to run on miscanthus grass.[203] Despite the opposition, Jasper elected to proceed with the project, issuing requests for proposals and ultimately creating a "volunteer group" to negotiate the terms of a lease for the power plant.[204]

The volunteer group was "charged with negotiating the terms of the lease" and consisted of the mayor, a member of the city council, a member of the City's Utility Service Board, the City Attorney, and a number of other individuals.[205] The group conducted its meetings without providing notice to the public and without opening them to the public.[206] Shortly after a final draft of the lease agreement was presented for approval by the City Council and Utility Board, HDC filed a declaratory judgment action on whether Jasper had violated the Open Door Law.[207] Ultimately, and despite the pending action, the Council and Utility Board members voted, at a public meeting, to approve the lease agreement and a resolution was passed to enter into the agreement.[208]

At that point, HDC began conducting discovery and a series of procedural battles erupted between HDC and Jasper over discovery, the pace of the trial, and HDC's efforts to amend its complaint.[209] Ultimately, the trial court conducted a bench trial, after which the court issued several findings essentially concluding that the volunteer group was not subject to the Open Door Law.[210] The court of appeals identified the issue of "whether the volunteer group constituted a

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199. *Id.* §§ 5-14-3-1 to -10.
200. 980 N.E.2d 352 (Ind. Ct. App. 2012).
201. *Id*. at 353.
202. *Id*.
203. *Id*. at 354.
204. *Id*.
205. *Id*.
206. *Id*.
207. *Id*. at 355.
208. *Id*.
209. *Id*. at 355-56.
210. *Id*. at 356-57.

governing body of a public agency under the Open Door Law" to be "at the heart of [the] appeal."[211]

For purposes of the appeal, the court focused on the statutory requirement that "a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business."[212] The court was unable to resolve the issue at the "heart of [the] appeal," because "there [was] nothing in the record explaining how the volunteer group was created and who assigned it the task to negotiate the lease agreement."[213] Thus, the court could not render a decision on whether the volunteer group constituted a "governing body" as defined by Indiana Code section 5-14-1.5-2(b), and by extension, whether it was potentially subject to the Open Door Law.[214] Neither could the court of appeals state with certainty that the actions of the volunteer group fell within the definition of "official action" under Indiana Code section 5-14-1.5-2(d).[215] Although that question was left unanswered, the court of appeals nevertheless empowered the HDC to investigate the factual record by reversing the trial court's decision, and remanding with instructions to compel discovery that might shed greater light on the actions of the volunteer group.[216]

While *Kreilein* focused attention on providing the public reasonable insight into the decision-making process of government bodies, the case in *Anderson v. Huntington County Board of Commissioners*[217] focused on a private citizen's right to access public records, and a public body's obligation to provide them.[218] Under Indiana Code section 5-14-3-3, any person is entitled to inspect "the public records of any public agency" provided that the request "identify with reasonable particularity the record being requested."[219]

In this case, Seth Anderson submitted four requests "all seeking the emails sent or received within a four and one-half month time span" that were identical except for the individuals identified as the senders and recipients.[220] This request was denied, as it failed to specify with "reasonable particularity" the documents sought, but the Commissioners' also "assured Anderson that once he had described the requested public records with reasonable particularity" they would be provided.[221] Rather than clarify his request, Anderson filed a formal complaint with the Public Access Counselor who ultimately concluded that the "Commissioners had not violated the ARPA because they had not denied

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211. *Id*. at 358.
212. *Id*. at 357 (quoting IND. CODE § 5-14-1.5-2(c) (2013)) (emphasis added).
213. *Id*. at 358.
214. *Id*.
215. *Id*.
216. *Id*. at 361.
217. 983 N.E.2d 613 (Ind. Ct. App.), *trans. denied*, 988 N.E.2d 797 (Ind. 2013).
218. *Id.* at 616.
219. IND. CODE § 5-14-3-3 (2013).
220. *Anderson*, 983 N.E.2d at 614.
221. *Id*. at 615.

Anderson's request outright but had requested Anderson revise his request."[222] The Public Access Counselor also provided a number of ways to clarify the request to meet the reasonably particular standard.[223]

Despite the determination of the Public Access Counselor, and despite the fact that the County eventually turned over approximately 9500 emails, Anderson filed a complaint to compel access to the public records, "defend[ing] the scope of his requests, maintaining that it was his right to look for 'unknown unknowns' in his effort to obtain information."[224] The trial court issued an order concluding that the County had "not improperly den[ied] access to the records" as Anderson was not "reasonably particular" in his request.[225] Anderson then appealed, essentially seeking a determination that his requests were "reasonably particular" within the meaning of Indiana Code section 5-14-3-3.[226]

This request required the court to consider what "reasonably particular" means as the phrase is not defined in the APRA.[227] In addressing this question, the court of appeals drew similarities between this case and *Jent v. Fort Wayne Police Department*,[228] in which another panel of the court "likened the reasonable particularity requirement to the discovery rules" and concluded that an item is "designated with 'reasonable particularity' if the request enables the subpoenaed party to identify what is sought and enables the trial court to determine whether there [is] sufficient compliance."[229]

To determine whether Anderson's request met this standard, the court of appeals also considered the decision by the Public Access Counselor.[230] Although the court was required to conduct review of that decision de novo, the court clearly gave some deference "inasmuch as this was not the first time [the] Public Access Counselor had addressed this issue."[231] The court also expressed concern that the requests were not reasonably particular in that they "required that the Commissioners determine which emails were truly public records and which were not" forcing the Commissioners to undertake a process of redaction to protect non-disclosable material.[232] Ultimately, the court concluded that the requests were not reasonably particular and that the Commissioners had no legal obligation to respond to them.[233]

In short, the decisions in *Anderson* and *Kreilein* remind us that the citizens

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222. *Id*. at 615-16.

223. *Id*. at 616.

224. *Id*.

225. *Id*.

226. *Id*. at 616-17.

227. *Id*. at 617.

228. 973 N.E.2d 30 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012).

229. *Anderson*, 983 N.E.2d at 617 (quoting *Jent*, 973 N.E.2d at 33) (internal quotation marks in the original).

230. *Id*.

231. *Id*.

232. *Id*. at 618.

233. *Id*.

have powerful tools at their disposal in keeping the work of agencies in the light of day. While the courts may not always allow searches for the "unknown unknowns" by reviewing the decisions of public bodies regarding disclosure of their official business, the courts help keep those tools focused in a manner that allows for transparency even as the tools allow the government to conduct its business in an efficient manner.

B. Confidential Treatment of Certain Records on Appeal

The last several survey articles discuss the interaction between Administrative Rule 9(G) and Indiana Code section 22-4-19-6, which excludes from public disclosure certain information regarding the identity of individuals appearing before the Department of Workforce Development.[234] This battle appears to have yet to come to a final resolution.

For example, in *T.B. v. Review Board of the Indiana Department of Workforce Development*,[235] the majority used the initials of the individual seeking unemployment compensation and the employer.[236] The majority did so based in part on a portion of the Indiana Supreme Court's decision in *J.M.*[237] Judge Riley, however, concurred only with the result and took issue with the decision to use initials rather than full names, arguing that the majority's reliance on the footnote in *J.M.* was inappropriate as the Indiana Supreme Court "does not decide important questions of law in footnotes."[238]

In a case appearing later in the survey period, however, the court of appeals noted that while the version of *J.M.* that appears on the Indiana Supreme Court's website stated that section 22-4-19-6(b) was "expressly implemented as to judicial proceedings" by Administrative Rule 9(G), the version of the same footnote appearing in the West Reporter conditioned the confidential treatment of claimant information on an affirmative request for such treatment.[239] Despite the absence of any record in the clerk's office of efforts to correct or amend that footnote, the court of appeals reasoned that as the West Reporter is the official reporter, the court was "required to follow West's version of *J.M.*" and used the names of the litigants.[240]

This, of course, raises an interesting question: If the Indiana Supreme Court does not make pronouncements of law through footnotes, does either version of

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234. *See* Joseph P. Rompala, *Survey of Indiana Administrative Law*, 45 IND. L. REV. 933 (2012); Joseph P. Rompala, *Survey of Indiana Administrative Law*, 44 IND. L. REV. 1010 (2011).

235. 980 N.E.2d 341 (Ind. Ct. App. 2012).

236. *Id.* at 343.

237. *Id*. at 343 n.1 (quoting J.M. v. Rev. Bd. of Ind. Dep't of Workforce Dev., 975 N.E.2d 1283, 1285 n.1 (2012)).

238. *Id.* at 346 (Riley, J. concurring in result) (quoting Molden v. State, 750 N.E.2d 448 (Ind. Ct. App. 2001)).

239. *See* Albright v. Review Bd. of Ind. Dep't of Workforce Dev., 994 N.E.2d 745, 748 n.1 (Ind. Ct. App. 2013).

240. *Id*.

the footnote in *J.M.* matter for purposes of determining whether litigants should, or should not, be identified by name in court opinions? Stated differently, it would seem the question and controversy will live on.

CONCLUSION

This survey article reviewed only a small number of decisions issued by Indiana's appellate courts involving review of administrative agency actions. By design, this Article did not consider unreported cases, those resolved at the trial court without further review, or agency decisions from which no review was sought. In short, the article is by no means a comprehensive review of the ever evolving and ever growing body of administrative law.

Despite addressing only a tiny fraction of the work of administrative agencies, the article hopefully furthers meaningful dialogue, not only about the role of the regulatory state, but also the safeguards that exist to protect the rights of Hoosiers from unwarranted intrusion by administrative agencies.

Such protections do exist in the form of judicial review which has grown into a rich body of law built on basic principles of our Constitutional system, legislative enactments, and the common law. Judicial review of agency actions remainsa fertile ground for further development, and one which should not be overlooked by the all too common assumption that "law" consists solely of judicial decisions and legislative acts.

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

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INTRODUCTION

The Indiana Supreme Court promulgates the Indiana Rules of Appellate Procedure ("Appellate Rules" or "Rules"), and Indiana's appellate courts—the Indiana Supreme Court ("supreme court"), the Indiana Court of Appeals ("court of appeals"), and the Indiana Tax Court—interpret and apply the Rules. This Article summarizes amendments to the Rules, analyzes cases interpreting the Rules, and highlights potential pitfalls that appellate practitioners can avoid. The Article does not cover every case interpreting the appellate rules that has occurred during the survey period.[1] Instead, it focuses on the most significant decisions.

I. RULE AMENDMENTS

The supreme court amended the Appellate Rules, effective January 1, 2014, and the amendments affect Rules 23, 28, 30, and the sample forms.[2] First, and most significantly, the court amended Rule 30 to facilitate the use of electronic transcripts.[3] The Rule previously required a trial court's approval before appellants could use electronic transcripts on appeal,[4] but now the trial court's approval is no longer required.[5] Under the amended Rule, with the consent of all parties and the court of appeals, the court reporter must "submit only an electronically formatted transcript."[6]

Second, the supreme court amended Rule 28 to provide that in cases arising

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1. The survey period is between October 1, 2012, and September 30, 2013.

2. *See* Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1301-MS-30 (Ind. Sept. 19, 2013), *available at* http://www.in.gov/judiciary/files/order-rules-2013-0919-appellate.pdf, *archived at* http://perma.cc/4FBN-SHN7; Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1301-MS-30 (Ind. Sept. 13, 2013), *available at* http://www.in.gov/judiciary/files/order-rules-2013-0913-appellate.pdf, *archived at* http://perma.cc/AB3Q-B7AG [hereinafter Order].

3. Order Amending Indiana Rules of Appellate Procedure at 2, 94200-1301MS-30 (Sept. 13, 2013), *available at* http://www.in.gov/judiciary/files/order-rules-2013-0913-appellate.pdf, *archived at* http://perma.cc/AY2C-T22V.

4. *Id*.

5. *Id.*

6. *Id.*

under Ind. Trial Rule 60.5—Mandate of Funds—"the Transcript shall be in an electronic format," as provided in Rule 30 or "as otherwise ordered pursuant to Rule 61."[7] Rule 61 provides that an appeal under Trial Rule 60.5 shall proceed in accordance with the orders of the supreme court.[8] Third, the supreme court added language to Rule 23(C)(8),[9] requiring parties to file an original and one copy of "any acknowledgement of the order setting oral argument."[10]

Fourth, the court revised the sample forms.[11] The court revised the Notice of Appeal form to require appellants to specify their grounds for appeal, i.e., "[t]his is an appeal from an order declaring a statute unconstitutional."[12] In addition, the "Certificate of Filing and Service" form now requires litigants to specify the means of service they used and specifically name the person served.[13]

Finally, as noted in the 2012 survey article, the court amended Appellate Rule 9(A), effective January 1, 2012, to require appellants to file the notice of appeal with the clerk of the appellate courts, as opposed to the trial court clerk as the Rule previously required.[14] When the court amended the Rule, it included a grace period: until January 1, 2014, appellants who timely filed "the Notice of Appeal with the trial court clerk or Administrative Agency, instead of the Clerk as required by App. R. 9(A)(1)," were deemed to have timely filed the appeal and the appeal was not subject to forfeiture.[15] The grace period expired on January 1, 2014, meaning that Notices of Appeal that are timely filed with the trial court clerk or Administrative Agency will not be deemed timely filed and will be subject to forfeiture.[16]

II. CASE LAW INTERPRETING APPELLATE RULES

Both the court of appeals and the supreme court issued opinions analyzing various Appellate Rules this year. The courts tackled a broad range of issues,

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7. *Id.* at 1.

8. IND. R. APP. P. 61 (providing that "Supreme Court Review of cases involving the mandate of funds is commenced pursuant to the procedure in Trial Rule 60.5(B). The appeal shall thereafter proceed in accordance with such orders on briefing, argument and procedure as the Supreme Court may in its discretion issue.").

9. IND. R. APP. P. 23(C)(8) (providing, "*Acknowledgement of Oral Argument*. An original and one (1) copy of any acknowledgment of the order setting oral argument. See Rule 52(C).")

10. *See* Order, *supra* note 2, at 1.

11. *Id.* at 2.

12. *Id.* at 4.

13. *Id.* at 6-7.

14. Bryan H. Babb & Oni Harton, *Developments in Indiana Appellate Procedure: Rule Amendments, Remarkable Case Law, and Court Guidance for Appellate Practitioners*, 45 IND. L. REV. 959, 960 (2012).

15. Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1101-MS-17 (Ind. Sep. 20, 2011), *available at* http://www.in.gov/judiciary/files/rule-amends-2011-order-amend-2011-appellate.pdf, *archived at* http://perma.cc/Q5CA-9J65.

16. *See id.*

such as when criminal defendants may appeal their convictions to which version of a published opinion controls and when the version published on the supreme court's website differs from West Publishing's version. But in the most important appellate procedure opinion during the reporting period, the court of appeals addressed when and how a third party may appeal a trial court's discovery order.

A. Third Party Appeal of Discovery Order

In a case with many procedural twists and turns, the court of appeals held that it lacked subject matter jurisdiction to hear the *Indianapolis Star*'s ("*The Star*") appeal of a trial court's discovery order, which required *The Star* to disclose the identity of a person who had anonymously commented on *The Star*'s website.[17] This case began in 2010, when an anonymous commenter, under the pseudonym "DownWithTheColts," posted a comment to a story on indystar.com, insinuating that Junior Achievement's former president Jeffrey Miller had stolen funds.[18] Miller sued for defamation and sought to obtain the identity of DownWithTheColts from *The Star* through non-party discovery.[19] The trial court ordered *The Star* to disclose the commenter's identity.[20]

The Star appealed the order, and Miller filed a motion to dismiss, arguing the court of appeals lacked subject matter jurisdiction.[21] The court of appeals' motions panel summarily denied Miller's motion.[22] The court then addressed the merits of *The Star*'s appeal, without analyzing whether it had jurisdiction, and it remanded the matter back to the trial court.[23]

On remand, the trial court once again ordered *The Star* to disclose the commenter's identity.[24] *The Star* once again appealed.[25] Despite the motions panel previously denying Miller's motion, and despite the court of appeals previously addressing the merits of *The Star*'s appeal (*Miller I*), the court of appeals addressed whether it had subject matter jurisdiction.[26]

The court looked to the Appellate Rules to determine whether it had jurisdiction.[27] Appellate Rule 5(A)[28] provides that the court of appeals has

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17. Ind. Newspapers, Inc. v. Miller (*Miller II*), 980 N.E.2d 852, 862 (Ind. Ct. App. 2012), *aff'd on reh'g*, *trans. granted*, *trans. vacated*.

18. *In re* Ind. Newspapers, Inc. (*Miller I*), 963 N.E.2d 534, 538 (Ind. Ct. App. 2012).

19. *Id.* at 541.

20. *Id.* at 542.

21. *Miller II*, 980 N.E.2d at 855.

22. *Id.*

23. *Miller I*, 963 N.E.2d at 552-53.

24. *Miller II*, 980 N.E.2d at 855-56.

25. *Id.* at 856.

26. *Id.*

27. *Id.* at 857.

28. IND. R. APP. P. 5(A) (providing that "Appeals From Final Judgments. Except as provided in Rule 4, the Court of Appeals shall have jurisdiction in all appeals from Final Judgments of

jurisdiction in all appeals from final judgments.[29] Appellate Rule 2(H) provides, in pertinent part, that a judgment is final if "the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment."[30] Trial Rule 54(B) allows a trial court to "direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[31] Alternatively, Appellate Rule 14(B) provides that upon a "motion by a party" an "appeal may be taken from other interlocutory orders if the trial court certifies its order and the court of appeals accepts jurisdiction over the appeal." [32]

The Star argued it could not appeal under Appellate Rule 2(H)(2) or 14(B)(1) because both rules refer to parties, and it was a non-party.[33] Therefore, *The Star* argued it could appeal under Appellate Rule 2(H)(5), which provides that a judgment is final if "it is otherwise deemed final by law."[34] The court of appeals rejected this contention.[35] It noted that *The Star* had jus tertii standing, which allows a media entity to assert the First Amendment rights of unnamed defendants and to resist discovery as if the media entity "were itself a party."[36] The court of appeals found that because *The Star* had third-party standing to assert the commenter's First Amendment rights, it also had standing to pursue an appeal from the discovery order, as any other party would.[37] So, it needed to appeal the trial court's order under either Trial Rule 54(B) or Appellate Rule 14(B), and it could not pursue an appeal under Appellate Rule 2(H)(5).[38]

The court found that to hold otherwise "would mean that non-parties have greater rights than parties have to appeal from a discovery order."[39] As such, parties must comply with Trial Rule 54 or Appellate Rule 14(B), whereas, under *The Star*'s argument, it could appeal, as a non-party, without complying with either rule.[40] The court concluded that a "non-party cannot have greater rights than a party would have to perfect an appeal by entry of a final judgment under Trial Rule 54(B) or a discretionary interlocutory appeal by certification under

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Circuit, Superior, Probate, and County Courts, notwithstanding any law, statute or rule providing for appeal directly to the Supreme Court of Indiana. See Rule 2(H).").

29. *Miller II*, 980 N.E.2d at 857.
30. *Id.*
31. *Id.* (quoting IND. R. TRIAL P. 54(B)).
32. *Id.*
33. *Id.* at 858.
34. *Id.*
35. *Id.* at 859.
36. *Id.* at 858-59.
37. *Id.* at 859.
38. *Id.*
39. *Id.*
40. *Id.*

Appellate Rule 14(B)."[41] This holding leaves undecided whether a non-party without jus tertii standing must also, or even can, comply with Trial Rule 54(B) and Appellate Rule 14(B), which both refer to parties.

The Star, however, argued that the discovery order was "equivalent to a final order because it is 'the beginning and the end' of The Star's involvement" in the case, and *The Star* is otherwise without meaningful remedy.[42] In addition, Indiana Constitution Article VII, section 6, provides for "an absolute right to one appeal," meaning *The Star* could appeal the trial court's discovery order.[43] The court of appeals found that this was an attempt to resuscitate the long dead "distinct and separate branch of the litigation" doctrine, which "held that a judgment was final and appealable even if it did not dispose of all the issues as to all the parties, so long as it disposed of 'a distinct and definite branch of the litigation.'"[44] The court concluded that Trial Rule 54(B) provided *The Star* with an adequate remedy.[45]

Finally, *The Star* argued that even if Appellate Rule 14(B) applied to it, despite the rule only applying to parties, then the Rule would not provide an adequate remedy because the right to appeal under the Rule is discretionary.[46] And a discretionary right to appeal, under Appellate Rule 14(B), cannot satisfy the Indiana Constitution's guarantee of a right to appeal.[47] The court of appeals found that if *The Star*'s argument were correct, then "Appellate Rule 14(B), which governs discretionary interlocutory appeals, would be unconstitutional *per se* because such appeals are not appeals as of right but can only be perfected if the trial court certifies its order and the court of appeals accepts jurisdiction."[48] The court refused to find Appellate Rule 14(B) unconstitutional, calling this a "bridge too far."[49] Moreover, "if appellate subject matter jurisdiction included the absolute right of non-parties to appeal from interlocutory discovery orders, there would be no end to appeals from such orders, and the Court of Appeals would become entangled in discovery disputes."[50]

Judge Pyle dissented.[51] He found the "majority ably argues that Trial Rule 54(B)" and the demise of the distinct and separate branch doctrine "permit shoehorning The Star into this litigation as a party."[52] But rather than trying to squeeze *The Star* into the litigation as a party, he would have concluded "the shoe

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41. *Id.*
42. *Id.* at 859-60.
43. *Id.* at 860.
44. *Id.* (quoting Guthrie v. Blakely, 125 N.E.2d 437 (Ind. 1955)).
45. *Id.* at 861.
46. *Id.* 861-62.
47. *Id.*
48. *Id.* at 862.
49. *Id.*
50. *Id.*
51. *Id.* at 863.
52. *Id.*

does not fit."[53] Judge Pyle found that *The Star* had a due-process interest in appellate review of the trial court's order, it was a non-party, and as a non-party, it "seems unreasonable to expect" *The Star* "to seek appellate review using a Trial Rule designed for parties."[54]

The Star then petitioned for rehearing, and the court of appeals granted the petition.[55] *The Star* argued, in part, that the trial court failed to comply with Trial Rule 34(C), which requires the trial court to condition a discovery order for a non-party "upon the pre-payment of damages to be proximately incurred."[56] Had the trial court complied with this rule, then *The Star* argued its appeal would have been as of right under Appellate Rule 14(A)(1).[57] Rule 14(A)(1) provides an interlocutory appeal may be taken as of right from an order "[f]or the payment of money."[58] The court of appeals rejected this argument for two reasons.[59] First, *The Star* waived the argument by failing to raise it before the trial court.[60] Second, the court of appeals had previously rejected "the argument that a discovery order . . . is equivalent to an order for the payment of money appealable as a matter of right under Rule 14(A)(1)."[61]

Finally, *The Star* asserted that Appellate Rule 66(B) should save its appeal.[62] The Rule provides that "[n]o appeal shall be dismissed as of right because the case was not finally disposed of in the trial court."[63] *The Star* asserted that if Appellate Rule 66(B) "'does not apply here[,] it does not apply anywhere.'"[64] The court was not persuaded by *The Star*'s argument because it cited no source supporting that Appellate Rule 66(B) could be used to circumvent the requirements of Trial Rule 54(B).[65] This is because "[w]hile Rule 66(B) might cure a minor or insubstantial procedural defect, it will not salvage a total failure to comply with Trial Rule 54(B)."[66]

In one final twist to this case, the Indiana Supreme Court initially granted transfer.[67] But after oral argument, the court decided to not assume jurisdiction over the appeal, thus reinstating the court of appeals' opinion.[68] The court concluded that *Miller II* (*The Star*'s second appeal) did not undermine the merits

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53. *Id.*
54. *Id.*
55. *Id.* at 863-64.
56. *Id.* at 866.
57. *Id.*
58. IND. R. APP. P. 14(A)(1).
59. *Miller II*, 980 N.E.2d at 866.
60. *Id.*
61. *Id.*
62. *Id.*
63. IND. R. APP. P. 66(B).
64. *Miller II*, 980 N.E.2d at 867.
65. *Id.*
66. *Id.*
67. Ind. Newspapers, Inc. v. Miller, 987 N.E.2d 70 (Ind. 2013).
68. Ind. Newspapers, Inc. v. Miller, 994 N.E.2d 731 (Ind. 2013).

of *Miller I* (*The Star*'s first appeal) because *Miller I* did not address whether the court of appeals had jurisdiction.[69]

B. Appeal of Criminal Conviction Without a Restitution Order

The supreme court held that the court of appeals had jurisdiction to hear a criminal appeal, even when the trial court had not yet ordered restitution.[70] In contrast, the court of appeals had previously held that criminal defendants may not appeal their convictions until the trial court orders restitution because until then the conviction is not a final judgment.[71]

In *Alexander*, the trial court sentenced the defendant without ordering restitution, the defendant appealed, and the State moved to dismiss, arguing that *Haste v. State*[72] held that the court of appeals did not have jurisdiction until the trial court ordered restitution.[73] The motions panel denied the State's motion, but it raised the issue again in its appellee's brief.[74] The court of appeals, relying on *Haste*, held that until a trial court orders restitution the sentence is not a final judgment under Appellate Rule 2(H)(1), so Appellate Rule 9(A)(1)[75] does not allow the defendant to appeal.[76] After determining that the defendant's appeal should be dismissed, the court admonished trial courts not to delay making restitution orders, in part because the "trial court is still subject to the ninety (90) day time limitation in Indiana Trial Rule 53.2 ('the lazy judge rule')."[77]

The supreme court granted transfer and decided that the court of appeals should not have dismissed because of the "particular circumstances" of Alexander's case.[78] The court noted that in the two years since Alexander's conviction, no court had considered his appeal on the merits, and the trial court had still not ordered restitution.[79] The court then distinguished *Haste* because "here the trial court advised Alexander that any Notice of Appeal had to be filed

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69. *Id.*

70. Alexander v. State, 4 N.E.3d 1169 (Ind. 2014).

71. Alexander v. State, 987 N.E.2d 182, 185 (Ind. Ct. App. 2013), *trans. granted*.

72. 967 N.E.2d 576 (Ind. Ct. App. 2012).

73. *Alexander*, 987 N.E.2d at 184.

74. *Id.* at 183-84.

75. IND. R. APP. P. 9(A)(1) provides for the following:

Appeals from Final Judgments. A party initiates an appeal by filing a Notice of Appeal with the Clerk (as defined in Rule 2(D)) within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion is noted in the Chronological Case Summary or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

76. *Alexander*, 987 N.E.2d at 185.

77. *Id.* at 186.

78. Alexander v. State, 4 N.E.3d 1169, 1170 (2014).

79. *Id.*

within thirty days" of the sentencing hearing.[80] "That advisement sufficiently put matters in a state of confusion about Alexander's appeal deadline, we think, such that he is entitled to have his appeal decided on the merits now."[81] The court then remanded the matter to the court of appeals for a merits decision.[82]

C. The Version of a Decision Published in West Publishing's Reporter Controls, Even if the Version Published on the Indiana Supreme Court's Website Differs

The court of appeals determined that when a version of a decision on the supreme court's website differs from the version published by West Publishing, the West version controls.[83] When *J.M. v. Review Board of the Indiana Department of Work Force Development* [84] was initially published on the Indiana Supreme Court's website, footnote one provided that the identities of a "claimant and employing unit" are generally confidential.[85] And in *T.B. v. Review Board of the Indiana Department of Work Force Development* [86] the court of appeals cited this version of the opinion.[87] But when *J.M.* was published in West's Northeastern Reporter, the footnote had changed to provide that courts would only keep parties confidential upon an "affirmative request."[88] The court of appeals found that the version in West's Reporter controlled because Appellate Rule 22 "provides that all Indiana cases shall be cited by giving the volume and page of the regional and official reporter (where both exist)."[89]

D. Court of Appeals Refuses to Dismiss Appeal for Appellant's Failure to Fully Comply with Rule 10(F)

Rule 10(F) requires the trial court clerk to "issue, file, and serve a timely Notice of Completion of Clerk's Record."[90] If the trial court clerk fails to do so, an "appellant shall seek an order from the Court on Appeal compelling the trial court clerk . . . to complete the Clerk's Record and issue, file, and serve its Notice

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80. *Id.* at 1171.

81. *Id.*

82. *Id.*

83. Albright v. Review Bd., Ind. Dep't of Work Force Dev., 994 N.E.2d 745, 747 n.1 (Ind. Ct. App. 2013).

84. 975 N.E.2d 1283 (Ind. 2012).

85. *Id.*

86. 980 N.E.2d 341, 343 n.1 (Ind. Ct. App. 2013).

87. *Id.*

88. *J.M.*, 975 N.E.2d at 1285 n.1.

89. *T.B.*, 980 N.E.2d at 343 n.1. It should also be noted that the discrepancy has been resolved because the version of *J.M.* on the supreme court's website now matches the version in the West Reporter. *See J.M.*, No. 93S02-1203-EX-138, at 2 n.1, *available at* http://www.in.gov/judiciary/opinions/pdf/10171201shd.pdf, *archived at* http://perma.cc/CP5G-XMT5 (last visited May 13, 2014).

90. IND. R. APP. P. 10(F).

of Completion."[91] If an appellant fails to seek such an order within fifteen days after the Notice of Completion was due, then the appeal "shall" be subject to dismissal.[92]

In *In re TP Orthodontics*, the trial court clerk issued and served the notice of completion, but she did not file it with the court of appeals.[93] The appellant did not seek an order from the court of appeals compelling the trial court clerk to file the notice, as Rule 10(F) requires.[94] On appeal, the appellees moved to dismiss for failure to comply with Rule 10(F), but the motions panel denied the motion.[95] The appellees raised the issue again before the court of appeals.[96] The appellants explained that "the trial-court clerk certified that she timely prepared the notice of completion and sent copies to the parties and the court of appeals clerk (as well as our Supreme Court and Tax Court) by United States mail, postage prepaid."[97] Despite these efforts, the "notice was not immediately reflected on the appellate docket. However, after the [appellees] filed their motion to dismiss, the docket was updated to reflect the notice, with the certificate-of-service" timely dated.[98] The court found that the trial-court-clerk's certification "entitled [appellant] to the presumption that the trial-court clerk had done her duty," and "[b]ased on these facts," the court would not overrule the motions panel.[99]

III. REFINING OUR APPELLATE PROCEDURE

During the survey period, the supreme court and the court of appeals offered helpful guidance, enabling practitioners to avoid various appellate-rule pitfalls.

A. If the Trial Court Declares a State Law Unconstitutional, Appeal to the Indiana Supreme Court, Not the Court of Appeals

The supreme court twice reminded practitioners that when the trial court declares a statute unconstitutional, the supreme court has mandatory and exclusive jurisdiction.[100] Appellate Rule 4(A) provides that the "Supreme Court shall have mandatory and exclusive jurisdiction over the" appeal of a final judgment "declaring a state or federal statute unconstitutional in whole or in part."[101] In *Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc.*, the trial court declared an "Indiana statute limiting the duration of reversionary

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91. *Id.*
92. *Id.*
93. 995 N.E.2d 1057, 1063 (Ind. Ct. App. 2013).
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. M & M Inv. Grp., LLC v. Ahlemeyer Farms, Inc., 994 N.E.2d 1108, 1111-12 n.2 (Ind. 2013); Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc., 988 N.E.2d 250, 253 (Ind. 2013).
101. IND. R. APP. P. 4(A)(1)(b).

interests to 30 years" unconstitutional, and the Appellant initially filed the appeal "in the Court of Appeals."[102] The supreme court noted that Appellate Rule 4(A) gave it "mandatory and exclusive jurisdiction over the appeal," so under Appellate Rule 6,[103] the case was transferred from the court of appeals to the supreme court.[104]

Similarly, in *M & M Investment Group, LLC v. Ahlemeyer Farms, Inc.*, the trial court issued an order declaring an Indiana statute unconstitutional.[105] In an interesting twist, the losing party appealed to the court of appeals, and the court of appeals affirmed the trial court's decision.[106] The supreme court granted transfer,[107] and it upheld the constitutionality of the statute.[108] The court found, under Appellate Rule 4(A)(1)(b), that the appeal to the court of appeals "was neither necessary nor proper under our Appellate Rules as this Court has 'mandatory and exclusive jurisdiction' over 'Appeals of Final Judgments declaring a state or federal statute unconstitutional in whole or in part.'"[109]

B. A Trial Court Must Enter a Finding that Appellant Has Shown Good Cause Before It May Certify an Order for Discretionary Interlocutory Appeal, When More Than Thirty Days Elapsed Since It Issued the Appealed Order

In *Pipkin v. State*, the State charged Pipkin with failing to register as a sex offender, and he moved to dismiss the charges.[110] The trial court denied the motion on September 8, 2011.[111] On May 3, 2012, the trial court, at Pipkin's request, certified the order for interlocutory appeal, and Pipkin filed his notice of appeal.[112] On appeal, the court of appeals sua sponte raised the issue of whether it had jurisdiction.[113] The court raised the issue because Appellate Rule 14(B)(1)(a) provides that a "motion requesting certification of an interlocutory order must be filed in the trial court within thirty (30) days after the date of the

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102. *Girl Scouts*, 998 N.E.2d at 253.

103. IND. R. APP. P. 6 provides the following:

> If the Supreme Court or Court of Appeals determines that an appeal or original action pending before it is within the jurisdiction of the other Court, the Court before which the case is pending shall enter an order transferring the case to the Court with jurisdiction, where the case shall proceed as if it had been originally filed in the Court with jurisdiction.

104. *Girl Scouts*, 998 N.E.2d at 253.

105. *M & M Inv. Grp.*, 994 N.E.2d at 1111.

106. M & M Inv. Grp., LLC v. Ahlemeyer Farms, Inc., 972 N.E.2d 889, 891 (Ind. Ct. App. 2012), *trans. granted*.

107. M & M Inv. Grp., LLC v. Ahlemeyer Farms, Inc., 978 N.E.2d 752 (Ind. 2012).

108. *M & M Inv. Grp.*, 994 N.E.2d at 1125.

109. *Id*. at 1111-12 n.2.

110. 982 N.E.2d 1085, 1085-86 (Ind. Ct. App. 2013).

111. *Id.* at 1086.

112. *Id.*

113. *Id.*

interlocutory order is noted in the Chronological Case Summary unless the trial court, for good cause, permits a belated motion."[114] When the trial court grants a belated motion and certifies the appeal, the Rule provides the trial court must "make a finding that the certification is based on a showing of good cause, and shall set forth the basis for that finding."[115]

In *Pipkin*, the trial court had clearly failed to certify Pipkin's request within thirty days of the appealed order, and it also failed to make a finding that good cause was shown.[116] The court of appeals concluded that "[b]ecause the trial court failed to find good cause for belatedly pursuing an interlocutory appeal . . . Pipkin's appeal was not properly perfected. We therefore lack jurisdiction over this matter, and must dismiss his appeal."[117]

C. If a Party Fails to Depose a Witness Before Trial, Then that Party May Not Claim After Trial that the Witness's Testimony Is Newly Discovered Evidence

In *State Farm Fire & Casualty Co. v. Radcliff*, a hailstorm damaged many homes in Indianapolis in 2006, and Radcliff's company repaired the homes of numerous State Farm customers.[118] State Farm then investigated Radcliff for fraud, and based on the company's efforts, he was eventually arrested on fourteen felony counts, though the charges were later dropped as part of a diversion agreement.[119] "State Farm then sued Radcliff . . . for fraud and racketeering," and he counterclaimed for defamation.[120] After a six-week jury trial, Radcliff prevailed, and the jury awarded him $14.5 million.[121]

State Farm appealed, and in its reply brief, it asked the court of appeals to grant its motion for limited remand under Appellate Rule 37.[122] Appellate Rule 37(A) provides that any party may move to have "the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court . . . for further proceedings."[123] Initially, the court of appeals noted that because State Farm only raised the issue in its reply brief, the issue was waived under Appellate Rule 46(C),[124] which provides that no "new issues shall be raised in the reply brief."[125]

Nevertheless, the court went on to address the merits of State Farm's

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114. IND. R. APP. P. 14(B)(1)(a).
115. *Id.*
116. *Pipkin*, 982 N.E.2d at 1086.
117. *Id.*
118. 987 N.E.2d 121, 125 (Ind. Ct. App. 2013), *trans. denied*.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 155.
123. IND. R. APP. P. 37(A).
124. *Radcliff*, 987 N.E.2d at 125.
125. IND. R. APP. P. 46(C).

argument.[126] State Farm argued that "newly discovered evidence from a former" employee supported that "Radcliff committed fraud—this time" on the trial court.[127] The court of appeals declined to remand the case because State Farm did not depose the employee before trial, despite having a deposition scheduled.[128] Moreover, the employee had contacted State Farm with the fraud allegations before State Farm filed a motion to correct errors with the trial court.[129] "[Y]et State Farm did not include this information in its motion."[130] Therefore, the court denied State Farm's motion.[131]

D. Parties Must Cite the Record

In *Solms v. Solms*, Cherie Solms petitioned the trial court for an order for protection against her ex-husband, Michael.[132] The trial court denied the petition, and Cherie appealed.[133] Michael filed a brief that did not include "any supporting citations to the appellate record or the appendices, contrary to the requirements of Indiana Appellate Rule 46(A)(6)(a),"[134] which requires facts to be supported by "page references."[135] The court found that "Michael's wholesale failure to follow our appellate rules has made his assertions unduly burdensome to verify. Accordingly, Michael's brief carries no persuasive value and has the same effect as if no brief had been filed."[136] Because the court considered Michael not to have submitted a brief, it applied a "less stringent standard of review," meaning it would reverse if Cherie "establishe[d] prima facie error."[137] The court found she cleared this lower hurdle and reversed the trial court.[138]

IV. INDIANA'S APPELLATE COURTS

A. Case Data from the Supreme Court

During the 2013 fiscal year,[139] the supreme court disposed of 1005 cases,

126. *Radcliff*, 987 N.E.2d at 155.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. 982 N.E.2d 1, 2 (Ind. Ct. App. 2012).
133. *Id.*
134. *Id*.
135. IND. R. APP. P. 46(A)(6)(a).
136. *Solms*, 982 N.E.2d at 2.
137. *Id.*
138. *Id.* at 3.
139. The Indiana Supreme Court 2013 fiscal year ran from July 1, 2012 to June 30, 2013. *See* INDIANA SUPREME COURT ANNUAL REPORT 2012-13, at 1 (2013), *available at* http://www.in.gov/judiciary/supreme/files/1213report.pdf, *archived at* http://perma.cc/ZK8P-M3CJ [hereinafter 2013 ANNUAL REPORT].

heard seventy-two oral arguments, and handed down seventy-eight majority opinions.[140] The court's caseload consisted of the following types of cases: 52.6% criminal; 29.6% civil; 13.6% attorney discipline; 3.5% original actions; 0.3% judicial discipline; 0.2% tax; 0.1% mandate of funds; and 0.1% unauthorized practice of law.[141] Despite civil and tax cases only comprising 29.8% of the court's case load, they accounted for 56.9% of oral arguments.[142] In contrast, criminal cases comprise 52.6% of cases disposed of by the court, but only 41.7% of oral arguments.[143] This disparity arose because the court denied transfer on 486 out of 529 total criminal cases (91.8% denial rate), whereas the court only denied transfer on 252 out of 297 total civil cases (84.8% denial rate).[144]

Chief Justice Dickson wrote sixteen majority opinions and three non-majority opinions; Justice Rucker wrote twelve majority opinions and nine non-majority opinions; Justice David wrote seventeen majority opinions and three non-majority opinions; Justice Massa wrote thirteen majority opinions and five non-majority opinions; Justice Rush wrote four majority opinions and two non-majority opinion; and Justice Sullivan wrote six majority and two non-majority opinions.[145] Justice Rucker led the court with seven dissents, which was half of the court's total number of dissents.[146] In comparison, Chief Justice Dickson, Justice David, and Justice Rush each only authored one dissent,[147] and 72% of the court's opinions were unanimous.[148]

B. Court Welcomes Justice Rush

On November 7, 2012, at a private ceremony, Chief Justice Dickson swore in Justice Loretta H. Rush as the supreme court's 108th justice.[149] On December 28, 2013, Justice Rush's robing ceremony took place and she took her oath of administration.[150] Less than two months later, she handed down her first two

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140. *Id.* at 14.

141. *Id.* at 15.

142. *Id.* at 18.

143. *Id.*

144. *See id.* at 16.

145. *Id.* at 20. Note that Justices Rush and Sullivan each only served a portion of the fiscal year.

146. *Id.* at 21.

147. *Id.*

148. *Id.*

149. Press Release, Ind. Sup. Ct., Loretta Rush to Be Sworn-In as 108th Indiana Supreme Court Justice (Nov. 2, 2012), http://www.in.gov/activecalendar/EventList.aspx?fromdate=10/1/2012&todate=1/30/ &display=Month&type=public&eventidn=60017&view=EventDetails&information_id=121110, *archived at* http://perma.cc/QJ85-3SYR.

150. Press Release, Ind. Sup. Ct., Robing Ceremony for Justice Rush December 28th (Dec. 19, 2012), http://www.in.gov/activecalendar/EventList.aspx?fromdate=10/1/2012&todate=1/30/2013&display=Month&type=public&eventidn=60918&view=EventDetails&information_id=12

majority opinions,[151] *Sickels v. State*[152] and *K.W. v. State*.[153] During her first year on the high court, none of her opinions has sparked a dissenting or concurring opinion.[154]

Indiana University Robert H. McKinney School of Law Professor Joel Schumm declared her first year a success: Justice Rush "wowed the legal community and beyond with her thoughtfully crafted and impactful opinions, incisive questions at oral argument, and her many speaking engagements and administrative work."[155] He was impressed with her opinions:

> A lawyer, local generalist newspaper reporter, or high school drop-out litigant can easily understand the Court's rationale without investing much time or energy. As law students (and even some law professors) lament, the same cannot be said of every court opinion, some of which provoke head-scratching and confusion even after multiple readings.[156]

One of your authors had the honor of clerking for Justice Rush during her first year at the supreme court, and her passion, energy, and intellect are an inspiration to all attorneys.

C. Case Data from the Court of Appeals

During 2013,[157] the court of appeals disposed of 3362 cases.[158] This continued a six-year trend of declining case loads, with the court's case load dropping from 4121 in 2008.[159] The court disposed of 1843 criminal cases, 980 civil cases, and 539 other cases.[160] The court affirmed the trial court 80.4% of the time, with the court affirming 86% of criminal cases, 91.2% of post-conviction relief cases, and 63.4% of civil cases.[161] The court of appeals manages its case load with impressive speed, with each case pending for one month on average.[162]

2937, *archived at* http://perma.cc/CDX5-L983.

151. 2013 ANNUAL REPORT, *supra* note 139, at 26.

152. 982 N.E.2d 1010 (Ind. 2013).

153. 984 N.E.2d 610 (Ind. 2013).

154. Joel Schumm, *A Remarkable First Year for Justice Loretta Rush*, IND. LAW BLOG (Nov. 4, 2013), http://indianalawblog.com/archives/2013/11/ind_courts_a_re_3.html, *archived at* http://perma.cc/7LTG-4PE8.

155. *Id.*

156. *Id.*

157. The court of appeals 2013 annual report covers January 1, 2013 through December 31, 2013. *See* INDIANA COURT OF APPEALS 2013 ANNUAL REPORT (2013), *available at* http://www.in.gov/judiciary/appeals/files/2013_Court_of_Appeals_Annual_Report.pdf, *archived at* http://perma.cc/FD2Q-V44P.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 2.

162. *Id.*

In addition to deciding cases, the court issued almost 7000 other orders.[163] It published 25.4% of its opinions and had seventy-two dissenting opinions during the year.[164]

D. Pilot Project for Expedited Transcripts

The court of appeals determined "that Indiana should explore some of the ways used by other jurisdictions to improve court reporting services."[165] The court ordered a pilot project using "expedited transcripts by professional transcription experts," which are already used in several other jurisdictions.[166] This order was the second of three orders in the special court reporting project,[167] and it followed an order by the supreme court last year establishing a pilot project to explore the use of an audio/visual record on appeal.[168] The goal of the court reporting project is to present the record on appeal "in a more timely, efficient, and cost-effective manner."[169]

The expedited transcript pilot project will involve twenty transcripts generated in Hamilton, Lake, Madison, Tippecanoe, and Vanderburgh counties.[170] The judges in those counties will select four cases to participate in the pilot project, and alternative appellate procedures will be utilized.[171] The alternative procedures require the transcription service to certify the transcript and file it with the trial court clerk within 30 days of the filing of Notice of Appeal.[172] The appellant then has forty five days after the date the trial court clerk serves its Notice of Completion of Transcript to file the appellant's brief.[173] This contrasts with the thirty days that an appellant has under Appellate Rule 45(B)(1). Similarly, the appellee is given forty-five days to file its brief under the alternative procedures,[174] whereas, under Appellate Rule 45(B)(2) it has thirty days. The alternative procedures also provide that "[a]ll briefs, appendices, addendums, and petitions filed with the court on appeal . . . shall be filed in paper format as required under the Rules of Appellate Procedure."[175]

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163. *Id.*

164. *Id.* at 5.

165. *In re* Pilot Project for Expedited Transcripts, 977 N.E.2d 1010, 1010-11 (Ind. Ct. App. 2012).

166. *Id.* at 1011.

167. *Id.*

168. *In re* Pilot Project for Audio/Visual Recordings, 976 N.E.2d 1218, 1218 (Ind. 2012).

169. *Id.* at 1219.

170. *In re Pilot Project for Expedited Transcripts*, 977 N.E.2d at 1011.

171. *Id.*

172. *Id.*

173. *Id.* at 1011-12.

174. *Id.* at 1012.

175. *Id.*

CONCLUSION

During the survey period, the Indiana appellate courts analyzed, interpreted, and applied the Appellate Rules. The amendments to the Rules will help move the courts closer to an electronic future. And the appellate court decisions will guide the future application of the Rules, helping practitioners to more effectively practice before the courts. Finally, with the addition of Justice Rush to the supreme court, it has one more new face, after so many years of familiar ones.

RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

MICHAEL A. DORELLI*
JONATHAN B. TURPIN**

Between October 1, 2012 and September 30, 2013,[1] Indiana courts rendered a number of significant decisions impacting businesses and business owners, officers, directors and shareholders. In addition, Indiana's Business Flexibility Act underwent several significant changes. Developments of interest to business litigators, corporate transactional lawyers, business owners, and in-house counsel are discussed herein.

I. CHANGES TO INDIANA'S BUSINESS FLEXIBILITY ACT

Indiana's Business Flexibility Act, House Enrolled Act 1394, also known as P.L. 40-2013 (the "Act"), became effective July 1, 2013 (the 2013 Amendments).[2] The Act made significant changes to the statutory scheme of LLCs, including changes affecting estate planning for LLC members.[3]

A. Freedom of Contract

The 2013 Amendments added a broad statement that Indiana policy "is to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements of limited liability companies."[4] This statement makes the underlying philosophy of the Act clear that the contract is to be respected when interpreting the statute.

B. Purpose of LLC

With the new amendments, section 6 of the Act now explicitly states that LLCs may be used not only for business purposes but also for personal and nonprofit purposes.[5] Prior to this change, there had been some confusion as to whether an LLC could be organized for these purposes. Under the 2013 Amendments, it is now clear that the LLC can be created and operated for a charitable or other nonprofit purpose or formed for a personal purpose, such as

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period: October 1, 2012, through September 30, 2013.

2. IND. CODE § 23-18-4-13 (2013).

3. *Id.*

4. *Id.*

5. *Id.* § 23-18-2-1.

holding non-income producing property.[6]

C. LLC Officers

Indiana law previously authorized member-managed or manager-managed companies exclusively.[7] In a member-managed LLC, the members have apparent authority to bind the company.[8] In a manager-managed LLC, the members appoint managers who have that authority.[9] The revisions to the Act, however, now expressly provide for the creation of officers of the LLC if provided for in a written operating agreement.[10] The operating agreement must specify the "title, powers, duties, and term of office (either perpetual or for a specific term) for each officer and the means by which each officer is to be appointed, elected, or reelected."[11]

The officer has only those powers and duties specified in the written operating agreement.[12] The officers will be agents of the LLC, may bind the LLC through acts within the officer's apparent authority, and notice of business matters provided to an officer will be deemed notice to the LLC.[13] The revisions allow the members of an LLC to establish officers who have the apparent authority to bind the company, while the members also retain that authority.[14] However, authority to manage the LLC is still reserved to members or managers unless otherwise provided in the operating agreement.[15]

D. Contractual Limitation or Elimination of Fiduciary Duties

The Act now expressly allows members to "[m]odify, increase, decrease, limit, or eliminate the duties (including fiduciary duties) . . . of a member or manager" in the operating agreement.[16]

E. Third Party Approval Rights

The 2013 Amendments provide that the Operating Agreement may designate "one (1) or more persons who are not members or managers [to] have the right

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6. *Id.*

7. John Millspaugh & Alan Becker, *Changes to Indiana Business Flexibility Act Likely to Impact LLCs Significantly*, BOSE CORPORATE AND M&A BLOG (May 17, 2013), http://corporateblog.boselaw.com/2013/05/17/changes-to-indiana-business-flexibility-act-likely-to-significantly-impact-llcs/.

8. *Id.*

9. *Id.*

10. *Id.*

11. IND. CODE § 23-18-4-4 (2013).

12. *Id.* § 23-18-3-2.5(1).

13. *Id.* § 23-18-3-2.5(2)-(4).

14. Millspaugh & Becker, *supra* note 7.

15. IND. CODE §§ 23-18-3-2.5, 23-18-4-4 (2013).

16. *Id.* § 23-18-4-4.

to approve or disapprove any one (1) or more specified actions with respect to the limited liability company, including: (A) voluntary dissolution; (B) merger; or (C) amending the written operating agreement."[17] Under this new subsection, the LLC can now give approval, disapproval, or veto rights to persons who are not members.[18]

F. Estate Planning

Amendments to section 10 of the Act now expressly permit an LLC interest to be held as "joint tenancy with right of survivorship," and permit LLC interests to be designated as "transfer on death property" (TOD) with a designated beneficiary of the interest on the death of the member.[19] In both instances, the survivor/beneficiary following the death of a member automatically receives the interest of the deceased member without probate.[20] Unlike joint tenancy, under the TOD provisions, the beneficiary does not own any interest in the property until the death of the original owner.[21]

A joint tenant or TOD beneficiary who receives the member interest after the death of the other joint tenant or owner will be an "assignee," not a member, until admitted as a member, unless a joint-tenant co-owner of a member interest was already a member.[22] Specifically, the statute provides that "[e]ach surviving [TOD] beneficiary has the status of an assignee of all or a fractional or percentage portion of the entire member interest owned by the deceased owner, . . . consistent with the [TOD] beneficiary designation, until that [TOD] beneficiary is admitted as a member of the limited liability company."[23] Further, "[e]ach surviving joint tenant has that status of an assignee of all or a fractional or percentage portion of the entire member interest, . . . until the surviving joint tenant is admitted as a member of the limited liability company unless the surviving joint tenant was already a member . . . before the death of each other joint tenant."[24]

The Act also clarifies that all transfer restrictions, redemption provisions, and similar provisions contained in an LLC's operating agreement will apply to the interest held by the survivor/beneficiary.[25]

G. Unanimous Approval for LLC Dissolution

The Act now requires unanimous member approval of dissolution for LLCs formed after June 30, 2013, unless a lower approval threshold is specified in the

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17. *Id.* § 23-18-4-4(a)(4).
18. *Id.*
19. *Id.* § 23-18-6-2.5.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* § 23-18-6-2.5(b)(1).
24. *Id.* § 23-18-6-2.5(c)(1).
25. *Id.* § 23-18-6-2.5(b)(2), (c)(2).

operating agreement.[26] The 2013 Amendments were made to address gift and estate tax valuation problems under section 2704(b) of the Internal Revenue Code.[27]

H. Other Changes

There were certain technical changes to the Act, including changes to the filing provisions affecting merger in Indiana Code section 23-18-7-4.[28] The change applies to mergers between two or more LLCs or between LLCs and other types of business entities.[29] It confirms that the "plan of merger" does not need to be included in the articles of merger that are filed with the Secretary of State.[30] Only those parts of the plan of merger that provide specific changes to the articles of organization of the surviving LLC need to be included.[31] Additional technical changes were made to Indiana Code section 23-18-12-1 addressing signature requirements for biennial reports.[32]

II. CORPORATE OFFICER DOCTRINE, SUCCESSOR LIABILITY, AND PIERCING THE CORPORATE VEIL

In *Reed v. Reid*,[33] the Indiana Supreme Court addressed the corporate officer doctrine that applies to violations under the Indiana Environmental Act, successor liability, and piercing of the corporate veil.[34] Under the corporate officer doctrine, "an individual associated with a corporation may be personally liable . . . for that corporation's violations of the [the] Act, whether or not the traditional doctrine of piercing the corporate veil would produce personal liability."[35] The court explained that an individual is liable under this doctrine in the following circumstances:

> (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.[36]

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26. *Id.* § 23-18-9-1.1.
27. 26 U.S.C. § 2704(b) (1996).
28. *Id.* § 23-18-7-4.
29. *Id.*
30. *Id.*
31. *Id.* § 23-18-7-4(a)(3).
32. *Id.* § 23-18-12-1.
33. 980 N.E.2d 277 (Ind. 2012).
34. *See generally id.*
35. *Id.* at 298 (quoting Comm'r, Ind. Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 558 (Ind. 2011)).
36. *Id.*

In *Reed*, North Vernon Drop Forge (Forge) had been depositing solid waste on David Reed's (Reed) auction barn site.[37] Reed sued for damages.[38] Forge had previously entered an Agreed Order with the Indiana Department of Environmental Management (IDEM) acknowledging that it allowed the disposal of solid waste on Reed's auction barn site.[39] Reed had to hire an environmental consulting company to remediate his property according to IDEM's instructions.[40] Reed filed a complaint against Forge, several of its employees, and Edward Reid (Edward), Forge's sole or controlling shareholder.[41]

The court found that Edward was in a position of responsibility to influence corporate policies or activities, but noted that his position as sole or controlling shareholder was insufficient alone to establish individual liability under the responsible corporate officer doctrine.[42] However, the evidence also revealed that Edward hired key Forge employees, he was regularly apprised of Forge operations, he was involved in the decision to take the Forge waste to the auction barn, and he took responsibility with IDEM for Forge's environmental violations at the auction barn site.[43] Accordingly, the court found that he "was directly involved in at least some corporate activities."[44] Based on these facts, the court held, as a matter of law, that Edward was liable to the same extent as Forge under the responsible corporate officer doctrine.[45]

Reed also alleged that Jennings Manufacturing Company, Inc. (Jennings) incurred Forge's "liability as its successor under the doctrines of *de facto* merger and mere continuation."[46] Generally, "[w]hen a corporation purchases another corporation's assets, the buyer typically does not assume the seller's debts and liabilities."[47] However, the law recognizes an exception under the doctrines of *de facto* merger and mere continuation.[48] "A *de facto* merger occurs where a transaction is essentially a merger in all but name."[49]

The court in *Reed* analyzed the following factors when making this determination: "the 'continuity of the predecessor corporation's business enterprise as to management, location, and business lines; prompt liquidation of the seller corporation; and assumption of the debts of the seller necessary to the

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37. *Id.* at 283.
38. *Id.*
39. *Id.*
40. *Id.* at 284.
41. *Id.*
42. *Id.* at 298.
43. *Id.*
44. *Id.* at 299.
45. *Id.*
46. *Id.*
47. *Id.* (citing Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1233 (Ind. 1994)).
48. *Id.* (citing Cooper Indus., LLC, v. City of South Bend, 899 N.E.2d 1274, 1288 (Ind. 2009)).
49. *Id.*

ongoing operation of the business.'"[50] Under the "mere continuation exception," the court "asks whether the processor corporation should be deemed simply to have re-incarnated itself, largely aside of the business operations."[51] The court will look at "whether there is a continuation of shareholders, directors, and officers into the new corporate entity."[52]

The *Reed* court found there was a genuine issue of material fact regarding whether the sale of Forge assets to Jennings created a *de facto* merger of the two, or whether Jennings was just a mere continuation of Forge.[53] Forge ceased operations in April 2006 and Jennings was incorporated in October 2006.[54] Jennings operated at the same location as Forge, used the same telephone number, the same person oversaw operations at both locations, and the same individual—based on substantial evidence—appeared to own both Forge and Jennings.[55] There was confusion, however, as to who the officers of the corporations were and who owned the property.[56] Further, no written agreement regarding the purchase or use of Forge's assets existed between forge and Jennings.[57] Accordingly, given the evidence, the court found a genuine issue of material fact as to Jennings' successor liability.

The court next analyzed whether Edward and other Edward entities could be personally liable through the doctrine of piercing the corporate veil.[58] "As a general rule, shareholders are not personally liable for the acts of a corporation, and a corporation is not liable for the acts of related corporations."[59] However, "[w]hen a corporation is functioning as an alter ego or a mere instrumentality of an individual or another corporation, it may be appropriate to disregard the corporate form and pierce the veil."[60]

This is a highly fact-driven inquiry and no fact is dispositive alone.[61] However, when making this determination, the court will consider the following:

> (1) undercapitalization of the corporation, (2) the absence of corporate records, (3) fraudulent representations by corporation shareholders or directors, (4) use of the corporation to promote fraud, injustice, or illegal activities, (5) payment by the corporation of individual obligations, (6)

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50. *Id.*

51. *Id.* (quoting Ziese & Sons Excavating, Inc. v. Boyer Constr. Corp., 965 N.E.2d 713, 722-23 (Ind. Ct. App. 2012)).

52. *Id.*

53. *Id.* at 300-01.

54. *Id.* at 300.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 301.

59. *Id.* (citing Aronson v. Price, 644 N.E.2d 864, 867 (Ind. 1994), *reh'g denied* (May 18, 1995); Greater Hammond Cmty. Servs., Inc v. Mutka, 735 N.E.2d 780, 784 (Ind. 2000)).

60. *Id.* (citing *Mutka*, 735 N.E.2d at 784).

61. *Id.*

> commingling of assets and affairs, (7) failure to observe required corporate formalities, and (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.[62]

Additionally, when a plaintiff attempts to hold one corporation liable for another closely-related corporation's debt by seeking to pierce the corporate veil, the aforementioned factors are not exclusive.[63]

> Additional factors to be considered include whether: "(1) similar corporate names were used; (2) the corporations shared common principal corporate officers, directors, and employees; (3) the business purposes of the [organizations] were similar; and (4) the corporations were located in the same offices and used the same telephone numbers and business cards."[64]

The court may also pierce the veil in pursuit of affiliated corporate entities "when they are not operated separately, but rather are managed as 'one enterprise through their interrelationship to cause illegality, fraud, or injustice or to permit one economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.'"[65] Factors to consider in making this determination include "the intermingling of business transactions, functions, property, employees, funds, records, and corporate names in dealing with the public."[66]

Reed presented evidence that Forge was consistently undercapitalized, that Forge's assets were commingled with Edward's personal asserts and with assets of the sister corporations, and that Forge failed to observe corporate formalities.[67] Evidence in the record also revealed that Edward personally made undocumented loans in excess of $1.4 million to his other entities, that he personally paid the operating costs of Jennings, and that his companies all shared employees.[68] One sister company also paid obligations of Forge, Jennings and the other company; the sister corporations shared officers and directors; and the companies failed to observe corporate formalities.[69]

Given the above facts, the court held that "substantial evidence" showed that the "sister corporations were mere instrumentalities or alter egos of Edward and each other."[70] But the court found that "whether equity demands that the corporate veil should be pierced in this case to prevent fraud or injustice

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62. *Id.* at 301-02 (internal citations and quotations omitted).

63. *Id.*

64. *Id.* (quoting Oliver v. Pinnacle Homes, Inc., 769 N.E.2d 1188, 1192 (Ind. Ct. App. 2002)).

65. *Id*.

66. *Id.*

67. *Id.* at 302.

68. *Id.*

69. *Id.*

70. *Id.* at 303.

require[d] weighing the evidence," and it is the for the fact finder to decide "whether the separate corporate identities of Edward's companies may be disregarded so that liability may be imposed on Edward personally, Jennings Manufacturing, and/or Reid Machinery."[71] As such, the court affirmed the trial court's denial of David's motion for summary judgment on this issue.[72]

III. APPARENT AUTHORITY: LIMITED LIABILITY COMPANY AND LIMITED PARTNERSHIP

In *Cain Family Farm, L.P. v. Schrader Real Estate & Auction Co.*,[73] the court addressed issues of apparent authority under corporate law.[74] In that case, the Cain Family Farm, L.P. (the LP) held title to approximately 400 acres of property (the Sylvan Lake property), consisting of seventeen tracts.[75] Being the sole general partner of the LP, the LLC had the sole exclusive control of the management and operation of the LP.[76] The LLC was managed by four Cain siblings: Candace, Melanie, John and Patricia.[77] The LLC entered into an exclusive contract for the sale of the Sylvan Lake property with Schrader Real Estate & Auction Company (Schrader).[78] Candace signed the auction contract as a member of the LLC with the consent of her siblings.[79]

Drerup, a member of Antlers Ridge, approached Candace about purchasing a portion of the property prior to the auction, but Candace informed him that his price was too low and any sale had to be approved by four siblings.[80] Prior to the auction, "the Cain siblings agreed to a minimum price for Tracts 2 through 17 of $2,250,000."[81] They agreed that if the bids did not meet this price, they would not sell the tracts.[82]

At the auction, Drerup made the highest bids on certain Tracts 2 through 4 and 6 through 17 for a total purchase price of $1.35 million.[83] Schrader prepared, and Candace and Drerup signed, a purchase agreement for Antlers Ridge.[84] Candace executed the purchase agreement in the name of the LLC, in its capacity as the general partner of the LP.[85]

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71. *Id.*
72. *Id.*
73. 991 N.E.2d 971 (Ind. Ct. App. 2013).
74. *See generally id.*
75. *Id.* at 973.
76. *Id.*
77. *Id.*
78. *Id.* at 974.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 975.
84. *Id.*
85. *Id*.

After the sale, the LP and LLC demanded that the sale be rescinded and brought suit to quiet title.[86] The plaintiffs argued that Candace did not have the apparent or inherent authority to bind the LLC and, by extension, the LP, to the purchase agreement.[87] The court disagreed.[88]

The court explained that "[a]pparent authority is the authority that a third person reasonably believes an agent to possess because of some manifestation from the agent's principal."[89] "The necessary manifestation is one made by the principal to a third party, who in turn is instilled with a reasonable belief that another individual is an agent of the principal."[90] The principal must either directly or indirectly instill "a reasonable belief in the mind of the third party" of the agents; "[s]tatements or manifestations made by the agent are not sufficient to create an apparent agency relationship."[91] For example, "the placing of the agent in a position to perform acts or make representations which appear reasonable to a third person is a sufficient manifestation to endow the agent with apparent authority."[92]

The court found that Drerup knew that Candace and her siblings were present at the auction, had met in private, and had rejected the bid on Tract 5.[93] Drerup was not aware that the siblings had rejected the other bids.[94] In fact, Schrader, the Cains' exclusive agent under the auction contract, announced to the audience that all but Tract 5 would sell that day.[95] The court held that the Cain siblings, "by their conduct and through their agent, Schrader, . . . indirectly communicated to Drerup and Antlers Ridge that they had accepted the remaining bids at the close of the auction."[96] Candace had previously communicated to Drerup that the consent of all the Cain siblings was required to sell the property.[97] The court found that

> Because the Cain siblings attended the auction and did not indicate to Drerup that they had rejected the Antlers Ridge bids, and because Schrader, [Plaintiff's] exclusive agent for the sale, presented the Purchase Agreement for Candace's and Drerup's signatures, Drerup reasonably believed that Candace had obtained the consent of her siblings and was authorized to sign the Purchase Agreement.[98]

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86. *Id.*
87. *Id.* at 977.
88. *Id.*
89. *Id.* (citing Pepkowski v. Life of Ind. Ins. Co., 535 N.E.2d 1164, 1166 (Ind. 1989)).
90. *Id.* (citing *Pepkowski*, 535 N.E.2d at 1166-67).
91. *Id.*
92. *Id.* (quoting Gallant Ins. Co. v. Isaac, 751 N.E.2d 672, 677 (Ind. 2001)).
93. *Id.*
94. *Id.*
95. *Id.* at 977-78.
96. *Id.* at 978.
97. *Id.*
98. *Id.* (internal footnote omitted).

The court, therefore, concluded that Candace had apparent authority to execute the purchase agreement as a matter of law.[99]

The court also found, however, that Candace had authority to act under Indiana Code section 23-18-3-1.1(b), which states:

> Except as provided in subsection (c) or the articles of organization, each member is an agent of the limited liability company for the purpose of the limited liability company's business or affairs, and *the act of any member, including the execution in the name of the limited liability company of an instrument for apparently carrying on in the usual way the business or affairs of the limited liability company, binds the limited liability company, unless:*
> (1) the acting member does not have authority to act for the limited liability company in the particular matter; and
> (2) the person with whom the member is dealing has knowledge of the fact that the member does not have the authority to act.[100]

The Plaintiffs argued that subsection (d) applied, which states:

> An act of a manager or member that is not apparently for the carrying on in the usual way the business of the limited liability company does not bind the limited liability company unless authorized in accordance with a written operating agreement or by the unanimous consent of all members at any time.[101]

They asserted that Candace's action were "*not* apparently for the carrying on in the usual way the business of the [LLC]."[102]

The court in *Cain* noted that no other court has interpreted or applied this statutory language, and thus, it was an issue of first impression.[103] The Plaintiffs argued that they were not in the business of selling real estate and that Candace was not carrying on the usual way the business of the LLC at the time she executed the purchase agreement.[104] The court disagreed, reasoning LLC's business was to act as the general partner of the LP, which owned the real estate.[105] "The Limited Partnership Agreement gave the LLC 'the full and exclusive power' to manage and operate the [LP's] affairs, including the power to 'buy and sell real or personal property.'"[106] Thus, the court found that Candace "apparently carr[ied] on in the usual way the business" of the LLC at the time she

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99. *Id.*
100. IND. CODE § 23-18-3-1.1(b) (2013) (emphasis added).
101. *Id.* § 23-18-3-1.1(d).
102. *Cain Family Farm, L.P.*, 991 N.E.2d at 980.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

signed the purchase agreement.[107]

IV. MERGERS, SUBSIDIES, AND UNEMPLOYMENT EXPERIENCE ACCOUNTS

In *Boulder Acquisition Corp. v. Unemployment Insurance Appeals of Indiana Department of Workforce Development*[108] the court evaluated whether a company became the successive employer of subsidiaries that were acquired in a merger with the former parent company.[109] There, Boulder Acquisition Corporation (BAC) merged with Affiliated Computer Services, Inc. (ACS).[110] As part of the deal, BAC acquired equity interests in ACS subsidiaries.[111] In reaction to the merger, the Indiana Department of Workforce Development combined the unemployment insurance experience accounts of BAC, ACS, and the subsidiaries.[112] These accounts are credited by employers' tax contributions and charged when an employee receives unemployment benefits.

Because Indiana Code section 22-4-10-6(a) provides that an employer is a successor employer when it "acquires the organization, trade, or business, or substantially all the assets of another employer . . . or all or a portion of the employer's trade or business."[113] The Department reasoned that BAC was a successor employer.[114] However, the court distinguished between the acquisition of an equity interest in a separate legal entity and the acquisition of the organization, trade, business, assets, trade, or business. The court held that "[b]ecause subsidiary companies are separate legal entities from their parent companies, acquiring equity ownership in a subsidiary, without more, does not constitute acquiring the organization, trade, or business, or substantially all of the assets, of such a subsidiary."[115]

V. JUDICIAL DISSOLUTION OF CORPORATION

The court in *Enders v. Enders*,[116] addressed judicial dissolution of a corporation.[117] In that case, Randall and his brother Timothy inherited equal shares in Enders & Longway Builders, Incorporated (the Company).[118] The brothers signed a buy-sell agreement that limited their ability to transfer their shares and provided that upon death of one brother, the surviving brothers

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107. *Id.*
108. 976 N.E.2d 1282 (Ind. Ct. App. 2012).
109. *See generally id.*
110. *Id*. at 1284.
111. *Id*.
112. *Id*. at 1284-85.
113. *Id.* at 1288.
114. *Id*.
115. *Id*.
116. 991 N.E.2d 154 (Ind. Ct. App. 2013).
117. *See generally id.*
118. *Id.* at 155.

automatically received the deceased's shares.[119] Timothy stopped actively working for the Company due to a disability. When Randall became terminally ill in 2012 and could no longer work for the Company, he approached Timothy about dissolving the Company because it was no longer profitable.[120] Timothy would not agree to dissolution.

Randall filed a petition for a judicial dissolution, stating "that the directors and shareholders were deadlocked in the management of corporate affairs. The trial court granted the dissolution effective the date of the hearing."[121] Timothy appealed the ruling, claiming that there was insufficient evidence for the trial court to dissolve the corporation pursuant to Indiana Code section 23-1-47-1.[122] That code section provides for judicial dissolution in the following circumstances:

> (A) the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; or
> (B) the shareholders are deadlocked in voting power and have failed, for a period that includes at least two (2) consecutive annual meeting dates, to elect successors to directors whose terms have expired.[123]

The Company's accountant testified that he recommended for several years that the brothers dissolve the corporation, explaining there was no reason "to keep the complexity of the corporation when Randall was performing all the labor and services for the Company."[124] Timothy would not agree to dissolve the corporation.[125] Thus, the court found that there was deadlock in the management of the Company.[126] The accountant also testified that the corporation's business affairs could not be conducted to the shareholders and directors' advantage due to the existing deadlock among shareholders.[127] The court found that the evidence established that the corporation was no longer profitable due to Timothy's disability and Randall's terminal illness, and that the trial court did not err in ordering the dissolution of the corporation.[128]

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119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 159.
123. *Id.* (citing IND. CODE § 23-1-47-1 (2013)).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

VI. CONTRACT

A. Indefinite Price Term

In *Allen v. Clarian Health Partners, Inc.*,[129] the court addressed the plaintiff's argument that the contract at issue was too indefinite regarding price to be enforceable.[130] In *Allen*, a putative class filed an action "against a hospital alleging breach of contract and seeking a declaration that rates the hospital billed were unreasonable and unenforceable."[131] The trial court granted the hospital's motion to dismiss, and the Indiana Court of Appeals reversed.[132] The defendant sought transfer to the Indiana Supreme Court.[133]

The plaintiff in *Allen* was an uninsured patient of the hospital who signed a form contract which the hospital had drafted.[134] The plaintiff agreed to pay all charges associated with her treatment.[135] Although the contract did not provide a specified amount for services rendered, it did provide that the patient "guarantees payment of the account."[136] After providing medical treatment to the plaintiff, the hospital billed its "chargemaster" rates for medical services and supplies.[137] The appellate court reversed, concluding, among other things, that because "the contract did not contain a price term[,] the reasonable value of services should be implied, and the issue of reasonableness" should be resolved by the finder of fact.[138] The Indiana Supreme Court disagreed and affirmed the trial court's ruling.[139]

The plaintiff argued that the contract lacked the material term of price, and because no price term was present, a "reasonable price" was imputed to the contract.[140] The court agreed that "*if* a contract is uncertain as to a material term such as price then Indiana courts may impute a reasonable price."[141] To be valid and enforceable, a contract must be reasonably definite and certain.[142] "Only reasonable certainty is necessary."[143]

The court explained "[a] contract need not declare a specific dollar amount

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129. 980 N.E.2d 306 (Ind. 2012).
130. *See generally id.*
131. *Id.* at 307.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 308.
139. *Id.*
140. *Id.* at 309.
141. *Id.* (citing Coleman v. Chapman, 220 N.E.2d 285, 288 (1966)).
142. *Id.* (citing Conwell v. Gray Loon Outdoor Mktg. Grp., Inc., 906 N.E.2d 805, 813 (Ind. 2009)).
143. *Id.* (quotations omitted).

for goods or services in order to be enforceable."[144] The court further stated that "[i]n the context of contracts providing for health care services precision concerning price is close to impossible."[145] The court further concluded:

> We align ourselves with those courts that have recognized the uniqueness of the market for health care services delivered by hospitals, and hold that [the plaintiff's] agreement to pay "the account" in the context of [the hospital's] contract to provide medical services is not indefinite and refers to [the hospital's] chargemaster.[146]

As such, the court could not impute a "reasonable" price term into the contract.[147]

B. Contract Interpretation

1. Applying Contracts as Written.—The case of *King v. King*[148] involved a dispute among siblings (Kay, George and Bob) concerning the ownership of several corporations and partnerships.[149] Kay and George often fought about who would control their father's multimillion dollar estate after his death.[150] A few weeks prior to their father's death, George shot Kay and Christopher (Kay's minor son) multiple times and was convicted of attempted murder.[151] Kay and Christopher subsequently filed a complaint on behalf of themselves and certain companies against George and Bob and five corporations, seeking "a determination on the ownership of certain Receivership Entities, dissolution of the Receivership Entities, and the appointment of a Receiver to manage the dissolution, winding up and accounting of the Entities."[152]

The court appointed the Receiver and directed him to take control of the business operations and its assets.[153] To pay outstanding tax liabilities, the Receiver drew on Crown's assets because this company had more liquid assets available than the other Receivership Entities.[154] To account for his use of Crown's assets, he credited "an account receivable in favor of Crown with corresponding payables charged to the Receivership or the Receivership Entities."[155]

In 2005, the siblings entered into a Term Sheet for settlement, which represented a partial agreement on the outlines of asset distribution and provided

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144. *Id.* at 310 (citing *Conwell*, 906 N.E.2d at 813).
145. *Id.*
146. *Id.* at 311.
147. *Id.*
148. 982 N.E.2d 1026 (Ind. Ct. App. 2013).
149. *See generally id.*
150. *Id.* at 1028.
151. *Id.*
152. *Id.* at 1029.
153. *Id.*
154. *Id.*
155. *Id.*

that George would be entitled to the assets or equity interest in Crown.[156] It stated that further agreements would be set forth in greater detail in a separate liquidation agreement and that if the parties could not agree upon the liquidation agreement, the dispute would be submitted to the Receivership Court for a final determination.[157] The siblings failed to enter into the liquidation agreement and thus, the trial court ordered the Receiver to eliminate all inter-company accounts prior to making the transfers contemplated by the Term Sheet and ordered the parties to enter into a definitive Settlement Agreement in accordance with the court's findings.[158]

The siblings still could not reach an agreement to divide the assets, and so, the Receiver submitted his plan for distribution to the trial court.[159] In his plan, the Receiver attempted (as best he could) to follow the Term Sheet.[160] The trial court approved the Receiver's plan of distribution.[161] George objected and after the trial court denied his objections, he appealed.[162]

George argued on appeal that the plan improperly failed to restore assets to Crown.[163] The court noted that the Term Sheet itself failed to address Crown's account receivables.[164] With respect to Crown, the Term Sheet merely stated that "[t]he assets and/or equity interest of [Crown] shall be conveyed by the Receiver to [George], *free and clear of any claims that were asserted or could have been asserted by any plaintiffs or any defendants in the King Receivership Litigation,* subject only to claims for any unpaid taxes and the claims of third-party creditors."[165] The court reasoned that "[g]iven the level of detail embodied in the Term Sheet, the absence of a clear expression by the parties to repay the accounts receivable which had been expressly created by the Receiver during the Receivership and which existed during the execution of the Term Sheet, is evidence of intent that no such offset was bargained for."[166] The court also found that the Term Sheet's language rejected George's argument.[167] The court stated that the "Term Sheet establishes that Crown has to be conveyed free and clear of claims that can be asserted by any plaintiff or defendant," and that "[t]he account receivable is a claim asserted by George in the Receivership litigation," and thus, not a part of Crown's conveyance.[168]

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156. *Id.*
157. *Id.* at 1030.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 1031.
164. *Id.*
165. *Id.* at 1033.
166. *Id.*
167. *Id.*
168. *Id.*

2. Interpreting Undefined Concepts.—In *Singleton v. Fifth Third Bank*,[169] the court held that a party satisfied a requirement that he "make payments" when he initiated a wire transfer on the due date.[170] In *Singleton*, the appellant, Singleton, faced foreclosure of his mortgages when Fifth Third filed against him.[171] In order to avoid foreclosure, Singleton entered into a forbearance agreement with the bank.[172] The agreement provided for fixed payments on specific dates.[173] On the date that the penultimate payment was due, Singleton initiated a wire transfer from his bank in the late afternoon and the payment was not received until the next day.[174] The trial court held that because the agreement required only that the payments be "paid by" the due date, Singleton had fulfilled his obligation.[175]

The following month, the situation repeated itself: Singleton wired his payment late on the due date, and the payment was not received until the following day.[176] Again, the parties returned to the trial court and reiterated their prior arguments.[177] The trial court held that because Singleton had chosen to replicate the previous problem, Fifth Third was entitled to prevail.[178]

On appeal, the court returned to the trial court's original reasoning and held that the act of initiating the transfer was sufficient to constitute making payment.[179] Because the agreement was silent regarding the required method of transfer and the method of determining when a payment was made, the court of appeals refused to read into the agreement any requirement that the other party *receive* the payment on that date.[180] The court of appeals reversed the trail court's ruling in favor of Fifth Third.

C. Indemnification Language

In *Flaherty & Collins, Inc. v. BBR-Vision I, L.P.*,[181] the court addressed the issue of whether the parties' indemnification agreement required the defendant to pay the plaintiff's attorney fees arising from the plaintiff's first-party action against the defendant.[182] The basis for the plaintiff's claim was the indemnification agreement in the parties' management agreement, which provided:

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169. 977 N.E.2d 958 (Ind. Ct. App. 2012).
170. *See generally id.*
171. *Id*. at 960.
172. *Id*.
173. *Id*.
174. *Id*. at 961.
175. *Id*. at 962.
176. *Id*. at 963.
177. *Id*. at 964.
178. *Id*. at 965.
179. *Id*. at 970.
180. *Id*.
181. 990 N.E.2d 958 (Ind. Ct. App.), *trans. denied*, 990 N.E.2d 958 (Ind. 2013).
182. *Id.* at 967.

> [Defendant] shall indemnify and defend [Plaintiff] against and hold [Plaintiff] harmless from any and all losses, costs, damages, liabilities and expenses, including*, without limitation*, loss or recapture of tax credits and reasonable [attorney] fees, *arising directly or indirectly out of (i) any intentional or material breach by [Defendant] of this Agreement* . . ., (ii) any negligence, willful misconduct or illegal acts of [Defendant], or any of its officers, partners, directors, agents, or employees, in connection with this Agreement . . . .[183]

The court initially noted that "indemnification clauses are strictly construed and the intent to indemnify must be stated in clear and unequivocal terms."[184] The general rule is that such clauses "cover 'the risk of harm sustained by *third persons* that might be caused by either the indemnitor or indemnitee.'"[185] However such indemnification is permitted where the plain language of the provision requires first-party indemnification.[186]

The plaintiff pointed to the following language in the indemnification clause as supporting its claim for attorney fees: "*without limitation . . .arising directly or indirectly out of (i) any intentional or material breach by [Defendant] of this Agreement*."[187] However, the court found that this language appeared "to be an attempt to ensure that all types of third-party damages be paid by [defendant] upon its breach of the management agreement."[188] The court did not find that the agreement stated "the intent to indemnify against first-party actions in clear and unequivocal terms."[189] The court noted that the agreement did not explicitly or implicitly refer to such actions, and thus, did "not create an exception to the general rule that an indemnity clause creates liability to pay only for third-party actions."[190]

D. Implied Contracts Between a University and Its Students

In *Chang v. Purdue University*,[191] the court evaluated, *inter alia*, whether a university's failure to precisely adhere to the implied contract that exists with its students is an actionable breach of contract.[192] Chang brought her suit after she was dismissed from the nursing program at Indiana University-Purdue University

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183. *Id.* (emphasis added).

184. *Id.*

185. *Id.* (citing L.H. Controls, Inc. v. Custom Conveyor, Inc., 974 N.E.2d 1031, 1046 (Ind. Ct. App. 2012)) (emphasis added).

186. *Id.* (citing Sequa Coatings Corp. v. N. Ind. Commuter Transp. Dist., 768 N.E.2d 1216, 1229 (Ind. Ct. App. 2003), *denying motion to certify* (2002).

187. *Id.* at 967-68.

188. *Id.* at 968.

189. *Id.*

190. *Id.*

191. 985 N.E.2d 35 (Ind. Ct. App. 2013), *trans. denied*, 985 N.E.2d 35 (Ind. 2014).

192. *See generally id.*

at Fort Wayne (IPFW) for unprofessional conduct.[193] Chang argued that IPFW violated her due process rights by not following all of the procedures outlined in the Purdue Code and the IPFW code.[194]

The court first noted that it is generally accepted that a contract is formed between students and a university by the "catalogues, bulletins, circulars, and regulations that are made available to its students."[195] However, courts use extreme restraint before applying rigid contract rules to the academic community.[196] "Absent a showing of bad faith on the part of the university or a professor, the court will not interfere."[197] "Bad faith in this context 'is not simply bad judgment or negligence[, r]ather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.'"[198] Thus, the court interpreted its sole function to be determining "whether the educational institution acted illegally, arbitrarily, capriciously, or in bad faith."[199]

Ultimately, the court found that Chang had been given notice of her hearing and the opportunity to present her side of the story, of which she availed herself.[200] Three times, Chang had the opportunity to appeal and present her version.[201] Three times her dismissal was upheld.[202] In light of these proceedings, the court held that there was insufficient evidence to establish that Chang's dismissal was "arbitrary, capricious, or made in bad faith."[203] Further, because Chang had a meaningful post-deprivation remedy, civil rights claims could not be brought against the individuals responsible for her dismissal.[204]

Additionally, the court held that Chang failed to meet the Indiana Torts Claims Act notice requirements.[205] The court noted that substantial compliance might be found in some instances where a claimant has failed to fully comply with the requirements.[206] But, in cases where the claimant has failed even to attempt to comply, substantial compliance cannot be found.[207]

Because the court held that Chang failed to comply with the notice requirements, and because the University violated neither the contract nor Chang's due process rights, the lower court's judgment was affirmed.[208]

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193. *Id*. at 44.
194. *Id*.
195. *Id*. at 46.
196. *Id*.
197. *Id*. at 47 (internal quotations and citations omitted).
198. *Id.* (internal quotations and citations omitted).
199. *Id*.
200. *Id*.
201. *Id*.
202. *Id*.
203. *Id.* at 48.
204. *Id*. at 49.
205. *Id.* at 54.
206. *Id*.
207. *Id*.
208. *Id*. at 55.

E. Exculpatory Clauses and Public Policy

In *Geller v. Kinney*,[209] the court evaluated whether an exculpatory clause in a contract was sufficient to shield a leasing agent from liability for breaching his or her statutory duties and obligations to the landlord.[210]

In *Geller*, the trial court found that the leasing agent breached his or her obligations by failing to disclose adverse material facts or risks regarding potential tenants.[211] However, the parties' agreement exempted the leasing agent from liability for "any error in judgment" and for "any good faith act or omission in its performance . . . of any of its duties or obligations."[212] Therefore, the trial court held that the exculpatory clause shielded the leasing agent from liability.[213]

The court of appeals agreed with the trial court's conclusion, but differed in its rationale: the exculpatory clause was sufficient as long as it was not contrary to public policy.[214] Whether or not a contract is unenforceable as a matter of public policy depends on consideration of five factors:

> (i) the nature of the subject matter of the contract; (ii) the strength of the public policy underlying the statute; (iii) the likelihood that refusal to enforce the bargain or term will further that policy; (iv) how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain; and (v) the parties' relative bargaining power and freedom to contract.[215]

The court held that the exculpatory clause was not unenforceable as a matter of public policy because though there is a strong public policy at play in the statute, it does not prohibit exculpatory clauses.[216] Further, the exculpatory clause at issue here was limited to "error[s] in judgment" and "'good faith' breaches."[217] Thus, the court held that the leasing agent was entitled to judgment.[218]

F. Sufficiency of Consideration

In *Pistalo v. Progressive Casualty Insurance Co.*,[219] the court evaluated whether the waiver of a right to collect an uncollectable judgment constitutes sufficient consideration for an assignment of rights.[220] Slavojka Pistalo had been

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209. Geller v. Kinney, 980 N.E.2d 390 (Ind. Ct. App. 2012).
210. *See generally id.*
211. *Id*. at 396.
212. *Id*. at 395.
213. *Id*. at 396.
214. *Id*. at 397.
215. *Id*. at 397-98.
216. *Id*. at 398.
217. *Id.*
218. *Id*.
219. 983 N.E.2d 152 (Ind. Ct. App. 2012), *trans. denied*, 986, N.E.2d 820 (Ind. 2013).
220. *See generally id.*

previously injured in an automobile accident that was the fault of Iris Wilks.[221] After Wilks' death, a trial court found that she was liable for Pistalo's injuries.[222] The damages added up to more than $300,000, however Wilks' insurance policy with Progressive had a policy limit of $100,000.[223]

Pistalo believed that Progressive had failed to negotiate in good faith prior to trial.[224] Based on this belief, she sought and received an assignment of the Wilks Estate's rights against Progressive in exchange for agreeing to forgo executing her judgment against the estate.[225] Progressive argued that the latter was insufficient consideration because the estate had no assets against which the judgment could have been pursued.[226] However, the court held that a right to execute a judgment constitutes sufficient consideration regardless of its collectability.[227] Thus, the assignment was supported by valid consideration and Pistalo could pursue the claim against Progressive.[228]

G. Mitigation of Damages

Returning to *Geller v. Kinney*,[229] the court also evaluated whether a landlord could recover the full value of a breached lease despite having sold the property after the termination of the lease but before the expiration of the lease term.[230] In awarding damages to the Gellers for the breach of the lease, the trial court declined to grant damages beyond the time at which the Gellers sold the property.[231] Thus, they were able to recover only the value of the lease for the period in which they owned the property rather than the full value of the breached lease.[232] Before the court of appeals, the Gellers argued that under the lease agreement they were not required to mitigate their damages and they were entitled to collect the full value of the lease regardless of whether or not they mitigated their damages.[233]

The court pointed out that the Gellers' arguments ignored the fact that the duty to mitigate is "a common law duty independent of the contract terms."[234] The court held that unless expressly disclaimed, the applicable law in force at the

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221. *Id*. at 155.
222. *Id*.
223. *Id*.
224. *Id.*
225. *Id*. at 160.
226. *Id*.
227. *Id*.
228. *Id.*
229. 980 N.E.2d 390, 398 (Ind. Ct. App. 2012).
230. *See generally id.*
231. *Id*. at 395.
232. *Id*.
233. *Id*. at 399.
234. *Id*.

time of the agreement is impliedly made a part of that agreement.[235] Because the agreement did not expressly negate the common law duty to mitigate, the Gellers were not relieved of the duty, and "the breaching party [was therefore] entitled to set off the amount of the damages mitigated.[236] Therefore, the trial court's judgment was affirmed.[237]

H. Liquidated Damages

In *Weinreb v. Fannie Mae*,[238] the court addressed the effect of non-recourse carve-out provisions and prepayment premiums for the first time in Indiana.[239] Non-recourse carve-out provisions "transform what is otherwise a non-recourse loan into a full recourse loan, 'enabling the creditor to look beyond simply the mortgaged property for repayment of the loan.'"[240] Prepayment premiums attempt to account for the lost interest payments that a lender suffers when a loan is prepaid.[241]

In the instant case, Weinreb purchased an investment property in Indianapolis via his LLC, and he financed the purchase with a commercial loan through Fannie Mae.[242] Ultimately, Fannie Mae declared the note to be in default due to the failure to release mechanic's liens and make monthly installments.[243] In the mortgage, the non-recourse carve-out provisions gave Fannie Mae the ability to accelerate the loan in the event of a default by Weinreb, and the prepayment premiums provision purported to be "an estimate 'of the damages [Fannie Mae] will incur because of a prepayment.'"[244]

At the trial court, Fannie Mae was awarded summary judgment in the amount of nearly $8 million, including the prepayment premium.[245] The court of appeals first held that the non-recourse carve-out provisions were not liquidated damages provisions because they only defined the situations in which full repayment of "all of the Indebtedness" became due.[246] Thus, because they only permit the lender to recover the damages that have actually been sustained and define the conditions in which personal liability will result, they are neither penalty nor liquidated-damages provision.[247]

The court further held that the prepayment premium constituted a liquidated

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235. *Id*.
236. *Id*.
237. *Id*. at 400.
238. 993 N.E.2d 223 (Ind. Ct. App.), *trans. denied*, 998 N.E.2d 213 (Ind. 2013).
239. *See generally id.*
240. *Id*. at 233 (internal quotation omitted).
241. *Id*.
242. *Id*. at 226.
243. *Id*.
244. *Id*. at 228.
245. *Id*.
246. *Id.* at 233.
247. *Id*.

damages provision because it was a forecast of damages that would result from a prepayment rather than a penalty intended to secure performance.[248] Though the premium amounted to twenty-five percent of the outstanding principal, the court held that this was not sufficiently disproportionate to render it unenforceable.[249] While an enforcing party must demonstrate proportionality, the relevant comparison is between the prepayment premium and "the projected loss at the time of contracting."[250] Because the prepayment of the loan occurred so early in the loan period, the lender was deprived of a substantial amount of interest, and therefore the prepayment premium was not grossly disproportionate to the loss suffered.[251]

VII. EQUITABLE REMEDIES

In *Kohl's Indiana, L.P. v. Owens*,[252] the court held that Kohl's could not recover against a county Plan Commission on the basis of contribution where that commission had not accepted any common duty.[253] Nor could they recover against the Board of Commissioners for the cost of completing a building project under a theory of unjust enrichment where the agreement between the parties was controlled by an express contract.[254]

In 2004, the Plan Commission approved an application for the construction of a new Kohl's store.[255] In 2005, the Board of Commissioners entered into an agreement with Kohl's in which Kohl's agreed to improve and reconstruct a road.[256] After the original developer, Owens, failed to complete the project, Kohl's completed it.[257]

After completing the project, Kohl's brought suit against the Plan Commission and the Board of Commissioners.[258] Against both defendants, Kohl's brought claims under the doctrine of contribution, and claims under the doctrine of implied contract or unjust enrichment (quantum meruit).[259] After the trial court entered summary judgment for the defendants, Kohl's appealed.

A. Contribution

The court held that the Plan Commission had not accepted a common obligation to complete the project simply because they had required, and been the

248. *Id*. at 234.
249. *Id*.
250. *Id*,
251. *Id*.
252. 979 N.E.2d 159 (Ind. Ct. App. 2012).
253. *Id.* at 166.
254. *Id.* at 167-68.
255. *Id*. at 162.
256. *Id.*
257. *Id*.
258. *Id*. at 163.
259. *Id*.

beneficiary of, letters of credit taken out by the developer who failed to complete the project.[260] Because the Plan Commission did not have a common duty with Kohl's, they could not be liable to Kohl's for contribution.[261]

Further, the court held that because there was an agreement between Kohl's and the Board of Commissioners, which stated that Kohl's had the obligation of reconstructing and improving the road, the doctrine of contribution could not be used to find an obligation on the part of the Board of Commissioners.[262]

B. Unjust Enrichment

Kohl's could not sustain an argument for unjust enrichment against the Plan Commission because there was no evidence of a benefit conferred upon the Plan Commission with their express or implied consent.[263] "When the rights of the parties are controlled by an express contract, recovery cannot be based on a theory implied in law."[264] Thus, because the relationship between the Board of Commissioners and Kohl's was controlled by an express contract, this recovery was not available to Kohls.[265]

VIII. DEFENSES

A. Good Faith Purchaser

In *Brinkley v. Haluska*,[266] the court evaluated whether a purchaser of a car on eBay was a good faith purchaser for value when there was a lawsuit regarding the vehicle in progress at the time of the sale.[267] There, the purchaser, Gindelberger, purchased the disputed vehicle on eBay from Haluska, who was not the rightful owner of the vehicle.[268] Because a defrauding buyer has voidable but not void title, the only question was whether Gindelberger was a good faith purchaser for value and could therefore obtain good title.[269]

The court defined good faith as "'honesty in fact and the observance of reasonable commercial standards of fair dealing.'"[270] The court acknowledged that, in the real estate context, a buyer is presumed to have notice of all properly recorded instruments in the chain of title and lis pendens notices give a buyer

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260. *Id*. at 164.

261. *Id*.

262. *Id*. at 165.

263. *Id*. at 168.

264. *Id*.

265. *Id*.

266. 982 N.E.2d 1019 (Ind. Ct. App. 2012), *reh'g denied* (Feb. 12, 2013), *trans. denied,* 987 N.E.2d 522 (Ind. 2013).

267. *Id.* at 1023.

268. *Id*. at 1021.

269. *Id*. at 1022.

270. *Id*. (quoting IND. CODE § 26-1-1-201 (2007)).

notice of pending litigation.[271] In the absence of case law however, the court declined to recognize any presumption of notice for vehicles and pointed out that there is no such thing as a lis pendens notice for vehicles.[272] Further, the court held that the buyer had no obligation to "get to know" the seller.[273] Thus, the trial court properly granted summary judgment to Gindelberger on the grounds that he was a good faith purchaser for value and the court of appeals affirmed.[274]

B. Caveat Emptor

In *Johnson v. Wysocki*,[275] the Indiana Supreme Court evaluated whether Indiana's Residential Real Estate Sales Disclosure Act abrogated the common law doctrine of caveat emptor for real estate purchases where a seller knowingly makes a fraudulent misrepresentation in statutorily required disclosures.[276]

The sellers, Mr. and Mrs. Johnson, sold their property to the Wysockis, and to do so, executed a Disclosure form stating that there were no building code violations, permit violations, foundational or structural problems, moisture problems, or leaks in the roof.[277] The buyers then ordered an inspection, which identified no problems, and the sale went through.[278] After taking possession, the buyers began to notice problems.[279] Among other things, the roof leaked, the pool was improperly wired, and the patio's structure was unsound.[280]

After a bench trial, the trial court awarded the buyers damages for the cost of repairing all of the problems.[281] However, the court of appeals reversed the judgment on the grounds that the buyers had not shown that the sellers had actual knowledge of the defects.[282]

The court cited back to the 19th century for the proposition that the law of Indiana has long been "the purchaser has no right to rely upon the representations of a 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."[283] Further, the Disclosure Act explicitly states that the disclosure forms do not create a warranty by the owner, that the disclosure forms do not substitute for inspections, and that the owner is not liable for errors or omissions

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271. *Id*. at 1023.
272. *Id*.
273. *Id*.
274. *Id*. at 1026.
275. 990 N.E.2d 456 (Ind. 2013), *trans. granted* 11 N.E.3d 923 (Ind. 2014).
276. *Id.* at 459.
277. *Id*.
278. *Id*.
279. *Id*.
280. *Id*. at 459-60.
281. *Id*. at 460.
282. *Id*.
283. *Id*. at 461 (quoting Cagney v. Cuson, 77 Ind. 494, 497 (1881)).

outside of his actual knowledge or based on the knowledge of another.[284]

Nonetheless, the court held that the Act clearly contemplated seller liability for knowing errors or omissions in the disclosures.[285] Rather than create new liability for sellers, this approach is in keeping with the common law, which already held that sellers could be liable for fraudulent misrepresentations when a buyer makes an inquiry.[286] The Act merely "relieved the buyer of needing to initiate a specific inquiry in order to get honest disclosure about significant features of a purchase."[287] Thus, the court held that "the seller may be liable for fraudulent misrepresentations made on the Disclosure Form when he or she had actual knowledge that the representation was false at the time he or she completed the form."[288] The court then remanded the case to the trial court for consideration of whether the sellers had actual knowledge.[289]

IX. TRIAL AND APPELLATE PROCEDURE

A. Res Judicata and Collateral Estoppel

Also in *Weinreb*,[290] the court of appeals evaluated whether the doctrines of *res judicata* and collateral estoppel preclude a litigant from contesting his own liability when judgment has been rendered in a prior claim involving the same claim against an LLC of which the litigant is one of six or seven members.[291] There, Weinreb had been erroneously named in the initial complaint, but removed from the case by the trial court.[292] At that time, the trial court stated that claims against Weinreb could be pursued at a later date.[293] However, Fannie Mae attempted to prevent Weinreb from contesting his own liability for the foreclosure based on the note and his guaranty.[294]

The court of appeals stated that four factors must be present in order to find claim preclusion:

> (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 parties to the present suit or their

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284. *Id*. at 461-62.

285. *Id*. at 463.

286. *Id*. at 465.

287. *Id*.

288. *Id*. at 466.

289. *Id*. at 467.

290. *See generally* Weinreb v. Fannie Mae, 993 N.E.2d 223 (Ind. Ct. App.), *trans. denied*, 998 N.E.2d 223 (Ind. 2013).

291. *See generally id.*

292. *Id*. at 228.

293. *Id*.

294. *Id*.

privies.[295]

Though the court acknowledged that claim preclusion might sometimes apply against an owner of a closely held corporation based on a prior action against the corporation, the court noted that Weinreb did not sign the note in question and did not negotiate the financing.[296] Thus there was not sufficient evidence to find that Weinreb was a party to the prior proceeding.[297] Further, because Weinreb was explicitly excluded from the prior action, the court concluded that Fannie Mae had not established privity either.[298]

Finally and for the same reasons, the court held that claim preclusion also did not apply against Weinreb because he did not have a full and fair opportunity to litigate the enforceability of the note or his guaranty.[299]

B. Venue Selection

In *City of Carmel ex rel. Redevelopment Commission v. Crider & Crider, Inc.*,[300] the court of appeals addressed the applicability of a venue selection clause to a case brought by a third-party with no contractual relationship to the party moving for transfer.[301] There, the appellant, the City of Carmel had hired a contractor to perform limestone and concrete work, and the city and the contractor signed a contract that designated Hamilton County as the preferred venue for litigation.[302] The contractor in turn hired a subcontractor, but without reducing the agreement to writing.[303] Ultimately, the subcontractor sued both the contractor and the City, and the contractor filed a cross-claim against the City.[304]

The court acknowledged that a third-party is ordinarily not bound by agreements that they are not party to.[305] However, in the instant case, because the contractor brought a cross-claim against the City, because Hamilton County was the appropriate venue for any litigation between the contractor and the city, and because the original complaint and the cross-claim were "inextricably intertwined" and needed to be decided together, the trial court abused its discretion by failing to transfer the matter to Hamilton County.[306]

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295. *Id*. at 229.
296. *Id*.
297. *Id*. at 230.
298. *Id*.
299. *Id*. at 231.
300. 988 N.E.2d 808 (Ind. Ct. App.), *trans. denied*, 993 N.E.2d 1150 (Ind. 2013).
301. *See generally id.*
302. *Id*. at 809.
303. *Id*.
304. *Id*.
305. *Id*. at 810-11.
306. *Id*. at 811.

C. Relief from Agreed Judgment

In *Wagler v. West Boggs Sewer District, Inc.*,[307] the court of appeals addressed whether a party was entitled to relief from an agreed judgment under Indiana Rules of Trial Procedure 60(B) on the grounds that the agreed judgment violated their religious liberty and multiple contractual doctrines.[308]

The Wagler family belongs to an Old Order Amish community in Loogootee, Indiana, and as such, holds themselves apart from society.[309] The West Boggs Sewer District is a not-for-profit utility, which sought, pursuant to statute, to require the Waglers to connect to the sewer system. Ultimately, the Waglers refused to do so and West Boggs brought suit.[310] Eventually, the Waglers' attorney reached an agreement with West Boggs, and the court issued an agreed entry and judgment.[311]

Unfortunately, the Waglers failed to comply with the terms of the agreement (i.e., that they connect to the sewer system), and West Boggs again sought relief from the court.[312] At that time, the Waglers, with new counsel, filed motions to set aside the judgment pursuant to Indiana Rules of Trial Procedure 60(B)(8), which the trial court denied.[313]

The court of appeals began by noting that the Waglers' briefing was far below the court's standards and failed in many areas to present cogent arguments.[314] Nonetheless, the court undertook to evaluate the merits of their arguments.[315]

The court held that it is a well-known premise that a trial court may not materially modify an agreed judgment after it has been entered.[316] Despite this, the court evaluated whether exceptional circumstances might exist in the instant case that would justify exceptional relief.[317] The court held that arguments of duress, unconscionability, and impossibility were all without merit because the Waglers agreed to the judgments while represented by counsel and they did not articulate a basis upon which their religious beliefs could render the judgment unconscionable or impossible.[318] Further, the Waglers could not sustain an argument that they did not receive consideration for their agreement because they did in fact receive a benefit: West Boggs agreed to maintain parts of the system

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307. 980 N.E.2d 363 (Ind. Ct. App. 2013).
308. IND. R. OF TRIAL P. 60(B) (2014).
309. *Wagle*, 980 N.E.2d at 368.
310. *Id*. at 367-68.
311. *Id*. at 368.
312. *Id*.
313. *Id*.
314. *Id*. at 375.
315. *Id.*
316. *Id*. at 376.
317. *Id*. at 377.
318. *Id*. at 378-79.

and the Waglers avoided having to go to court.[319] In light of the foregoing reasoning, the court held that the Waglers were not entitled to relief under Indiana Rules of Trial Procedure 60(B)(8) and affirmed the trial court's holding.[320]

X. ABANDONMENT OF PARTNERSHIP AGREEMENTS

In *Estate of Kappel v. Kappel*,[321] the court found that two brothers who had entered into a partnership agreement abandoned their 1973 partnership agreement.[322] In that case, Nathaniel and William were each fifty percent owners of Kappel Brothers.[323] In the partnership agreement, the brothers agreed not to sell their interest to any third party, and, upon the death of a partner, the surviving partner "shall purchase the deceased party's entire interest in the partnership business"; the purchase price was to be determined by a stipulated value.[324] They agreed that "[w]ithin 30 days following the end of each fiscal year of the partnership, the parties shall stipulate the value of said partnership business, and shall endorse such value on Schedule A attached hereto."[325] In the event the brothers failed to stipulate to a value, the partnership agreement provided a default procedure for determining the value.[326] Each party also agreed to "apply the proceeds of the insurance policy owned by him to purchase the partnership interest of the deceased party."[327]

In 1993, Nathaniel executed his Last Will and Testament and stated his intention to leave his interest in the partnership, and the proceeds of his life insurance policy, to his children.[328] In 1996, William and Nathaniel purchased life insurance policies on the other's life in the amount of $750 thousand.[329] Nathaniel died in 2004.[330] This suit ensued when Nathaniel's estate and William disagreed as to who was entitled to Nathaniel's life insurance proceeds.[331] The policy was paid to William in accordance with the terms of that policy contract, but the estate claimed that William was required to tender that amount to Nathaniel's estate under the terms of the 1973 partnership agreement.[332]

The probate court found that "[a]s of 2004, the brothers had abandoned the original partnership agreement, having conducted their business in a manner

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319. *Id*. at 379.
320. *Id*. at 385.
321. 979 N.E.2d 642 (Ind. Ct. App. 2012).
322. *Id.* at 653.
323. *Id.* at 646.
324. *Id.*
325. *Id.* at 647.
326. *Id.*
327. *Id.*
328. *Id.* at 648.
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.* at 652.

inconsistent with maintaining the agreement, for example, bringing in a new partner and failing to observe the formalities (valuation and listing of insurance policies) contemplated by the agreement."[333] Thus, the probate court held that the $750,000 proceeds from the life insurance policy were not property of the estate.[334] The appellate court affirmed.[335]

The court explained that "[t]he abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted."[336] The court continued that "[a]bandonment may be inferred from the conduct of the parties, and a contract will be treated as abandoned when one party acts inconsistently with the existence of the contract, and the other party acquiesces."[337] The court of appeals held that, because the brothers did not create and maintain a schedule to list insurance policies under the 1973 agreement, did not annually update the partnership valuation, and welcomed a third party in the partnership, they had abandoned the partnership agreement.[338] The court found it irrelevant that there may have been evidence showing that the intent of Nathaniel and William in purchasing the 1996 life insurance policies was for the purpose of complying with the buy-sell provisions of the 1973 partnership agreement; the probate court was entitled to weigh the conflicting evidence in finding an intent to abandon.[339]

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333. *Id.* at 650.

334. Id.

335. *Id.* at 652.

336. *Id.* (internal quotation marks omitted) (quoting Baker v. Estate of Seat, 611 N.E.2d 149, 152 (Ind. Ct. App. 1993)).

337. *Id.*

338. *Id.* at 653.

339. *Id.*

INDIANA CONSTITUTIONAL DEVELOPMENTS: SMALL STEPS

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This survey period is the first in the last four years that saw no change in the composition of the Indiana Supreme Court. The development of Indiana constitutional jurisprudence continues as they work together to both address new issues under the Indiana Constitution and incrementally advance legal rules and analysis in more-developed areas. During the survey period, the justices applied justiciability doctrines to avoid ruling on a contentious dispute within the legislative branch, and they continued their line of rulings providing few if any enforceable rights under the Indiana Constitution's education article.[1] In criminal law, in contrast, the court unanimously shifted a burden of proof that had been in place for more than 150 years.[2] The court also continued incremental development of unique Indiana constitutional rules addressing search and seizure, double jeopardy, and *ex post facto* legislation.[3]

I. SEPARATION OF POWERS—ARTICLE 3

The Indiana Supreme Court declined to adjudicate most of a long-running dispute created when the Indiana House of Representatives imposed fines on members of the minority party who did not attend legislative sessions to purposely deprive the body of a quorum.[4] The House then collected the fines by deducting them from minority members' legislative salaries.[5] The focus of the case, called *Berry v. Crawford*, was not on the majority's authority to impose the fines, but rather on its ability to collect by ordering the State Auditor to withhold funds from the minority legislators' paychecks.[6] The minority argued that this approach violated the Indiana Constitution and the Wage Payment Statute, Indiana Code chapter 22-2-5.[7] The trial court ruled that it lacked authority to

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1. *See infra* Parts I and II.
2. *See infra* Part III.
3. *See infra* Parts IX, XI, XIII.
4. Berry v. Crawford, 990 N.E.2d 410, 413 (Ind. 2013).
5. *Id*. The Indiana Supreme Court transferred jurisdiction from the court of appeals using Appellate Rule 56(A).
6. *Id*. at 418-21.
7. *Id*.

enforce the constitutional provisions because to do so would interfere with the internal affairs of the legislative branch, but it ruled that the directive to withhold pay violated the Wage Payment Statute.[8]

The Indiana Supreme Court majority, in a decision by the Chief Justice, agreed that the courts could not address any issues involving the right of a legislative body to compel the attendance of its members or to determine fines because doing so would "amount to the type of 'constitutionally impermissible judicial interference with the internal operations of the legislative branch' which we have rejected in the past."[9] The court repeated that Indiana respects strict separation of powers.[10] Article 4, section 10 gives the legislative branch authority to determine its own rules, and "the constitutional grant of jurisdiction to the legislature over its internal proceedings and the discipline of its members is exclusive."[11]

The court rejected the minority's argument of a violation of article 4, section 26—"[a]ny member of either House shall have the right to protest, and to have his protest, with his reasons for dissent, entered on the journal."[12] The court interpreted this provision to allow dissent, including by the tactic of quorum-breaking, but not to preclude the legislative branch from punishing that conduct.[13] It also rejected the argument based on article 4, section 29, which states that legislators "shall receive for their services" compensation in an amount fixed by law.[14] The minority members argued that this provision gives them a property right in their salaries that invokes the takings clause; the court concluded that the collection of fines "did not impinge upon legislative compensation for services, but rather were predicated on the absent legislators' *lack* of services."[15] The court concluded that neither of these sections diluted the legislature's power to make its own rules and compel its members' attendance, and it ruled that neither provision precludes the legislature from decreasing its own members' salaries while they are in office.[16]

The court also rejected the argument based on the Wage Payment Statute, reasoning that the House of Representatives had the constitutional power to compel attendance and punish members who did not attend, and the Wage Payment Statute could not limit that constitutional authority.[17] "The purported *statutory* limitation cannot serve as a means for the courts to consider challenges to legislative action to compel attendance and punish disorderly members when there exists no *constitutional* limitation on the House's express constitutional

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8. *Id*. at 413-14.
9. *Id*. at 414.
10. *Id*. at 415.
11. *Id*. at 418.
12. *Id*. at 419.
13. *Id.*
14. *Id*.
15. *Id*. (emphasis in original).
16. *Id*. at 419-20.
17. *Id*. at 420.

power to take such action."[18] The court directed the trial court to enter summary judgment in favor of the defendants on all issues in the case.[19]

Justice Rucker dissented, joined in part by Justice Rush.[20] He expressed his understanding that the Court's decision not to consider the minority's claim was prudential rather than jurisdictional and stated that the Court should rule unless barred from doing so by a specific constitutional provision.[21] In this case, he said, the justices should have examined and enforced article 4, section 29, protecting legislative pay, because the issue is justiciable and conveys an enforceable right.[22] Citing article 4, sections 1 and 29, he would have ruled that the minority's pay could not be decreased in the manner used in this case because a pay decrease must be accomplished by statute.[23] He also would have ruled that the majority's enforcement of the fines violated the Wage Payment Statute. Justice Rush joined the portions of this dissent applying article 4, sections 1 and 29, and the Wage Payment Statute, but not the portion criticizing the majority's justiciability discussion.[24]

II. RELIGION CLAUSES—ARTICLE 1, SECTIONS 4 AND 6

The Indiana Supreme Court affirmed the constitutionality of Indiana's broad school voucher program in *Meredith v. Pence*, a unanimous opinion authored by the Chief Justice.[25] This program, called the Choice Scholarship Program, offers vouchers that students who meet certain family income guidelines may use to attend private schools.[26] The vouchers could be used only at accredited private schools that administer the statewide graduation qualification test.[27] *Meredith* was a facial challenge, meaning the plaintiffs assumed the burden to show that there is no set of circumstances in which the statute could be applied constitutionally.[28]

The court rejected the argument that the program violates article 1, section 1, which requires the General Assembly to provide by law for a uniform system

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18. *Id*. (emphasis in original).

19. *Id*. at 422.

20. The voting in this case did not break down entirely on partisan lines, that is, the lines defined by the party of the governor appointing the justice. Justice Rucker is the only member of the Indiana Supreme Court appointed by a Democratic governor, and the plaintiffs in this case were Democratic minority members of the House of Representatives. His dissent was joined in part, however, by Justice Rush, appointed by a Republican governor.

21. *Id*. at 422-23.

22. *Id*. at 424.

23. *Id*. at 426-28.

24. *Id*. at 422.

25. 984 N.E.2d 1213 (Ind. 2013).

26. *Id*. at 1217.

27. *Id*. at 1219.

28. *Id*. at 1217-18.

of common schools.[29] The court previously held that this section gives the legislature broad discretion in creating a uniform common school system, and the court rejected the argument that the voucher program violated this section.[30] Plaintiffs argued that up to sixty percent of Indiana children could qualify for the program, meaning that a majority of children could receive state funds to pay for education outside the uniform system of common schools, but the court ruled that this possibility would not support a facial challenge to the law.[31] "The school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren in accordance with the dictates of the Education Clause."[32] The court distinguished authority invalidating voucher programs in other states because their state constitutions contained different language.[33]

The court also rejected the argument that the program violated article 1, section 4, which states that "no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent,"[34] invoking this clause because the vast majority of vouchers are used at religious schools.[35] The court ruled that this section of the constitution is directed at preventing the compelled payment of taxes to be used for religious purposes.[36] In other words, it is directed not at the expenditure of state funds (which is the subject of article 1, section 6), but at the compulsion of taxpayers.[37] The court therefore ruled that article 1, section 4, does not restrict the voucher program.[38]

Finally, the court rejected the argument about government spending, which contended that the voucher program violates article 1, section 6—"No money shall be drawn from the treasury, for the benefit of any religious or theological institution."[39] First, clarifying language in *Embry v. O'Bannon*, the court concluded that the test to be applied under this clause is not whether a religious institution substantially benefits from a public expenditure, but instead whether the expenditure directly benefits the religious institution.[40] The court found that the voucher program passes this test.[41] The purpose of the program, it held, is to benefit children and their families.[42] They are the direct beneficiaries.[43] The

29. *Id*. at 1220.
30. *Id*. at 1221-22 (citing Bonner v. Daniels, 907 N.E.2d 516, 520 (Ind. 2009)).
31. *Id*. at 1222-23.
32. *Id*. at 1223.
33. *Id*. at 1223-24.
34. *Id.* at 1225.
35. *Id*. at 1225-26.
36. *Id*. at 1226.
37. *Id*.
38. *Id*.
39. *Id*. at 1227.
40. *Id*. at 1227-28 (citing Embry v. O'Bannon, 798 N.E.2d 157 (Ind. 2003)).
41. *Id*. at 1228-29.
42. *Id*. at 1229.
43. *Id*.

religious schools are mere indirect or ancillary beneficiaries.[44] This analysis is bolstered by the fact that the State does not choose which schools receive money through the vouchers; that decision is made by the families receiving the vouchers.[45]

The court went on to conclude that religious schools are not contained in the definition of "religious or theological institution" in article 1, section 6.[46] This analysis may be viewed as dictum. Once the court decided the case on the basis that the schools receipt of voucher funds does not violate section 6 because they are not direct beneficiaries, the additional analysis described in this paragraph is not necessary to the holding in the case. This portion of the opinion relied heavily upon history, as dictated by the principle that the Indiana Constitution is construed to effectuate the intent of the framers and ratifiers.[47] The court concluded that most children who were receiving education at the time of the 1850 constitutional convention attended religious or private schools and that "[i]t was generally accepted that the teaching of religious subject matter was an essential component of . . . general education."[48] The court concluded, "the framers did not manifest an intent to exclude religious teaching from such publicly financed schools," leading to the conclusion that section 6 does not "apply to preclude government expenditures for functions, programs, and institutions providing primary and secondary education."[49]

III. BAIL—ARTICLE 1, SECTION 17

The Indiana Supreme Court put a new gloss on the bail clause in *Fry v. State*, a murder case.[50] The clause provides that "[o]ffenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong."[51] In *Fry*, the supreme court changed a 150-year-old practice by switching the burden of proof to the State on bail in murder cases, requiring the State to show that "proof is evident, or the presumption strong," to preclude bail.[52]

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44. *Id*.

45. *Id*.

46. *Id*. at 1230.

47. *Id.* at 1229-30.

48. *Id*. at 1230.

49. *Id*. The First Amendment precludes some such expenditures. Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985). It does not preclude school vouchers, at least in some settings. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

50. 990 N.E.2d 429 (Ind. 2013).

51. *Id*. at 453.

52. *Id*. at 433. Although the constitutional provision refers to murder and treason, this description focuses only on murder because treason is almost always prosecuted federally. There is no reason to assume that any different burden-of-proof analysis would apply in treason cases than is discussed in *Fry* for murder.

Fry was arrested and charged with murder.[53] He sought bail, claiming that the evidence against him was circumstantial, making the presumption not strong.[54] He also sought a declaration from the trial court that the statute placing the burden on the defendant to prove bailability in murder cases was contrary to article 1, section 17.[55] The trial court required the State to present proof that proof was evident or the presumption strong, and he denied bail to Fry after hearing that evidence.[56] Fry's appeal went directly to the Indiana Supreme Court because the trial court's order denying bail found the statute, Indiana Code section 35-33-8-2(b) unconstitutional on its face.[57]

In its discussion, the supreme court described the historic importance of bail in the American system as a bulwark against unconstitutional pre-trial punishment; the court said bail allowed a defendant to participate in preparing his defense and should be used only to ensure a defendant's availability for trial.[58] The court concluded, however, that it is proper to deny bail in a category of the most serious cases—where murder is charged—if certain prerequisites are met.[59]

The court also explained that since at least 1866, Indiana courts have placed the burden on murder defendants to show that their offenses are bailable because the proof is not evident or the presumption not strong, requiring the defendant to prove that he should be admitted to bail.[60] That presumption was enacted in Indiana Code section 35-33-8-2 in 1981.[61] This allocation of the burden, the court said, arose almost entirely from case law before the statute was enacted.[62]

The court discussed the history behind this allocation of the burden, concluding that it developed from a time when most murder charges arose from grand jury indictments, on which judges often placed great weight.[63] The court also determined that, when the burden was first allocated, defendants had to seek bail in habeas corpus proceedings in which they had the burden to file the petition to seek pre-trial release and, generally, to prove that they should be released from custody on bail before trial.[64]

The court also looked at other states, finding similar language about the proof and the presumption in the state constitutions of thirty-nine other states.[65] The court determined that these states allocated the burden of proof in a variety of

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53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*. at 433-34.
57. *Id*. at 434 (citing IND. APP. R. 4(A)(1)(b)).
58. *Id*.
59. *Id*. at 434-35.
60. *Id*. at 435 (citing *Ex Parte* Heffren, 27 Ind. 87, 88 (1866)).
61. *Id*.
62. *Id*.
63. *Id*. at 436.
64. *Id*. at 436-37.
65. *Id*. at 438 n.10.

ways.[66] The Indiana court drew certain themes from other states' case law on burden allocation. First, the cases highlighted the presumption of innocence and its link to bail.[67] Second, other states placed weight upon a defendant's likelihood of appearing at trial.[68]

The court's conclusion—that the burden should be on the State—was drawn from these and other factors. The court stated that the language regarding murder is an exception to the basic constitutional right to bail and, because it is an exception, the burden more properly falls on the State to show that the exception should apply.[69] The court also noted that the State is more likely to have relevant facts and evidence in its possession, especially because, by definition, the defendant has been incarcerated and has had no opportunity to assemble facts or evidence.[70] As Justice David's opinion states, if the burden is placed on the defendant, "we are in effect requiring him, while hampered by incarceration, to disprove the State's case *pre*-trial in order to earn the right to be unhampered by incarceration as he prepares to disprove the State's case *at* trial."[71] The court also noted that grand juries are used in murder cases far less often than they were in the 1860s, when this rule arose, eliminating one of the reasons the burden was placed on the defendant in the first place.[72]

After deciding that the burden must be shifted to the State, the court analyzed exactly what is meant by the "proof [being] evident" or the "presumption strong."[73] As to this portion of the analysis as well, the court determined that other states with similar constitutional language applied a variety of standards.[74] The court determined that the standard must "lie somewhere in the middle" between reasonable suspicion, which justifies arrest, and beyond a reasonable doubt, which equals conviction.[75] The court ultimately adopted this standard from Arizona: "The State's burden is met if all of the evidence, fully considered by the court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed" the charged offense.[76] After reviewing the record, the court then ruled that the trial court properly denied bail to Fry under this standard.[77]

Justice David wrote only for himself, although two other justices agreed with the decision to shift the burden of proof and three other justices agreed to affirm

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66. *Id*. at 439-40.

67. *Id*. at 440.

68. *Id*.

69. *Id*. at 441.

70. *Id*.

71. *Id*. at 442. (emphasis in original)

72. *Id*. at 442-43.

73. *Id.* at 444.

74. *Id*. at 446-48 (citing examples from New Jersey, Oregon, Rhode Island, Florida, Arizona, Texas, and Utah).

75. *Id*. at 445.

76. *Id*. at 447 (quoting Simpson v. Owens, 85 P.3d 478, 491 (Ariz. Ct. App. 2004)).

77. *Id.* at 450.

the trial court's order denying bail.[78] Concurring, the Chief Justice, joined by Justice Rush, focused on the language of the constitution, concluding that the constitutional language itself placed the burden on the State to prove the existence of a prerequisite to denying bail.[79] Justice Massa dissented from the new constitutional rule but concurred in the decision affirming the order denying bail.[80] He discussed the remarks of various delegates to the 1850 constitutional convention and cited appellate decisions issued shortly after the constitution was adopted, concluding that the framers intended the burden to be on the defendant in a murder case to prove that he satisfied a precondition for bail.[81] Justice Rucker also dissented, stating that because the trial court placed the burden on the State and the State met its burden (as agreed by the trial court and the supreme court), as a matter of stare decisis and judicial restraint this was not a proper case in which to analyze where the burden of proof should lie.[82]

IV. CONTRACT CLAUSE—ARTICLE 1, SECTION 25

The Indiana Supreme Court found a statute unconstitutional as applied in *Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc.* because the law unconstitutionally impaired a contract.[83] One scouting organization deeded a campground to another scouting organization on the condition that the campground revert to the grantor if the property was not used for scouting for forty-nine years.[84] When the donee decided to sell the property after forty-four years, the donor sought return of the property.[85] The donee then requested relief under an Indiana statute that limits reversionary clauses to a maximum of thirty years.[86]

The donor maintained that the statute was constitutional because the Indiana Constitution allows retroactive impairment of possibilities of reverter—which are not vested rights.[87] The court disagreed. The court found that the contract was for the continued use of the property for scouting purposes for forty-nine years with the possibility of reverter as simply one enforcement mechanism.[88] The donor's "bundle of rights" went beyond just the reverter.[89] The charitable use requirement, along with the reverter, created a valid condition subsequent. And

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78. *See id.* at 451-56 (discussing, in Justice David's separate opinion, the decision to shift the burden of proof and deny bail).

79. *Id.* at 451-52.

80. *Id.* at 452-54.

81. *Id*.

82. *Id*. at 454-56.

83. 988 N.E.2d 250 (Ind. 2013).

84. *Id.* at 252.

85. *Id.* at 253.

86. *Id.* at 252.

87. *Id*. at 253-54.

88. *Id*. at 255-256.

89. *Id.* at 256.

the Contract Clause prohibits statutory impairments of such contractual provisions.[90]

The court also considered whether the state could limit the restriction under the "general" police power. The General Assembly has authority to limit parties' prospective ability to contract, but the constitution allows impairment of existing contracts only through the more limited "necessary" police power.[91] The statute intended to secure marketable title and eliminate "naked possibilities of reverter" that rest on chance or speculation and do not touch and concern the land.[92] Because the court found that the reverter in this case touched and concerned the land and provided social utility, the law was not within the legislature's "necessary" police power and was unconstitutional as applied in this case.[93]

V. RIGHT TO BEAR ARMS—ARTICLE 1, SECTION 32

The Indiana constitutional provision guarding the right to bear arms appears near the end of article 1's Bill of Rights. The provision states that the "people shall have a right to bear arms, for the defense of themselves and the State."[94] Like other provisions in the Bill of Rights, the right to bear arms limits the State's police power. In *Price v. State*, the Indiana Supreme Court established that the State's police power may not "materially burden" the "preserves of human endeavor" embodied in the Bill of Rights.[95] The General Assembly may qualify the "cluster of essential values" provided in Indiana's Bill of Rights but it may not entirely alienate those rights.

In *Redington v. State*, the court addressed whether an Indiana statute allowing the seizure of an individual's firearms was constitutional as applied.[96] After a hearing, the trial court found that the State proved by clear and convincing evidence that Redington was dangerous as defined by the statute and ordered the police to retain Redington's fifty-one firearms.[97] The provision defines dangerousness in two general categories. A person is dangerous if she presents "an imminent risk of personal injury to the individual or to another individual."[98] Alternatively, the individual is dangerous if he presents not an imminent risk, but a general risk the same injury and either (A) has a statutorily defined mental illness that medication cannot effectively control or (B) evidence gives "rise to a reasonable belief that the individual has a propensity for violent or emotionally unstable conduct."[99]

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90. *Id.* at 257.
91. *Id.*
92. *Id.* at 257-58.
93. *Id.* at 258.
94. IND. CONST. art. 1, § 21.
95. 622 N.E.2d 954, 960 (Ind. 1993).
96. 992 N.E.2d 823 (Ind. Ct. App.), *trans. denied*, 997 N.E.2d 356 (Ind. 2013).
97. *Id*. at 828.
98. IND. CODE § 35-47-14-1(a)(1) (West 2011).
99. *Id.* § 35-47-14-1(a)(2).

Redington maintained that although the statute was facially valid, it was not a rational or valid exercise of the police power as applied to him.[100] Redington was never convicted of a crime.[101] He did not have a mental illness as defined by the law.[102] And he dutifully took his medications.[103] Rather, Redington maintained that the trial court concluded that he was dangerous based on hypothetical concerns about future potential conduct.[104] Thus, the law not only materially burdened his right to bear arms in self-defense, it eviscerated his right to bear firearms.[105]

The Indiana Court of Appeals assumed that the firearms law implicated a core value.[106] Relying on *Lacy v. State*,[107] it refused to weigh the burden placed on Redington or allow the state action's social utility to influence whether the burden was material.[108] Rather, the court of appeals looked at the impairment's magnitude—whether the impaired right no longer served its designed purpose.[109] The right to bear arms is not absolute.[110] The legislature may provide "reasonable regulations for the use of firearms" in the interest of public safety and welfare.[111] And state action does not materially burden that right if the impairment's magnitude is "slight" or the exercise of the right "threatens to inflict 'particularized harm' analogous to tortious injury on readily identifiable private interests."[112]

The court of appeals recognized that the legislature may limit the right to bear arms just as it may prescribe punishment for expression that constitutes a tort.[113] The court of appeals relied on the Indiana Supreme Court's recent analysis in *State v. Economic Freedom Fund*,[114] which addressed the constitutionality of Indiana's "Autodialer Law," to determine the materiality of Redington's impairment.[115] First, the material burden must establish a "substantial obstacle." And if a substantial obstacle exists, the court must look at whether the actions the

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100. *Redington*, 992 N.E.2d at 831.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* Redington also challenged his conviction under the Indiana Constitution's Takings Clause in article 1, section 21, which the court analyzed with the U.S. Constitution's Fifth Amendment Takings Clause. *See id.* at 835.

106. *Id.* at 833.

107. 903 N.E.2d 486, 490 (Ind. Ct. App. 2009).

108. *Redington*, 992 N.E.2d at 833.

109. *Id.*

110. *Id.*

111. *Id.* (quoting *Lacy,* 903 N.E.2d at 490-91).

112. *Id.* (quoting State v. Econ. Freedom Fund, 959 N.E.2d 794, 805 (Ind. 2011)).

113. *Id.* at 834-35.

114. 959 N.E.2d 794, 805 (Ind. 2011).

115. *Redington*, 992 N.E.2d at 833-34.

state seeks to prohibit or limit causes a "particularized harm."[116]

Within that framework, the court of appeals found that the law did not materially burden Redington's right to bear arms.[117] Redington could regain his right to carry a handgun under the statute by petitioning for the return of the firearms 180 days after the trial court's order.[118] If he did not succeed, he could petition every 180 days thereafter.[119] Upon the filing of each petition, the trial court would hold a hearing and give Redington an opportunity to prove by a preponderance of the evidence that he was no longer dangerous.[120] Redington could possess other weapons for the purpose of self-defense.[121] Even if Redington's impairment was substantial, the court of appeals found that Redington's continued ownership of firearms threatened to inflict a "particularized harm" analogous to a tortious injury on readily identifiable parties.[122] Whether that threat was real was subject to the trial court's determination that the State satisfied the clear and convincing evidence standard of proving Redington's status as a "dangerous" individual.[123] The court of appeals then found that the government presented sufficient evidence to justify confiscating Redington's firearms under the statute.

VI. PUNITIVE DAMAGES CAP—ARTICLE 3

In *State v. Doe*, the Indiana Supreme Court analyzed an attack on the State's punitive damage cap statute, which caps punitive damages at three times the amount of compensatory damages or $50,000, whichever is greater, and which requires punitive damages to be paid to the appropriate clerk of court, who forwards one-quarter of the amount to the plaintiff and three-quarters to the State of Indiana for the violent crime victims compensation fund.[124] The case in which the issue arose involved a $150,000 punitive damage judgment against a priest who committed sexual abuse.[125] The trial court found the punitive damage cap to violate constitutional separation of powers and the jury trial guarantee in the Indiana Constitution.[126]

The Indiana Supreme Court reversed unanimously.[127] It ruled that the punitive damages cap did not violate the right to jury trial because the jury is still allowed to determine the appropriate level of damages; the trial court must reduce

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116. *Id.*
117. *Id.* at 834.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 835.
124. 987 N.E.2d 1066 (Ind. 2013); *see* IND. CODE § 34-51-3-4, 34-51-3-6 (West 2011).
125. *Doe*, 987 N.E.2d at 1070.
126. *Id*.
127. *Id*. at 1073.

that level if necessary to comply with the statute.[128] The supreme court also ruled that the allocation of three-quarters of the punitive award to the State does not violate the jury trial right because it does not impinge on any fact-finding by the jury.[129] The allocation of the damage award is "not a 'finding of fact' for constitutional purposes."[130]

The court also ruled that the cap and allocation do not offend separation of powers principles.[131] The court ruled that although courts have the power to punish quasi-criminal conduct through punitive damages, the legislature has authority to set boundaries on that power.[132] The plaintiff argued that the courts have the sole right to limit damages (through remittitur), but the Indiana Supreme Court disagreed.[133] The courts have exclusive power to apply rules—including rules limiting punitive damages—in specific cases, but the legislature has authority to set those rules.[134] The court found the statute constitutional in all respects.[135]

In a related matter, *Plank v. Community Hospitals of Indiana, Inc.*, the Indiana Supreme Court was presented an opportunity to re-examine the constitutionality of statutory caps on damages for medical malpractice.[136] After receiving a verdict of $8.5 million, reduced to $1.25 million because of the caps, Plank asked for an evidentiary hearing to show that "the factual underpinnings that led this Court to find the statutory cap constitutional over thirty years ago … no longer exist today."[137] The trial court denied the request for evidentiary hearing, and the Indiana Court of Appeals reversed in a 2-1 decision.[138] The Indiana Supreme Court unanimously rejected the challenge on procedural grounds because the plaintiff gave no notice or warning before trial that he questioned the statutory caps.[139] The supreme court therefore found the claim forfeited because it was not timely raised.[140] The plaintiff argued that he could not know until the jury rendered its verdict that he would be subject to the cap, but the court countered that the plaintiff's compensatory damages were greater than the cap, as he knew before trial, so he should have raised the issue of the cap's constitutionality in advance of trial.[141]

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128. *Id*. at 1071 (citing Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 602 (Ind. 1980)).
129. *Id*.
130. *Id*.
131. *Id.* at 1072.
132. *Id*. at 1071-72.
133. *Id*.
134. *Id*. at 1072.
135. *Id*. at 1072-73.
136. 981 N.E.2d 49 (Ind. 2013).
137. *Id*. at 50, 52.
138. *Id*. at 51.
139. *Id*. at 54-55.
140. *Id*. at 55.
141. *Id*. at 54-55.

VII. RIGHT TO ONE APPEAL—ARTICLE 7, SECTION 6

In *In re the Adoption of Minor Children*, the Indiana Supreme Court ruled that an adoption had to be vacated because the court of appeals had reversed the judgment terminating the biological mother's rights.[142] The court based its unanimous decision primarily on the biological parent's constitutional right to be the parent to his or her children absent a finding of unfitness.[143] But it also focused on the right to appeal "in all cases" contained in article 7, section 6 of the Indiana Constitution, noting that "Indiana is particularly solicitous of the right to appeal."[144] The court concluded that the biological mother's "appellate right would mean little if it could be short-circuited by an adoption judgment being issued before her appeal is complete."[145] The court emphasized the importance of speedy processing of cases involving children and ruled that the trial court was required to set aside the judgment of adoption under Trial Rule 60(B)(7) once the underlying judgment terminating parental rights—a prerequisite to adoption—was reversed on appeal.[146]

VIII. JURY TRIAL—ARTICLE 1, SECTION 13

The Indiana Supreme Court addressed an aspect of the jury trial right in a death-penalty case, *Wilkes v. State*.[147] In an application for post-conviction relief, Wilkes noted that one juror refused to answer portions of two questions in the jury questionnaire, one relating to drug abuse and the other relating to counseling for drug or mental health issues.[148] Neither Wilkes nor the State timely objected to seating this juror.[149] The court noted that other answers in the questionnaire indicated that this juror had contact with substance abuse and mental illness through family members and the juror's responses revealed the juror's view that "social factors and the particular details of a crime are each relevant to determining punishment."[150] The court ruled that trial counsel was not ineffective for failing to question or object to this juror.[151] Wilkes made a separate claim that the juror's failure to fully complete the questionnaire deprived him of an impartial jury because a complete response would have supported the juror's exclusion for cause.[152] The supreme court ruled that the juror's action failed to support a showing of misconduct because, although he should have filled out the

142. *In re* Adoption of C.B.M., 992 N.E.2d 687, 691 (Ind. 2013).
143. *Id*. at 692.
144. *Id*.
145. *Id*.
146. *Id*. at 694-67.
147. 984 N.E.2d 1236 (Ind. 2013).
148. *Id*. at 1246.
149. *Id*. at 1247.
150. *Id*.
151. *Id*. at 1247-48.
152. *Id*. at 1249.

questionnaire, his failure to do so was not gross misconduct.[153] Also, Wilkes could not show that he was harmed by the juror's action because the juror was not untruthful and his answers showed that the juror had exposure to the issues that Wilkes was concerned about and did not indicate the juror lacked impartiality.[154]

The court of appeals reversed another conviction based on a jury issue in *Sowers v. State*, in which a criminal defendant raised a defense of mental disease or defect.[155] After the jury was charged and it was apparent deliberations would extend after 5 p.m., "the foreperson asked the bailiff if they were to stay and deliberate until they reached 100 percent agreement with the counts."[156] The bailiff responded, "yes as the Judge stated in there you have to be 100 percent in agreement."[157] "The jury found Sowers not responsible by reason of insanity" on one count and guilty but mentally ill on two others.[158] Upon polling the jury, one said, "I have a conscience about it but yes" when asked if the verdict was her true verdict.[159] After the verdict, one juror learned that it would have been possible for a jury not to agree, and she expressed unhappiness at having been told by the bailiff that the jury was required to reach a verdict.[160] Sowers did not request a mistrial at the time, but the court of appeals nonetheless reversed because the bailiff's conduct was fundamental error.[161] He should not have communicated with a juror outside the defendant's presence, especially when the communication was that the jury must reach a verdict.[162] The court of appeals presumed prejudice from the nature of the communication and reversed.[163] Judge Bradford dissented, disagreeing that the bailiff's communication necessarily had to be understood to require the jury to reach a verdict.[164]

The court of appeals also addressed jury trial rights in *Gates v. City of Indianapolis*, in which the defendant was charged with violating animal control ordinance, which are infractions.[165] Gates sought a jury trial, and the trial court denied the request.[166] The court of appeals reviewed the constitutional requirement that a jury be available on issues of fact in all causes of action where a jury was available before June 18, 1852 and in cases predominantly at law rather than equity.[167] The ordinances at issue in this case did not exist before

153. *Id*. at 1250.
154. *Id*.
155. 988 N.E.2d 360, 364 (Ind. Ct. App.), *on reh'g*, 996 N.E.2d 1280 (Ind. Ct. App. 2013).
156. *Id*. at 365.
157. *Id.*
158. *Id*.
159. *Id*.
160. *Id*. at 365-66.
161. *Id*. at 368.
162. *Id*.
163. *Id*. at 369-70.
164. *Id*. at 371-72.
165. 991 N.E.2d 592 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 1278 (Ind. 2013).
166. *Id*. at 592-93.
167. *Id*. at 593-94.

1852, so the question is whether the claim against Gates was legal or equitable.[168] The court found the claims "quasi-criminal [in nature] because they are enforced by the Indianapolis Department of Public Safety, complaints are initiated and litigated by a prosecuting attorney . . . and violators are fined by the government."[169] The "mandatory fines . . . are akin to claims for money damages, which were 'exclusively legal actions in 1852.'"[170] As a result, a jury trial should have been available to Gates, and the court of appeals reversed his conviction.[171] The holding occurred despite the City's statement that it will in the future include equitable claims (requests for injunctions) in all similar cases, so they may no longer be predominantly legal.[172]

IX. SEARCH AND SEIZURE—ARTICLE 1, SECTION 11

The degree to which the government may intrude on the lives of individuals has drawn increased scrutiny. Everyday human activity is subject to increasing systematic electronic chronicling, and government agencies expand their ability to maintain vast databases of information. This new world of persistent information gathering and storage raises new circumstances in which courts must apply constitutional principles governing searches and seizures by government officials. The courts' decisions on these issues help shape the manner in which the government interacts with its citizens.

Article 1, section 11 of the Indiana Constitution contains language substantively identical to that found in the Fourth Amendment of the U.S. Constitution.[173] Yet Indiana courts use a separate analytical framework for determining how article 1, section 11 applies to government actions.[174] Using this separate analysis, Indiana courts have at times found protections of individual liberty in article 1, section 11 greater than those found in the Fourth Amendment.[175] This survey period was no exception.

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168. *Id*. at 594.

169. *Id*. at 595.

170. *Id*.

171. *Id*. at 595-96.

172. *Id*. at 595.

173. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); IND. CONST. art. 1, § 11 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.").

174. *See* Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005))

175. S*ee, e.g.*, Pirtle v. State, 323 N.E.2d 634 (Ind. 1975) (holding that state constitution requires police to inform an individual in custody that the individual has a right to consult with counsel before consenting to a search).

In *Maryland v. King*, the U.S. Supreme Court held that a brief swab of the cheek for DNA identification purposes does not offend the expectation of privacy of a validly arrested individual.[176] This result stemmed from the Court's analysis of whether the "search" of the individual by means of a buccal swab was "reasonable in its scope and manner of execution."[177] Yet just two months earlier, the Indiana Court of Appeals held in *Guilmette v. State*[178] that the DNA testing of what appeared to be blood spots on a suspect's shoe violated the protections provided in article 1, section 11.[179] Thus, while the Fourth Amendment reasonableness analysis allows government officials to subject suspected individuals to routine DNA collection, Indiana's constitution, as currently interpreted, requires the government provide a relevant and meaningful justification before collecting and analyzing a suspect's DNA.[180]

The result in *Guilmette* stemmed from the totality of circumstances test established in *Litchfield v. State*.[181] *Litchfield* turned on balancing three factors: (1) the law enforcement officer's degree of concern, suspicion, or knowledge of a crime; (2) the intrusiveness of the method used by the law enforcement officer; and (3) the extent of the law enforcement need.[182] The police had taken Guilmette's shoes incident to his arrest for theft, a permissible jail booking procedure.[183] At that particular time, the police knew that Guilmette was with the victim the night he was brutally murdered, maintained a degree of animosity toward the victim, and had lied about taking the victim's keys, money, and car.[184] The police thus had a "high degree" of suspicion that Guilmette participated in the murder. And the intrusion was slight—the police had already removed his shoes incident to the arrest.[185]

Despite the two factors weighing in the government's favor, the court found that the lack of an exigent police need tipped the scales in Guilmette's favor.[186] The police arrested Guilmette for theft, not murder. Once Guilmette was in police custody, the evidence's contamination or destruction was unlikely.[187] Using the opportunity presented by taking an inmate's clothing for inventory and

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176. 133 S. Ct. 1958, 1980 (2013).

177. *Id.* at 1970.

178. 986 N.E.2d 335 (Ind. Ct. App.), *trans. granted*, 996 N.E.2d 327 (Ind. 2013).

179. *Id.* at 341.

180. The court in *Guilmette* did not address the suggestion from the Indiana Supreme Court in 2011 that a warrant is unnecessary for police to obtain a cheek swab to test DNA. *See* Jon Laramore, *Indiana Constitutional Developments: Debtors, Placements, and the Castle Doctrine*, 45 IND. L. REV. 1043, 1057-58 (2012) (discussing Garcia-Torres v. State, 949 N.E.2d 1229 (Ind. 2011)).

181. 824 N.E.2d 356, 359 (Ind. 2005).

182. *Id.* at 361.

183. *Guilmette*, 986 N.E.2d 335, 338 (Ind. Ct. App. 2013).

184. *Id.* at 341.

185. *Id.*

186. *Id.*

187. *Id.*

safekeeping during his incarceration to "investigate and test the clothing regarding an unrelated and uncharged crime triggers the constitutional protection of needing to obtain a warrant to do so."[188] The Court went on to find that the DNA evidence was not the State's strongest evidence and thus admitting it was harmless error.[189]

In another highly publicized area of search and seizure law, the Indiana Court of Appeals addressed warrantless searches of a cell phone's contents in *Kirk v. State*.[190] The amount of information law enforcement can gather by searching an individual's cell phones continues to grow with increasingly prevalent use of "smart phones"[191] often storing bank account data, health records, and GPS tracking data.[192]

The Indiana Court of Appeals held in *Kirk* that under the Indiana Constitution police cannot routinely search the contents of an arrestee's cell phone.[193] The court skipped analyzing the question under the Fourth Amendment based on the U.S. Supreme Court's caution in *City of Ontario v. Quon*[194] to avoid elaborating on Fourth Amendment implications of emerging technology before its role in society becomes clear.[195] Instead, the court found the search unreasonable under the *Litchfield* factors.[196]

The officers found marijuana, a pipe, and a cell phone in a search incident to Kirk's arrest.[197] The officer immediately opened the cell phone's inbox and looked at six to eight text messages.[198] Although the officer could unquestionably

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188. *Id.*

189. *Id.*

190. 974 N.E.2d 1059 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012). Kirk was addressed briefly in the 2012 survey issue. *See* Jon Laramore, *Indiana Constitutional Developments: Changes on the Court*, 46 IND. L. REV. 1010, 1031-32 (2012).

191. *Smartphone Users Worldwide Will Total 1.75 Billion in 2014*, E-MARKETER (Jan. 16, 2014), http://www.emarketer.com/Article/Smartphone-Users-Worldwide-Will-Total-175-Billion-2014/1010536, *archived at* http://perma.cc/3LVQ-8VGW.

192. *See, e.g.*, Jacob Fenston, *Smart Phone Banking On The Rise, But Is It Safe?,* NAT'L PUB. RADIO (Jan. 4, 2011), http://www.npr.org/2011/01/04/132657646/Smart-Phone-Banking-On-The-Rise-But-Is-It-Safe, *archived at* http://perma.cc/M444-BWGB; Michael B. Farrell, *Good Health & Fitness Apps for Your Smartphone*, BOS. GLOBE (Nov. 17, 2013), https://www.bostonglobe.com/business/2013/11/17/apps-for-living-longer-living-better/iKC85ggLGkwlXWnuXU0K0J/story.html, *archived at* http://perma.cc/RBQ2-XULA; Stephen Lawson, *Ten Ways Your Smartphone Knows Where You Ar*e, PCWORLD (Apr. 6, 2012), http://www.pcworld.com/article/253354/ten_ways_your_smartphone_knows_where_you_are.html, *archived at* http://perma.cc/3ESA-VMXQ.

193. *Kirk*, 974 N.E.2d at 1071.

194. 560 U.S. 746 (2010).

195. *Kirk*, 974 N.E.2d at 1070.

196. *Id.* The U.S. Supreme Court decided this question in substantially the same manner several months later. Riley v. California, 134 S. Ct. 2473 (2014).

197. *Kirk*, 974 N.E.2d at 1070-71.

198. *Id.* at 1070.

confiscate the cell phone, there was no real police need to open the cell phone and read the text messages.[199] The court rejected a justification for the search on the basis that the intrusion was minimal and police needs were significant.[200] There was no reasonable concern that the phone's contents could be remotely erased, and even if these were such a risk, the officer could have used less intrusive means to manage it by removing the SIM card or turning the cell phone off.[201] The court also questioned the State's claim that the phone's contents were important because neither party accessed the device again for three months.[202] The court found the text message evidence was harmless as to three of Kirk's convictions but not harmless as to his conviction for conspiracy to commit dealing in a controlled substance, so it reversed the conspiracy conviction.[203]

The justification police officers use to stop motorists affects anyone who drives an automobile. Generally, observing a violation of the laws governing the operation of motor vehicles on the public streets is sufficient to justify a stop.[204] But there are wrinkles to this general rule.

In *Johnson v. State*, the court of appeals found a traffic stop justified even though the basis of the stop was an officer's incorrect belief that a minivan's rear window tint was darker than allowed by Indiana law.[205] The decision turned on the provisions in the Indiana's Window Tint Statute.[206] That law prohibits a person from driving a motor vehicle with windows tinted to a degree that the vehicle's occupants cannot be "easily identified or recognized" from the outside.[207] The statute hedges this subjective standard by allowing a defense if it turns out that the tint's actual solar reflectance is no more than twenty-five percent and the light transmittance is at least thirty percent.[208] The State did not contest Johnson's assertion that the windows on his Dodge minivan were factory standard, and the court assumed the manufacturer did not mass-produce minivans with illegally dark windows, so there was no statutory violation.[209]

Yet under article 1, section 11, the court found that the police officer's conduct was reasonable under *Litchfield*'s totality of the circumstances test.[210] The officer's degree of suspicion, concern, or knowledge that Johnson was committing a traffic violation was "not overwhelming."[211] Compared to running

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199. *Id.* at 1071.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1071-72.

204. 992 N.E.2d 955, 957-58 (Ind. Ct. App.), *trans. denied*, 999 N.E.2d 417 (Ind. 2013) (citing Sanders v. State, 989 N.E.2d 332, 335 (Ind. 2013)).

205. *Id.*

206. IND. CODE § 9-19-19-4 (2013).

207. *Id.*

208. *Id.*

209. *Johnson*, 922 N.E.2d at 958 n.4.

210. *Id.* at 959 (quoting Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005)).

211. *Id.*

a red light, turning without signaling, or speeding, the court recognized "there is much subjectivity that goes into deciding whether a window of a moving car is too dark."[212] And the State's interest in enforcing the statute "is not an overwhelmingly pressing public safety concern," especially compared to the "inherently dangerous" acts of running red lights, failing to signal, and speeding.[213] Yet the officer still had some degree of suspicion, the State's interests were legitimate, and the intrusion on Johnson was not excessively high.[214] And that was sufficient to justify the stop.[215]

By contrast, the court of appeals strictly construed Indiana's vehicle tail lamp law in *Kroft v. State*.[216] Indiana law requires a vehicle to have two taillights that must emit a red light plainly visible from a distance of at least 500 feet.[217] The State Trooper stopped Kroft because of a crack in the tail light's plastic covering causing the emission of "a white light," although apparently just a tiny bit of white light.[218]

Although a good faith belief that a driver committed a traffic violation will justify a stop, the court emphasized that a mistaken belief about what constitutes a violation will not amount to good faith.[219] And the Trooper's understanding of the tail light requirements of Indiana law was mistaken.[220] The statute did not require the visibility of "only" red light.[221] Rather, the tail lamp merely had to emit "a red light."[222] The court rejected the argument that the hole placed Kroft's vehicle in an unsafe condition, concluding that a motorist approaching Kroft's car would have no difficulty discerning the light's color, which was mostly red.[223]

The results reached in *Kroft* and *Johnson* rested on the nature of the statutory provision.[224] In *Johnson*, the court recognized that the law allowed for subjective determinations that could be wrong.[225] By contrast, an officer's belief that a tiny bead of white light emitting from tail lamp constitutes illegal operation of a vehicle was simply incorrect.[226] This incorrect interpretation of the statute could

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212. *Id.*

213. *Id.*

214. *Id.*

215. Similarly, a month earlier in *Herron v. State*, 991 N.E.2d 165, 171 (Ind. Ct. App.), *trans. denied* 995 N.E.2d 620 (Ind. 2013), the court found that the officers could stop a car based on their belief that the window tint was illegal.

216. 992 N.E.2d 818 (Ind. Ct. App. 2013).

217. IND. CODE § 9-19-6-4(a) (2013).

218. *Kroft*, 992 N.E.2d at 820.

219. *Id.* at 821.

220. *Id.*

221. IND. CODE § 9-19-6-4(a) (2013).

222. *Kroft*, 992 N.E.2d at 821.

223. *Id.* at 822.

224. *Id.*; *see also* Johnson v. State, 992 N.E.2d 955 (Ind. Ct. App.), *trans. denied*, 999 N.E.2d 417 (Ind. 2013).

225. *Johnson*, 992 N.E.2d at 960.

226. *Kroft*, 992 N.E.2d at 821.

never be reasonable whereas an incorrect belief as to window tint could be reasonable under article 1, section 11.[227]

X. RIGHT TO COUNSEL—ARTICLE 1, SECTION 13

The right to counsel may be relinquished only by knowing, voluntary, and intelligent waiver.[228] The Indiana Supreme Court enforced this principle in *Hawkins v. State* by reversing a conviction of a defendant tried in absentia and without counsel.[229] The defendant lived out of state.[230] He participated by telephone in certain pretrial proceedings.[231] But he did not participate in the final pretrial proceeding where his counsel's motion to withdraw was granted—just before trial.[232] As Hawkins' trial began, he was on a bus heading to Indiana.[233] He informed the deputy prosecutor, who informed the court, of his whereabouts.[234] Upon arriving at the courthouse later that same day, Hawkins was told that he had been convicted in absentia.[235]

The court found that Hawkins had not been properly advised of his right to an attorney.[236] The court noted that Hawkins claimed he was never told that his public defender was allowed to withdraw and he had not been informed of his right to counsel.[237] Thus, the mere failure to appear could not function as a waiver of his right to counsel.[238] The court emphasized that Hawkins could have done more, such as contacting the court to find out if he was still represented.[239] But Hawkins did not demonstrate conduct consistent with efforts manipulate the system for his personal gain.[240]

XI. DOUBLE JEOPARDY—ARTICLE 1, SECTION 14

Indiana's test for double jeopardy under article 1, section 14 goes beyond the federal "same elements" test.[241] In addition to the federal test, the government may not use the "same evidence" to convict a defendant of more than one offense.[242] This additional test—also dubbed the "actual evidence" test—asks

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227. *See Johnson*, 992 N.E.2d at 960; *Kroft*, 992 N.E.2d at 821.
228. Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003).
229. 982 N.E.2d 997 (Ind. 2013).
230. *Id.* at 998.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 1002.
237. *Id.* at 1001.
238. *Id.* at 1002.
239. *Id.* at 1001.
240. *Id.*
241. Richardson v. State, 717 N.E.2d 32 (Ind. 1999).
242. *Id.* at 52.

whether the government proved each offense by at least one item of evidence not used to prove any of the other offenses.[243] This test originated in the fifteen-year-old *Richardson v. State* case authored by then-Justice Dickson.[244]

Garrett v. State addressed whether the "actual evidence" test applies after a jury acquits on one charge and the State retries the defendant on a related charge on which the jury did not reach a verdict.[245] The Double Jeopardy Clause assures that the State will not be able to repeatedly attempt to convict an accused of the same offense.[246] The notion of "risk" is at the core of the "jeopardy" to which a defendant may not face twice.[247] The constitutional provision protects against the risk of a trial and conviction, not of punishment.[248] Thus, double jeopardy occurs where a defendant shows that he might have been acquitted or convicted in the first trial of the charge for which he was convicted at the second trial.[249] Therefore, the court held that there is no reason the *Richardson* actual evidence test would not apply when there are, on the same facts, multiple verdicts as opposed to multiple convictions.[250]

In *Garrett*, the State charged two identical counts of rape.[251] And at trial, the prosecutor presented two separate sequential rape incidents.[252] Neither the information, the evidence, nor the argument at trial specifically linked either count with a particular incident.[253] The first jury acquitted Garrett on Count I but could not reach a verdict on Count II.[254] The State then retried and convicted Garrett on Count II in a bench trial.[255] Garrett maintained that it was impossible to know whether the first jury's decision on Count I acquitted Garrett of the first or second rape. The Indiana Supreme Court, in opinion by Justice Rucker, agreed with the State that it was reasonable to infer that Count I was the first-in-time alleged offense and that Count II was the second.[256] Both counts were felonies, one occurred before the other, the parties' attorneys understood this, the victim's testimony was presented in this order, and the deputy prosecutor referred to the alleged rapes in that order.[257]

But the court went on to find that essentially the same evidence was presented

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243. *Id.* at 52-3.
244. *Id.*
245. 992 N.E.2d 710 (Ind. 2013).
246. *Id.* at 721.
247. *Id.*
248. *Id.*
249. *Id.* (citing Brinkman v. State, 57 Ind. 76, 79 (1877)).
250. *Id.*
251. *Id.* at 721-22.
252. *Id.* at 722.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id*.
257. *Id.*

at both trials.[258] In fact, the evidence of the second rape was more extensive at the first trial than at retrial.[259] Thus, under the actual evidence test, the court held that there was a reasonable possibility that the evidentiary facts used by the fact finder to establish the elements of the one offense may have been used to establish the essential elements of the second offense.[260] The court noted that its holding modified the *Richardson* test, but only "slightly."[261]

Justice Massa argued in a separate opinion that the trial court should be trusted to "separate wheat from chaff" despite "being exposed to inadmissible evidence that would irreparably taint a lay jury."[262] Justice Rucker responded that the *Richardson* violation does not require an actual mistake to trigger double jeopardy concerns—just a "reasonable possibility" of a mistake.[263]

In *Jones v. State*, the court of appeals vacated two misdemeanor battery convictions because there was a reasonable possibility they were proved with the same evidence as a third conviction for felony domestic battery, thereby violating double jeopardy principles.[264] The court found that the "actual evidence" test required the convictions' invalidation because the evidence presented supported only a single domestic battery offense.[265]

The State claimed that the difference in proof of the three charges was whether the battery occurred in front of the children in the bedroom or outside the children's presence in the living room.[266] But under the law announced in *True v. State*,[267] it did not matter whether the children saw the battery.[268] What mattered was whether there was a possibility that the children might see or hear it.[269] Because the children could have perceived any of the three offenses, this argument did not differentiate the three counts from one another and did not save the two misdemeanor convictions from invalidity under the "same evidence" test.[270]

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258. *Id.* at 723.

259. *Id.* at 722.

260. *Id.* at 723.

261. *Id.*

262. *Id.* at 725 (Massa, J. concurring in result).

263. *Id.* at 723 n.3 (Rucker, J., for the court).

264. 976 N.E.2d 1271 (Ind. Ct. App. 2012), *trans. denied*, 983 (N.E.2d 1157 (Ind. 2013).

265. *Id.* at 1278.

266. *Id.* at 1276.

267. 954 N.E.2d 1105, 1110-11 (Ind. Ct. App. 2011).

268. *Jones*, 976 N.E.2d at 1277 (citing *True*, 954 N.E.2d at 1110-11.).

269. *Id.*

270. *Id.* The court also addressed whether Jones' criminal confinement conviction violated the same actual evidence test. Jones maintained that the evidence established the essential evidence of felony domestic battery and strangulation but without a degree of confinement greater than required to commit just those crimes. The court disagreed. In addition to evidence of choking, slapping, and biting, there was evidence that Jones pushed the victim onto a couch, sat on her, told her not to get up or leave, and kept her in the home until he left the next morning.

In *Brewington v. State*,[271] the court of appeals held that there was a reasonable possibility that the jury used the same facts to establish both intimidation and attempted obstruction of justice. The indictment alleged that Brewington committed intimidation and attempted obstruction of justice by threatening the same individual starting on August 1, 2007.[272] By incorporating this language into the jury instructions, the trial court allowed the jury to consider the same harassing conduct in support of both convictions. The court also found that the evidence supporting the intimidation conviction also supported obstruction of justice. The State presented the same faxed letters and Internet postings—all of which were threatening—to support both charges. In closing arguments, the prosecutor asked the jury to consider essentially the same acts for both charges.[273]

In *Kovats v. State*, the court of appeals found that a defendant's conviction for both Class B felony neglect of a dependent resulting in serious bodily injury, Class D felony OWI causing serious bodily injury, and Class D felony criminal reckless for inflicting serious bodily injury were all based on the same serious bodily injury.[274] Thus, the court reversed the conviction for criminal recklessness but reduced Kovats's conviction for Class D felony OWI causing serious bodily injury to a Class A misdemeanor OWI because the element of serious bodily injury simply enhanced the underlying OWI conviction to a felony.[275]

XII. RIGHT AGAINST SELF-INCRIMINATION—ARTICLE 1, SECTION 14

The Indiana Court of Appeals addressed whether Indiana's self-incrimination provision, in article 1, section 14, provides protection broader than the Fifth Amendment in *Wilson v. State*.[276] Wilson was charged based on her alleged membership in a burglary and theft ring, and after pleading guilty, she was given use immunity and asked to testify against another alleged member of the ring.[277] She claimed that the Indiana Constitution entitled her to transactional immunity, a right broader than that conveyed by the Fifth Amendment.[278]

The United States Supreme Court has ruled that the Fourteenth Amendment requires that a target witness must receive both use immunity and derivative use immunity when the witness's testimony is compelled, but that the federal

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271. 981 N.E.2d 585 (Ind. Ct. App. 2013).

272. *Id.* at 954.

273. *Id.* at 595.

274. 982 N.E.2d 409 (Ind. Ct. App. 2013).

275. *Id.* at 414.

276. 988 N.E.2d 1211 (Ind. Ct. App. 2013).

277. *Id.* at 1214.

278. *Id.* at 1216. Use immunity prohibits use at a subsequent criminal prosecution of testimony compelled of the witness (other than perjury for false testimony). Derivative use immunity prohibits admission against a witness in a subsequent criminal prosecution of evidence obtained as a result of the witness's compelled testimony. Transactional immunity prohibits the State from criminally prosecuting the witness for any transaction concerning that to which the witness testifies. *Id.* at 1219.

constitution does not require transactional immunity.[279] The court of appeals concluded that the trial court gave Wilson both use and derivative use immunity before finding her in contempt for declining to testify.[280] The court of appeals looked to *In re Caito*, a 1984 Indiana Supreme Court case, for guidance on the application of the Indiana Constitution to these immunity issues.[281] The court of appeals noted that the Indiana Supreme Court referred to "constitutions" in the plural when ruling that compelled testimony need be accompanied by only use and derivative use immunity to adequately protect witnesses, concluding "[b]ased upon *Caito* . . . we cannot say that the Indiana Constitution requires transactional immunity or that the trial court's finding of contempt was an abuse of discretion."[282]

XIII. EX POST FACTO—ARTICLE 1, SECTION 24

As in the past several years, Indiana's appellate courts have reviewed cases applying the ex post facto clause of the Indiana Constitution, mostly in the context of the sex offender registry, which gives rise to claims involving the retrospective application of statutory amendments.[283] In *Gonzalez v. State*, an offender's ten-year registration period was extended to lifetime registration by an amendment enacted after he was convicted.[284] The Indiana Supreme Court ruled unanimously that the amendment was unconstitutional as applied to Gonzalez.[285]

As in past cases, a key factor in determining unconstitutionality was that the statute provided Gonzalez no mechanism for a court to review of his future dangerousness or complete rehabilitation.[286] The supreme court, per its precedent, applied a seven-factor test to determine whether the effects of the amendment are so punitive in nature as to constitute a criminal penalty that would violate the ex post facto clause if imposed retroactively.[287] The court found that three factors weighed in favor of finding the amendment punitive and three weighed on the side of finding it non-punitive, making the decisive factor whether the statute appears excessive in relation to the alternative purposes assigned.[288] The court reasoned that when a sex offender has no method to show that he is rehabilitated, the effects of lifetime registration are excessive in relation to protecting the public from repeat sex offenders, which is the alternative purpose assigned by the State

279. *Id.* at 1220 (citing Kastigar v. United States, 406 U.S. 441, 453 (1972)).

280. *Id.* at 1221.

281. *Id.* (citing *In re* Caito, 459 N.E.2d 1179, 1181-84 (Ind. 1984)).

282. *Id.*

283. *See*, *e.g.*, Hevner v. State, 919 N.E.2d 109 (Ind. 2010); State v. Pollard, 908 N.E.2d 1145 (Ind. 2009); Jensen v. State, 905 N.E.2d 384 (Ind. 2009); Wallace v. State, 905 N.E.2d 371 (Ind. 2009).

284. 980 N.E.2d 312, 315 (Ind. 2013).

285. *Id*. at 315.

286. *Id*. at 320.

287. *Id*. at 317 (citing *Wallace*, 905 N.E.2d at 379).

288. *Id*. at 317-20.

in its argument.[289] Because the lifetime registration requirement was excessive for this registrant given his inability to show that he is no longer dangerous, the court ordered him to be exempted from the lifetime registration requirement.[290]

The Indiana Court of Appeals also addressed several cases raising ex post facto issues in connection with the sex offender registry. In *Andrews v. State*, the petitioner was convicted in another state and petitioned that his name be removed from Indiana's sex offender registry.[291] Based on a law enacted long after his offense, he was required to register for life because of a thirty-year-old conviction, despite having become a business owner with no record of subsequent offenses.[292] Applying *Wallace v. State*,[293] the court ruled that requiring Andrews to register violated the ex post facto clause.[294] The State conceded that Andrews would not have to register if he had been convicted in Indiana and argued that because Andrews was convicted elsewhere, the protections of the Indiana Constitution did not apply to him.[295] The court rejected this position as well as an argument that Andrews was required to register by federal law.[296] The same Indiana Court of Appeals panel reached the same result in *Hough v. State*, another case involving an out-of-state conviction and similar circumstances.[297] The court of appeals addressed another out-of-state conviction in *Burton v. State*, in which the defendant was required to register in the state of his conviction.[298] Had he been convicted in Indiana, however, *Wallace* would have dictated that registration was unconstitutionally *ex post facto*.[299] The court ruled that the defendant was protected by the provisions of Indiana's constitution and therefore did not have to register.[300]

XIV. BANKRUPTCY EXEMPTIONS—ARTICLE 1, SECTION 22

In a civil forfeiture matter, *Sargent v. State*, the Indiana Court of Appeals examined whether the debtor protections mandated by article 1, section 22 of the Indiana Constitution precluded the forfeiture of the automobile at issue in this case.[301] The forfeiture arose because Sargent stole some electronic equipment from a store and drove away in the vehicle, which was then subjected to

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289. *Id*. at 321.

290. *Id*. The Indiana Court of Appeals followed *Gonzalez* in a factually similar case, *Healey v. State*, 986 N.E.2d 825 (Ind. Ct. App. 2013).

291. 978 N.E.2d 494 (Ind. Ct. App. 2012), *trans. denied*, 985 N.E.2d 339 (Ind. 2013).

292. *Id.* at 495.

293. 905 N.E.2d 371 (Ind. 2009).

294. *Andrews*, 978 N.E.2d at 497-98.

295. *Id.* at 498.

296. *Id.* at 498-503.

297. 978 N.E.2d 505 (Ind. Ct. App. 2012), *trans. denied*, 985 N.E.2d 339 (Ind. 2013).

298. 977 N.E.2d 1004, 1006 (Ind. Ct. App. 2012), *trans denied*, 985 N.E.2d 339 (Ind. 2013).

299. *Id.* at 1008-09.

300. *Id.* at 1009.

301. 985 N.E.2d 1108 (Ind. Ct. App.), *trans. granted*, 999 N.E.2d 417 (Ind. 2013).

forfeiture.[302] After concluding that there was a sufficient nexus between the vehicle and the crime, the court addressed Sargent's argument that the vehicle should be exempt from forfeiture because she was impoverished and fell within the exemptions enacted under the constitutional provision requiring statutes to exempt "a reasonable amount of property from seizure or sale, for the payment of any debt or liability . . . ."[303] The relevant statute exempts from creditors' reach personal property up to $8000 in value, and Sargent's vehicle was worth less than that amount.[304] The court rejected applying the exemption in this case, however, ruling that they do not apply to forfeitures.[305] The constitutional provision is designed to protect "debtors," a term that does not apply to Sargent in this case, and "expanding the reach of those exemptions . . . would be contrary to the clear intent of our legislature."[306]

XV. OPEN COURTS—ARTICLE 1, SECTION 12

The Indiana Court of Appeals held in *Jenkins v. South Bend Community School Corporation*,[307] that interpreting a clause in a collective bargaining agreement in a manner that would make advisory arbitration the exclusive remedy for resolving controversies violated the provision of article 1, section 12 providing for open courts.[308] The school's contract with bus drivers included a nonbinding arbitration provision that the contract deemed the "exclusive remedy" for disputes.[309]

Jenkins's dispute was arbitrated in her favor, but the school refused to comply, treating the ruling as merely advisory, and Jenkins sued complaining that the school corporation fired her without just cause.[310] The court held that because article 1, section 12 promises a "remedy by due course of law" for any "injury," the arbitration provision must be read as an exhaustion-of-administrative-remedies provision and not a bar to the civil court system.[311]

In *Medley v. Lemmon*, a prisoner in the custody of the Indiana Department of Correction sought judicial relief for a sanction imposed outside the prison disciplinary system, relying on the "open courts" language in article 1, section 12.[312] After Medley was convicted in an administrative process of certain rule

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302. *Id*. at 1113.

303. *Id*. at 1113-14 (citing IND. CONST. art. 1, § 22).

304. *Id*. at 1114 (citing IND. CODE § 34-55-10-2).

305. *Id*.

306. *Id*. at 1115.

307. 982 N.E.2d 343 (Ind. Ct. App.), *trans. denied*, 992 N.E.2d 208 (Ind. 2013).

308. *Id.* at 348 (representing appellee in this matter was the Indiana law firm Faegre Baker Daniels LLP).

309. *Id.* at 345.

310. *Id.*

311. *Id.* at 348.

312. 994 N.E.2d 1177 (Ind. Ct. App.), *trans. denied*, 999 N.E.2d 418 (Ind. 2013).

violations, the facility where she was housed restricted her visitation privileges.[313] These restrictions were explicitly independent of the sanctions she received for the rule violation.[314] She filed an action in court against prison officials, making claims under federal civil rights laws and for violations of the state and federal constitutions, alleging primarily that the restrictions were in retaliation for grievances she filed.[315] She also alleged that the prison officials' actions violated state statutes.[316] The court of appeals ruled that it lacked jurisdiction to address any alleged statutory violations, reiterating the case law holding that there is no judicial review of prison disciplinary decisions or of alleged statutory violations relating to discipline or conditions of custody.[317] It also reiterated the Indiana Supreme Court's ruling that the open courts provision of the Indiana Constitution does not allow judicial review of prison officials' actions relating to prisoners' disputes over custody or confinement.[318] The court affirmed dismissal of all Medley's state claims, but reversed as to certain federal claims alleging retaliation.[319]

XVI. FREE SPEECH—ARTICLE 1, SECTION 9

In *Harris v. State,* the court of appeals addressed Indiana's sex offender registration requirement and prohibition on sex offenders' participation in Internet chat rooms, instant messaging, or social networks with unlimited access to persons under the age of eighteen.[320] The court found that the prohibition violated First Amendment principles,[321] but held that a registration requirement satisfied both the First Amendment and Indiana's constitutional protection of speech.[322]

Indiana's Free Expression Clause provides that no law shall restrain "the free interchange of thought and opinion, or restricting the right to speak, write, or print freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."[323] The court applied the provision's qualifier—"for the abuse of that right, every person shall be responsible"—by requiring Harris show that the State could not reasonably conclude that his restricted expression was

313. *Id.* at 1181.

314. *Id.*

315. *Id.* at 1182.

316. *Id.*

317. *Id.* at 1185.

318. *Id.* at 1186.

319. *Id.* at 1191.

320. 985 N.E.2d 767 (Ind. Ct. App.), *trans. denied*, *989* N.E.2d 337 (Ind. 2013).

321. *Id.* at 780 (The court's holding rested on the decision in *Doe v. Marion County Prosecutor*, 705 F.3d 694 (7th Cir. 2013), finding the state law unconstitutional under the First Amendment).

322. *Id.* at 782.

323. *Id.* at 781 (quoting IND. CONST. art. 1, § 9).

abused.[324] In other words, Harris had to show that the State's regulation lacked rationality.[325] The court found that his argument that the State failed to allege abuse did not satisfy this burden.[326]

XVII. SPECIAL LAWS—ARTICLE 1, SECTIONS 1, 12, 23 AND ARTICLE 4, SECTION 22

A claim that the state law provision classifying heirs and taxing the various classes at different rates violated the Indiana Constitution failed in *Odle v. Indiana Department of State Revenue*.[327] The classifications did not violate the Equal Privilege and Immunities Clause (article 1, section 23) or the principles of equality in article 1, section 1, because of Indiana Supreme Court precedent holding that inheritance tax classifications distinguishing between relatives and strangers are equitable and reasonable.[328] The classifications did not violate article 1, section 12 because a remedy for injury was not precluded and inequitable administrative costs were not imposed.[329] The prohibition on "special laws" in article 4, section 22 did not apply because the classifications applied uniformly—not just in one location or to one group.[330]

XVIII. SENTENCING—ARTICLE 7, SECTION 4

As has been true for the past several years, both the Indiana Supreme Court and Indiana Court of Appeals issued several opinions during the survey period applying their authority to review and revise sentences under article 7, section 4 of the Indiana Constitution.[331] These decisions will be reviewed in full in the article on developments in Indiana criminal law.

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324. *Id.* at 782.

325. *Id.*

326. *Id.* The court also found that Harris failed to meet his burden of showing that the statute's actual operation restricted his speech.

327. 991 N.E.2d 631, 632-33 (Ind. T.C.), *review denied*, 997 N.E.2d 356 (Ind. 2013).

328. *Id.* at 635 (citing Crittenberger v. State Sav. & Trust Co., 127 N.E. 552 (1920)).

329. *Id.* at 636.

330. *Id.* at 636-37.

331. *See*, *e.g.*, Chambers v. State, 989 N.E.2d 1257 (Ind. 2013); Kovats v. State, 982 N.E.2d 409 (Ind. Ct. App. 2013); Kimbrough v. State, 979 N.E.2d 625 (Ind. 2012).

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

The General Assembly and Indiana's appellate courts confronted several significant criminal law issues during the survey period October 1, 2012, to September 30, 2013. Some of the most notable developments are explored below.

I. LEGISLATIVE DEVELOPMENTS

The 2013 so-called long session of the General Assembly created a few new offenses and enhancements, but the main event was House Enrolled Act 1006—the first major overhaul of the criminal code since the 1970s. With an effective date of July 1, 2014, however, HEA 1006 remained somewhat of a work in progress subject to further changes in the 2014 short session, and thus is best summarized in detail in its true final form in next year's survey article. This survey instead focuses on the many changes outside HEA 1006.[1]

A. Changes to Sex Crimes and the Sex Offender Registry

1. Rape Broadened to Include Criminal Deviate Conduct.—Apart from HEA 1006, another significant change to the criminal code is not effective until July 1, 2014, but seems unlikely to be changed in the 2014 session. The separate offense of criminal deviate conduct will be eliminated and rolled into the offense of rape. For many decades, a person who engaged in deviate sexual conduct (involving the mouth, sex organ, anus, or object) committed criminal deviate conduct.[2] This offense could involve defendants whose victims were of the opposite or same sex. Under the amended statute, the crime of rape—which was previously limited to those had "sexual intercourse with a member of the opposite sex"—has been broadened to include those who knowing or intentionally cause "another person to perform or submit to deviate sexual conduct."[3]

2. Child Seduction.—Although the age of consent for sexual conduct is

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1. Although this section discusses most of the changes to the criminal code during the 2013 session, space limitation preclude a detailed discussion of every change. For example, a new crime of possession or delivery of a synthetic drug or synthetic lookalike substance was created and is no longer part of the marijuana statute. Senate Enrolled Act 536 includes several related changes. This Article also does not discuss the expansion through House Enrolled Act 1392 of the so-called expungement statute to include restriction on access to infractions, which are considered civil according to statutory and decisional law. *See generally* Cunningham v. State, 835 N.E.2d 1075, 1077 (Ind. Ct. App. 2005).

2. IND. CODE §§ 35-42-4-2 (listing elements of the offense); 35-41-1-9 (2013) (defining "deviate conduct").

3. *Id.* § 35-42-4-1(a).

generally sixteen, the child seduction statute imposes criminal liability for sexual conduct with sixteen or seventeen year olds when the perpetrator has a special relationship with the child, such as a teacher or the child's custodian.[4] That list was broadened in 2013 to include a person who has a "professional relationship" with the child, "may exert undue influence on the child because of the person's professional relationship with the child," and uses that professional relationship to engage in sexual conduct with the child.[5] The statute also includes factors the trier of fact may consider in making this assessment, which include (1) the age difference between the defendant and victim, (2) whether the defendant occupied a position of trust, (3) whether the defendant committed any ethical occupational/professional ethical violations, (4) the authority of the defendant over the child, (5) whether the defendant exploited any particular vulnerability of the child, and (6) "any other evidence relevant to the defendant's ability to exert undue influence over the child."[6]

3. Exposed Female Nipples and Child Exploitation.—The definition of sexual conduct was broadened to include exhibition of "the female breast with less than a fully opaque covering of any part of the nipple,"[7] and the child exploitation statute was similarly broadened to include that language in criminalizing such things as the managing, taping, or distribution of performances that involve the uncovered genitals or female nipples of those under eighteen.[8]

4. Child Solicitation and Related Offenses.—In response to a January 2013 Seventh Circuit opinion that struck down the statute banning certain sex offenders access to social media on First Amendment grounds,[9] the General Assembly amended the child solicitation statute in a number of ways. First, specific definitions of "instant messaging or chat room program"[10] and "social networking web site"[11] were added.

The legislation also requires as a condition of probation or parole for a sex offense:

> the court shall prohibit the convicted person from using a social networking web site or an instant messaging or chat room program to communicate, directly or through an intermediary, with a child less than sixteen (16) years of age. However, the court may permit the offender to communicate using a social networking web site or an instant messaging or chat room program with:
>
> (1) the offender's own child, stepchild, or sibling; or
>
> (2) another relative of the offender specifically named in the court's

4. *Id.* § 35-42-4-7.
5. *Id.* § 35-42-4-7(n).
6. *Id.* § 35-42-4-7(o).
7. *Id.* § 35-42-4-4(4)(c)(i)
8. *Id.* § 35-42-4-4(b)
9. Doe v. Marion Cnty. Prosecutor, 705 F.3d 694 (7th Cir. 2013).
10. IND. CODE § 35-31.5-2-173 (2013).
11. *Id.* § 35-31.5-2-307.

order.[12]

Violations of the statute are not simply a reason to revoke probation or parole but also constitute a misdemeanor (or, if committed a second time, a felony) "sex offender internet offense."[13]

Unrelated to the Seventh Circuit opinion, the legislation also amended the general attempt statute to make clear how it applies in child solicitation cases:

> a person engages in conduct that constitutes a substantial step if the person, with the intent to commit a sex crime against a child or an individual the person believes to be a child:
>
> (1) communicates with the child or individual the person believes to be a child concerning the sex crime; and
>
> (2) travels to another location to meet the child or individual the person believes to be a child.[14]

5. Statute of Limitations for Certain Sex Crimes.—Although the criminal statute of limitation for Class B, C, and D felonies is five years,[15] new legislation extended that period for several sex crimes listed in Indiana Code section 11-8-8-4.5.[16] If the crime is not a Class A felony or is not listed in subsection (e) of the statute, criminal charges may be pursued up to the later of (1) ten years after the offense or (2) four years after the victim ceases to be a dependent of the perpetrator.[17]

6. Sex Offender Registry.—Finally, under legislation passed in 2013, the Department of Correction is now required by statute to remove deceased persons and those no longer required to register from the public portal of the sex offender registry.[18] Some administrative changes were also made to the registry, including reporting changes in status within 72 hours and reporting vehicle identification numbers.[19]

B. Intimidation

The General Assembly made several changes to the intimidation statute, including addition of a definition for "communicates," which had been defined in case law as knowing or having reason to believe the threat would be made known to the target.[20] The new statutory definition does not codify that general language but instead contemplates modern technology, as it "includes posting a

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12. *Id.* § 35-38-2-2.7
13. *Id.* § 35-42-4-12(b).
14. *Id.* § 35-41-5-1(c).
15. *Id.* § 35-41-4-2(a). There is no statute of limitations for Class A felonies. *Id.* § 35-41-4-2(c).
16. *Id.* § 35-41-4-2(m).
17. *Id.*
18. *Id.* § 11-8-2-13(b)(3).
19. *Id.* §11-8-8-8(a)(1) & (c).
20. Ajabu v. State, 677 N.E.2d 1035, 1042 (Ind. Ct. App.1997).

message electronically, including on a social networking web site (as defined in IC 35-42-4-12(d)).”[21]

Intimidation was also broadened to include interfering with the occupancy of a vehicle, dwelling, building, or other structure (a class A misdemeanor)[22] and threats communicated to owners of buildings open to the public employees as well as employees of a hospital, school, church, or religious organization (a class D felony).[23] Previously a D felony, intimidation of a judge or bailiff of a court or prosecuting attorney or deputy prosecutor is now a Class C felony.[24]

C. School Resource Officers

Early in 2013, the Indiana Supreme Court reversed a juvenile adjudication for resisting law enforcement while noting

> We recognize it is somewhat anomalous that two uniformed law-enforcement officers responding to the same school incident could be treated differently for purposes of resisting law enforcement, if one was purely an “outside” officer while the other was a school-resource officer. School-resource officers serve a vitally important role in maintaining school safety and order against a growing range of discipline problems and threats, and we in no way diminish the value of their work. Yet we are also reluctant to risk blurring the already-fine Fourth Amendment line between school-discipline and law-enforcement duties by allowing the same officer to invisibly “switch hats”—taking a disciplinary role to conduct a warrantless search in one moment, then in the next taking a law-enforcement role to make an arrest based on the fruits of that search.
>
> We note, though, that it would be within the Legislature’s prerogative to conclude that evolving threats to school security and discipline warrant expanding the resisting law enforcement statute to apply to forcible resistance, obstruction, or interference “with a law enforcement[, school liaison, or school resource] officer[,] or a person assisting the officer[,] while the officer is lawfully engaged in the execution of the officer’s duties.” *See* I.C. § 35-44.1-3-1(a)(1). Not only is such a policy judgment about the changing role of school officers best reserved to a politically responsive branch of government, it would be less likely than common law to cause unintended Fourth Amendment consequences. The Legislature may wish to consider such a change.[25]

The General Assembly quickly took up the suggestion, amending the definition of law enforcement officer to include “a school resource officer (as defined in IC 20-26-18.2-1) and a school corporation police officer appointed under IC 20-26-

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21. IND. CODE § 35-45-2-1(c).
22. *Id.* § (a)(3)(B).
23. *Id.* § (b)(1)(viii) & (ix).
24. *Id.* § (b)(2)(B).
25. K.W. v. State, 984 N.E.2d 610, 613 (Ind. 2013).

16."[26] The statute includes an exception, however, for resisting a school resource officer by fleeing.[27]

Although the statutory change would seem to allow a conviction for forcibly resisting a school resource officer—the issue left unresolved in the supreme court opinion—the broader problems about "switching hats" largely persist. Amended language added to Title 20 now provides that a

> school resource officer may:
> (1) make an arrest;
> (2) conduct a search or a seizure of a person or property using the reasonable suspicion standard;
> (3) carry a firearm on or off school property; and
> (4) exercise other police powers with respect to the enforcement of Indiana laws.[28]

Indiana decisional law had made a distinction between general law enforcement officers, who must comply with the Fourth Amendment, and school resource officers acting to enforce school rules or school officials, who are generally held to a lower standard of "reasonableness."[29]

D. Other Changes

Likely in response to the *Bisard* case discussed in last year's survey,[30] changes were made to the statutes governing the collection of bodily substance samples. First, a law enforcement officer may not obtain a blood sample from another law enforcement officer who has been involved in an accident or alleged crime.[31] Apart from law enforcement officers, the previously restrictive language regarding those who could collect a bodily substance sample was broadened to allow "any person qualified through training, experience, or education" to collect such samples.[32]

Finally, the deadline for the State to file the habitual offender enhancement was changed from ten days before the omnibus date to at least thirty days before trial.[33] The provision allowing a later filing at any time before trial "upon a showing of good cause" was amended to include the language "if the amendment

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26. IND. CODE § 35-31.5-2-185(d) (2013).

27. *Id.* § 35-44.1-3-1 (f) ("A person may not be charged or convicted of a crime under subsection (a)(3) if the law enforcement officer is a school resource officer acting in the officer's capacity as a school resource officer.").

28. *Id.* § 20-26-18.2-3.

29. T.S. v. State, 863 N.E.2d 362, 369 (Ind. Ct. App. 2007).

30. Joel M. Schumm, *Recent Developments in Indiana Criminal Law & Procedure*, 46 IND. L. REV. 1033, 1042-43 (2013) [hereinafter Schumm, *2013 Recent Developments*].

31. IND. CODE § 9-30-6-6(k) (2013).

32. *Id.* § 9-30-6-6(j)(6).

33. *Id.* § 35-34-1-5(e).

does not prejudice the substantial rights of the defendant."[34] When a habitual enhancement is filed less than thirty days before trial courts must grant a continuance to the State for good cause shown or to the defendant for any reason.[35]

II. SIGNIFICANT DECISIONAL LAW DEVELOPMENTS

Last year's survey period included the retirements of Chief Justice Shepard and Justice Sullivan. They were replaced by Justices Mark Massa and Loretta Rush. This year's survey includes an unusually high number of unanimous opinions from the newly constituted Indiana Supreme Court. Although the types of cases taken on transfer and approach to decisions was largely similar to previous years, a couple of exceptions stand out. First, a decision on bail in murder cases shows the willingness of at least three members of the court—including two of the three newest members—to overrule long-standing precedent in some circumstances. Second, in a major shift from the Shepard-led court, under Chief Justice Dickson the justices have shown little interest in reducing sentences under Appellate Rule 7(B) and have even shown a willingness to vacate reductions ordered by the court of appeals.

Because a comprehensive survey of every criminal case is not possible, this section includes most of the Indiana Supreme Court decisions as well as court of appeals' decisions on issues that are especially significant, unsettled, or likely to recur.

A. Pretrial Bail

1. Bail in Felony Cases and the Appellate Remedy.—Previous Survey articles have discussed seldom-brought appeals of excessive bail,[36] which present challenges with mootness because of the months-long appellate process. This Survey period includes yet another successful challenge to pretrial bail. In *Lopez v. State*,[37] the court of appeals reversed a trial court's decision to set bail at $3,000,000 surety plus $250,000 cash for a defendant charged with several Class C and D felonies involving allegations to report and pay business taxes.[38] The appellate court applied the statutory factors in Indiana Code section 35-33-8-4(b), concluding "the extraordinary bail set here is at an amount significantly higher than reasonably calculated to assure Lopez's presence in court."[39] The court remanded "with instructions for the trial court to set a reasonable bond amount based upon the relevant statutory factors."[40]

In a footnote, the court explained: "Bail should be established by the trial

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34. *Id.*
35. *Id.*
36. Schumm, *2013 Recent Developments*, *supra* note 30, at 1041-42.
37. 985 N.E.2d 358 (Ind. Ct. App. 2013).
38. *Id.* at 360.
39. *Id.* at 362.
40. *Id.*

court and not by this Court on appeal."[41] Other cases, however, have reduced bail to a specific amount, which is generally the better approach.[42] The court of appeals has before it more than ample information to select an amount, just as it does in reducing sentences to a specific term of years. Moreover, by failing to set a specific bail amount, another appeal seems quite possible. For example, the trial court in *Lopez* could decide the $3,000,000 surety plus $25,000 cash bond should be reduced to $2,000,000 or some other amount that remains excessive. The defendant would then be required to initiate another appeal and wait months longer for a decision.

Although not part of the published opinion in *Lopez*, the court of appeals' online docket shows that a petition for appellate assistance in setting bond was filed just three days after the opinion was issued and was granted five days later.[43] The court of appeals ordered the trial court to set a bond hearing within ten days of the order or set bond at $100,000 surety with a 10% cash option.[44]

2. Murder Cases.—The bail statute cited in *Lopez* governs the thousands of felony cases filed every year in Indiana, but in *Fry v. State*[45] the Indiana Supreme Court confronted the far less common issue of bail in a couple hundred murder cases filed annually. According to the Indiana Constitution, "Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong."[46] Codifying Indiana Supreme Court precedent dating back to 1866,[47] a 1981 statute provides that "A person charged with murder has the burden of proof that he should be admitted to bail."[48]

In *Fry*, a three-justice majority overruled that precedent and declared Indiana Code section 35-33-8-2 unconstitutional, holding that defendants cannot be required to disprove the State's case pre-trial.[49] Rather, it the State must present competent evidence of guilt by preponderance of evidence.[50] Chief Justice

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41. *Id.* (quoting Reeves v. State, 923 N.E.2d 418, 422 (Ind. Ct. App. 2010)).

42. *See generally* Winn v. State, 973 N.E.2d 653, 656 (Ind. Ct. App. 2012) ("We reverse and remand with instructions that the trial court grant Winn's motion [to reduce a $25,000 cash bond to a $25,000 10% bond]."); Sneed v. State, 946 N.E.2d 1255, 1260 (Ind. Ct. App. 2011)). ("Sneed's $25,000 bail is not excessive, but the trial court abused its discretion by requiring cash only bail and denying Sneed's request for the option of a surety bond.").

43. The online docket may be accessed at https://courtapps.in.gov/Docket/Search/Refine Search, *archived at* http://perma.cc/EP3H-6THA. The appellate case number for *Lopez* is 15A01-1212-CR-00550.

44. *Id.*

45. 990 N.E.2d 429 (Ind. 2013). This decision is a significant Indiana constitutional law opinion and also discussed in that survey article. Jon Laramore & Daniel E. Pulliam, *Indiana Constitutional Developments: Small Steps*, 47 IND. L. REV. 1015, 1019-22 (2014).

46. IND. CONST. art. 1, § 17.

47. *Fry*, 990 N.E.2d at 435.

48. *Id.* at 435 & n.3 (quoting IND. CODE § 35-33-8-2).

49. *Id.* at 451.

50. *Id.* at 448, 451.

Dickson, joined by Justice Rush, concurred but wrote separately to make clear the text of the state constitution is controlling: "Ensuing contrary opinions of this Court, or statutory attempts to codify such opinions, are contrary to the text of the Constitution and cannot prevail."[51] Justices Rucker and Massa each wrote separate dissents.

Fry is significant for at least two reasons. First, it establishes an easier path to bail for defendants charged with murder and may lead to some appeals on the issue of pretrial bail in murder cases. Second, and more broadly, the case demonstrates the willingness of three justices to overrule nearly 150 years of precedent, noting "'because that's the way we've always done it' is a poor excuse . . . for continuing to do it *wrong*."[52] Whether that approach will be followed in other areas of the court's criminal law jurisprudence will be seen in the coming years.

B. Speedy Trials with Pro Se Motions

Criminal defendants generally speak through counsel once counsel is appointed.[53] But sometimes defendants are unhappy with appointed counsel and may file *pro se* motions or seek to discharge counsel. In *Schepers v. State*,[54] a defendant represented by appointed counsel filed a *pro se* appearance, a motion to remove his appointed counsel, and a request for a speedy trial.[55] Because appointed counsel "was still representing Schepers when the pro se motions were filed," the court of appeals held the subsequently filed motion to dismiss was properly denied.[56]

The issue remains a potential thicket, though, as highlighted by some of the precedent discussed in *Schepers*. For example, a 2012 court of appeals' case distinguished an earlier case where the trial court had refused a *pro se* motion because the defendant was represented by counsel, disagreeing "that the appointment of counsel and not the appearance of counsel is the relevant time."[57]

C. Trial in Absentia

Sometimes a failure to appear at trial may constitute a waiver of the right to counsel and right to be present at trial, but *Hawkins v. State*[58] offers an usual set of facts that led the Indiana Supreme Court to reverse convictions entered against a North Carolina resident who failed to appear at his Elkhart County jury trial for

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51. *Id.* at 451 (Dickson, C.J., concurring).

52. *Id.* at 442 (emphasis in original).

53. Schepers v. State, 980 N.E.2d 883, 886 (Ind. Ct. App. 2012).

54. *Id.*

55. *Id.* at 886.

56. *Id.* at 887.

57. Fletcher v. State, 959 N.E.2d 922, 929 (Ind. Ct. App.), *trans. denied*, 968 N.E.2d 768 (Ind. 2012).

58. 982 N.E.2d 997 (Ind. 2013).

non-support of a dependent.[59] Although not approving of the defendant's actions in any "way, shape, or form," the court emphasized the defendant (1) had appeared at every scheduled hearing until the final pretrial, (2) was never notified that his public defender's motion to withdraw had been granted, (3) contacted the trial court by letter after trial to explain the absence, and (4) had relayed a message to the deputy prosecutor, who in turn told the court that the defendant was attempting to get to court but would not arrive until early in the afternoon.[60]

Acknowledging the burden of delaying the jury trial and the impact on other matters on the trial court's docket, the supreme court concluded that a "trial court is the protector of more than just its own calendar. In criminal cases it must also vigorously protect the rights of those who are called before it as defendants."[61]

D. Bifurcation of SVF Charge

The court of appeals has long held the bifurcation of possession of a firearm by a serious violent felon (SVF) charges "serves the ends of justice" and "circumvent[s] legitimate concerns regarding fairness by avoiding reference to [a defendant] as a 'serious violent felon' until after the jury had decided whether he had knowingly or intentionally possessed" a firearm.[62] However, a second phase of the trial should occur "if, and only if, the jury first concluded beyond a reasonable doubt that [the defendant] had knowingly or intentionally possessed a firearm."[63]

In *Wood v. State*,[64] the court of appeals held the trial court "made an error of law when it instructed the State it could proceed to a second phase of trial even after the jury returned a verdict finding Wood had not knowingly or intentionally possessed the firearms."[65] Although the defendant then pleaded guilty to that charge, the court of appeals nevertheless reversed the conviction based on federal double jeopardy principles and the doctrine of collateral estoppel.[66]

E. Insufficient Time to Prepare for Juvenile Waiver Hearing

In *Gingerich v. State*[67] a twelve-year-old boy was charged with murder and waived to adult courts at a hearing for which his lawyer had only four business days to prepare.[68] Although the boy later pleaded guilty in adult court, the court of appeals addressed his challenge on direct appeal by reiterating "one may challenge a waiver into adult court at any time, as it involves a question of subject

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59. *Id.* at 997-98.
60. *Id.* at 1001.
61. *Id.*
62. Williams v. State, 834 N.E.2d 225, 228 (Ind. Ct. App. 2005).
63. *Id.*
64. 988 N.E.2d 374 (Ind. Ct. App. 2013).
65. *Id.* at 378.
66. *Id.* at 377-78.
67. 979 N.E.2d 694 (Ind. Ct. App. 2012), *trans. denied,* 984 N.E.2d 221 (Ind. 2013).
68. *Id.*

matter jurisdiction."[69] The court of appeals held the juvenile court abused its discretion in denying repeated requests for a continuance of the waiver hearing, pointing to prejudice from the inability to investigate competence or to prepare to refute the testimony of a probation officer who testified he was unaware of a juvenile facility that would accept Gingerich.[70]

F. Crime or Not a Crime?

As has become a Survey article tradition, this section explores cases in which the appellate courts decided whether there was sufficient evidence to support a charge, often with broad principles that could shape future charging and trial decisions.

1. Bodily Injury.—Many criminal statutes enhance offenses based on "bodily injury." In *Bailey v. State*,[71] the supreme court considered whether a husband shoving his wife and repeatedly poking her in the forehead, causing pain, was sufficient to prove the bodily injury element of a domestic battery conviction.[72] After surveying Indiana precedent and the approaches of other states, the supreme court adopted a bright-line approach that any degree of physical pain may constitute bodily injury.[73] It rejected the requirement that "physical pain rise to a particular level of severity before it constitutes an impairment of physical condition" because that approach "could bring uncertainty to our relatively straightforward statutory structure," "could unfairly discount the suffering of certain victims who may have a lower pain tolerance than others," and would excuse "from punishment conduct that is covered under the language of the statute."[74]

The supreme court acknowledged that its opinion "may raise the specter of witness coaching, whereby a victim is encouraged to say 'it hurt' when, in actuality, it did not," which is especially dangerousness in emotionally charged domestic disputes that are often boil down to "he said/she said" testimony with no other witnesses.[75] Those issues, however, are not new and "are largely addressed through zealous advocacy and effective cross-examination."[76]

2. Resisting Law Enforcement: Force and Video.—In *K.W. v. State*,[77] the supreme court reversed a true finding for resisting law enforcement based on the failure of the State to prove the resistance was forcible. The officer's testimony that the juvenile "began to resist and pull away" and "turned" to take a step away did not meet the lofty requirement of "strength, power, or violence," which has

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69. *Id.* at 705 (quoting Roberson v. State, 903 N.E.2d 1009, 1009 (Ind. Ct. App. 2009)).
70. *Id.* at 713.
71. 979 N.E.2d 133 (Ind. 2012).
72. *Id*.
73. *Id.* at 141-42.
74. *Id.*
75. *Id.* at 142.
76. *Id.*
77. 984 N.E.2d 610 (Ind. 2013).

been found insufficient in similar cases of "leaning away" or "twisting and turning a little bit."[78]

At the oral argument, at least two of the justices made clear they had watched the surveillance video of the incident.[79] In a footnote the court remarked the video confirmed the officer's "cautious characterization" of the incident: "K.W. turning and taking a step away from Sergeant Smith while his arm was still in the officer's grasp, immediately after which Sergeant Smith brought him to the floor by the straight arm-bar take-down his testimony described."[80]

3. No Accomplice Liability for Violation of a No-Contact Order.—The violation of a no-contact order issued as a condition of pre-trial release is the Class A misdemeanor offense of invasion of privacy.[81] A separate statute makes clear that an invitation by the protected person "does not waive or nullify an order for protection."[82] In *Patterson v. State*,[83] the court of appeals decided as an issue of first impression that a protected person could not be charged as an accomplice for invasion of privacy by inviting the respondent to make contact.[84] Relying heavily on an Ohio Supreme Court case, the court of appeals concluded, "Protection orders are about the behavior of the respondent and nothing else. How or why a respondent finds himself at the petitioner's doorstep is irrelevant. To find appellant guilty of complicity would be to criminalize an irrelevancy."[85]

4. Unexplained Addresses Insufficient to Support HTV Conviction.—A conviction for driving as a habitual traffic violator (HTV) requires defendants know their privileges are suspended, which is often established through a statutory presumption when notice is mailed "to the person at the last address shown for the person in the bureau's records."[86] In *Cruz v. State*,[87] the defendant had never applied for an Indiana license and therefore the Bureau of Motor

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78. *Id.* at 613 (citations omitted).

79. The webcast of the Indiana Supreme Court's oral argument are available at: http://mycourts.in.gov/arguments/, *archived at* http://perma.cc/GH2Y-3VCX.

80. *K.W.*, 984 N.E.2d at 613 n.1. A court of appeals' opinion also touched upon issues related to video, although in the context of whether a jury instruction should have been given. In *Burton v. State*, 978 N.E.2d 520, 525 (Ind. Ct. App. 2012), a dash camera captured a disturbing episode where a sleeping driver was awakened and "could have been confused and/or scared for his life when Officer Gray threatened to shoot him, Officer Witt broken into the car, and both officers pulled him out of the car and threw him to the ground." *Id.* at 526. Although the officers "testified to different versions of what occurred," the court of appeals found a strong evidentiary basis for jury instructions on self-defense and excessive force by police. *Id.* The case was reversed and remanded for a new trial because the failure to give the instructions was not harmless error.

81. IND. CODE § 35-46-1-15.1(5).

82. *Id.* § 34-26-5-1.

83. 979 N.E.2d 1066 (Ind. Ct. App. 2012).

84. *Id.* at 1069.

85. *Id.* (quoting State v. Lucas, 795 N.E.2d 642, 648 (Ohio 2003)).

86. IND. CODE § 9-30-10-16(b).

87. 980 N.E.2d 915 (Ind. Ct. App. 2012).

Vehicles (BMV) could not rely on the address self-reported by the driver.[88] Although the court found the BMV's "practice of using court records is generally acceptable," all the records submitted at trial showed addresses different from the one where the BMV had sent the HTV notice.[89] A BMV employee speculated the address used came from a traffic violation several years earlier, but the records admitted were replete with more recent addresses.[90] Finding a "total lack of evidence" to explain how the notice address was determined, the court of appeals reversed Cruz's conviction because the State failed to prove notice was mailed to the "last address shown."[91]

5. Refusing to Exit Home Is Not Fleeing.—In *Vanzyll v. State*,[92] police officers were stationed at the front and back door of a residence and wanted a suspect to exit. The State conceded the suspect was not required to open the door when police knocked but argued he was committed resisting law enforcement (fleeing) when he ran back inside the house. Distinguishing *Wellman v. State*,[93] where a suspect fled by disobeying an officer's command to remain outside, the court of appeals reversed Vanzyll's conviction for fleeing because officers never ordered him to stop before or after he opened the back door and then ran inside the residence.[94]

6. Temporarily Empty Home is an "Inhabited" Dwelling Under Criminal Recklessness Statute.—Criminal recklessness is a Class C felony when a person shoots "a firearm into an inhabited dwelling or other building or place where people are likely to gather."[95] In *Tipton v. State*,[96] the court of appeals held as a matter of first impression that a "residence may be 'inhabited' for criminal recklessness purposes if someone is likely to be inside."[97] The court reasoned that the temporary absence of occupants "does not lessen the risk of danger to others or the recklessness of [the defendant's] behavior and that shooting at a structure currently used as a dwelling poses a great risk or 'high probability' of death."[98]

G. Sentencing Issues Under Appellate Rule 7(B)

For many years, substantive appellate sentence review under Appellate Rule 7(B) was a one-way street, with the supreme court reducing a few sentences on

88. *Id.* at 919 (citing IND. CODE § 9-24-13-4).
89. *Id.*
90. *Id.*
91. *Id.*
92. 978 N.E.2d 511 (Ind. Ct. App. 2012).
93. 703 N.E.2d 1061 (Ind. Ct. App. 1998).
94. *Id.* at 516.
95. IND. CODE § 35-42-2-2(c)(3).
96. 981 N.E.2d 103 (Ind. Ct. App. 2012).
97. *Id.* at 110.
98. *Id.*

transfer each year.[99] That rule, which implements the Indiana Constitution's power to review and revise sentences, allows appellate courts to revise a statutorily authorized sentence "if, after due consideration of the trial court's decision, the Court find that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[100] These reductions were on top of the several ordered by the court of appeals, which were seldom contested through a petition to transfer filed by the State.

Near the end of the last survey period, the supreme court broke new ground by granting a petition to transfer filed by the State and reinstating a sentence ordered by the trial court.[101] But that article continued with summaries of a few sentence reductions from the same year.[102]

The traffic on that one-way street has now been reversed. During the survey period, the Indiana Supreme Court issued opinions in four cases that vacated court of appeals' opinions ordering reductions—and reinstated the trial court's sentence.[103]

In *Kimbrough v. State*,[104] the Indiana Supreme Court applied basic and well-settled legal principles in reinstating a trial court's sentence. The defendant did not raise a claim that his sentence was inappropriate under Appellate Rule 7(B) but instead argued the trial court abused its discretion in finding two aggravating factors and requested a lesser sentence because "his mitigating circumstances outweighed aggravating ones."[105] By agreeing and reducing the sentence from forty to twenty years, the court of appeals contravened the basic principles of

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99. *See generally* Schumm, *2013 Recent Development*, *supra* note 30, at 1057; Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 45 IND. L. REV. 1067, 1093 (2012) [hereinafter Schumm, *2012 Recent Developments*].

100. IND. R. APP. P. 7(B).

101. Schumm, *2013 Recent Developments*, *supra* note 30, at 1058 (discussing Bushhorn v. State, 971 N.E.2d 80 (Ind. 2012)).

102. *Id.* at 1059-61.

103. A fifth case, decided early in the survey period, is more difficult to categorize, as the supreme court largely affirmed the trial court while granting a small measure of sentencing relief far short of what the court of appeals had ordered. *See* Kucholick v. State, 977 N.E.2d 351 (Ind. 2012) (revising sentence to four years imprisonment after trial court imposed a seven year sentence with four of the years executed, which the court of appeals had reduced to two years in a community corrections program and two years of probation).

104. 979 N.E.2d 625 (Ind. 2012).

105. *Id.* at 628 (quoting Br. of Appellant at 14). Appellate counsel probably took this approach to avoid the possibility of an increased sentence. Although appeals are often seen as a no-risk venture for criminal defendants, a request for appellate review of a sentence under article 7, sections 4 or 6 of the Indiana Constitution and Appellate Rule 7(B) allows the court to "affirm, reduce, or increase the sentence." McCullough v. State, 900 N.E.2d 745, 750 (Ind. 2009). In the years since *McCullough*, the court of appeals has increased only one sentence, and that increase was quickly vacated by the Indiana Supreme Court. *See* Akard v. State, 937 N.E.2d 811 (Ind. 2010). Nevertheless, the possibility remains—and likely deters some defendants from raising 7(B) claims.

Anglemyer v. State,[106] which requires that trial courts give reasons for felony sentences but makes clear that "a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors."[107] More importantly, by failing to cite or rely on Appellate Rule 7(B) and saying nothing of the nature of the offense or character of the offender, the defendant cannot secure a sentence reduction under that rule.[108]

The other three cases represent a departure from traditional practice and suggest a new normal for appellate sentence review. In each case, the supreme court granted transfer and issued a short *per curiam* opinion that recited the relevant facts and court of appeals' holding, summarized the boilerplate legal standard for a reduction, and then concluded: "Having reviewed the matter, our collective judgment is that the sentence imposed by the trial court is not inappropriate under Appellate Rule 7(B), and does not warrant appellate revision. Accordingly, we affirm the sentence imposed by the trial court."[109]

Without any further reasoning or specific application of precedent, the reasons for a reversing a reduction—and the prospect of that continuing in future cases—remain a bit of a mystery. Some clues may be gleaned from the March 2013 oral argument in the only case set for oral argument. In *Lynch v. State*,[110] the court of appeals had reduced a forty-year sentence for attempted child molesting to the minimum term of twenty years.[111] The justices' questions suggested the Court was trying to refine its approach to addressing 7(B) claims rather than completely abandoning 7(B) review. Even the Deputy Attorney General did not argue for abandoning the rule but did suggest the court of appeals should set forth a "compelling analysis" when reducing a sentence.[112] The justices' specific questions focused on the failure of the court of appeals to provide a detailed analysis or application of precedent as well as its failure to include the "after due consideration of the trial court's decision" language of Rule 7(B).[113]

As the following chart highlights, the change in the supreme court's approach to sentence revisions appear to have had a significant effect on the court of appeals' willingness to grant reductions.

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106. 868 N.E.2d 482 (Ind. 2007).

107. *Id.* at 491.

108. *Kimbrough*, 979 N.E.2d at 628.

109. Chambers v. State, 989 N.E.2d 1257, 1259 (Ind. 2013); Lynch v. State, 987 N.E.2d 1092, 1093 (Ind. 2013); Merida v. State, 987 N.E.2d 1091, 1092 (Ind. 2013).

110. 987 N.E.2d 1092 (Ind. 2013).

111. *Id.* at 1093 (citing Lynch v. State, No. 40A05–1201–CR–26, 2012 WL 5381372 (Ind. Ct. App. Nov. 2, 2012) (mem. dec), *vacated*).

112. *See supra* note 79. The *Lynch* oral argument was held on April 11, 2013.

113. *See supra* note 79.

Sentence Reductions at the Indiana Court of Appeals

Year[114]	7(B) Claim Raised	Reduced by Court of Appeals	Transfer to Supreme Court	Net Reductions
10/1/10-9/30/11	391	26	0	26 (6.6 %)
10/1/11-9/30/12	337	16	3	13 (3.9%)
10/1/12-9/30/13	302	4	3	1 (0.3%)

In the twelve-months of the survey period, the court of appeals reduced sentences just four times—compared to as many as four times the year before and more than six times as many two years earlier.[115] Just one of those four reduced sentences actually stuck,[116] as transfer was sought and granted in the other three.[117]

Moreover, beyond rejecting the vast majority of 7(B) claims, the court of appeals decided a case in July as an incredibly rare *per curiam* opinion and largely parroted the language of recent supreme court cases.[118] Although the issuance of *per curiam* court of appeals' opinions denying sentencing relief seems unlikely, the trend of few, if any reductions, seems likely.

Cases mostly likely to secure a revision are those in which the court of appeals sets forth a compelling analysis and perhaps applies earlier supreme court precedent that had ordered a reduction. None of those earlier cases have been overruled or disapproved and remain available for advocates and appellate judges to use in making a compelling case for a reduction.

H. Other Sentencing Claims

Beyond the long odds for substantive sentencing relief under Appellate Rule

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114. The first two years of data in the table comes from the last two years' Survey articles. Schumm, *2013 Recent Developments*, *supra* note 30, at 1057; Schumm, *2012 Recent Developments*, *supra* note 99, at 1093. The most recent year's data came from a Westlaw search of Indiana Court of Appeals' cases and is on file with the author. The author thanks Scott Milkey, IU-McKinney Class of 2014, for his invaluable research assistance.

115. Schumm, *2013 Recent Developments*, *supra* note 30, at 1057; Schumm, *2012 Recent Developments*, *supra* note 99, at 1093.

116. *See* Kovats v. State, 982 N.E.2d 409 (Ind. Ct. App. 2013) (reducing a twenty year sentence to fifteen years).

117. *See supra* note 109.

118. King v. State, 992 N.E.2d 743 (Ind. Ct. App. 2013).

7(B), defendants have several procedural-type routes for sentencing relief. A few of these are discussed below.

1. Community Outrage Not a Proper Sentencing Consideration.—In an especially short and pointed opinion that blurs the line between a substantive and procedural challenge, the supreme court made clear that it is keeping a careful eye on the reasoning of the court of appeals in sentencing cases.[119] The court of appeals had used the following sentence in affirming a maximum sentence: "In other words, the maximum sentence here can be justified as a deontological response giving voice to a community's outrage, based on the facts and circumstances of the crime."[120] The supreme court "disagree[d] and disapprove[d] of consideration of a community's outrage in the determination or review of a criminal sentence."[121] Presumably a trial court's similar comments in ordering a lengthy sentence would be greeted by a similar rebuke. Ultimately, though, the court "agree[d] with the ultimate conclusion of the Court of Appeals that the sentence imposed by the trial court is appropriate and should be affirmed."[122]

2. Late Pre-Sentence Investigation (PSI) Report.—Pre-sentence investigation (PSI) reports contain important information for judges to consider at sentences, and by statute must be given to a defendant "sufficiently in advance of sentencing" to allow "a fair opportunity to controvert the material included."[123] In *Gilbert v. State*,[124] the court of appeals held due process requires a new sentencing hearing when the defendant was in Indiana only forty-eight hours before sentencing, had less than twenty-four hours notice of his sentencing, received the PSI the day of the sentencing hearing, and was given "only a few minutes during the hearing to review the report."[125]

3. Consecutive Sentences Require Reasons.—*Bowen v. State*[126] highlights the important statutory limitation on consecutive sentences for different counts in the same case. There, the supreme court reiterated that "[p]recedent requires that a trial court 'include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence,' including the reasons for imposing consecutive sentences."[127] The court opted "to remand to the trial court for clarification of its sentencing decision and preparation of a new sentencing order."[128]

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119. Escobedo v. State, 989 N.E.2d 1248, 1248 (Ind. 2013).

120. *Id.*

121. *Id.*

122. *Id.*

123. IND. CODE § 35-38-1-12(b).

124. 982 N.E.2d 1087 (Ind. Ct. App. 2013).

125. *Id.* at 1092.

126. 988 N.E.2d 1134 (Ind. 2013).

127. *Id.* at 1134 (quoting Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind. 2007)).

128. *Id.* at 1135. Months later, after the survey period, the court granted rehearing to respond to the defendant's contention that a new judge was now presiding in the trial where the case had been remanded. 1 N.E.3d 131 (Ind. 2013). Under these circumstances, the supreme court provided three options:

4. Unbargained-For Illegal Sentences.—The Indiana Supreme Court held in 2008 that a defendant can forfeit his or her right to appellate review of a sentence as part of a written plea agreement,[129] and has repeatedly explained that a defendant "may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that is was an illegal sentence."[130] But how do those principles apply when the sentence imposed is contrary to law (impermissible consecutive habitual offender enhancements) and not addressed in the plea agreement? Distinguishing the earlier cases where illegal sentences were "explicitly provided for in the plea agreement, and the defendant benefited from the plea,"[131] in *Crider v. State*[132] the supreme court remanded for resentencing because the defendant had not agreed to consecutive habitual enhancements and thus his appeal waiver was invalid and the sentences had to be served concurrently.[133]

5. Trial Courts Can Aggravate Remaining Counts Based on Facts From Counts Dismissed as Part of a Plea Agreement.—A 1986 supreme court opinion made clear that trial courts could not aggravate a sentence to compensate for disagreement with a jury's verdict, i.e., acquittal on some counts.[134] In *Bethea v. State*,[135] the supreme court applied that precedent to the plea agreement context. There, a defendant charged with nine counts, including Class A felony burglary resulting in bodily injury, pleaded guilty to two counts, including Class B felony burglary, which does not include the bodily injury element.[136] The supreme court concluded that the plea agreement "did not limit what the State could offer as aggravating factors . . . . In other words, it did not limit the sentencing evidence, only the maximum sentence."[137] Thus, the trial court was free to give significant weight to evidence of bodily injury in sentencing the defendant for Class B felony burglary.[138] In future cases, however, the parties could include in a plea agreement language restricting the ability of the trial court to use evidence related

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> On remand for a new sentencing order that responds to concerns raised by the Supreme Court, the trial court may discharge this responsibility by (1) issuing a new sentencing order without taking any further action, (2) ordering additional briefing on the sentencing issue and then issuing a new order without holding a new sentencing hearing, or (3) ordering a new sentencing hearing at which additional factual submissions are either allowed or disallowed and then issuing a new order based on the presentations of the parties.

Id.

129. Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008).
130. Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004).
131. *Id.*
132. 984 N.E.2d 618 (Ind. 2013).
133. *Id.* at 625.
134. Hammons v. State, 493 N.E.2d 1250 (Ind. 1986).
135. 983 N.E.2d 1134 (Ind. 2013).
136. *Id.* at 1137-38.
137. *Id.* at 1144.
138. *Id.* at 1145.

to dismissed charges.[139] In the absence of that language, however, "it is not necessary for a trial court to turn a blind eye to the facts of the incident that brought the defendant before them."[140]

The conclusion to the opinion notes "[u]nless the *evidence* is forbidden by terms of the plea agreement, the trial court judge may consider all *evidence* properly before him."[141] The fact section mentions that the trial court heard "testimony of one of the victims,"[142] which surely qualifies of evidence. Presumably the State will be required to call witnesses to prove facts related to dismissed charges—and may not simply rely on the probable cause affidavit filed with the original charges (and usually attached to the presentence investigation report).[143]

6. Continuing Crime Doctrine.—Indiana's double jeopardy clause provides broad protection against multiple convictions based on the same evidence,[144] and a less commonly cited but powerful variety of double jeopardy protection is the "continuing crime doctrine." That doctrine prohibits the State from securing multiple convictions for same continuous offense if was "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction."[145]

Applying the doctrine's "fact-sensitive analysis" in *Chavez v. State* the court of appeals reduced five convictions for child molesting by fondling to two convictions for actions occurring at two separate points in the same day.[146] During the first encounter, the defendant kissed the child on the mouth, inserted his tongue into her mouth, rubbed her nipple, and held his hand on her buttocks—acts that were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction."[147] Similarly, later in the day his insertion of his tongue in the victim's mouth while placing his hand over her clothes on her vagina was a single transaction for which only one conviction could stand.[148] Thus, three of the five convictions were vacated based on the continuing crime doctrine.

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139. *Id.*

140. *Id.*

141. *Id.* at 1146 (emphasis added).

142. *Id.* at 1138.

143. The approach of *Bethea* seems somewhat at odds with the restitution context, where trial courts may not order restitution for damages related to a charge that is dismissed as part of a plea agreement. *See infra* notes 157-58 and accompanying text.

144. *See generally* Richardson v. State, 717 N.E.2d 32 (Ind. 1999) (creating and applying the "actual evidence test" for assessing double jeopardy violations under the Indiana Constitution).

145. Chavez v. State, 988 N.E.2d 1226, 1228 (Ind. Ct. App. 2013) (quoting Riehle v. State, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005)).

146. *Id.* at 1229-30.

147. *Id.* at 1229 (quoting *Riehle*, 823 N.E.2d at 296).

148. *Id.* at 1230.

I. Restitution

1. Restitution in Non-Support of Dependent Cases.—In *Sickels v. State*,[149] Indiana Supreme Court granted transfer to address the narrow question of whether a custodial parent qualifies as the "victim" for purposes of restitution in a child-support arrearage cases involving emancipated children.[150] The court of appeals had *sua sponte* found the defendant's children—and not his former wife, the custodial parent of their children—was the victim.[151] Relying on civil cases, the supreme court expanded to the criminal restitution realm the presumption that a custodial parent whose children are now emancipated has expended his or her own funds to offset any deficit caused by missing child-support payments.[152] Although the custodial parent of *emancipated* children may not be the only possible victim entitled to restitution, criminal restitution will be payable only to the custodial parent in cases involving *dependent* (non-emancipated) children.[153]

2. Letter from Victim Sufficient.—Restitution orders must provide a "reasonable basis for estimating loss" and cannot "subject the trier of fact to mere speculation or conjecture."[154] In *Guzman*, the court of appeals affirmed a restitution order based on a letter from the victim's attorney that set out "medical expenses incurred as a result of the accident, breaking down the total by amount and to whom the amount was due."[155] The court emphasized the letter established an "exact amount of law" and provided a reasonable basis for determining that loss, which did not require speculation or conjecture by the trial court.[156]

3. Limited to Crimes in Plea Agreement.—Restitution orders must be based on the amount of damage to the victim "incurred as a result of the crime"—which in the plea agreement context means only the crime(s) to which the defendant has pleaded guilty.[157] Thus, in *Gil v. State* the court of appeals remanded a $20,000 restitution order because the defendant pleaded guilty to only one or two burglary counts and even the State conceded that it was not clear how the trial court arrived at its restitution amount.[158]

4. Joint and Several Liability?—Although merely dicta because the court was otherwise remanding for a new restitution hearing, *Gil* includes an important discussion of whether joint and several liability for the full amount of restitution

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149. 982 N.E.2d 1010 (Ind. 2013).

150. *Id.* at 1012.

151. *Id.*

152. *Id.* at 1014.

153. *Id.*

154. Guzman v. State, 985 N.E.2d 1125, 1130 (Ind. Ct. App. 2013) (citations omitted).

155. *Id.* at 1131.

156. *Id.*

157. Gil v. State, 988 N.E.2d 1231, 1236 n.5 (Ind. Ct. App. 2013).

158. *Id.* at 1236. Similarly, as the court of appeals reiterated in another case decided during the survey period, "when a plea agreement is silent on the issue of restitution, a trial court may not order the defendant to pay restitution as part of his or her sentence; such an order exceeds the scope of the plea agreement." Morris v. State, 985 N.E.2d 364, 369 (Ind. Ct. App. 2013).

"is constitutionally proportionate to the nature of the offense committed by a defendant who has caused only a portion of the damages."[159] Citing federal district court opinions, the court of appeals suggested it "may be particularly advisable to apportion liability among defendants under some factual circumstances, such as when there are varying lengths and levels of involvement by the criminal participants."[160]

5. Proper Remedy Is New Hearing.—Finally, in *Iltzch v. State*[161] the supreme court considered the proper remedy when the State fails to present sufficient evident to support a restitution order. Reversing a divided court of appeals' opinion that required the order be vacated,[162] the supreme court held the appropriate remedy is instead to remand to the trial court "to conduct a new restitution hearing, at which the State will be permitted to present, and [the defendant] will be allowed to confront, any additional evidence supporting the victim's property loss."[163] Chief Justice Dickson dissented from that view, concluding that "permitting the State a second opportunity to overcome its deficiency in proof is inconsistent with principles prohibiting double jeopardy."[164]

J. Probation Conditions

1. Standard of Proof for Violation.—In *Heaton v. State*[165] the supreme court made clear the State must prove a violation of probation by a preponderance of the evidence—overruling an earlier case that suggested the standard was merely probable cause.[166] Because it was unclear which standard the trial court applied, the supreme court remanded the case "for reconsideration of whether the defendant violated her probation and if so, what sanction, if any, is appropriate."[167]

2. Probation for Misdemeanor Sentences.—In *Jennings v. State*,[168] the Indiana Supreme Court clarified the confusion surrounding limitations on suspended sentences and probation in misdemeanor cases. The court of appeals had held "term of imprisonment" includes both executed and suspended time, which meant after a thirty-day jail sentence and 150 day suspended sentence, the period of probation could not exceed 185 days (30+150+185=365).[169] Based on the plain language of the statute, legislative intent, and the rehabilitative purpose of probation, the supreme court concluded that imprisonment means executed or

159. *Gil*, 988 N.E.2d at 1236.
160. *Id.*
161. 981 N.E.2d 55 (Ind. 2013).
162. *Id.* at 57 (citing Iltzsch v. State, 972 N.E.2d 409 (Ind. Ct. App. 2012)).
163. *Id.* at 57.
164. *Id.* (Dickson, C.J., dissenting).
165. 984 N.E.2d 614 (Ind. 2013).
166. *Id.* at 616-17 (overruling Cooper v. State, 917 N.E.2d 667 (Ind. 2009)).
167. *Id.* at 618.
168. 982 N.E.2d 1003 (Ind. 2013).
169. *Id.* at 1004.

incarcerated time and does not include the suspended portion of the sentence.[170] Because the trial court imposed a thirty-day jail sentence, it could impose a probationary period as long as 335 days.[171]

3. Probation Conditions Upheld.—The court of appeals also considered the propriety of probation conditions in two separate cases. First, in *Whitener v. State*,[172] the court of appeals held it was within the trial court's discretion to require a defendant convicted of burglary to register as a sex offender as a condition of probation.[173] Trial courts have broad discretion in setting probation conditions "reasonably related to the person's rehabilitation," and a jury had found the defendant guilty of rape as the underlying felony, which was vacated on double jeopardy grounds.[174]

Second, in *Patton v. State*,[175] a defendant convicted of child seduction challenged a probation condition prohibiting access of "certain websites, chat rooms, or instant messaging programs frequented by children" as both overly broad and unconstitutionally vague.[176] The court distinguished a Seventh Circuit case,[177] which had struck down a similarly worded restriction on certain non-probationary sex offenders in Indiana Code section 35-42-4-12. Emphasizing that the Seventh Circuit case recognized the ability of trial courts to limit internet access as a condition of supervised release, the court of appeals distinguished the limited rights of probationers in concluding the condition was "reasonably and directly related to deterring Patton from having contact with children and to protecting the public."[178] As to the vagueness challenge, the court of appeals noted "a number of ways that Patton can learn which internet activities are permissible," including websites that require age verification, the names of chat rooms, and the terms and conditions of social media sites.[179]

K. Sex Offender Registry

Finally, the Indiana Supreme Court decided two sex offender registry cases, building on its landmark opinion in *Wallace v. State*,[180] which applied a seven-factor "intents-effects" test in assessing potential violations of Indiana's ex post

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170. *Id.* at 1009.

171. *Id.* at 1004, 1009. The same days that *Jennings* was issued, the court applied the case in affirming a suspended sentence of one year with a one-year probationary term in *Peterink v. State*, 982 N.E.2d 1009, 1010 (Ind. 2013).

172. 982 N.E.2d 447 (Ind. 2013).

173. *Id.* at 447-48.

174. *Id.* at 448.

175. 990 N.E.2d 511 (Ind. Ct. App. 2013).

176. *Id.* at 514.

177. Doe v. Marion Cnty. Prosecutor, 705 F.3d 694, 703 (7th Cir. 2013).

178. *Patton*, 990 N.E.2d at 515-16.

179. *Id.* at 516-17.

180. 905 N.E.2d 371 (Ind. 2009).

facto clause.[181] In *Gonzalez v. State*,[182] the supreme court addressed whether a defendant who pleaded guilty to class D felony child solicitation in 1997 could be required to register for life as a sex offender under a 2006 statutory amendment. Considering the crime was the lowest level felony in Indiana's criminal code and carried only a ten-year registration requirement at the time of the offense, the court concluded that the statute's effect of lifetime registration was so punitive as to constitute a criminal penalty in violation of the ex post facto clause.[183] As in earlier cases, the seventh factor—whether the statute appears excessive in relation to the alternative purpose assigned—was especially important.[184] Distinguishing earlier cases that had upheld lifetime registration requirements, the supreme court emphasized that the defendant had "no available channel through which he may petition the trial court for review of his future dangerousness or complete rehabilitation" and noted the trial court had refused to grant a hearing despite repeated requests.[185]

Next, in a case with likely significance outside the sex offender registry realm, the supreme court considered the effect of a prosecutor's failure to appeal a registry ruling on the Department of Correction's ability to later raise the issue.[186] As the unanimous opinion in *Becker v. State*[187] succinctly put it, "the State is the State, whether it acts through a deputy prosecutor or through the Department of Correction. Both entities share the same substantial interest—to maximize an offender's registration obligations—and are therefore in privity with each other in cases involving that interest."[188] By failing to appeal the 2008 order, the State (through the local prosecutor) bound the State (via the DOC) under principles of res judicata.[189]

181. *Id.* at 378.
182. 980 N.E.2d 312 (Ind. 2013).
183. *Id.* at 321.
184. *Id.* at 319.
185. *Id.* at 320-21.
186. *See* Becker v. State, 992 N.E. 2d 697 (Ind. 2013).
187. 992 N.E.2d 697 (Ind. 2013).
188. *Id.* at 698-99.
189. *Id.* at 699.

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW: OCTOBER 1, 2012 TO SEPTEMBER 30, 2013

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INTRODUCTION

The Indiana Rules of Evidence serve as an important guide for the Indiana legal community. Since Indiana's codification of the Federal Rules of Evidence in 1994, case law and statutory revisions have continued to interpret and apply the Rules. This Article describes the developments in Indiana evidentiary practice during the survey period of October 1, 2012 through September 30, 2013.[1] The purpose of this Article is not to provide an exhaustive list of every case addressing the Indiana Rules of Evidence, but to summarize important developments in this area of practice. Discussion topics are listed below in the same order as the Rules.

I. GENERAL PROVISIONS (RULES 101-106)

Generally, the Rules apply to court proceedings in the State of Indiana, unless otherwise required by the United States Constitution, Indiana Constitution, or rules promulgated by the Indiana Supreme Court.[2] Rule 102 sets forth a very clear purpose for construction: "[T]o administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[3] In the event an evidentiary issue arises that is not covered by the Rules, common or statutory law governs.[4] Judge Robert L. Miller, Jr., of the U.S. District Court, Northern District of Indiana, has explained this as follows:

> [I]n resolving an evidentiary issue, a court must consult the evidence rules first; if they provide an answer, all other sources, whether statutory or case law, are to be disregarded. In deciding whether the evidence rules provide an answer, the rules are to be constructed in accordance with the principles articulated in Rule 102. If the evidence rules provide

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1. On September 13, 2013, the Indiana Supreme Court issued an order amending the Rules; however, these amendments did not take effect until January 1, 2014 and, therefore, are not addressed herein.

2. IND. R. EVID. 101(b).

3. IND. R. EVID. 102.

4. IND. R. EVID. 101(b).

no answer, the court must turn to common law and statutory sources.[5]

Preservation of claims of error, which is addressed in Rule 103, is a very important part of evidentiary practice. In order to claim error, the error must first affect a "substantial right of the party."[6] If a party is claiming error in the admission of evidence, a party must timely object or move to strike, and state the specific basis for the objection.[7] Alternatively, if the ruling erroneously excluded evidence, the party must inform the court of the substance through an offer of proof.[8] Specifically, the Indiana Court of Appeals has noted, "A trial court's ruling excluding evidence may not be challenged on appeal unless a substantial right of the party is affected and the substance of the evidence was made known by an offer of proof or apparent from the context."[9] The Indiana Court of Appeals recently explained this concept in *Allen v. State*, where the defendant proffered an exhibit containing a taxi cab receipt.[10] The trial court ultimately excluded the receipt and the record contained no information regarding the specifics of the receipt.[11] As a result, defendant did not provide a sufficient record for the appellate court and effectively waived the argument.[12]

II. JUDICIAL NOTICE (RULE 201)

Rule 201 sets forth the types of facts and laws of which a court may take judicial notice.[13] Facts that are generally known within the jurisdiction of the trial court and are not subject to "reasonable dispute" may be judicially noticed.[14] Similarly, facts that can be accurately and readily determined from sources whose accuracy cannot be questioned may be judicially noticed.[15] Additionally, a trial court may judicially notice laws that include:

(1) The decisional, constitutional, and public statutory law;
(2) Rules of court;
(3) Published regulations of governmental agencies;
(4) Codified ordinances of municipalities;
(5) Records of a court of this state; and
(6) Laws of other governmental subdivisions of the United States or any

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5. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE § 102 cmt. 1 (2013).

6. IND. R. EVID. 103(a).

7. *Id.*

8. *Id.*

9. Allen v. State, 994 N.E.2d 316, 321 (Ind. Ct. App. 2013).

10. *Id.*

11. *Id.*

12. *Id.*

13. IND. R. EVID. 201.

14. IND. R. EVID. 201(a).

15. *Id.*

state, territory or other jurisdiction of the United States.[16]

A court may take judicial notice at any point in the proceedings, either on its own or upon the request of a party when the court is supplied with necessary information.[17]

In *Banks v. Banks*,[18] the Indiana Court of Appeals analyzed the limits of judicial notice. *Banks* involved a contested post-dissolution of marriage, where an ex-husband sought a reduction in his incapacity spousal maintenance obligation to his ex-wife.[19] The trial court granted the ex-husband's request, reducing the amount of spousal maintenance that he was paying to his ex-wife, and an appeal ensued. Ex-husband included a copy of a Social Security Administration (SSA) decision with his appellee's appendix, requesting that the appellate court take judicial notice of the decision for purposes of his appeal.[20] Ex-wife filed a motion to strike this material from the appellee's appendix. The Indiana Court of Appeals noted the dichotomy between its inability to consider new evidence on appeal, and the provision in Rule 201(d) permitting judicial notice at any point in the proceedings.[21] While the court declined to strike the SSA decision from the appellee's appendix, it importantly noted that "judicial notice may not be used on appeal to fill evidentiary gaps in the trial record."[22] The court further noted, "We need not definitively resolve whether we could or should take judicial notice of the SSA decision. However, because [appellee] presents a colorable basis for taking judicial notice of the SSA decision, we decline to order that the pages of his appendix containing the order be stricken."[23]

III. RELEVANCY AND LIMITATIONS (RULES 401-413)

A. Defining Relevancy

Relevant evidence is defined in Rule 401, while Rule 402 addresses generally the admissibility of relevant evidence. Specifically, Rule 401 deems evidence relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence[, and if] . . . the fact is of consequence in determining the action."[24] While all irrelevant evidence is inadmissible, relevant evidence is not automatically admissible.[25] Relevant evidence can be excluded if prohibited by the state or federal constitution, a statute, other provisions within the Indiana

16. IND. R. EVID. 201(b).

17. IND. R. EVID. 201(c).

18. 980 N.E.2d 423 (Ind. Ct. App. 2012), *trans. denied*, 985 N.E.2d 738 (Ind. 2013).

19. *Id.* at 424.

20. *Id.* at 425-26.

21. *Id.* at 426.

22. *Id.* (citing Dollar Inn, Inc. v. Slone, 695 N.E.2d 185, 188 (Ind. Ct. App. 1998)).

23. *Id.*

24. IND. R. EVID. 401; *see also* Erkins v. State, 988 N.E.2d 299, 311 (Ind. Ct. App.), *trans. granted*, 993 N.E.2d 625 (Ind. 2013).

25. *See* IND. R. EVID. 402.

Rules of Evidence, or other court rules.[26]

In *Chang v. Purdue University*,[27] the Indiana Court of Appeals drew a line with regard to relevancy. Chang was a nursing student in the College of Health and Human Services at Indiana University-Purdue University Fort Wayne who was ultimately dismissed from the program due to various incidents with other students and staff.[28] Chang sued Purdue University, among others. Some counts and defendants were dismissed following summary judgment, and the trial court later conducted a bifurcated jury trial regarding liability and damages on the remaining counts.[29] At the jury trial, the court excluded testimony from two students at IPFW. The first excluded witness was a student who was suspended from class for "unprofessional conduct and violations of the IPFW Disciplinary Code."[30] The second excluded witness observed the incident that led to Chang's dismissal from the Department of Nursing.[31] The jury found against Chang, and she appealed.[32]

The Indiana Court of Appeals concluded that the first witness was properly excluded because his dismissal significantly differed from Chang's dismissal.[33] For example, the dismissal of this witness was premised upon a different IPFW code, which implicated different procedures.[34] As a result, testimony from this witness would have little or no relevance to Chang's claims.[35] The appellate court also affirmed the exclusion of the second witness.[36] The issues before the jury were limited to the nature of the contractual agreement between Chang and the university, and whether the university failed to follow proper procedures such that it breached that contract.[37] Specifically, the jury was limited to determining the disciplinary procedures that IPFW was contractually obligated to follow, and determining whether those procedures were actually followed.[38] Because the second witness would not have aided in determining these questions, her testimony was properly excluded.[39]

In *Wressell v. R.L. Turner Corp.*,[40] the court of appeals further elaborated on definitions of relevancy within the context of the Common Construction Wage Act (CCWA). Wressell sued R.L. Turner, alleging that he was underpaid; R.L.

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26. *Id.*
27. 985 N.E.2d 35 (Ind. Ct. App. 2013), *trans. denied*, 4 N.E.3d 1187 (Ind. 2014).
28. *Id.* at 40.
29. *Id.* at 45.
30. *Id.* at 54.
31. *Id.*
32. *Id.* at 39.
33. *Id.* at 54.
34. *Id.*
35. *Id.*
36. *Id.* at 55.
37. *Id.*
38. *Id.*
39. *Id.*
40. 988 N.E.2d 289 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 328 (Ind. 2013).

Turner moved for summary judgment; Wressell submitted a response and cross-moved for summary judgment.[41] As part of Wressell's designation of evidence, he included an affidavit from Monte Moorhead, an employee with the Indiana Department of Labor.[42] The trial court struck portions of Moorhead's affidavit on the basis that it contained legal conclusions and was irrelevant.[43] The Indiana Court of Appeals ultimately concluded that the stricken paragraphs of the affidavit were "unquestionably relevant."[44] The excluded portions of the affidavit explained the IDOL's definition of fringe benefits and clarified the application of IDOL policy.[45] Specifically, the appellate court noted, "Whether IDOL considers a certain type of payment to be a fringe benefit strikes us as evidence that would be quite helpful to the factfinder in characterizing that payment, and therefore relevant."[46] As a result, the judgment of the trial court was reversed and remanded.[47]

The Indiana Court of Appeals further elaborated on Rule 401 in *In re TP Orthodontics, Inc*.[48] This case addressed a dispute among siblings regarding the family business. Three sibling shareholders of TP Orthodontics ("TP") sued their brother and president of TP, on behalf of the family business.[49] As a result, TP's board of directors established a special litigation committee to investigate the siblings' derivative claims.[50] In conjunction with this investigation, a written report was prepared, which recommended the claims that should be pursued and those that should be avoided.[51] The plaintiff siblings demanded a copy of this report, and TP refused to produce it in its entirety.[52] Only heavily redacted copies of the report were produced, as attached to their motion to dismiss the rejected claims.[53] The trial court ordered TP to produce the report, and TP filed an interlocutory appeal on the basis of relevancy and privilege. The relevancy arguments are addressed here, but the privilege arguments resurface in Part III of this Article.[54]

Specifically, the plaintiff siblings asserted that the entire report was relevant to determine whether the special litigation committee conducted a good faith investigation of their claims.[55] TP responded by asserting that the unredacted

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41. *Id.* at 292-93.
42. *Id.* at 294.
43. *Id.* at 296.
44. *Id.* at 297.
45. *Id.*
46. *Id.*
47. *Id.* at 299.
48. 995 N.E.2d 1057 (Ind. Ct. App. 2013), *trans. granted*, 9 N.E.3d 170 (Ind. 2014).
49. *Id.* at 1058.
50. *Id.* at 1059.
51. *Id.*
52. *Id.*
53. *Id.*
54. *See infra* Part III.
55. *TP Orthodontics*, 995 N.E.2d at 1064.

portions of the report were the only sections relevant to the issue of good faith.[56] In other words, TP asked the court and the plaintiff siblings to "trust" that they provided all relevant information.[57]

In deciding the relevancy issue, the appellate court noted that the unredacted version of the report presented a "partial picture, at best."[58] While the unredacted version described what actions the special litigation committee took, it failed to give information about what the committee may have neglected to do or may have done improperly.[59] For example, in investigating the sibling's allegations, the committee could have failed to interview an important employee or explore a key issue.[60] The appellate court concluded that the plaintiff siblings would not be able to determine if the committee acted in good faith without seeing the entire report.[61] As a result, a complete version of the unredacted report was relevant to the issue of good faith.[62]

B. The Admission of Relevant Evidence Hangs in the Balance

Rule 403 sets forth a balancing test for the admission of relevant evidence. Under this rule, courts are permitted to exclude relevant evidence its probative value is substantially outweighed by any of the following: potential confusion of issues, unfair prejudice, undue delay, or accumulation of evidence.[63] The Indiana Court of Appeals elaborated on this rule in *Smith v. State*.[64] Here, the defendant was first tried in 2010 and faced a multitude of charges, including: attempted murder, criminal confinement, armed robbery, possession of a firearm by a serious violent felon, auto theft, and resisting law enforcement.[65] Smith was found not guilty of attempted murder and criminal confinement, but the jury was unable to reach a verdict on the remaining counts.[66] A mistrial was declared on the remaining counts, and the state later retried Smith on those counts in 2011.[67]

At the 2011 jury trial, Smith faced felony charges of robbery, possession of a firearm by a serious violent felon, auto theft, and resisting law enforcement.[68] A prosecution witness provided testimony regarding shots that were fired at an officer.[69] Smith objected to this testimony under Rule 401 on the basis that it was

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. IND. R. EVID. 403.
64. 982 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 986 N.E.2d 819 (Ind. 2013).
65. *Id.* at 400.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 402. The basis for Smith's argument was that he was previously acquitted of

not relevant to the charges before the jury.[70] Smith further asserted that even if the evidence was relevant, it was outweighed by the risk of prejudice under Rule 403.[71] The trial court overruled the objection, and the court of appeals affirmed.[72]

The appellate court first addressed Smith's 401 argument, noting the low threshold for relevancy determinations: evidence "need only have some tendency, however slight, to make the existence of a material fact more or less probable, or tend to shed any light upon the guilt or innocence of the accused."[73] Specifically, the court of appeals determined that the evidence was relevant to the charge of resisting law enforcement, as it showed where the defendant went after the shooting and why the officer did not immediate follow in an attempt to apprehend him.[74] With regard to Smith's argument under Rule 403, the court did not find that the probative value of the testimony was outweighed by the likelihood of prejudice.[75] During the trial, the jury heard other evidence making them aware that Smith was armed and had fired at an officer.[76] As a result, the appellate court concluded that the evidence regarding Smith firing his weapon and fleeing from police was relevant to the charge of resisting law enforcement and was not unfairly prejudicial.[77]

C. Evidence of Character, Crimes, and Other Bad Acts

Generally, Rule 404 prohibits the admission of evidence of a person's character or prior bad acts to prove "action in conformity therewith on a particular occasion."[78] Under Rule 404(a), certain exceptions regarding character evidence exist for defendants and victims in criminal cases. For example, a defendant may offer evidence of his or her pertinent traits, and if admitted, it may be rebutted by the prosecution; a defendant may offer evidence as to a pertinent trait of an alleged victim, subject to restrictions in sex-offense cases under Rule 412; and in homicide cases, evidence of a victim's trait of peacefulness may be offered by the prosecution to rebut evidence that the victim was the first aggressor.[79] Finally, character traits of a witness can be admitted for impeachment purposes under Rules 607, 608, and 609.[80] Under Rule 404(b), the admission of evidence regarding prior crimes or other wrongs may not be admitted for purposes of conformity, but may be admitted to prove "motive, opportunity, intent,

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attempted murder at the first trial. *Id.*

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* (quoting Simmons v. State, 717 N.E.2d 635, 638 (Ind. Ct. App. 1999)).
74. *Id.*
75. *Id.* at 403.
76. *Id.*
77. *Id.*
78. IND. R. EVID. 404(a)(1); *see also* MILLER, *supra* note 5, § 404.
79. IND. R. EVID. 404(a)(2).
80. IND. R. EVID. 404(a)(3).

preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[81]

In *Wells v. State*,[82] Rule 404(b) was evaluated in conjunction with a motion to sever under Indiana Code section 35-34-1-11. Wells was charged with various offenses arising out of four instances of sexual assault against four separate victims.[83] The Indiana Court of Appeals issued an unpublished memorandum decision, which affirmed the trial court's denial of Wells's motion for severance.[84] The Indiana Supreme Court later granted transfer, vacating the court of appeals' opinion. After granting transfer, considering the arguments presented by counsel in briefs and oral arguments, and further discussion among the justices, the majority of the supreme court determined that transfer was inappropriate.[85] As a result, the Indiana Court of Appeals not-for-publication opinion was reinstated as a memorandum decision.

Justice Rucker dissented, issuing a separate opinion with which Chief Justice Dickson concurred. In this opinion, Justice Rucker noted that he would consider Rule 404(b) when determining the appropriateness of joinder when two or more offenses are of the same or similar character.[86] Justice Rucker thoroughly examined a variety of cases from other states in his analysis. He further explained his position as follows: "I would hold that if under Rule 404(b) relating to other crimes, the evidence of the crimes on trial would be inadmissible in a separate trial for the other, then the defendant is entitled to severance as of right under Indiana Code section 35-34-1-11(a)."[87] Justice Rucker concluded by acknowledging that Indiana's "traditional approach is in need of reconsideration."[88] While Justice Rucker's dissent is not controlling on this issue, it will be interesting to see this area of the law develop in the future.

The Indiana Court of Appeals further elaborated on the "prior bad acts" rule of 404(b) in *Bryant v. State*.[89] Bryant appealed his conviction for aggravated battery as a Class B felony, and his classification as a habitual offender. Bryant argued that the trial court improperly admitted a recording of a telephone conversation that he made from the jail telephone to a friend, which "painted him as a racist with a criminal history, violent propensity, and penchant for fighting

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81. IND. R. EVID. 404(b).

82. 983 N.E.2d 132 (Ind. 2013).

83. *Id.* at 132 (Rucker, J., dissenting).

84. *See generally* Wells v. State, 953 N.E.2d 1281 (Ind. Ct. App. 2011).

85. *Wells*, 983 N.E.2d at 132 ("By order dated February 2, 2012, the [c]ourt granted a petition seeking transfer of jurisdiction from the [c]ourt of [a]ppeals. After further review, including consideration of the points presented by counsel in supplemental briefs and at oral argument, and discussion among the [j]ustices in conference after the oral argument, the [c]ourt has determined that it should not assume jurisdiction over this appeal and that the [c]ourt of [a]ppeals not-for-publication memorandum decision . . . should be reinstated as a memorandum decision.").

86. *Id.* at 139 (Rucker, J., dissenting).

87. *Id.*

88. *Id.*

89. 984 N.E.2d 240 (Ind. Ct. App.), *trans. denied*, 988 N.E.2d 796 (Ind. 2013).

in jail."[90] Specifically, he asserted that this conversation was inadmissible hearsay,[91] was unfairly prejudicial, and informed the jury of prior bad acts as prohibited under Rule 404(b).[92]

With regard to Bryant's 403 arguments, the court of appeals determined that the recording was offered to prove intent and, as a result, the probative value of the recording exceeded any unfair prejudice that may result.[93] With regard to Bryant's 404(b) arguments, the court noted that the recording evidenced his intent—an issue that Bryant raised by making claims of self-defense.[94] Intent is one exception to inadmissible character evidence under Rule 404(b). This exception has been explained as follows:

> The intent exception in . . . [Indiana Evidence Rule] 404(b) will be available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent. When a defendant alleges in trial a particular contrary intent, whether in opening statement, by cross-examination of the State's witnesses, or by presentation of his own case-in-chief, the State may respond by offering evidence of prior crimes, wrongs, or acts to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense. The trial court must then determine whether to admit or exclude such evidence depending upon whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.[95]

Bryant's allegations that he acted in self-defense served as evidence of contrary intent sufficient to invoke the exception to Rule 404(b).[96] As a result, the recording was admissible.[97]

A very similar issue was addressed by the court of appeals in another case—*Sudberry v. State*.[98] The State charged Sudberry with four counts of battery, resulting from an altercation between Sudberry and his brother.[99] At trial, the prosecution sought to introduce evidence of a prior threat made one year before by Sudberry to his brother—"[I]f you push[] me again, I will kill you."[100]

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90. *Id.* at 249 (internal quotations omitted).

91. Bryant's hearsay arguments are addressed in greater detail in Part VII of this Article. *See infra* Part VII.B.

92. *Bryant*, 984 N.E.2d at 249.

93. *Id.*

94. *Id.* at 250.

95. *Id.* at 249-50 (quoting Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993) (internal quotations omitted)).

96. *Id.* at 250.

97. *Id.*

98. 982 N.E.2d 475 (Ind. Ct. App. 2013).

99. *Id.* at 479.

100. *Id.* (alterations in original).

Sudberry objected on the basis of Rule 404(b).[101] Similar to *Bryant*, at trial Sudberry raised the issue of intent by asserting self-defense. Sudberry acknowledged his self-defense argument, but responded that "the threat was too remote in time to be relevant and probative of his intent at the time of the battery."[102] Evidence suggested that there were no altercations between Sudberry and his brother between the date the threat was made and the date of the incident at issue.[103] As a result, the Indiana Court of Appeals concluded that "a reasonable jury could conclude that Sudberry did not have a reason to act on his threat until the date of the battery."[104] Therefore, the appellate court concluded that the trial court did not abuse its discretion by admitting the evidence of the prior threat.[105]

D. Compromise Offers and Settlement Negotiations

Rule 408 prohibits the use of settlement negotiations to prove or disprove the validity of a claim or for impeachment by a prior inconsistent statement or contradiction.[106] However, evidence of settlement negotiations may be used for another purpose such as proving witness bias or prejudice, negating contention of undue delay, or proving efforts to obstruct a criminal investigation or prosecution.[107]

Rule 408 applies to both informal negotiation and alternative dispute resolution. The Indiana Supreme Court addressed the impact of Rule 408 on statements made during mediation in *Horner v. Carter*.[108] In this case, the parties were divorced pursuant to the trial court's decree of dissolution, which incorporated their mediated settlement agreement.[109] Six years later, husband sought to modify a maintenance provision contained in the agreement.[110] Husband sought to admit evidence of statements that he made to the mediator during negotiations leading to the agreement at issue, which the trial court excluded.[111] Husband's purpose in seeking to admit this evidence was to circumvent liability under the agreement "on grounds that it reflected neither his intent, nor his oral agreement during the mediation."[112]

On appeal to the Indiana Court of Appeals, the court concluded that the agreement was ambiguous and, therefore, husband's statements were admissible

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101. *Id.* at 480.
102. *Id.*
103. *Id.* at 481.
104. *Id.*
105. *Id.*
106. IND. R. EVID. 408(a).
107. IND. R. EVID. 408(b).
108. 981 N.E.2d 1210 (Ind. 2013).
109. *Id.* at 1211.
110. *Id.*
111. *Id.*
112. *Id.* at 1212.

as extrinsic evidence to aid in construction of the agreement.[113] Upon transfer to the Indiana Supreme Court, the court disagreed, finding:

> Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation. The benefits of compromise settlement agreements outweigh the risks that such policy may on occasion impede access to otherwise admissible evidence on an issue.[114]

As a result, the trial court's exclusion of husband's statements was affirmed.[115]

IV. PRIVILEGE (RULES 501-502)

Rules 501 and 502 address privilege and waiver. Generally, unless provided by constitution, statutory law, Indiana Supreme Court rules, or common law, there is no privilege to refuse to serve as a witness, refuse to disclose, refuse to produce documents or objects, or prevent another person from disclosure or from serving as a witness.[116] Privilege can be waived if a person, or a person's predecessor in privilege, voluntarily and intentionally disclosed or consented to disclosure of any significant portion of the privileged matter.[117] Importantly, an erroneous compulsion of privileged information does not defeat privilege.[118]

Rule 502 specifically addresses the attorney-client privilege. This rule was elaborated upon in *In re T.P. Orthodontics, Inc.*[119] The factual background for this case was previously addressed in this Article and, therefore, is not restated in this section.[120] In addition to the relevancy arguments explained in the previous section, TP also refused to provide the redacted material on the basis of privilege.[121] Prior to this case, Indiana courts had not yet considered privilege in the context of special litigation committee reports.[122] In this case, the Indiana Court of Appeals noted that other courts throughout the United States have held that special litigation committee reports may contain privileged material.[123] Because it is common for special litigation committees to seek legal advice in determining how to proceed on particular claims, it is not unusual for some attorney-client communications to be included in these reports.[124]

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113. *Id.*
114. *Id.*
115. *Id.* at 1213.
116. IND. R. EVID. 501(a).
117. IND. R. EVID. 501(b).
118. IND. R. EVID. 501(c).
119. 995 N.E.2d 1057 (Ind. Ct. App. 2013), *trans. granted*, 9 N.E.3d 170 (Ind. 2014).
120. *See supra* Part III.A.
121. *TP Orthodontics*, 995 N.E.2d at 1064.
122. *Id.* at 1065.
123. *Id.*
124. *Id.*

The court of appeals noted the instances in which privilege can be waived and held, "this is another instance where privilege is waived because the report is necessary to the litigation and requiring its production comports with fairness."[125] The court further explained its holding by stating:

> We allow access to the committee report because Indiana law permits the siblings to make two challenges to the committee's determination—they can argue that the committee was not disinterested or that their investigation was not made in good faith. The most relevant source of that information is undoubtedly the committee's report. The siblings cannot make their statutorily allowed challenges, particularly their good-faith challenge, without access to the entire report.[126]

Only two Indiana cases mention special litigation committee reports, and plaintiffs were provided with access to the reports in both cases.[127] Aside from the value of the report to the derivative plaintiffs, the appellate noted the considerable value to the trial court.[128] Limiting trial court access to these types of reports would hinder the proper evaluation and adjudication of derivative plaintiff claims.[129]

V. WITNESS TESTIMONY (RULES 601-617)

A large portion of the Rules specifically detail witness competency, character, and impeachment.

A. Evaluating Witness Competency

The Rules provide generally for competency, such that every person is competent to be a witness unless otherwise provided in the Rules or by statute.[130] In *Archer v. State*,[131] the Indiana Court Appeals applied and interpreted Rule 601 in the context of testimony from a child at the defendant's trial for felony child molesting. The court noted that determinations as to witness competency are subject to the discretion of the trial court.[132] When children are called to testify, it is appropriate for trial courts to consider the following in evaluating competency: (1) whether the child understands the difference between telling the truth and a lie; (2) whether the child knows she is compelled to the tell the truth; and (3) whether the child knows what a true statement is.[133] Here, the trial court asked the child witness the following questions to determine if she was competent

125. *Id.*
126. *Id.*
127. *Id.* at 1065-66 (citing Cutshall v. Barker, 733 N.E.2d 973 (Ind. Ct. App. 2000)).
128. *Id.* at 1066.
129. *Id.*
130. IND. R. EVID. 601.
131. 996 N.E.2d 341 (Ind. Ct. App. 2013), *trans. denied*, 2 N.E.3d 686 (Ind. 2014).
132. *Id.* at 346.
133. *Id.*

to testify:

- "Do you understand the difference between telling the truth and telling a lie?"[134]
- "If I told you that I was sitting up here and this robe in [sic] color, would that be the truth or would it be a lie?"[135]
- "And sometimes if you get caught telling a lie, what happens to you?"[136]

After asking these questions and hearing the corresponding answers from the witness, the trial judge stated in the presence of the jury, "Okay. Very good. I'm very satisfied that this witness understands the oath and that she is competent, understands the difference between the truth and a lie and understands the consequences of telling a lie."[137] Archer alleged on appeal that the trial judge's comments effectively vouched for the child's testimony in the presence of the jury.[138]

The appellate court disagreed, finding that the trial judge's comments did not amount to vouching for the child's testimony.[139] The court further explained its position as follows: "Whether a witness is competent and whether a witness is credible are different questions, the former for the trial court and the latter for the jury."[140] The trial court's statement addressed the child's competency, not credibility, and therefore was not erroneous.[141]

B. Impeachment

Any party may attack a witness's credibility, including the party who called the witness.[142] A witness's character for truthfulness or untruthfulness may be attacked or supported based on reputation or opinion testimony; however, evidence of "truthful character" is only admissible after the witness's character for truthfulness has been attacked.[143] Specific conduct is largely inadmissible for impeachment purposes, unless "the door has been opened by other evidence."[144] Additionally, past convictions may also be used for impeachment purposes, subject to certain limitations.[145] Importantly, past convictions may not be used to demonstrate bad character and propensity to act in accordance with past behavior.

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 347.
139. *Id.*
140. *Id.*
141. *Id.*
142. IND. R. EVID. 607.
143. IND. R. EVID. 608(a).
144. MILLER, *supra* note 5, § 608 cmt. 5; *see also* IND. R. EVID. 608(b).
145. IND. R. EVID. 609(a).

For example, in *Brown v. Brown*,[146] Tammy sued her ex-husband, Terry, for fraud, forgery, and battery. Tammy sought to introduce evidence of Terry's past convictions of rape and check deception.[147] Prior to the trial, Terry filed a motion in limine to exclude his convictions from the evidence.[148] At the hearing on the motion in limine, Tammy argued:

> [W]e believe that these two [convictions of rape and check deception] are quite relevant in that this; [sic] number one: we are arguing that there is a forge [sic] and fraudery (sic) of a document. He has a history right here of a check deception. Both—what we're alleging and what he was convicted of involved deception. Number two; [sic] we're arguing that during a sexual act he battered her causing injury. He's been convicted of rape, which involves a sexual act and of course, battery. So the two convictions that he has are quite relevant to this issues being brought forth in this matter.[149]

The trial judge denied the motion in limine and admitted the evidence, noting: "I believe [the admissibility of Terry's convictions] goes to the weight rather than the admissibility."[150] At trial, Tammy used Terry's past convictions to demonstrate Terry's bad character and his propensity for behavior similar to the conduct alleged in the instant case.[151]

The court of appeals noted that Rule 609(a) places very specific restrictions on the use of evidence relating to past convictions.[152] Evidence of past convictions may only be used for attacking the credibility of a witness.[153] The appellate court concluded that the evidence of Terry's past convictions was not used to attack Terry's credibility within the confines of Rule 609(a).[154] The court further expressed concern that Terry's convictions (which were over twenty years old) could have reasonably led the jury to make the forbidden inference that based on the convictions Terry had the propensity to commit the acts that Tammy alleged.[155] Ultimately, the admission of this evidence was more prejudicial than probative, which violated the exception set forth in Rule 609(b).[156] As a result, the trial court was reversed and the case was remanded for additional

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146. 979 N.E.2d 684 (Ind. Ct. App. 2012).

147. *Id.* at 685.

148. *Id.*

149. *Id.* at 686 (alterations in original).

150. *Id.* (alterations in original).

151. *Id.*

152. *Id.* at 687.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* Rule 609(b) places a limit on the use of convictions that are more than ten years old. If ten years have passed, evidence of the conviction is only admissible if the probative value of the evidence outweighs its prejudicial effect; and notice of the intent to use the conviction is provided and the opposing party is given the opportunity to contest its use. IND. R. EVID. 609(b).

proceedings.[157]

The Indiana Court of Appeals elaborated on the confines of Rule 609(b) in *Sisson v. State*.[158] In this case, the defendant was convicted of burglary, receiving stolen property, and unlawful possession of a firearm by a serious violent felon.[159] Sisson argued on appeal that the trial court erred in excluding evidence of the criminal history of a witness who testified at his trial.[160] Specifically, Sisson asserted that evidence of the witness's criminal history was admissible for impeachment purposes and to prove that the witness had committed the burglary of which Sisson was accused.[161] With regard to Sisson's argument that the criminal history was admissible to prove that the witness committed the burglary at issue, Sisson never argued this at trial; therefore, this argument was waived on appeal.[162] The court of appeals noted that whether the witness had committed burglary in the past had no bearing on whether he committed the burglary in the instant case.[163]

While the witness's past convictions may have been substantively inadmissible, evidence of the criminal history is not precluded for purposes of impeachment under Rule 609.[164] However, Rule 609 imposes timeframe requirements such evidence. Here, all of the witness's convictions, except for one mail fraud conviction, fell outside the ten (10) year timeframe included in Rule 609(b).[165] As a result, Sisson was required to prove that the probative value of the convictions substantially outweighed any resulting prejudice.[166] Some of the witness's convictions were more than twenty-five years old; as a result, the court of appeals found that the probative value of this evidence was substantially outweighed by the prejudicial effect.[167]

With regard to the mail fraud conviction that fell within Rule 609(b)'s timeframe requirements, the court of appeals determined the exclusion amounted to harmless error.[168] In explaining this position, the appellate court noted that based on the testimony of other witnesses, the credibility of this particular witness was already in question, and the exclusion of evidence regarding one mail fraud conviction would not have changed the jury's determination.[169]

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157. *Brown*, 986 N.E.2d at 687.
158. 985 N.E.2d 1 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 1017 (Ind. 2013).
159. *Id.* at 6.
160. *Id.* at 16.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 17.
166. *Id.*
167. *Id.*
168. *Id.* at 18.
169. *Id.* at 17.

VI. EXPERT WITNESSES (RULES 701-705)

The Rules limit when witnesses can testify about their personal opinion on a matter. Concerning lay witnesses, Rule 701 states that lay witnesses may testify as to their opinion only if it is "rationally based on the witness's perception; and . . . helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue."[170] For both lay and expert witnesses, they are not permitted to testify as to their opinions about a defendant's guilt or innocence in a criminal matter, the veracity of a witness's testimony, legal conclusions, or the truthfulness of allegations at issue.[171]

Additional requirements are imposed on expert witnesses. Expert witnesses, in order to testify, need to be qualified either through knowledge, skill, experience, training or education.[172] Their testimony needs to "help the trier of fact to understand the evidence or to determine a fact in issue."[173] Expert *scientific* testimony will only be allowed if the court first finds that testimony to be grounded in "reliable scientific principles."[174] Notably, Rule 703 allows experts to base their testimony upon inadmissible evidence so long as other experts in their same field rely on such evidence.[175]

The admissibility of expert scientific testimony was considered in the context of the termination of a parent/child relationship in *T.H. v. Indiana Department of Child Services*.[176] In this case, a mother was appealing the state's decision to remove her two sons and permanently terminate her parental rights. The trial court conducted an evidentiary hearing in August 2012 seeking termination of the mother's parental rights.[177] During this hearing, the Miami County Office of the Indiana Department of Child Services sought to establish through its evidence that the mother could not give her two children stability and safety at her home. Additionally, they called an expert witness, a social worker, to testify as to her recommendation that the mother's rights be terminated. The expert examined this matter through individual tests of the parenting techniques of the mother, an observation of the mother spending time with the children and an interview with the mother.[178] The trial court allowed the social worker to testify as an expert. Part of the social worker's testimony was her findings after administering the Child Abuse Potential Inventory ("CAPI").[179]

In addition to appealing the trial court's decision to qualify the social worker

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170. IND. R. EVID. 701.

171. IND. R. EVID. 704(b).

172. IND. R. EVID. 702(a).

173. *Id.*

174. IND. R. EVID. 702(b).

175. IND. R. EVID. 703.

176. 989 N.E.2d 355 (Ind. Ct. App. 2013).

177. *Id.* at 357.

178. *Id.* at 358.

179. *Id.* at 358-59. The CAPI is a test that assesses a person's propensity to physically abuse children. *See id.* at 358.

as an expert, the mother appealed the trial court's decision to allow testimony on the CAPI test, arguing this assessment is not based on reliable scientific principles. Looking to Rule 702(b), the trial court stated that "no specific test is required to establish a scientific process's reliability."[180] The court in *T.H.* noted that despite no specific test being required, trial courts generally may consider

> (1) whether the technique has been or can be empirically tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error, as well as the existence and maintenance of standards controlling the technique's operation; and (4) general acceptance within the relevant scientific community.[181]

In finding that the testimony regarding CAPI was based on reliable scientific methodology, the court of appeals discussed how the social worker described the history of this test and its widely-accepted use in the psychiatric community.[182] The mother put great emphasis in her appeal on the fact that the social worker was unable to cite specific studies and journal articles on the CAPI.[183] The court of appeals agreed with the trial court that this inability to cite specific statistics did not make her testimony about CAPI unreliable.[184]

To comply with Rule 702(b), the party seeking to use that testimony does have the burden of proof to establish the scientific principles serving as the basis for that expert's testimony, but does not have to conclusively establish the reliability of those principles.[185] At issue in *State Automobile Insurance Co. v. DMY Realty Co.*, was the admissibility of an expert report used by an insured in a declaratory judgment action. The expert report, drafted by a professional engineer and geologist, opined that the contamination at the relevant site began or persisted during the period the insurance policies at issue were held. [186] The expert report was cited by the insured in its cross-motion for summary judgment. The insurers filed a motion to strike this report as being based on unreliable scientific principles.[187]

The trial court admitted this expert report and granted the insured's cross-motion for summary judgment.[188] The insurers argued that the expert report should have been excluded as it was based on guesswork and speculation.[189] The Indiana Court of Appeals stated that "[s]cientific knowledge admitted by a trial court under Indiana Evidence Rule 702 must be 'more than a subjective belief or

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180. *Id.* at 362 (citing Troxell v. State, 778 N.E.2d 811, 815 (Ind. 2002)).
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. State Auto. Ins. Co. v. DMY Realty Co., 977 N.E.2d 411, 429 (Ind. Ct. App. 2012).
186. *Id.* at 416.
187. *Id.* at 417.
188. *Id.*
189. *Id.* at 422.

unsupported speculation.'"[190] Specifically, the insurers argued that certain values used to calculate the estimated contamination period were estimated rather than tested, and the expert's use of a certain modeling software should not have been applied to this type of contamination and did not account for certain unique variables at that site.[191] The insured responded by noting that the modeling software was designed by the United States EPA, and was "perfectly appropriate" for use by the expert.[192]

The Indiana Court of Appeals conducted an extensive examination of the expert's qualifications and methods in finding that the trial court did not abuse its discretion in admitting this report.[193] The court decided the report did contain a detailed explanation of the processes used to reach his opinion.[194] To the extent the modeling software was inappropriately used, the court concluded that the insured did not need to have "conclusively established the reliability of [the expert's] scientific principles in order to prove admissibility."[195]

The Indiana Court of Appeals expounded on the admissibility of expert scientific testimony in the context of conducting an autopsy. In *Carter v. Robinson*,[196] a medical negligence and wrongful death action was filed after a patient in his sixties passed away the same afternoon after visiting with Dr. John Carter complaining of stress. The patient was diagnosed with stress and insomnia, but nothing was noted about any possible heart problems. The autopsy technician concluded that the patient died from acute and chronic congestive heart failure.[197] The plaintiff hired the autopsy technician as an expert in this action. Dr. Carter filed a motion to strike the testimony of the autopsy technician and submitted his own expert's affidavit concluding that the technician's conclusion about the patient's death was unsound and based on unreliable scientific principles. At trial, the trial court permitted the testimony of the autopsy technician, but did not permit Dr. Carter's expert physician to testify as an expert witness.[198]

The court elaborated on Rule 702 by stating that its purpose was to expand the admission of reliable scientific testimony rather than to narrow it.[199] Dr. Carter alleged that the testimony of the autopsy technician failed to follow the differential etiology methodology, a procedure where other causes of death are considered and excluded.[200] Dr. Carter also claimed that certain scientific facts

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190. *Id.* at 423 (quoting Armstrong v. Cerestar USA, Inc., 775 N.E.2d 360, 366 (Ind. Ct. App. 2002)).

191. *Id.* at 423-24.

192. *Id.* at 425.

193. *Id.* at 429.

194. *Id.*

195. *Id.* at 428.

196. 977 N.E.2d 448 (Ind. Ct. App. 2012), *trans. denied*, 989 N.E.2d 338 (Ind. 2013).

197. *Id.* at 451.

198. *Id.*

199. *Id.* at 452.

200. *Id.*

on which the technician based his opinion were not reliable, such as the technician's lack of knowledge about the patient's medical history and his reliance on observations from the patient's estranged wife who had not seen the patient in a year.[201]

The Indiana Court of Appeals evaluated the differential etiology methodology, explaining that the reliability of this methodology should be judged independently in each case.[202] For this specific methodology, the court of appeals explained that "admissible expert testimony need not rule out all alternative causes, but where a defendant points to a plausible alternative cause and the doctor offers no explanation for why he or she has concluded that it was not the sole cause, that doctor's methodology is unreliable."[203] The court found that had the autopsy technician appropriately used the differential etiology model as evidenced by his testimony at trial looking at other potential causes of the patient's death and excluding those.[204] With regard to Dr. Carter's contention that the autopsy technician wrongly relied on the testimony of the patient's estranged wife, the technician testified that the cause of death was determined independently from his conversation with the estranged wife.[205] Concerning Dr. Carter's other factual disputes in the testimony of the autopsy technician, the court determined these disputes went to the credibility and weight of the testimony rather than the admissibility of that testimony.[206]

> Once the trial court is satisfied that the expert's testimony will assist the trier of fact and that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact.[207]

In *Shelby v. State*,[208] the court of appeals considered whether the trial court erred in restricting the testimony of a defense expert on false or coerced confessions, specifically the expert's opinion whether the actions of the police in questioning Shelby were coercive. During Shelby's trial for murder of his stepdaughter, he put on Dr. Richard Leo to support the defense's argument that Shelby's confession to killing his stepdaughter was false and coerced.[209] While the trial court permitted Dr. Leo to testify generally about police interrogation tactics, the trial court did not allow Dr. Leo to give his impression on whether the

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201. *Id.* at 452-53.

202. *Id.* at 453.

203. *Id.* (citing Henricksen v. ConocoPhillips Co., 605 F. Supp. 2d 1142, 1162 (E.D. Wash. 2009)).

204. *Id.* at 454.

205. *Id.*

206. *Id.* at 455.

207. *Id.* (citing Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 460 (Ind. 2001)).

208. 986 N.E.2d 345 (Ind. Ct. App.), *trans. denied*, 989 N.E.2d 782 (Ind. 2013).

209. *See id.* at 367-68.

questioning tactics by the police in this case were coercive.[210]

In reviewing this decision, the court of appeals examined *Miller v. State*,[211] and *Callis v. State*.[212] The Indiana Court of Appeals interpreted *Miller* to find that

> experts may testify on the general subjects of coercive police interrogation and false or coerced confessions. Experts may not, however, comment about the specific interrogation and controversy in a way that may be interpreted by the jury as the expert's opinion that the confession in that particular case was coerced or false, as this would invade the province of the jury and violate Evidence Rule 704(b).[213]

Looking to *Miller* and *Callis*, the court of appeals found it was not reversible error for the trial court to restrict Dr. Leo's testimony since the jury received ample evidence of the details surrounding Shelby's interrogation and evidence about the interrogation tactics used on Shelby.[214] Dr. Leo was permitted to testify generally about police interrogation tactics and how those tactics can lead to false or coerced confessions.[215]

VII. HEARSAY (RULES 801-806)

Hearsay is defined as a statement "not made by the declarant while testifying at the trial or hearing" and "offered in evidence to prove the truth of the matter asserted."[216] Hearsay evidence is generally not admissible unless the rules of evidence provide for an exception or other law provides differently.[217] "[T]he exceptions to the [hearsay] rule have been generally based upon some combination of the unavailability of the declarant, the reliability of the declaration, or the presumed inefficiency of any possible cross-examination."[218]

A. Statement of an Opposing Party—Rule 801(d)(2)

Rule 801(d)(2) states that admissions or other statements by a party opponent in a case can be used against that person and are not hearsay. In *Turner v. State*,[219] Marion Turner appealed his conviction for dealing cocaine, partly on the basis that during trial, the trial court denied Turner the permission to repeat statements of a confidential informant whom he believed acted as an agent of the

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210. *Id.* at 368.

211. 770 N.E.2d 763 (Ind. 2002).

212. 684 N.E.2d 33 (Ind. Ct. App. 1997).

213. *Shelby*, 986 N.E.2d at 369.

214. *Id.* at 369-70.

215. *Id.* at 370.

216. IND. R. EVID. 801.

217. IND. R. EVID. 802.

218. Embrey v. State, 989 N.E.2d 1260, 1264 (Ind. Ct. App. 2013) (quoting In re Termination of Parent-Child Relationship of E.T., 808 N.E.2d 639, 641-42 (Ind. 2004)).

219. 993 N.E.2d 640 (Ind. Ct. App.), *trans. denied*, 997 N.E.2d 357 (Ind. 2013).

State.[220] The court of appeals concluded the statements of the confidential informant should have been considered non-hearsay under Rule 801(d)(2), citing the testimony of a police sergeant who described how informants act as agents for the police.[221] The court then analyzed this error under the harmless error analysis.[222] An error is harmless in this context if "in light of the totality of the evidence in the case, its probable impact on a jury is sufficiently minor so as not to affect the substantial rights of the parties."[223] Although the jury was not explicitly made aware that the informant offered Turner additional money for the cocaine, the court determined this was harmless error.[224]

B. Excited Utterance—Rule 803(2)

In *Young v. State*,[225] Young appealed his conviction of felony domestic battery and strangulation, in part, contending that the testimony of two firefighters and a police officer at his trial were inadmissible hearsay which violated the Confrontation Clause.[226] Shortly after the alleged incident of domestic violence, firefighters at a fire station near Young's home observed Young's wife, the victim, approach the fire station crying.[227] In speaking with her as she continued to cry, the firefighters learned the incident occurred less than twenty minutes prior to her arrival at the fire station.[228] They also observed bruises and abrasions on her arm, hand, and neck to which they tended.[229] Approximately forty-five minutes after she approached the fire station, at which time the wife had previously stopped crying and was "antsy to leave," Officer Stuff arrived.[230] Officer Stuff observed her crying again and appearing scared.[231]

The court of appeals partially agreed with the trial court, finding that the firefighters' testimony was properly admitted.[232] The appellate court disagreed with the trial court's admission of Officer Stuff's testimony and with the State's justification for this testimony as an excited utterance under Rule 803. Rule 803(2) states that a statement is admissible as an exception to the hearsay rule when it is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[233]

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220. *Id.* at 642.
221. *Id.* at 643.
222. *Id.*
223. *Id.* (citing Miller v. State, 720 N.E.2d 696, 704 (Ind. 1999)).
224. *Id.*
225. 980 N.E.2d 412 (Ind. Ct. App. 2012).
226. *See* U.S. CONST. amend. VI.
227. *Young*, 980 N.E.2d at 416.
228. *Id.*
229. *Id.*
230. *Id.* at 417.
231. *Id.*
232. *Id.* at 423.
233. IND. R. EVID. 803(2).

Admissibility under this exception depends "on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications."[234]

In finding that Officer Stuff's testimony on the wife's statements was not an excited utterance and should not have been admitted, the court cited *Boatner v. State*,[235] a case explaining that "[w]hile lapse of time is not dispositive, if a statement is made long after a startling event, it is usually 'less likely to be an excited utterance.'"[236] As the officer first spoke to the wife an hour after the incident and the wife had stopped crying for some time during that hour, the officer's testimony of the wife's statements was inadmissible hearsay.[237] This error was not harmless because it was the only evidence used for the strangulation charge, so the court of appeals reversed the conviction of felony strangulation.[238]

In *Bryant v. State*,[239] a case discussed earlier in this Article,[240] this hearsay exception was similarly addressed in the context of a detective's testimony after speaking with a stabbing victim. Crowdus was stabbed in the ear with a pencil and taken to the hospital for treatment after fighting with Bryant in jail. At Bryant's trial for this incident, the trial court admitted the detective's testimony about his conversation with Crowdus prior to his receiving medical treatment. The Indiana Court of Appeals disagreed, concluding this testimony was admitted in error.[241] In this instance, Crowdus had returned to his cell after the fight and the State did not establish how much time elapsed between the fight and Crowdus's conversation with the detective, a key consideration for this hearsay exception.[242] This error was harmless as it was mostly cumulative of Crowdus's own testimony at trial.[243]

The excited utterance exception was again considered in *Teague v. State*.[244] The evidence at issue was a 911 call from a neighbor relaying statements from Saylor that her ex-boyfriend Teague had just beat Saylor's mother and robbed them.[245] The trial court admitted this evidence at Teague's trial for multiple charges of burglary, robbery, and battery. To complicate matters, the 911 call contained hearsay included within hearsay, Saylor's statements to the neighbor and the neighbor's statements to the 911 operator.[246] Teague agreed that Saylor's

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234. *Young*, 980 N.E.2d at 421 (quoting Sandefur v. State, 945 N.E.2d 785, 788 (Ind. Ct. App. 2011)).

235. 934 N.E.2d 184, 185 (Ind. Ct. App. 2010).

236. *Young*, 980 N.E.2d at 421 (quoting *Boatner*, 934 N.E.2d at 186)).

237. *Id.* at 422.

238. *Id.*

239. 984 N.E.2d 240 (Ind. Ct. App.), *trans. denied*, 988 N.E.2d 796 (Ind. 2013).

240. *See supra* Part II.C.

241. *Bryant*, 984 N.E.2d at 247.

242. *Id.*

243. *Id.*

244. 978 N.E.2d 1183 (Ind. Ct. App. 2012).

245. *Id.* at 1186.

246. *Id.* at 1187.

statements to the neighbor were excited utterances, but argued that the neighbor's statements to the 911 operator were not excited utterances and thus, should not have been admitted at trial.[247]

Whether a 911 call could be admitted where the caller, with no personal knowledge of the event, was relaying statements from the victim, with personal knowledge of the event, was a matter of first impression for the court of appeals.[248] In considering the neighbor's statements, the court observed that a statement can still fall under this exception if it is in response to a question "so long as the statement is unrehearsed and is made under the stress of excitement from the event."[249]

The court found the neighbor was under the stress of the event when she made the 911 call as a distraught and bloodied Saylor had moments before arrived at the neighbor's house in hysterics claiming her mother was beaten.[250] At the same time, the neighbor could hear the mother screaming next door and was unsure if Teague remained at Saylor's house.[251] Although the neighbor did not have personal knowledge of the original beating of Saylor's mother, she did have personal knowledge of the frightening event that she observed.[252] The court found her statements bore "sufficient indicia of reliability, the hallmark of all hearsay exceptions," and were excited utterances under Rule 803(2).[253]

C. Statement Made for Medical Diagnosis or Treatment—Rule 803(4)

In *Clark v. State*,[254] the court addressed the medical diagnosis and treatment hearsay exception to determine whether reports prepared by a social worker could be used against Clark as evidence of his age at the time of the offense. Clark was convicted at trial of felony battery under Indiana Code section 35-42-2-1(a)(2)(b), which requires proof that the battery injured a person less than fourteen years old and was committed by a person eighteen years old or older.[255] The only evidence used by the State to prove Clark's age at the time of the offense were two reports on the abuse allegations prepared by a social worker.[256] The State argued on appeal that these reports, although hearsay, were properly admitted by Rule 803(4).[257] This Rule allows hearsay statements "made by persons who are seeking medical diagnosis or treatment and describing medical history, or past or

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247. *Id.*

248. *Id.* at 1188.

249. *Id.* (citing Yamobi v. State, 672 N.E.2d 1344, 1346 (Ind. 1996)).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. 978 N.E.2d 1191 (Ind. Ct. App. 2012), *aff'd on reh'g*, 985 N.E.2d 1095 (Ind. Ct. App. 2013).

255. *Id.* at 1193.

256. *Id.*

257. *Id.* at 1195.

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."[258]

The trial court analyzed the reports under a two-step analysis used in *McClain v. State*,[259] "1) is the declarant motivated to provide truthful information in order to promote treatment; and 2) is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment."[260] The court of appeals noted that although Rule 803(4) can include statements made to clinical social workers, the statements about Clark's age had "no apparent relevance to a diagnosis of the child's injuries."[261] As such, Clark's conviction was reversed.[262]

D. Records of Regularly Conducted Business Activity—Rule 803(6)

Rule 803(6) states that certain types of business records are exceptions to the hearsay rule. The documents subject to this exception are as follows:
A memorandum, report, record, or data compilation, in any form, of facts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstance of preparation indicate a lack of trustworthiness.[263]

This rule was at issue in *Embrey v. State*,[264] where Embrey argued that a statutorily-required report documenting ephedrine and pseudoephedrine purchases by Embrey from Indiana retailers was inadmissible hearsay used to convict him at trial for felony dealing in methamphetamine. Specifically Embrey argued that because the custodian of the records did not have personal knowledge of the purchases, the report should not have been admitted.[265]

The court of appeals disagreed with Embrey, preliminarily observing that the custodians who record facts need not have personal knowledge of the facts contained within it.[266] From a review of the report and the affidavit of the custodian of that report, the court decided that the submissions of Embrey's

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258. IND. R. EVID. 803(4).

259. 675 N.E.2d 329 (Ind. 1996).

260. *Clark*, 978 N.E.2d at 1196 (quoting *McClain*, 675 N.E.2d at 331 (adding further that "to satisfy the requirement of the declarant's motivation, the declarant must subjectively believe that he was making the statement for the purpose of receiving medical diagnosis or treatment")).

261. *Id.* at 1197.

262. *Id.* at 1198.

263. IND. R. EVID. 803(6).

264. 989 N.E.2d 1260 (Ind. Ct. App. 2013).

265. *Id.* at 1266.

266. *Id.* at 1264.

purchases listed in the report were made by others with a duty to report accurately and were made in the ordinary course of their employment.[267] Because the report was considered a business record and the custodian of the report did not need to have firsthand knowledge of Embrey's purchases, the court ruled that this evidence was properly admitted within the discretion of the trial court.[268]

E. Public Records and Reports—Rule 803(8)

Comparable to business records, public records and reports are also exceptions to the hearsay rule if created as part of their regularly conducted activity or investigation.[269] Among a limited set of specific restrictions on this exception, Rule 803(8) does not provide a hearsay exception for "investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case."[270]

In *Smith v. Delta Tau Delta*,[271] the Smiths' son died from alcohol poisoning at his fraternity house at Wabash College after consuming large amounts of alcohol. The Smiths appealed the grant of summary judgment in favor of the national fraternity Delta Tau Delta by the trial court, finding that Delta Tau Delta assumed no duty to protect Smiths' son or other fraternity members.[272] They argued that, among other improper evidence, two unsworn and uncertified statements supposedly made to police offers about this incident, and used as part of Delta Tau Delta's motion for summary judgment, should have been stricken.[273]

Delta Tau Delta tried to get around the requirements of Indiana Trial Rule 56(E)[274] that an unsworn statement cannot qualify as proper evidence by contending the two statements at issue were admissible under the public records exception.[275] The court of appeals found that "the statements purport to be an interview by a police officer of two witnesses pertaining to the events surrounding [the son's] death. As such, both documents fall within the provision of investigative police reports and are inadmissible as hearsay statements . . . ."[276] The court held that the trial court abused its discretion in admitting those

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267. *Id.* at 1267.

268. *Id.*

269. IND. R. EVID. 803(8).

270. *Id.*

271. 988 N.E.2d 325 (Ind. Ct. App. 2013).

272. *Id.* at 331-32.

273. *Id.* at 328.

274. Indiana Trial Rule 56(E) states:

> [s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies not previously self authenticated of all pages or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

275. *Smith*, 988 N.E.2d at 334.

276. *Id.* at 335.

statements and partly for this reason, the court of appeals reversed Delta Tau Delta's grant of summary judgment.[277]

Evidence in *Allen v. State*,[278] Allen's arrest report, was similarly examined against Rule 803(8). Allen was tried and convicted for attempted robbery, robbery, and being a habitual offender. Allen appealed his conviction, arguing his arrest report was improperly admitted because it was an "investigative report[] by police and other law enforcement personnel."[279] The Indiana Court of Appeals did not agree with Allen, but rather considered the arrest report closer to a booking report.[280] The court determined the report was properly admitted, explaining that "[w]hile this booking report was created by law enforcement, the biographical information on the printout was obtained and recorded in the course of a ministerial nonevaluative booking process."[281]

F. Forfeiture by Wrongdoing—Rule 804(b)(5)

The Rules of Evidence provide for additional hearsay exceptions in certain circumstances where the declarant is unavailable for cross-examination at trial. One of those exceptions is Rule 804(b)(5): "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying."[282]

In *White v. State*,[283] White appealed his murder conviction partly on the admission of testimony under Rule 804(b)(5). White was convicted of murdering his ex-girlfriend Amy Meyer.[284] Testimony was admitted at trial after the trial court determined by a preponderance of the evidence that White killed Meyer to prevent her from testifying against him at a provisional custody hearing concerning their son scheduled the day after the murder.[285]

White argued on appeal that the trial court misapplied Rule 804(b)(5) when the "State did not prove by a preponderance of the evidence that his purpose in shooting [Meyer] was to prevent her from testifying."[286] Prior to 2009, when Rule 804(b)(5) was adopted, case law held that "a party, who has rendered a witness unavailable for cross-examination through a criminal act, including homicide, may not object to the introduction of hearsay statements by the witness as being inadmissible under the Indiana Rules of Evidence."[287] Rule 804(b)(5)

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277. *Id.* at 340.
278. 994 N.E.2d 316 (Ind. Ct. App. 2013).
279. *Id.* at 320 (quoting IND. R. EVID. 803(8)).
280. *Id.* at 321.
281. *Id.*
282. IND. R. EVID. 804(b)(5).
283. 978 N.E.2d 475 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 1016 (Ind. 2013).
284. *Id.* at 479.
285. *Id.* at 476-79.
286. *Id.* at 479.
287. *Id.* (quoting Roberts v. State, 894 N.E.2d 1018 (Ind. Ct. App. 2008)).

requires more than the case law did, demanding that "the party procured the unavailability of the declarant for the purpose of preventing the declarant from attending or testifying."[288] Evaluating this additional requirement under the Indiana Rules of Evidence was a matter of first impression for the Indiana Court of Appeals.[289]

In analyzing this Rule, the court looked to Federal Evidence Rule 804(b)(6) and case law interpreting that Rule.[290] The court also examined *United States v. Dhinsa*,[291] which understood the federal rule to mean the government "need not . . . show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant 'was motivated in part by a desire to silence the witness.'"[292] The court of appeals agreed with the trial court that by a preponderance of the evidence,[293] the hearsay evidence was not admitted in error because "White *was at least partially* motivated to kill Amy to prevent her from testifying at the provisional custody hearing."[294] Through its finding, the court appeared to implicitly adopt the interpretation of Rule 804(b)(5) from Weissenberger's Indiana Evidence Court Room Manual, that this "hearsay exception applies where offering party shows party engaged in wrongdoing that resulted in witness's unavailability and that one purpose was to cause the witness to be unavailable at trial."[295]

VIII. AUTHENTICATION OF EVIDENCE (RULES 901-902)

In *B.J.R. v. C.J.R.*,[296] a mother appealed a court order modifying child support to be paid by the father for their son. An initial child support order (hereinafter "Pennsylvania Order") was entered in Pennsylvania in 2000.[297] In 2010, the father filed a petition in Marion County, Indiana to modify the child support.[298] In 2012, the trial court granted the father's petition to decrease child support.[299] On appeal, the mother claimed the Pennsylvania Order was not properly authenticated before the trial court in Marion County, Indiana.[300]

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288. *Id.*

289. *Id.*

290. *See id.* at 479-80.

291. 243 F.3d 635 (2d Cir. 2001).

292. *White*, 978 N.E.2d at 480 (quoting *Dhinsa*, 243 F.2d at 1279).

293. *See id.* at 481. The court of appeals added that if the evidence at issue were live testimony rather than a paper record, a clearly erroneous standard of review would apply. *Id.*

294. *Id.* at 482 (emphasis added).

295. *Id.* (citing A.J. STEPHANI & GLEN WEISSENBERGER, WEISSENBERGER'S INDIANA EVIDENCE COURTROOM MANUAL 320 (2012-13 ed.)).

296. 984 N.E.2d 687 (Ind. Ct. App. 2013).

297. *Id.* at 690.

298. *Id.*

299. *Id.* at 691.

300. *Id.* at 694. She specifically alleged that the Pennsylvania Order "consist[ed] of two documents, the order and the stipulation, and that these two documents bore different case numbers,

The Indiana Court of Appeals in *B.J.R.* first explained Indiana's rule on authentication found in Rule 901(a), that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[301] Looking next to domestic official records, such a record is self-authenticated "provided that it is 'attested by the officer having the legal custody of the record, or by his deputy.'"[302] In this case, the trial court decided that the Pennsylvania Order was authentic and the handwritten changes did not impact that authenticity.[303] The court of appeals found the trial court did not abuse its discretion in authenticating this record as the Pennsylvania Order was certified by a stamp, handwritten notation, and a deputy's signature.[304]

CONCLUSION

This survey of Indiana appellate case law reveals how the Indiana Rules of Evidence, and their interpretation, create an ever-changing legal landscape. Knowledge of decisions that evolve these Rules is invaluable to any attorney's practice in law.

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the stipulation was not certified, and the two documents had been altered by an unknown person without authentication of the hand-written changes made." *Id.*

301. IND. R. EVID. 901(a); *B.J.R.*, 984 N.E.2d at 695.

302. *B.J.R.*, 984 N.E.2d at 695 (quoting IND. R. EVID. 902(1)).

303. *Id.*

304. *Id.*

RECENT DEVELOPMENTS IN INDIANA FAMILY LAW

MARGARET RYZNAR*

This Article considers notable developments in Indiana family law during the survey period of October 1, 2012 to September 30, 2013. The state statutes and published cases surveyed in this Article concern the parenting time guidelines, parental rights, adoption, relocation and child custody, child support, educational support orders, disposition of property and maintenance upon divorce, and mediation.

I. PARENTING TIME GUIDELINES

When the parents of a child separate, they might share legal and physical custody of the child. If only one of the parents receives physical custody of the child, the other parent is entitled to parenting time with the child to maintain the parent-child relationship.[1]

In such a case, Indiana lawmakers encourage parents to create a parenting plan for themselves, but the plan must protect the best interests of the child. If the parents cannot agree, Indiana provides a parenting plan in the form of the Parenting Time Guidelines, which are dependent on the child's age and which represent the minimum recommended time a parent should have in order to maintain frequent, meaningful, and continuing contact with a child.[2]

These Indiana Parenting Time Guidelines have undergone significant changes during the survey period. Specifically, the Indiana Supreme Court approved several amendments to the Guidelines that took effect for all new orders beginning on March 1, 2013.[3] The changes require a spirit of cooperation between the parents and are child-centered.

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1. Act of April 25, 2005, Pub. L. No. 68-2005, § 45, 2005 Ind. Acts 1582 (amending IND. CODE § 31-17-4-1, concerning the rights of a noncustodial parent, to replace "visitation" with "parenting time").

> [F]or 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. 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."

Randall T. Shepard, *Elements of Modern Court Reform*, 45 IND. L. REV. 897, 900 (2012).

2. Amended Order Amending Indiana Parenting Time Guidelines, Cause Number 94S00-1205-MS—275 (Ind. Jan. 4, 2013), *available at* http://www.in.gov/judiciary/files/order-rules-2013-0107-parenting.pdf, *archived at* http://perma.cc/6UYT-A6BN.

3. *Id.* at 32.

A noteworthy change regards how parents should share custody of their child over holiday periods.[4] Amendments to the Holiday Parenting Time address the Christmas Break schedule and add President's Day, Martin Luther King Day, and Fall Break as new holidays to be split between the parents.[5] Furthermore, a parent may now receive three consecutive weekends of custody in certain circumstances.[6]

Another amendment to the Parenting Time Guidelines introduces the new concept of parallel parenting, which is a temporary deviation from the Parenting Time Guidelines when the court determines that the parents are high conflict—meaning that they are litigious, chronically angry or distrustful, unable to communicate, or otherwise risk the child's well-being.[7] In parallel parenting, the parent with the child makes the day-to-day decisions. Communication between the parents is limited and often in writing, and counseling professionals are recommended to assist the parents with parallel parenting arrangements.[8]

During the survey period, Indiana courts encountered some resistance to the concept of parenting time. In *In re Paternity of J.T.*,[9] the Indiana Court of Appeals affirmed the lower court's custody change from mother to father after the mother routinely obstructed father's parenting time.[10] The court of appeals noted that the mother's denial of the father's parenting time established a substantial change in the interrelationship of the parents, which allowed a modification in custody.

II. PARENTAL RIGHTS

During the survey period, Indiana courts decided several cases implicating parents' rights, which are constitutionally protected through several United States Supreme Court cases.[11] A few of the recent Indiana cases involved grandparents.

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4. *Id.* at 20.
5. *Id*. at 20-21.
6. *Id.* at 20.
7. *Id.* at 23.
8. *Id.*
9. 988 N.E.2d 398, 401 (Ind. Ct. App. 2013).
10. *Id.*
11. *See, e.g.*, Pierce v. Soc'y of the Sisters, 268 U.S. 510, 535 (1925) (noting that the parents' right to choose private education over public education is a fundamental liberty interest protected by the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (noting that the parents' right to hire a teacher to teach their child a foreign language is a fundamental liberty interest protected by the Fourteenth Amendment); *see also* Troxel v. Granville, 530 U.S. 57, 65 (2000) (noting that "[t]he liberty interest at issue in this case—the 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."); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (noting that the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment). Such protection has also been called the "parental liberty interest," which permits parents to direct the upbringing of their children. *See, e.g.*, Kandice K. Johnson, *Crime or*

An Indiana court first recognized a limited right to grandparent visitation in 1981.[12] Since then, grandparent visitation has been extensively litigated in many courts across the country, including in the United States Supreme Court.[13] In light of the U.S. Supreme Court's decision in *Troxel v. Granville*,[14] state courts have continued to seek the proper balance between grandparents' rights and parents' rights.

In *In re Visitation of M.L.B.*,[15] a child's paternal grandfather sought visitation with his grandchild in Indiana, which the lower court granted.[16] The Indiana Supreme Court remanded so that the trial court would cure certain defects.[17] Specifically, the court instructed that 1) the trial court must include findings that address the four factors for balancing parents' rights and the child's best interests in the context of grandparent visitation,[18] and that 2) the trial court must limit the grandparents' visitation award to an amount that did not substantially infringe on the parents' constitutional rights to control the upbringing of their children.[19]

In *In re Paternity of A.S.*,[20] the Indiana Court of Appeals reversed the lower court, which had awarded physical custody of a child to the grandmother.[21] The court of appeals reiterated that the United States Constitution protects parental rights and that a presumption exists that it is in the best interests of the child to be placed in the custody of the natural parent in disputes between that parent and

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Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?, 1998 U. ILL. L. REV. 413, 425 (noting that the parent-child relationship creates a Fourteenth Amendment "liberty interest" that allows parents to direct the upbringing of their children).

12. Krieg v. Glassburn, 419 N.E.2d 1015, 1018-19 (Ind. Ct. App. 1981) (interpreting Indiana Trial Rule 24(A)(2) to permit grandparents to intervene of right in post-dissolution custody and stepparent adoption proceedings and to petition for visitation).

13. Troxel v. Granville, 530 U.S. 57 (2000). For litigation in Indiana courts, see McCune v. Frey, 783 N.E.2d 752 (Ind. Ct. App. 2003); Crafton v. Gibson, 752 N.E.2d 78 (Ind. Ct. App. 2001).

14. 530 U.S. 57 (2000).

15. 983 N.E.2d 583 (Ind. 2013).

16. *Id.* at 584-85.

17. *Id.* at 589.

18. The four factors that a grandparent-visitation order must address are: "(1) a presumption that a fit parent's decision about grandparent visitation is in the child's best interests (thus placing the *burden* of proof on the petitioning grandparents); (2) the "special weight" that must therefore be given to a fit parent's decision regarding nonparental visitation (thus establishing a heightened *standard* of proof by which a grandparent must rebut the presumption); (3) "some weight" given to whether a parent has agreed to some visitation or denied it entirely (since a denial means the very *existence* of a child-grandparent relationship is at stake, while the question otherwise is merely *how much* visitation is appropriate); and (4) whether the petitioning grandparent has established that visitation is in the child's best interests." *Id.* at 586 (citation omitted).

19. *Id.* at 584.

20. 984 N.E.2d 646 (Ind. Ct. App.), *trans. denied*, 987 N.E.2d 521 (Ind. 2013).

21. *Id*. at 653.

a third party.[22] The court of appeals determined that, in this case, the grandmother failed to overcome this presumption despite the mother's mental health issues.[23] However, the court suggested that on remand the trial court should determine whether any visitation rights are due to the grandmother under the Grandparent Visitation Act.[24]

In *In re Guardianship of L.R.T.*,[25] the great-grandparents of a child were the child's custodians until the lower court ordered the custody of the children to be transferred to their mother.[26] The great-grandparents appealed, but the Indiana Court of Appeals affirmed, citing the constitutional framework protecting parents' rights.[27]

Due to the constitutional protection of parents' rights, when Indiana terminates a parent-child relationship, it must comply with due process requirements.[28] This requires balancing three factors: 1) the private interests affected by the proceeding, 2) the risk of error created by Indiana's chosen procedure, and 3) the countervailing governmental interest supporting the challenged procedure.[29]

In *D.T. v. Indiana Department of Child Services*,[30] the Indiana Court of Appeals held that a minor father's due process rights were not violated when the trial court failed to appoint him a guardian ad litem before terminating his parental rights.[31] The court of appeals noted that both the private interests and the state's interests were substantial in termination cases, leaving the only factor to be the risk of error.[32] The court of appeals concluded that any risk of error created by the lack of a guardian ad litem was low because the minor father was represented by counsel and his mother was involved in the process.[33] Furthermore, he refused to participate in services that would allow him to maintain his relationship with his child.[34] Finally, the child's interests would be best served by adoption.[35]

In *In re R.S.*,[36] the Indiana Court of Appeals reviewed the evidence in child protection proceedings, reversing the lower court's order adjudicating a child as

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22. *Id*. at 651.

23. *Id.* at 653.

24. *Id.* (IND. CODE § 31-17-5-1 (2014) is commonly known as the Grandparent Visitation Act.).

25. 979 N.E.2d 688 (Ind. Ct. App. 2012), *trans. denied*, 983 N.E.2d 1157 (Ind. 2013).

26. *Id.* at 689.

27. *Id.* at 691.

28. *In re* E.E., 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006).

29. *Id.*

30. 981 N.E.2d 1221 (Ind. Ct. App. 2013).

31. *Id.* at 1226.

32. *Id.* at 1225.

33. *Id*.

34. *Id.* at 1226.

35. *Id*.

36. 987 N.E.2d 155 (Ind. Ct. App. 2013).

being a child in need of services (CHINS).[37] The court of appeals noted that the parents had a clean residence and that they nurtured their child, despite the lower court's finding that the parents lacked financial resources and adequate housing to properly care for their special needs children.[38]

In *A.D.S. v. Ind. Dept. of Child Services*,[39] the court of appeals affirmed the lower court's order terminating a mother's parental rights.[40] The court determined that the findings of mother's lack of capacity to remain sober and failure to address her domestic violence issues sufficed to support the termination of her parental rights, and that the best interests of her children were served by terminating those parental rights.[41]

In *In re A.M.-K.*,[42] the Indiana Court of Appeals held that a mother involuntarily committed for emergency mental health treatment was adequately notified of the Department of Child Service's recommended plan of participation in various services.[43] However, the court also held that the Department of Child Services had produced insufficient evidence to overcome mother's objection to a parental participation order requiring her to take prescribed medications.[44]

In *D.L. v. Huck*,[45] the Indiana Court of Appeals held that the Department of Child Services and its workers were not entitled to quasi-judicial immunity for their removal of a child from the home of relatives who were caring for her and who were in the process of adopting her.[46] However, the court held that the workers and the Department of Child Services were entitled to statutory immunity under Indiana Code section 31-25-2-2.5.[47] The court subsequently affirmed its opinion as to Department of Child Services (DCS) in all other respects and "allowed tort claims against DCS to proceed under a theory of vicarious liability, within the [Indiana Tort Claims Act] ITCA; and to allow federal civil rights claims to proceed."[48]

III. ADOPTION

Related to parents' rights are consent procedures for adoption. As parents' rights are permanently severed in an adoption, parents must typically give their consent to the adoption of their child. Several cases arose during the survey

37. *Id.* at 157.
38. *Id.* at 159.
39. 987 N.E.2d 1150 (Ind. Ct. App.), *trans. denied*, 992 N.E.2d 206 (Ind. 2013).
40. *Id.* at 1153.
41. *Id.* at 1159.
42. 983 N.E.2d 210 (Ind. Ct. App. 2013).
43. *Id.* at 212.
44. *Id.* at 217.
45. 978 N.E.2d 429 (Ind. Ct. App. 2012), *aff'd on reh'g*, 984 N.E.2d 223 (Ind. Ct. App. 2013).
46. *Id.* at 435.
47. *Id.* at 436.
48. D.L. v. Huck, 984 N.E.2d 223, 225 (Ind. Ct. App. 2013).

period implicating Indiana's statutory framework on the required parental consent for a child's adoption.[49]

In *In re Adoption of J.T.A.*,[50] an Indiana woman appealed the lower court's denial of her petition to adopt her fiancé's child.[51] The court of appeals affirmed the lower court, requiring the biological mother's consent to the adoption despite her nonpayment of child support for six years because there was a question regarding her ability to pay the support.[52] The court also concluded that the mother's consent to the adoption was not implied because she did not receive proper or complete notice of the adoption.[53]

However, the Indiana Court of Appeals determined that if the adoption was successful, it would not sever father's parental rights because this was an intra-family adoption despite the couple's non-marital status.[54] The court reasoned that both members of the couple acted as parents to the child and neither wanted the adoption to terminate the father's parental rights.[55] The court therefore concluded that the trial court was mistaken that the couple's non-marital status would result in the severance of both biological parents' rights.[56]

Finally, the court of appeals in *In re Adoption of J.T.A.* [57] called upon state legislators to re-write the Indiana adoption statute in gender-neutral terms.[58] Currently, the statute assumes that it is always the mother putting her child up for adoption, and consequently notice of the adoption would be given to the father.[59] In this particular case, however, the biological mother needed to be given notice.[60]

In *In re Adoption of K.S.*,[61] the Indiana Court of Appeals reversed the lower court's denial of a petition for adoption brought by a child's stepmother.[62] The Indiana Court of Appeals simply applied Indiana Code section 31-19-9-8, which dispensed with the biological mother's consent to the adoption based on her failure to pay child support for more than one year.[63]

IV. RELOCATION AND CHILD CUSTODY

A parent planning to relocate with a child who is the subject of an existing

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49. IND. CODE § 31-19-9-8 (2014).
50. 988 N.E.2d 1250 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 1278 (Ind. 2013).
51. *Id.* at 1252.
52. *Id.* at 1255.
53. *Id.* at 1256.
54. *Id.* at 1253.
55. *Id.*
56. *Id.*.
57. 988 N.E.2d 1250 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 1278 (Ind. 2013).
58. *Id.* at 1256 n.4.
59. *Id.* at 1256.
60. *Id*.
61. 980 N.E.2d 385 (Ind. Ct. App. 2012).
62. *Id.* at 386.
63. *Id.* at 389.

custody order must file a motion with the court that issued the custody or parenting time order.[64] Upon motion, the court must have a hearing before modifying parenting time or custody.[65] The other parent, if opposing relocation, must file a motion to prevent the relocation of the child within sixty days of receiving notice of the planned relocation.[66] The parent planning to relocate must bear the burden of proof to show that the relocation is made in good faith and for a legitimate reason.[67] If the relocating party meets this burden, the burden of proof shifts to the nonrelocating parent to show that the relocation is not in the best interests of the child.[68]

In *D.C. v. J.A.C.*,[69] the Indiana Supreme Court reiterated that the trial courts are afforded a great deal of deference in family law matters, including relocation and custody disputes.[70] This serves the interest of finality in custody.[71] Accordingly, the Indiana Supreme Court reversed the Indiana Court of Appeals for reversing the trial court in such a dispute.[72]

In the case, the mother and father had shared legal custody of their son, who lived with the mother subject to the father's parenting time, which consisted of three overnight visits per week and two weekends per month.[73] About two years into this arrangement, the mother filed a notice of intent to relocate.[74] While the motion pended, she moved with her son to Tennessee, but returned the child to Indiana after the trial court denied her relocation motion.[75]

Around the same time, the father filed a motion to modify custody and prevent his son's relocation.[76] At an evidentiary hearing on the issues of relocation and modification of custody, the guardian ad litem testified that he did not believe that the relocation was in the best interests of the child. Various relatives also testified.[77]

The trial court granted the father's motion.[78] Although the mother and father would retain joint legal custody, the father would become the primary physical custodian, while the mother would be granted parenting time during school breaks and on any other occasions she visited central Indiana.[79]

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64. IND. CODE § 31-17-2.2-1(a)(1) (2014).
65. *Id.* § 31-17-2.2-1(b).
66. *Id.* § 31-17-2.2-5(a).
67. *Id.* § 31-17-2.2-5(c).
68. *Id.* § 31-17-2.2-5(d).
69. 977 N.E.2d 951 (Ind. 2012).
70. *Id*. at 956.
71. *Id.* at 957.
72. *Id.* at 957-58.
73. *Id.* at 953.
74. *Id.*
75. *Id.*
76. *Id*
77. *Id.*
78. *Id.*
79. *Id.*

The trial court had determined that the child's relocation to Tennessee would not be in the child's best interests.[80] The court reasoned that the distance involved was significant, that the father was very involved in the child's daily life, that both sets of grandparents and other extended family lived in Indiana, and that the child's relationship would deteriorate with his Indiana family if he moved to Tennessee.[81]

The court of appeals reversed the trial court,[82] finding that the trial court's best-interest determination was clearly erroneous.[83] Specifically, the court of appeals found that the trial court had undervalued the benefit that the mother's new management-level employment would provide by finding that her primary motivation was to join her boyfriend in Tennessee.[84] The court of appeals also noted the trial court's finding that the father had already purchased a more fuel-efficient vehicle for visitation purposes, and that time spent traveling was neutral because it occurred regardless of which parent had the child.[85] Finally, although the court of appeals acknowledged that relocation would cause the deterioration of the child's relationship with the father and extended family, the court noted that the Indiana statute would never allow relocation if denial of daily life with one parent were always against the child's best interests.[86]

The Indiana Supreme Court reversed, underscoring the deferential nature of the "clearly erroneous" standard.[87] This deference was justified, especially in family law matters, because of the trial court's unique position to interact with the parties over time. Meanwhile, appellate courts were limited to a "cold transcript of the record."[88]

Under the clearly erroneous standard, the Indiana Supreme Court could not conclude that no facts supported the trial court's judgment that relocation was against the child's best interests.[89] On the contrary, the trial court had "ample support for its decision."[90] Therefore, the Indiana Supreme Court affirmed the trial court.[91]

Subsequent to *D.C. v. J.A.C.*, the Indiana Courts of Appeals affirmed the lower courts in other cases on child custody and relocation matters. For example, in *Dixon v. Dixon*,[92] the Indiana Court of Appeals affirmed the trial court's order

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80. *Id.* at 955.

81. *Id.*

82. D.C. v. J.A.C., 966 N.E.2d 158 (Ind. Ct. App.), *opinion vacated*, 977 N.E.2d 951 (Ind. 2012).

83. *Id.* at 160.

84. *Id.* at 163.

85. *Id.* at 161.

86. *Id.* at 164.

87. D.C. v. J.A.C., 977 N.E.2d 951, 957-58 (Ind. 2012).

88. *Id.* at 956.

89. *Id.* at 957.

90. *Id.*

91. *Id.* at 957-58.

92. 982 N.E.2d 24 (Ind. Ct. App. 2013).

granting the mother's notice of intent to relocate.[93]

In *Dixon*, mother had physical custody of the parties' two children and the father had parenting time when the mother filed a notice of intent to relocate.[94] She planned to remarry and move with her new husband to Illinois.[95] Father then filed a petition to modify custody and support.[96]

The mother, a schoolteacher, testified in subsequent hearings that although she would marry her fiancé regardless of whether the trial court approved the relocation, she would not move to Illinois if it would jeopardize her custody of the children.[97] She also testified that if the court granted her request to relocate, she would continue alternating weekends with the father and ensure that the children were in Indiana for holidays so that they could spend time with him, his second wife, and their children.[98]

The trial court granted the mother's request to relocate, which effectively denied the father's motion to modify custody.[99] The trial court found that the mother's desire to relocate was made in good faith, for a legitimate reason, and was not done in haste.[100] The trial court further noted that it was in the best interests of the children to remain with their mother because she had been their primary caretaker since the separation.[101]

Reviewing the record, the Indiana Court of Appeals determined that the lower court's judgment was not clearly erroneous.[102] The court concluded that the lower court had properly considered the relevant statutory factors in making its determination on the relocation issue.[103]

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93. *Id.* at 28.

94. *Id.* at 25.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id*.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 28.

103. In determining whether to modify a custody order, the trial court must consider the factors in IND. CODE § 31-17-2.2-1(b) (2014):

> (1) The distance involved in the proposed change of residence.
>
> (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.
>
> (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
>
> (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either p thwart a non-relocating individual's contact with the child.
>
> (5) The reasons provided by the:
>
> (A) relocating individual for seeking relocation; and

In *Kietzman v. Kietzman*,[104] the Indiana Court of Appeals affirmed the lower court's decision permitting the mother to move to China with her nine-year-old daughter, whose legal and physical custody she shared with her ex-husband.[105] The mother wanted to relocate when her second husband, an engineer employed by a large chemical manufacturer, received an offer to train personnel in a factory in China for three years.[106] The family would live in a special compound for employees of large international businesses and the daughter would attend an international school in China.[107] The family would be able to return to the United States twice annually for a visit of three or four weeks.[108]

At the hearing in the lower court, various family members testified on the mother's planned relocation.[109] The girl's guardian ad litem concluded that it was in her best interests to move to China if her father received ample parenting time.[110]

The Jefferson Circuit Court granted the mother's petition to relocate to China with the girl and gave her sole custody of the child so that decisions could be made quickly abroad, finding that it was in the child's best interests.[111] The girl's father was to receive three periods of parenting time: two when the child returned to the United States with the rest of the family and one that required the father to visit the girl in China.[112] The court further ordered that both parents be afforded liberal access to the girl via telephone, Skype, and other forms of communication.[113]

In a child custody case without a relocation aspect, the Indiana Court of Appeals reversed the trial court, noting that the trial court's finding that the father was incarcerated on child molestation charges was insufficient by itself to deny his petition for modification of visitation.[114] The court of appeals reiterated the presumption that the Indiana Parenting Time Guidelines applied to all cases covered by the guidelines, and that deviation from these Guidelines must be accompanied by a written explanation indicating why the deviation was necessary or appropriate in the case.[115] The case was accordingly remanded for such determination.[116]

(B) non-relocating parent for opposing the relocation of the child.

(6) Other factors affecting the best interest of the child.

104. 992 N.E.2d 946 (Ind. Ct. App. 2013).

105. *Id.* at 950.

106. *Id.* at 947.

107. *Id.*

108. *Id.*

109. *Id.* at 948.

110. *Id.* at 947-48.

111. *Id.* at 948.

112. *Id.*

113. *Id.*

114. Rickman v. Rickman, 993 N.E.2d 1166, 1169 (Ind. Ct. App. 2013).

115. *Id.* at 1169-70.

116. *Id.*

V. CHILD SUPPORT

Indiana courts utilize the Child Support Guidelines to establish a presumptively correct child support amount.[117] The Guidelines have several objectives, including to promote settlement,[118] but the courts nonetheless encountered child support litigation during the survey period.

In *Ashworth v. Ehrgott*,[119] a father challenged the trial court's modification of his child support obligation.[120] First, he argued that the trial court failed to account for alimony payments and issued an income withholding order inconsistent with a previous order.[121] Second, he argued that the trial court abused its discretion in calculating his additional child support obligation based on his 2010, 2011, 2012 bonuses and subsequent employment bonuses, which he argued amounted to impermissible retroactive modification of his child support obligation.[122] Finally, he argued that the trial court abused its discretion by not addressing his alleged overpayment of child support.[123]

The Indiana Court of Appeals reiterated that the trial court's calculation of child support is presumptively valid and that the trial court's decision regarding child support should be upheld unless there was an abuse of discretion.[124] The court concluded that the trial court did not abuse its discretion in calculating the father's 2012 and subsequent weekly child support obligation.[125] The trial court also did not abuse its discretion in its use of an income allocation ratio to determine the amount of additional child support and in calculating the father's child support obligation based on his irregular income for 2011 and 2010.[126] However, the court concluded that the trial court did abuse its discretion by using an irregular income factor based upon the parties' prior financial declarations to determine father's additional child support obligation.[127]

At issue in *Schwartz v. Heeter* was an agreement between the parents that solved the problem of father's variable income by requiring each parent's weekly support obligation to be adjusted and recalculated at the end of each year based

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117. IND. CHILD SUPPORT GUIDELINES, *available at* www.in.gov/judiciary/rules/child_support/ (last visited Aug. 10, 2014).

118. *Id.* The other explicit objectives of the Guidelines are "[t]o establish as state policy an appropriate standard of support for children, subject to the ability of parents to financially contribute to that support; [and] [t]o make awards more equitable by ensuring more consistent treatment of people in similar circumstances." *Id.* at GUIDELINE 1. PREFACE.

119. 982 N.E.2d 366 (Ind. Ct. App. 2013).

120. *Id.* at 368.

121. *Id.*

122. *Id.*

123. *Id.* at 371.

124. *Id.* at 372.

125. *Id.* at 378.

126. *Id.*

127. *Id.*

on reported gross taxable income divided by fifty-two weeks.[128] One year into this arrangement, the Indiana Supreme Court amended the Guidelines to increase the child support obligation for high-income parents, which would impact the father's obligation given his six-figure income.[129] Under the revised Guidelines, the father would owe his children $44,720, versus $6,344 under the previous Guidelines.[130] The parents' agreement did not state which version of the Support Guidelines would apply.[131]

The Indiana Supreme Court held that the version of the Guidelines that governed was the one that was in effect when the father earned each year's income.[132] First, the court determined that the parents intended to treat the Guidelines as a "variable" that changed. [133] Second, the court noted that the agreement is presumed to contemplate the federal-law obligation to review the Guidelines every four years and, naturally, to incorporate the resulting changes.[134] Finally, the court presumed that the parties intended their obligations to be updated with periodic amendments to the Guidelines, regardless of the impact of the amendments on their personal financial obligations.[135]

In *Nikolayev v. Nikolayev*,[136] the Indiana Court of Appeals affirmed the lower court's determination that the money that a husband voluntarily contributed to his 401(k) retirement plan was includable in his income for purposes of determining his child support obligation.[137] The husband had been diverting nearly half of his $100,000 income from Eli Lilly to his 401(k) and savings accounts.[138]

In *Engelking v. Engelking*,[139] the Indiana Court of Appeals held that children born during marriage as a result of artificial insemination with a third party's sperm were "children of marriage" within the meaning of the Dissolution of Marriage Act.[140] The court affirmed the lower court's determination that the father should pay child support upon divorce, reasoning that the mother testified that he knew of the artificial inseminations that led to the conception of both children and helped her in the process, even holding the children out as his own during the marriage.[141]

In *Tisdale v. Bolick*,[142] the Indiana Court of Appeals held that the state court

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128. 994 N.E.2d 1102, 1105 (Ind. 2013).
129. *Id.* at 1104.
130. *Id.*
131. *Id.*
132. *Id.* at 1105.
133. *Id.*
134. *Id.*
135. *Id.* at 1107.
136. 985 N.E.2d 29 (Ind. Ct. App.), *trans. denied*, 988 N.E.2d 797 (Ind. 2013).
137. *Id.* at 31.
138. *Id.* at 30.
139. 982 N.E.2d 326 (Ind. Ct. App. 2013).
140. *Id.* at 328-29.
141. *Id.* at 328.
142. 978 N.E.2d 30 (Ind. Ct. App.2013).

had continuing, exclusive jurisdiction over a child support order entered in that court if either parent or one of their children resided in that state or until mutual written consent was given to another state's exercise of jurisdiction.[143] The court also held that the father was entitled to a hearing in the lower court on whether the state's courts retained jurisdiction over child support matters following the transfer to another state of child custody and parenting time issues.[144]

In *In re B.J.R.*,[145] the Indiana Court of Appeals affirmed the lower court's grant of a petition to modify a foreign child support order.[146] The court of appeals reasoned that the trial court had subject matter jurisdiction and did not abuse its discretion by finding that the foreign child support order was properly authenticated.[147] The court of appeals further held that the evidence was sufficient to establish changed circumstances to make the terms of foreign child support unreasonable and that the foreign child support order differed by more than twenty percent than would be ordered by applying the child support guidelines.[148]

Effective July 1, 2012, the legislature amended Indiana Code section 31-16-6-6, changing the presumptive age for termination of child support from twenty-one to nineteen.[149] In *Turner v. Turner*,[150] a father argued that the amendment controlled the issue of whether his child support should end for his nineteen-year-old son.[151]

The trial court held that its final dissolution decree controlled in the case

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143. *Id.* at 35.

144. *Id.* at 36.

145. 984 N.E.2d 687 (Ind. Ct. App. 2013).

146. *Id.* at 690.

147. *Id.* at 694.

148. *Id.* at 697.

149. The amended version of IND. CODE § 31–16–6–6 (2014) provides:

> (a) The duty to support a child under this chapter, which does not include support for educational needs, ceases when the child becomes nineteen (19) years of age unless any of the following conditions occurs:
>
> (1) The child is emancipated before becoming nineteen (19) years of age. In this case the child support, except for the educational needs outlined in section 2(a)(1) of this chapter, terminates at the time of emancipation, although an order for educational needs may continue in effect until further order of the court.
>
> (2) The child is incapacitated. In this case the child support continues during the incapacity or until further order of the court.
>
> (3) The child:
>
> (A) is at least eighteen (18) years of age;
>
> (B) has not attended a secondary school or postsecondary educational institution for the prior four (4) months and is not enrolled in a secondary school or postsecondary educational institution; and
>
> (C) is or is capable of supporting himself or herself through employment.

150. 983 N.E.2d 643 (Ind. Ct. App. 2013).

151. *Id.* at 645.

instead, which the court had issued twelve years earlier, when the father and mother were divorcing.[152] The final dissolution decree required the father to pay $144.00 per week until the child reached 21 years of age, married, left home, or was emancipated.[153]

The Indiana Court of Appeals reversed, agreeing with the father that his obligation to pay child support for his son terminated as a matter of law on July 1, 2012 because of the amendment to Indiana Code section 31-16-6-6.[154] The Indiana Court of Appeals confirmed that the trial court's failure to follow the law as set forth by the Indiana legislature constituted an abuse of discretion.[155] According to the court of appeals, the trial court had no discretion to extend the father's duty to pay child support beyond what the law required.[156] The court noted, however, that its opinion applied only to the father's obligation to provide child support, not to his obligation to provide educational support.[157]

VI. EDUCATIONAL SUPPORT ORDERS

Indiana law provides that a court may enter an educational support order for a child's college education, which is separate from a child support order.[158] However, the child's repudiation of a parent is a complete defense to such an educational support order.[159] In *Lovold v. Ellis*, the Indiana Court of Appeals affirmed the lower court's denial of an educational support order for college expenses because the child repudiated a relationship with his father.[160]

In a matter of first impression, the Indiana Court of Appeals also held in *Lovold* that a father was not required to pay child support for the time his son lived away from home on a college campus.[161] The court noted that to hold otherwise would make repudiation no longer a complete defense to the payment of college expenses.[162]

In *Svenstrup v. Svenstrup*,[163] a mother appealed the trial court's order denying her petition for allocation of college expenses.[164] The Indiana Court of Appeals affirmed, but noted that where a parent petitioned for an educational support order before a child's emancipation at age nineteen, the order is subject to

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152. *Id.* at 646.

153. *Id.* at 645.

154. *Id.*

155. *Id.* at 648.

156. *Id.*

157. *Id.* at 648 n.4.

158. IND. CODE § 31-16-6-2 (2014).

159. *See* Lovold v. Ellis, 988 N.E.2d 1144, 1150 (Ind. Ct. App. 2013) (stating that "[r]epudiation of a parent by the child, however, is recognized as a complete defense").

160. *Id.* at 1152.

161. *Id.*

162. *Id.* at 1153.

163. 981 N.E.2d 138 (Ind. Ct. App. 2012).

164. *Id.* at 139.

modification when denied by the trial court's order.[165]

In denying the education expenses at the time of the case, the court in *Svenstrup* noted that neither parent could bear the financial burdens of college expenses.[166] Indiana Code section 31-16-6-2, which lists factors that courts must consider in awarding such expenses, provides that the courts must consider the ability of each parent to meet the expenses.[167] The other statutory factors include the child's aptitude and ability, as well as the child's reasonable ability to contribute to educational expenses through work, loans, and other financial aid.[168]

VII. DISPOSITION OF PROPERTY AND MAINTENANCE UPON DIVORCE

During the survey period, several cases prompted Indiana courts to explore the contours of property division upon the dissolution of marriage. A few cases also brought maintenance claims to the forefront, particularly maintenance for an incapacitated spouse.

In *In re Marriage of Edwards and Bonilla-Vega*,[169] the Indiana Court of Appeals confirmed that a *chose in action* in the form of the husband's action in tort against his employer is divisible marital property because the property right existed before the wife filed for divorce.[170] Accordingly, the trial court did not abuse its discretion when it included the *chose in action* in the marital pot for division upon divorce.[171]

In *Troyer v. Troyer*,[172] the Indiana Court of Appeals determined that the lower court had acted within its discretion in a divorce case.[173] The lower court had held that there was no dissipation of marital assets when a wife sold her shares in her former law firm for particular value, that the wife's "enterprise goodwill" was not included in her assets, that the jewelry that the husband gave to the wife was valued at $1,000, that there was no misconduct when the wife cashed out of a retirement account, that the husband's remaining inheritance money was marital property when it was previously held in a joint account and used for shared bills, and that the husband and wife should share custody of their children.[174]

In *Birkhimer v. Birkhimer*,[175] the Indiana Court of Appeals held that it was

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165. *Id.* at 146.

166. *Id*. at 142.

167. IND. CODE § 31-16-6-2(a)(1)(c) (2014).

168. *Id.* § 31-16-6-2 (2013).

169. 983 N.E.2d 619 (Ind. App. 2013).

170. *Id.* at 621-22. As the court's opinion notes, Black's Law Dictionary defines *chose in action* as "1. A proprietary right *in personam,* such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. 2. The right to bring an action to recover a debt, money, or thing." BLACK'S LAW DICTIONARY 234 (7th ed. 1999).

171. *Id.* at 622.

172. 987 N.E.2d 1130 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 1278 (Ind. 2013).

173. *Id.* at 1138.

174. *Id.* at 1140-48.

175. 981 N.E.2d 111 (Ind. Ct. App. 2012).

error for the lower court not to consider the impact of the wife's debt to her father in dividing the marital property.[176] The court reiterated that marital property includes both assets and liabilities.[177] The court also held that the lower court acted within its discretion in ordering the wife to pay some of her husband's attorney's fees.[178] However, the court required the lower court to make written findings supporting its deviation from Indiana guidelines in calculating the wife's income for purposes of the child support calculation.[179]

In *Banks v. Banks*,[180] the Indiana Court of Appeals encountered a maintenance issue, ultimately affirming the lower court's reduction in spousal maintenance due to the incapacitation of the obligor spouse.[181] The court of appeals determined that the reduction was justified by the former husband's deteriorating health and resulting unemployment and bankruptcy.[182]

Finally, in *Alexander v. Alexander*,[183] the wife appealed the denial of her request for incapacity maintenance.[184] The Indiana Court of Appeals held that the lower court's denial was not clearly erroneous despite the wife's past injuries and present medical conditions.[185] The court noted that the wife received disability payments and was college-educated as an accountant.[186]

VIII. MEDIATION

Mediation continues to be often used in family law cases.[187] Accordingly, Indiana courts encountered litigation regarding the mediation process during the survey period.

In *Horner v. Carter*,[188] the Indiana Supreme Court confirmed that statements made during mediation were inadmissible in a hearing on a petition to modify a mediated settlement agreement.[189] The husband had tried to introduce statements he allegedly made during mediation to terminate his monthly housing payments to his former wife.[190] The court stressed that Indiana policy strongly favored the

176. *Id.* at 121.
177. *Id.* at 120.
178. *Id.* at 127.
179. *Id.* at 129.
180. 980 N.E.2d 423 (Ind. Ct. App. 2012), *trans. denied*, 985 N.E.2d 738 (Ind. 2013).
181. *Id.* at 424.
182. *Id.* at 428.
183. 980 N.E.2d 878 (Ind. Ct. App. 2012).
184. *Id.* at 879.
185. *Id.* at 881-82.
186. *Id.* at 881.
187. For the background on and benefits of mediation, see Carolynn Clark Camp, *Mediating the Indissoluble Family: Mediators Style in Domestic Relations Cases*, 26 BYU J. PUB. L. 187 (2012).
188. 981 N.E.2d 1210 (Ind. 2013).
189. *Id.* at 1213.
190. *Id.* at 1212.

confidentiality of mediation discussions.[191]

In *Stone v. Stone*,[192] the Indiana Court of Appeals held that the trial court's determination regarding the best interests of the child trumped the parents' mediation agreement,[193] which provided for joint physical and legal custody of the child.[194] However, the trial court had indicated that it would only approve the agreement if there were some explanation as to how the agreement was in the child's best interests.[195] Hearing the mother's evidence of the father's recent irrational behavior, the trial court awarded mother primary physical custody and sole legal custody.[196]

The court of appeals further decided in *Stone* that the father was entitled to a continuance to await the results of his mental health evaluation.[197] The court also required that, on remand, the trial court give full force and effect to the settlement agreement's provision on attorney fees.[198]

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191. *Id.*

192. 991 N.E.2d 992 (Ind. Ct. App.), *aff'd on reh'g*, 4 N.E.3d 666 (Ind. Ct. App. 2013).

193. *Id.* at 1001-02.

194. *Id.* at 995.

195. *Id.* at 996.

196. *Id*. at 997.

197. *Id.* at 1003.

198. *Id*. at 1004.

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ*

For this Survey Period,[1] the appellate and federal courts continued a recent trend of addressing fewer insurance coverage cases. However, the courts did address important issues in automobile coverage cases as well as commercial general liability cases. This Article examines the most significant decisions affecting automobile, commercial general liability, homeowners, and property policies and their impact upon the field of insurance law.[2]

I. AUTOMOBILE COVERAGE CASES

A. Supreme Court Determines that Prejudgment Interest Statute Applies to Underinsured Motorist Claims

The case of *Inman v. State Farm Mutual Automobile Insurance Co.*[3] involved a determination by the Indiana Supreme Court on whether prejudgment interest under the Tort Prejudgment Interest Statute ("Interest Statute")[4] was recoverable on an underinsured motorists ("UIM") claim. The insured received personal injuries after being rear-ended by another motorist.[5] After the insured presented a personal injury claim, the motorist's liability insurer offered his full liability policy limits of $50,000.[6]

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1. The Survey Period for this Article is September 30, 2012 to October 1, 2013.

2. Selected cases decided during the survey period, but not addressed in this Article include: *Consolidated Insurance Co. v. National Water Services, LLC*, 994, N.E.2d 1192 (Ind. Ct. App.) (finding insured's execution of release of claim eliminated insurer's subrogation rights so that insurer was discharged for any coverage obligation), *trans. denied*, 999 N.E.2d 417 (Ind. 2013); *Everhart v. Founders Insurance Co.*, 993 N.E.2d 1170 (Ind. Ct. App. 2013) (concluding that bar patron was victim of battery by insured bar employee and liability coverage was excluded); *Holiday Hospital Franchising, Inc. v. AMCO Insurance Co.*, 983 N.E.2d 574 (Ind. 2013) (concluding that victim's sexual abuse claim against insured hotel was subject to molestation exclusion); *State Auto Insurance Co. v. DMY Realty Co.*, 977 N.E.2d 411 (Ind. Ct. App. 2012) (finding absolute pollution exclusion in commercial general liability policy as ambiguous); *State Farm Fire & Casualty Co. v. Riddell National Bank*, 984 N.E.2d 655 (Ind. Ct. App.) (finding policy's suit limitation provision violated Indiana statute such that ten year statute of limitations applied to insured's suit against insurer), *trans. denied*, 989 N.E.2d 782 (Ind. 2013); *State Farm Insurance Co. v. Young*, 985 N.E.2d 764 (Ind. Ct. App. 2013) (ordering medical payments insurer's lien to be reduced pursuant to IND. CODE § 34-51-2-19 (2013) as insured could not collect full value of its damages from tortfeasor).

3. 981 N.E.2d 1202 (Ind. 2012).

4. IND. CODE §§ 34-51-4-1 to -9 (2013).

5. 981 N.E.2d at 1203.

6. *Id.*

The insured possessed an auto policy with UIM limits of $100,000.[7] The insured presented a UIM claim to her own insurer seeking to recover an additional $50,000 of coverage, after setting off the $50,000 received from the UIM.[8] The insurer disputed whether the insured was entitled to any UIM coverage, and the insured filed a lawsuit against the insurer.[9] The case proceeded to trial, and the jury returned a verdict for the insured in the amount of $50,000.[10] The insured filed a motion to recover prejudgment interest pursuant to the Interest Statute.[11] The insurer argued that the Interest Statute did not apply to a contract action such as an UIM claim.[12] In the alternative, the insurer argued that even if the Interest Statute did apply, public policy prohibited the insured from being able to recover prejudgment interest in excess of the UIM policy limits in the absence of a breach of the duty of good faith claim against the insurer.[13]

The trial court denied the insured's motion without comment.[14] The court of appeals reversed the trial court, and ordered that the insured be awarded prejudgment interest.[15]

The Indiana Supreme Court granted transfer, and determined that prejudgment interest was recoverable in a UIM case under the Interest Statute.[16] The court noted that the Interest Statute "applies to any civil action arising out of tortious conduct," and that a UIM claim is a "prototypical example" of a case meeting that definition.[17] While the insured's lawsuit against her UIM insurer was a contractual action, the factual basis of the insured's action "arose out of" an automobile accident, a tort event.[18] Thus, the Indiana Supreme Court concluded prejudgment interest was recoverable in UIM claims.[19]

The court also rejected the insurer's argument that prejudgment interest could not be recovered by the insured because her UIM policy limits were exhausted by her claim.[20] The court further observed that the purpose of the Interest Statute was "to expedite the amicable settlement of litigation without trial, and to permit compensation to a party who is unreasonably deprived of proceeds as a result of

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. 938 N.E.2d 1276 (Ind. Ct. App. 2010), *trans. granted*, 981 N.E.2d 1202 (Ind. 2012). The court of appeals awarded a total amount of interest of $3616.44 and an additional $13.10 per day from the date of the plaintiff's motion.
16. *Inman*, 981 N.E.2d at 1204.
17. *Id.*
18. *Id.*
19. *Id.* at 1205.
20. *Id.*

a settlement delay."[21] With that purpose in mind, the Supreme Court concluded that prejudgment interest was recoverable in a UIM case as a collateral litigation expense, not subject to the policy limits.[22] However, the Indiana Supreme Court affirmed the trial court's refusal to award prejudgment interest, as such a decision was within the trial court's discretion.[23]

The Indiana Supreme Court's decision appears to be a sound one and is significant to the insurance industry. Insureds may not only seek prejudgment interest in their UIM claims, but any interest award is recoverable as a litigation expense, even if the policy limits have been exhausted by payments for the UIM claim.

B. Court of Appeals Concludes That Policy Arbitration Provision Became Mandatory if Either Party Requested It

In *Pekin Insurance Co. v. Hanquier*,[24] an insured sustained personal injuries after being involved in an automobile accident. The insured filed a lawsuit against the other motorist and her UIM insurance company.[25] The policy contained the following arbitration provision:

> ARBITRATION
>
> If we and an "insured" do not agree:
>
> 1. whether that person is legally entitled to recover damages under this endorsement; or
>
> 2. as to the amount of damages
>
> either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third.[26]

The UIM carrier made a written demand for arbitration of the UIM claim, and also filed a Motion to Stay the lawsuit against the other motorist pending the conclusion of the arbitration.[27] The trial court denied the motion.[28] The insurance company filed a second motion asking the trial court to compel arbitration

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21. *Id.* at 1206.

22. *Id.* The court noted "[P]rejudgment interest is imposed on the insurer not by reason of its contract with the insured, but because the insurer has failed to make a qualifying settlement offer and the trial court believes such interest is warranted." *Id.* at 1209 n.5.

23. *Id.* at 1208.

24. 984 N.E.2d 227 (Ind. Ct. App. 2013).

25. *Id.* at 229.

26. *Id.* at 230.

27. *Id.* at 229.

28. *Id.*

pursuant to Indiana Code section 34-57-2-3(a) (2013).[29] After the trial court denied the motion, an appeal was pursued.[30]

The insurer argued that the policy provision was mandatory if either party requested arbitration.[31] The insured contended that the policy's language that "either party may" request arbitration, made the provision a permissive, rather than mandatory, provision.[32]

The court of appeals concluded that the provision was unambiguous and mandated arbitration after a request was made by either party.[33] In explaining its decision, the court stated:

> Under the policy, either [the insurer] or the insured "may" make a demand for arbitration, but neither is required to make such a written demand. However, once either party makes a written demand for arbitration, arbitration becomes mandatory. The policy provides that after either party submits a written request for arbitration, "each party *will* select an arbitrator. The two arbitrators *will* select a third. . . . Each party *will* . . . [b]ear the expenses of the third arbitrator equally. A decision agreed to by two of the arbitrators *will* be binding . . . ." (citation omitted). After written demand for arbitration is made, the language of the policy is no longer permissive.[34]

The decision is consistent with Indiana's public policy favoring enforcement of arbitration provisions.[35] While the court determined arbitration was required and ordered a stay of proceedings against the insurer, the court permitted the insured's claim against the motorist to proceed.[36]

C. Court of Appeals Determines That Assetless Estate May Still Assign Estate's Rights to Collect Excess Judgment

The decision of *Pistalo v. Progressive Casualty Insurance Co.*[37] provides an interesting analysis by the court of appeals on the recovery of an excess judgment against an insured's estate. An insured was involved in an automobile accident with the plaintiff who sustained personal injuries.[38] The plaintiff filed a personal

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29. This statute provides in pertinent part: "[o]n application of a party showing a written agreement to submit to arbitration, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration." *Id.* at 230.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (original emphasis).

35. Koors v. Steffen, 916 N.E.2d 212, 215 (Ind. Ct. App. 2009).

36. *Pekin Ins. Co.*, 984 N.E.2d at 231.

37. 983 N.E.2d 152 (Ind. Ct. App. 2012), *trans. denied.*

38. *Id.* at 154.

injury lawsuit against the insured.[39] The insured was defended by her auto liability insurer under an insurance policy with liability limits of $100,000.00.[40] Before trial, the insured passed away.[41] The plaintiff did not learn of the insured's death, until over two years after the motor vehicle accident.[42] As a result, the plaintiff opened an estate and named a representative for the insured's estate.[43]

The liability insurer continued to defend the estate's representative.[44] Before the trial, the liability insurer offered the insured's full policy limits to the plaintiff to settle, but the offer was refused.[45] The case eventually went to trial resulting in a verdict in favor of the plaintiff in the amount of $309,000.00.[46] The liability insurer deposited the $100,000.00 of the insured's policy limits into the court, but the plaintiff filed proceedings supplemental against the estate seeking to recover the full amount of the judgment from the insurer for the estate.[47]

The trial court issued an order that found that the plaintiff was entitled to $1,000.00 in fees[48] and prejudgment interest of $123,600.00.[49] However, the court further found that the estate's liability insurer was not a party to the case nor were there any allegations of bad faith asserted as part of the claim against the insurer.[50] Thus, the court ordered that the plaintiff was only entitled to $100,000.00 policy limits deposited with the court.[51]

The plaintiff did not give up on collecting the judgment. The estate's representative assigned its rights against the insurer to the plaintiff in exchange for a covenant not to execute on collecting the excess judgment.[52] The plaintiff filed a direct action against the liability insurer seeking to recover the full amount of the judgment by alleging that the insurance company acted in bad faith in failing to settle the case within the policy limits.[53] Both parties filed a Motion for Summary Judgment, and the court ruled that the insurer was not responsible for any amount above its policy limits because the estate's assignment was invalid.[54]

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39. *Id.* at 155.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* Pursuant to IND. CODE § 34-50-1-6 (2012), the court found that the plaintiff was entitled to $1000.00.

49. *Pistalo*, 983 N.E.2d at 155. This award was made pursuant to IND. CODE § 34-51-4-8 (2012).

50. *Pistalo*, 983 N.E.2d at 156.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

On appeal, the first issue that the court addressed was whether the plaintiff's action was barred because her claim against the estate was not filed within the nine month time limitation contained in the probate code.[55] The court of appeals rejected the argument that the plaintiff's claim against the estate was time barred.[56] Specifically, the court found that the only requirement to pursue a claim against the estate is that the claim be filed within the statute of limitations for the tort action.[57] In this particular case, because the plaintiff had filed his action against the insured within the applicable statute of limitations,[58] the plaintiff's action was not time barred.[59]

Furthermore, the court rejected the argument that because the estate had no assets, the plaintiff could not recover the excess judgment from the insurer.[60] The court found no public policy reason to condition the ability to pursue a breach of duty of good faith claim against an estate based upon its liquidity.[61] The court observed that if it conditioned the ability to pursue the bad faith claim upon whether an estate had assets, the court "would not serve the purpose of promoting good faith bargaining by liability carriers."[62] Furthermore, the court concluded that "[t]he fact that the estate had no assets goes to the *collectability* of the judgment, not the *right* to execute on the judgment against the estate."[63]

As a result, the court of appeals reversed the trial court's summary judgment entered in favor of the insurance company.[64] However, the court ruled as a matter of law that it could not determine whether the insurance company acted in bad faith, so it remanded the case back to the trial court for that determination.[65]

This case determined that the purpose behind finding a breach of duty of good faith is to make sure that insurance companies negotiate in good faith, which outweighed the fact that the estate had no collectible assets that were subject to execution by the plaintiff for the excess verdict.[66]

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55. *Id. See* IND. CODE § 29-1-7-7(e) (2013) provides, "[A] claim filed under Ind. Code 29-1-1-14-1(a) more than nine (9) months after the death of a decedent is barred."

56. *Pistalo*, 983 N.E.2d at 158.

57. *Id.*

58. IND. CODE § 34-11-2-4 (2013).

59. *Pistalo*, 983 N.E.2d at 158.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 160.

64. *Id.*

65. *Id.*

66. *See* Economy Fire & Cas. Co. v. Collins, 643 N.E.2d 382 (Ind. Ct. App. 1994) (adopting "judgment rule" that an insurer may be liable for the entire excess judgment entered against its insured, despite its insured's lack of ability to pay any of the excess judgment), *trans. denied* (Ind. 1995).

II. HOMEOWNERS COVERAGE CASES

A. Insurer Was Entitled to Rescind Policy for Material Misrepresentation Despite Its Failure to Return the Policy Premiums to Insured

In providing insurance coverage to insureds, the insurance companies rely upon receiving accurate information from the insureds when the coverage is sought. In *Dodd v. American Family Mutual Insurance Co.*,[67] the Indiana Supreme Court found that an insurance company could rescind an insurance policy based upon an insured's material misrepresentation despite the insurer's failure to refund the policy premium to the insured.[68]

At the time of the acquisition of his policy, the named insured, Michael, was living in a home with his girlfriend, Katherine.[69] In the policy application, Michael listed Katherine as "an unrelated person in the household."[70] The application also asked if Michael "or any member of [the] household" had any past or current losses at any other location.[71] Michael answered this question in the negative.[72] However, while Michael and Katherine were previously living together in a home owned by Katherine, their home was destroyed by a fire resulting in a claim to another insurance company.[73] Relying upon Michael's application for a policy with the omission of the earlier fire loss, a new policy was issued by a new insurance company.[74]

Michael and Katherine sustained another fire loss which destroyed their garage.[75] They filed a claim with their new insurance company, and during its investigation into the cause and origin of the fire, Michael disclosed for the first time the earlier home fire to the insurance company.[76] Upon learning of the prior fire, the new insurance company treated the insured as making a material misrepresentation in the acquisition of coverage, and voided the insurance policy from its inception.[77] However, the insurer did not return the policy premiums.[78] The insurer also denied Michael and Katherine's garage fire loss claim.[79]

Michael and Katherine filed a lawsuit against the insurance company for breach of contract and intentional infliction of emotional distress.[80] The

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67. 983 N.E.2d 568 (Ind. 2013).
68. *Id.* at 570-71.
69. *Id*. at 569.
70. *Id*.
71. *Id*.
72. *Id.*
73. *Id*.
74. *Id*.
75. *Id*.
76. *Id.*
77. *Id*.
78. *Id.*
79. *Id.*
80. *Id.*

insurance company sought and the trial court granted summary judgment to the insurer due to Michael's misrepresentation in the acquisition of the insurance coverage.[81] Michael and Katherine pursued an appeal to the court of appeals, which affirmed the trial court in part, but also reversed the decision in part.[82]

The Indiana Supreme Court granted transfer of the court of appeals' decision.[83] The crux of Michael and Katherine's appeal was that the insurance company could not rescind the policy based upon the fact that the insurer did not refund the premiums paid by them for the coverage.[84] There was no dispute that the insurance company did not refund the premiums to the insureds.[85] However, after summary judgment was granted to it, the insurance company interpled all of the premiums that it had collected to the trial court which held the funds pending the outcome of the appeal.[86] The Indiana Supreme Court mentioned the longstanding general rule that an insurance company that attempts to rescind a policy, must offer to return the premiums it has collected from the insured "within a reasonable time after the discovery of the alleged [misrepresentation]."[87] The court observed that if the insurance company failed to return the premiums, such omission constituted a waiver of any misrepresentation defense.[88]

However, the Indiana Supreme Court also observed that there is an exception to the general rule requiring the insurance company to return the premiums.[89] Specifically, a tender of the premiums was unnecessary if "the insurer has paid a claim . . . which is greater in amount than the premiums paid."[90] The evidence demonstrated that the insurance company had previously paid a hail damage claim presented by Michael and Katherine which exceeded the amounts that they had paid in premiums.[91] Consequently, the court affirmed the trial court in finding that a material misrepresentation had occurred, and due to the exception involving a separate claim presented by the insureds, found that the insurance company was not required to tender the premiums before it could rescind the insurance policy.[92]

This decision is a sound one concerning material misrepresentation by insureds. The insured received the benefit of coverage for the earlier claim.

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81. *Id.*

82. Dodd v. Am. Family Mut. Ins. Co., 956 N.E.2d 769, 770 (Ind. Ct. App. 2011), *trans. granted*, 983 N.E.2d 568 (Ind. 2013).

83. *Dodd*, 983 N.E.2d at 570.

84. *Id.*

85. *Id*.

86. *Id.*

87. *Id.* (citing Grand Lodge of Bhd. of R.R. Trainmen v. Clark, 127 N.E. 280, 282 (Ind. 1920)).

88. *Id.*

89. *Id*.

90. *Id.* (quoting Am. Standard Ins. Co. v. Durham, 403 N.E.2d 879, 881 (Ind. Ct. App. 1980)).

91. *Id.* at 571.

92. *Id.*

Consequently, the justification for requiring a return of the premiums to the insured when the insurance company wished to rescind the policy, was not present.

B. Court of Appeals Determines That Mortgage Company Was Entitled to Equitable Lien on Insurance Proceeds Despite Its Failure to Be Listed as Payee Under the Policy

The decision of *Marling Family Trust v. Allstate Insurance Co.*[93] addressed an interesting fact scenario. A homeowner obtained a second mortgage from a trust.[94] The second mortgage agreement required the homeowner to insure the residence for the benefit of the trust.[95] The homeowners obtained an insurance policy from Allstate but failed to list the trust as a mortgagee on the homeowners policy.[96]

The homeowner lost the property due to foreclosure.[97] At the sheriff's sale, the trust purchased the home and took physical possession of the property.[98] At that time, the trust learned that there was significant interior water damage to the home that occurred during the applicable policy period of the Allstate homeowners policy.[99] The trust notified Allstate that it was submitting a claim for coverage under the policy.[100]

Allstate denied the trust's claim for proceeds under the homeowners policy.[101] The trust brought a lawsuit against Allstate, contending that the trust possessed an equitable lien upon policy proceeds due to its position as a mortgage holder.[102] The trial court granted Allstate's summary judgment motion and concluded that no coverage was available.[103]

The court of appeals reversed the trial court's decision.[104] The court applied the equitable doctrine that the court "will treat as done that which should have been done."[105] Relying upon an earlier court of appeals' decision,[106] the court concluded that because the mortgage agreement placed a duty upon the

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93. 981 N.E.2d 85 (Ind. Ct. App. 2012).

94. *Id.* at 87.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* Even though the trust was a second mortgage holder, when it purchased the home through the foreclosure sale, it bought out the interest of the first mortgagee.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 89 (quoting Lakeshore Bank & Trust Co. v. United Farm Bureau Mut. Ins. Co., Inc., 474 N.E.2d 1024 (Ind. Ct. App. 1985)).

106. *See Lakeshore*, 474 N.E.2d 1024.

homeowner to acquire insurance for the benefit of the trust, an equitable lien existed on behalf of the trust to the insurance proceeds from the policy.[107] The court found that "the mere existence of the duty" upon the homeowner to insure the property for the benefit of the mortgage company, was sufficient to create the lien.[108]

However, the court also required that the trust give proper notice of its interest in the property to the insurance company before the insurance company distributes the policy proceeds.[109] This requirement was to avoid the possibility of the insurer having to make double payments, one payment to the original homeowner, and another payment to an unknown mortgage holder.[110] In this case, because the trust gave notice to Allstate of its interest before Allstate distributed the proceeds, it could still recover the insurance proceeds.[111]

This decision clearly contemplates addressing the interest of a party that should have been protected. While the mortgage holder was not listed as an insured party, it should have been protected under the policy by the homeowner.

III. COMMERCIAL GENERAL LIABILITY CASES

A. Court of Appeals Determines That Release Between Insured and Insurance Company Unambiguously Applied to Any Claims Pursued Under Excess Policies

The decision of *United States Fidelity and Guaranty Co. v. Warsaw Chemical Co.*[112] provides an interesting analysis of the extent of a release and whether it applies to both primary and excess insurance policies possessed by an insured. The insured, a chemical company, possessed both primary and excess commercial general liability policies with the same insurer.[113] The insured was advised of a need to remediate a chemical spill existing on its premises.[114] The chemical company notified the insurance company of the remediation order, and requested reimbursement for defense and remediation costs from the insurer.[115] The insurer initially denied coverage for a number of reasons.[116] However, the insured and the insurance company entered into a settlement agreement where the chemical company released the insurer of all claims or demands related to the remediation in exchange for $25,000.00.[117]

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107. *Marling*, 981 N.E.2d at 89.
108. *Id.* (quoting *Lakeshore*, 474 N.E.2d at 1026).
109. *Id.*
110. *Id.*
111. *Id*.
112. 990 N.E.2d 18 (Ind. Ct. App.), *trans. denied*, 994 N.E.2d 732 (Ind. 2013).
113. *Id*. at 19.
114. *Id*.
115. *Id*.
116. *Id*.
117. *Id*.

Approximately fifteen years after the execution of the release agreement, the chemical company sued the insurer, contending that the release that was executed only applied to the insurer's obligations under the primary liability policies.[118] The chemical company sought coverage under the excess policies for additional remediation and defense costs.[119] The trial court concluded that the release only applied to the primary policies, and not the excess policies.[120]

On appeal, the court engaged in an analysis of the specific language of the release. The release contained a number of "recital" paragraphs which identified only the primary policies issued by the insurer.[121] However, the operational agreement portion of the release provided in pertinent part that:

> 1. In consideration for the payment of $25,000.00, receipt of which is hereby acknowledged, [the chemical company] releases, acquit[s], and forever discharges [the insurer] and its agents, representatives, parent organizations, subsidiaries, and all other persons, firms or corporations in privity with [the insurer] from any further claims, demands, causes of action, damages, clean-up costs, expert fees, consulting fees, attorney fees, costs or losses of any kind and nature. . . related to, the pollution and contamination of the soil and groundwater in, upon or adjacent to the [premises].[122]

The insurer argued that the unambiguous language of the release clearly contemplated that the chemical company released the insurer for *all* claims and was not limited to only the listed insurance policies.[123] The chemical company contended that because the "recitals" had only referenced the primary insurance policies, the agreement only extended to release the insurer for any coverage obligation under those policies.[124]

The court noted that the language at issue was clear and unambiguous.[125] The court concluded that the clear language covered any and all policies that the insurer issued to the chemical company, and that the trial court erred in denying the insurance company's summary judgment motion.[126]

This case involves an interpretation of unambiguous provisions of a release. Because the broad nature of the release applied to any and all claims, as opposed to only listed policies, it encompassed all claims pursued under both the primary and excess policies.

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118. *Id*.
119. *Id*.
120. *Id*.
121. *Id*.
122. *Id*. at 20.
123. *Id*. at 19.
124. *Id*.
125. *Id*. at 24.
126. *Id.*

B. Seventh Circuit Affirms Summary Judgment to Insurer Where Insured Voluntarily Settled with Claimant Without Receiving Consent of Insurance Co.

The decision in *West Bend Mutual Insurance Co. v. Arbor Homes, LLC*[127] discussed the application of a "voluntary payment" provision of an insurance policy. The insured was a home builder that had contracted with buyers for the construction of a residential home.[128] The builder subcontracted the plumbing work to a plumber.[129] Pursuant to the subcontract, the plumber was to obtain liability insurance that named the builder as an additional insured.[130] The plumber purchased a liability insurance policy from West Bend.[131]

Unfortunately for the home buyers, the plumber failed to connect the home's plumbing to the main sewer lines such that raw sewage was discharged into the home's crawl space.[132] Soon after taking possession of the home, the buyers smelled an odor and complained of feeling ill.[133] After notifying the builder of the situation, the builder discovered the incorrect plumbing installation.[134] The builder had the plumber connect the sewer line and engaged in environmental remediation of the home to address the sewage contamination.[135] In the end, the builder ended up spending more than $65,000.00 to repair and clean the home.[136]

The home buyers were unwilling to accept the home after its remediation.[137] Instead, they demanded that the builder buy the home, and construct a new one.[138] The builder told the subcontractor to notify West Bend regarding the buyers' claims.[139] The builder sent a letter to the plumber which discussed a tentative settlement that was reached with the buyers, and requested that the plumber send the letter to West Bend.[140]

After not hearing from the plumber or West Bend, the builder assumed that West Bend had no objections to the settlement and entered into a final settlement agreement with the buyers.[141] The builder agreed to buy the home, build another home for the buyers, pay all closing costs and moving expenses of the buyers as well as compensate the buyers for any increase in their mortgage rate.[142]

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127. 703 F.3d 1092 (7th Cir. 2013), *reh'g denied*.
128. *Id*. at 1093.
129. *Id*.
130. *Id*.
131. *Id*.
132. *Id*. at 1094.
133. *Id*.
134. *Id*.
135. *Id*.
136. *Id*.
137. *Id*.
138. *Id*.
139. *Id*.
140. *Id*.
141. *Id*.
142. *Id*.

The builder eventually filed suit against the plumber alleging a number of legal theories to seek reimbursement for its settlement with the buyers.[143] The builder's attorney also sent a copy of the complaint to West Bend, requesting that West Bend become involved in resolving the dispute.[144] West Bend denied any liability and filed a declaratory judgment lawsuit.[145] In addition to asserting other coverage defenses,[146] West Bend contended that the "voluntary payment" policy provision was violated.[147] That provision provided: "No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our [the insurer's] consent."[148]

The district court granted summary judgment to West Bend by finding that there was no coverage available to the builder.[149] The builder appealed contending that the insurer sustained no prejudice from the builder's settlement such that the voluntary payment provision could not apply to disclaim coverage.[150]

The Seventh Circuit rejected this argument.[151] The court observed that the purpose of the "voluntary payment" provision is to give the insurer "the opportunity to protect itself and its insured by investigating any incident that may lead to a claim under the policy, and by participating in any resulting litigation or settlement discussions."[152] Although the court found that the builder "behaved admirably" by resolving the buyers' claim, the builder failed to protect West Bend's interest when the builder did not obtain West Bend's consent to the settlement.[153] The court observed that the "voluntary payment" provision "is not a notice provision *per se*, but a consent provision."[154] Because the undisputed evidence established that the builder did not obtain the West Bend's consent, no coverage was owed.[155]

This case is an excellent example of the purpose and application of the "voluntary payment" provision. An insurer must be afforded the opportunity to participate in its insured's defense and to be involved in any potential settlement negotiations. Failure to obtain the insurance company's consent will be fatal to any claim for coverage.

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143. *Id*.

144. *Id*.

145. *Id*.

146. *Id*. (The insurer contended that the builder was not an "additional insured," that a "fungi and bacteria" exclusion applied, and that no coverage was afforded for completed-operations of the insured.)

147. *Id*. at 1095.

148. *Id*.

149. *Id*. at 1094.

150. *Id*.

151. *Id*.

152. *Id*. at 1095.

153. *Id*. at 1096

154. *Id*.

155. *Id*.

C. Court of Appeals Refuses to Allow Insurer to Intervene in Lawsuit Against Insured After Insurer Offered to Defend Insured Under Reservation of Rights

The decision in *Granite State Insurance Co. v. Lodholtz*[156] provides guidance to insurance companies of unfortunate results that can occur if an insured is not afforded a defense even when coverage is in question. A contractor sustained serious personal injuries while working at the insured's facilities.[157] The injured contractor sued the insured who notified the claims administrator of its liability insurer about the lawsuit.[158] The administrator sought and obtained an extension of time to answer the complaint for the insured, but did not file an answer within the extended deadline.[159] As a result, a default judgment was entered against the insured.[160] After the default judgment was entered and before a damages award was assessed, the insured, on its own, agreed to a settlement with the injured contractor where he would not attempt to collect any damages directly from the insured but only seek the damages from any insurance coverage available to the insured.[161]

Approximately a week after the settlement between the contractor and insured, the insurance company advised the insured that it would represent the insured in the lawsuit under a reservation of rights.[162] The trial court entered a default judgment in favor of the contractor and awarded damages of $3,866,462.00.[163] The insurer attempted to intervene in the lawsuit pursuant to Indiana Rule of Trial Procedure 24(a)(2) to assert its coverage defenses, and to request the court to vacate the default judgment.[164] The trial court refused to allow the insurer to intervene.[165]

On appeal, the insurer contended the trial court abused its discretion in denying the Motion to Intervene.[166] The insurer explained that its interests in the litigation were in danger of being impeded and were not protected.[167] However, the contractor contended that the insurer's interests were only "contingent," because the insurer reserved its rights to deny coverage and did not offer coverage to the insured.[168] The contractor relied upon the decision of *Cincinnati Insurance Co. v. Young*[169] where the test for intervention as of right required proposed

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156. 981 N.E.2d 563 (Ind. Ct. App. 2012), *trans. denied*.
157. *Id*. at 565.
158. *Id*.
159. *Id*.
160. *Id*.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*.
165. *Id*.
166. *Id*. at 566.
167. *Id*.
168. *Id*.
169. 852 N.E.2d 8, 13 (Ind. Ct. App. 2006), *trans. denied*.

intervenors to show "(1) an interest in the subject of the action, (2) disposition of the action may as a practical matter impede the protection of that interest, and (3) representation of the interest by existing parties is inadequate."[170]

The court of appeals affirmed the trial court's denial of the insurer's request for intervention.[171] The court concluded that because the insurance company reserved its rights to deny coverage, it did not have a "direct interest" as required under Trial Rule 24 to justify intervention as of right.[172]

This decision seems to completely ignore the interests of the insurance company in challenging the coverage issues. As Judge Baker observed in the dissent, intervention appeared to be the only way the insurer could challenge the contractor's claim after default judgment was entered.[173] Furthermore, the insurer had not denied coverage to the insured, but rather defended under a reservation of rights, which previous court rulings have addressed is the proper way for an insurance company to avoid the effects of collateral estoppel when it has coverage issues that it wishes to still address.[174]

D. Court of Appeals Concludes That Umbrella Policy was Ambiguous with Respect to Whether It Provided "Completed Operations" Coverage to Insured

The case of *Hammerstone v. Indiana Insurance Co.*[175] provides an interesting analysis by the court in addressing an alleged insurance policy's ambiguity. The insured was the manufacturer of a vacuum machine that was utilized to mulch leaves and other yard debris.[176] An operator was injured while using the machine, and filed a product liability action against the insured manufacturer and others.[177] The insured submitted the claim to its primary insurer which agreed to provide a defense to the insured for the injured customer's claim.[178] However, the umbrella insurer issued a reservation of rights letter to the insured and also filed a declaratory judgment action to present coverage defenses.[179] The umbrella insurer contended that insurance coverage under the umbrella policy was excluded by a policy endorsement that specifically provided that "products-completed operations" coverage did not apply to bodily injury claims.[180] The umbrella insurer filed and was granted summary judgment finding that no coverage was available.[181]

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170. *Granite*, 981 N.E.2d at 566 (quoting *Cincinnati Ins.*, 852 N.E.2d at 13).
171. *Id*.
172. *Id*. at 567.
173. *Id*. at 568 (Baker, J., dissenting).
174. *See* Liberty Mut. Ins. Co. v. Metzler, 586 N.E.2d 897 (1992).
175. 986 N.E.2d 841 (Ind. Ct. App. 2013).
176. *Id*. at 842.
177. *Id*.
178. *Id*. at 843.
179. *Id*. at 845.
180. *Id*. at 844.
181. *Id*. at 845.

The insured appealed and argued that the umbrella policy was inherently ambiguous.[182] While acknowledging the exclusion for "completed operations" within the policy, the insured argued that an ambiguity existed because the declarations page specifically stated that $2,000,000 of policy limits applied for claims involving "products-completed operations."[183]

The court of appeals reversed the trial court, and concluded that the policy was ambiguous.[184] In its finding, the court stated: "Thus, the Umbrella Policy states that it both provides $2,000,000 of coverage for products-completed operations and that the insurance does not apply to products-completed operations hazard injuries. As a result, the Umbrella Policy is inherently ambiguous."[185]

From the description of the case, it appears that an ambiguity existed within the policy. The insurer could not offer an explanation as to why limits for completed operations coverage were listed on the declarations page, but also excluded by the policy language. As a result, an ambiguity in the policy existed.

IV. PROPERTY INSURANCE CASE: *COURT OF APPEALS AFFIRMS TRIAL COURT'S ORDERS COMPELLING INSURANCE COMPANY TO PRODUCE PAST HAIL CLAIM HISTORY AND RESERVE INFORMATION*

The decision of *Auto-Owners Insurance Co. v. C & J Real Estate, Inc.*[186] is a troubling decision that will likely adversely affect insurers. The insured was the owner of a commercial building that was insured under a property policy.[187] After a hail storm, the insured filed a claim seeking coverage for damage to the roof of the insured's building.[188] The insurance company investigated, but ultimately denied the claim, finding that the roof was not damaged due to hail.[189]

The insured filed a lawsuit against the insurer alleging breach of contract and breach of the duty of good faith and fair dealings owed by the insurer to the insured.[190] During the discovery stage of the litigation, the insured requested that the insurance company answer discovery requests relating to "every hail damage claim that [the insurer] received from an insured residing in Indiana with a commercial property insurance policy from the period of 2009 to the present date."[191] The insurer objected to producing this information by claiming that such evidence was irrelevant and unlikely to lead to the discovery of admissible evidence.[192] The insurer relied upon the case of *Ramirez v. American Family*

182. *Id*.
183. *Id*. at 844.
184. *Id*.
185. *Id*. at 846.
186. 996 N.E.2d 803 (Ind. Ct. App. 2013).
187. *Id*. at 804.
188. *Id*.
189. *Id*.
190. *Id*.
191. *Id*. at 805.
192. *Id*.

Mutual Insurance Co.[193] where in a lawsuit relating to a first party coverage claim, the court determined that "[i]nformation regarding other claims made by other insureds under other contracts was not relevant to the coverage afforded under the [present insured's] insurance policy."[194]

Additionally, the insured sought to obtain the amount of reserves[195] that the insurance company placed on the insured's claim.[196] The insurance company objected to producing this information by contending the reserves were prepared by the insurer in anticipation of litigation.[197]

The trial court ordered the insurance company to produce information relating to its hail claims history and the reserve information.[198] The court of appeals affirmed the trial court's ruling relating to the discovery of both discovery matters.[199] Because the insured had presented claims for both breach of contract and breach of duty of good faith, the court concluded that discovery of those matters was warranted as each was relevant to the claim for breach of duty of good faith.[200] The court reiterated that under the standard for discovery, information is discoverable, even if not admissible at trial, so long as it may lead to the discovery of admissible evidence.[201]

The key to this case appears to be that because the breach of contract and breach of duty of good faith claims had not been bifurcated, the court felt obligated to allow discovery of this information, even if it was prejudicial to the insurance company on the breach of contract claim.[202] In cases where claims for both breach of contract and breach of duty of good faith are alleged, insurers will need to immediately seek a bifurcation of the breach of duty of good faith claim from the breach of contract claim, in order to prevent the disclosure of this prejudicial evidence. The court hinted that its ruling may have been different if discovery of those claims had been bifurcated.

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193. 652 N.E.2d 511 (Ind. Ct. App. 1995).

194. *Id*. at 517.

195. IND. CODE § 27-1-13-8(c) (2014) requires an insurance company to set aside a "reserve for outstanding losses at least equal to the aggregate estimated amounts due or to become due on account of all losses or claims of which the company has received notice."

196. *Id*.

197. *Id*. at 807.

198. *Id*.

199. *Id*. at 808.

200. *Id*. at 806.

201. *Id*. (*see* IND. R. TR. PROC. 26).

202. Because reserves are based upon an insurer's estimate of its risk for a loss, disclosure of such information is prejudicial to the insurer on the breach of contract claim.

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

This Survey reviews the significant product liability cases decided during the survey period. It offers select commentary and context,[1] following the basic structure of the Indiana Product Liability Act ("IPLA").[2] While it does not address all related cases decided during the survey period in detail, this survey focuses on cases involving important substantive product liability concepts and offers appropriate background information about the IPLA. This survey will not discuss issues decided on procedural or non-product liability substantive grounds.

The 2013 Survey period probably will be remembered not so much for the breadth of coverage, but for the depth of analysis in a handful of significant cases. Although there were fewer cases this year addressing the scope of the IPLA, the cases generally tended to fall within the traditionally popular areas for substantive treatment, such as warning and design defects, the rebuttable presumption for regulated products, and use of expert witnesses in product liability cases.

I. THE SCOPE OF THE IPLA

The IPLA regulates actions against manufacturers or sellers by users or consumers.[3] The IPLA regulates these actions when a product causes physical harm, "regardless of the substantive legal theory or theories upon which the action is brought."[4] Read together, Indiana Code sections 34-20-1-1 and -2-1 establish five unmistakable threshold 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

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1. The survey period is October 1, 2012 to September 30, 2013.

2. IND. CODE §§ 34-20-1-1 to -9-1 (2013). 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. *Id.* §§34-20-1-1 & 34-6-2-11.5.

4. *Id.* §§ 34-20-1-1 & 34-6-2-115.

defective condition";[5] (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";[6] (3) "physical harm caused by a product";[7] (4) a "product in a defective condition unreasonably dangerous to [a] user or consumer" or to his or her property;[8] and (5) a product that "reach[ed] the user or consumer without substantial alteration in [its] condition."[9] Indiana Code section 34-20-1-1 clearly establishes that the IPLA regulates every claim which satisfies the five threshold requirements, "regardless of the substantive legal theory or theories upon which the action is brought."[10]

A. User/Consumer and Manufacturer/Seller

Over the last decade or so, there have been a number of cases that addressed the scope and reach of the IPLA. Several of those cases have addressed who may file suit in Indiana as product liability plaintiffs because they are "users,"[11] or "consumers."[12] By the same token, there is likewise a fairly robust body of case law that has helped to identify those people and entities that are "manufacturers"[13]

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5. *Id.* §§ 34-20-1-1(1) & 34-20-2-1(1).

6. *Id.* §§ 34-20-1-1(2) & 34-20-2-1(2). For example, corner lemonade stand operators and garage sale sponsors are excluded from IPLA liability, according to the latter section.

7. *Id.* § 34-20-1-1(3).

8. *Id.* § 34-20-2-1.

9. *Id.* § 34-20-2-1(3).

10. *Id.* § 34-20-1-1.

11. *Id.* § 34-6-2-147.

12. *Id.* § 34-6-2-29. A literal interpretation of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined "user" or "consumer," before proceeding with a claim under the IPLA, he or she also must satisfy another statutorily-defined threshold. *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, it does not appear that the IPLA provides a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product's defective condition if that claimant does not fall within the IPLA's definition of "user" or "consumer." Two of the leading recent cases addressing "users" and "consumers" include *Vaughn v. Daniels Co. (W. Va.) Inc.*, 841 N.E.2d 1133 (Ind. 2006), and *Butler v. City of Peru*, 733 N.E.2d 912 (Ind. 2000).

13. IND. CODE § 34-6-2-77 (2013). For purposes of the IPLA, a manufacturer is "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.* § 34-6-2-77(a). A few of the more recent influential cases that have evaluated whether an entity qualifies as a "manufacturer" under the IPLA include *Mesman v. Crane Pro Services*, 512 F.3d 352 (7th Cir. 2008), *Pentony v. Valparaiso Department of Parks & Recreation,* 866 F. Supp. 2d 1002 (N.D. Ind. 2012), and *Warriner v. DC Marshall Jeep*, 962 N.E.2d 1263 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 155 (Ind. 2012) (manufacturer/seller).

or "sellers"[14] and, therefore, proper defendants in Indiana product liability cases. For the first time in several years, there were no significant cases during the 2013 Survey period that addressed user/consumer or manufacturer/seller issues.

B. 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."[15] It "does not include gradually evolving damage to property or economic losses from such damage."[16] A "product" is "any item or good that is personalty at the time it is conveyed by the seller to another party," but not a "transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product."[17] The 2013 Survey period added two more cases to those that recently have interpreted the "physical harm" requirement.[18]

In the first case, *Bell v. Par Pharmaceutical Companies, Inc.*, Pamela Bell ("Bell") sued Par Pharmaceuticals, Inc. ("Par") after she consumed medication that allegedly contained foreign objects.[19] Specifically, Bell alleged that the cholestyramine mixture manufactured by Par contained blood and two latex glove

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14. IND. CODE § 34-6-2-136 (2013). The IPLA defines a seller as "a person engaged in the business of selling or leasing a product for resale, use, or consumption." *Id.* Indiana Code section 34-20-2-1 adds three additional and clarifying requirements as it relates to "sellers." First, an IPLA defendant must have sold, leased, or otherwise placed an allegedly defective product in the stream of commerce. Second, the seller must be in the business of selling the product. And, third, the seller has expected the product to reach and, in fact, did reach the user or consumer without substantial alteration. *Id.*; *see also* Williams v. REP Corp., 302 F.3d 660, 662-64 (7th Cir. 2002). Sellers can also be held liable as manufacturers in two ways. First, a seller may 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 may be held liable as 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." Kennedy v. Guess, Inc., 806 N.E.2d 776, 781 (Ind. 2004) (quoting IND. CODE § 34-20-2-4). When the theory of liability is based upon "strict liability in tort," Indiana Code section 34-20-2-3 makes clear that a "seller" that cannot otherwise be deemed a "manufacturer" is not liable and is not a proper IPLA defendant.

15. IND. CODE § 34-6-2-105(a) (2013).

16. *Id*. § 36-6-2-105(b).

17. *Id*. § 34-6-2-114.

18. Some of the recent cases include *Fleetwood Enterprises, Inc. v. Progressive Northern Insurance Co.*, 749 N.E.2d 492, 493-34 (Ind. 2001), *Guideone Insurance Co. v. U.S. Water Systems, Inc.*, 950 N.E.2d 1236, 1244 (Ind. Ct. App. 2011), *Hathaway v. Cintas Corp. Services, Inc.*, 903 F. Supp. 2d 669 (N.D. Ind. 2012), *Pentony v. Valparaiso Department of Parks & Recreation*, 865 F. Supp. 2d 947 (N.D. Ind. 2012), and *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998).

19. Bell v. Par Pharm. Cos., No. 1:11-CV-01454-TWP-MJD, 2013 WL 2244345, at *1 (S.D. Ind. May 21, 2013).

fingertips.[20] However, Bell spat out the latex gloves before she swallowed them.[21] Further, Bell's only known symptom following the incident was nausea for half a day.[22] Bell never sought medical treatment for the nausea, and she never tested positive for any condition resulting from exposure to foreign blood despite being tested numerous times.[23] Although she claimed to suffer from anxiety after the incident, Bell was never diagnosed with any physical or mental condition as a result of the incident, and she never sought or received counseling or therapy.[24]

The Southern District of Indiana granted summary judgment in favor of Par, in part, because Bell could not show that the product harmed her.[25] Because Bell merely suffered from nausea temporarily following the incident and sought no additional medical treatment (other than the blood tests, which all came back negative), the court was not able to find any evidence of bodily injury.[26] Thus, the court found that these claims were insufficient to meet the requirement of "physical harm" under the IPLA.[27]

The second case decided during the 2013 Survey period interpreting the "physical harm" requirement is *Barker v. CareFusion 303, Inc*.[28] There, the court addressed whether the plaintiffs' emotional distress claim could be pursued in a product liability action.[29] The plaintiffs were parents of an infant who suffered brain damage after a cardiac arrest induced by the rapid influx of "total parenteral nutrition" ("TPN").[30] The week-old infant was receiving TPN via a machine manufactured by the defendant.[31] The machine malfunctioned as it was being powered down, and it delivered excessive TPN to the infant.[32] The infant's parents witnessed the cardiac arrest and resuscitation efforts.[33] They sued the manufacturer for damages on behalf of the infant, and for their own emotional distress.[34] The manufacturer moved to dismiss the emotional distress claim arguing that the plaintiffs did not suffer "physical harm" as required by the IPLA.[35]

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20. *Id*.
21. *Id*.
22. *Id*. at *2.
23. *Id*.
24. *Id*.
25. *Id*. at *8.
26. *Id*.
27. *Id*. ("Because Ms. Bell cannot prove an essential element of her claim – that she was injured by the cholestyramine product – Par is entitled to summary judgment.").
28. No. 1:11-CV-00938-TWP-DKL, 2012 WL 5997494, at *1 (S.D. Ind. Nov. 30, 2012)
29. *Id*.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*. at *2.

The court noted that at common law, Indiana allows the recovery of damages for emotional distress resulting from the negligence of another if the plaintiff satisfies "the bystander rule" or the "modified impact rule."[36] However, this case arose from harm caused by a product, and the IPLA provides the sole remedy for product liability actions sounding in tort.[37] Thus, the plaintiffs' emotional distress claim had to satisfy the requirements of the IPLA in order to survive.[38] The court concluded that the parents failed to show that they suffered physical harm, as they did not allege that they sustained any "bodily injuries, death, loss of services, [or] rights arising from any such injuries, or major property damage."[39] The court declined to import the common law "bystander theory" into the IPLA.[40] Accordingly, the court dismissed the plaintiffs' emotional distress count for failure to state a claim under the IPLA.[41]

C. Defective and Unreasonably Dangerous

IPLA liability only extends to products that are in "defective condition,"[42] which exists if the product, at the time it is conveyed by the seller to another party, is: "(1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and (2) unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption."[43] Both are threshold proof requirements.[44]

Indiana claimants may prove that a product is in a "defective condition" by asserting one or any combination of the following three theories: "(1) the product has a defect in its design ("design defect"); (2) the product lacks adequate or appropriate warnings ("warning defect"); or (3) the product has a defect that is the result of a problem in the manufacturing process ("manufacturing defect")."[45]

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36. *Id*. at *3. The court discussed *Spangler v. Bechtel*, 958 N.E.2d 458, 466 (Ind. 2011), which found that at common law "independent, stand-alone actions for negligent infliction of emotional distress are not cognizable in Indiana. But actions seeking damages for emotional distress resulting from the negligence of another are permitted in two situations: where the plaintiff has (1) witnessed or come to the scene soon thereafter the death or severe injury of certain classes of relatives (i.e., the bystander rule) or (2) suffered a direct impact (i.e., the modified impact rule)." (internal citations omitted).

37. *Barker*, 2012 WL 5997494 at *3.

38. *Id*.

39. *Id.*

40. *Id*.

41. *Id*. at *4.

42. IND. CODE § 34-20-2-1 (2013).

43. *Id*. § 34-20-4-1; Joseph R. Alberts et al., *Survey or Recent Developments in Indiana Product Liability Law* 46, IND. L. REV. 1151, 1152 (2013

44. *See* Baker v. Heye-Am., 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003).

45. *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. v. Am. Wood Fibers, Inc., No. 2:03-CV-178-TS, 2006 U.S. Dist. LEXIS 80046, at *14 (N.D. Ind. Oct. 31, 2006); *Baker*, 799 N.E.2d at 1140; Alberts et

An unreasonably dangerous product under the IPLA is one that "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."[46] If a product injures in a fashion that is objectively known to the community of product consumers, it is not unreasonably dangerous as a matter of law.[47]

Recently, when considering cases where improper design or inadequate warnings served as the theory for proving a product was in a "defective condition," courts have recognized that substantive defect analysis (i.e., whether a design was inappropriate or a warning was inadequate) is secondary to an analysis that determines whether the product is "unreasonably dangerous."[48]

A negligence standard is imposed by the IPLA in all product liability claims relying upon a design or warning theory to prove defectiveness. Additionally, the IPLA retains "strict" liability (a term traditionally applied to liability without regard to fault or liability despite the exercise of all reasonable care) for claims relying upon a manufacturing defect theory.[49] Just like a claimant advancing a negligence theory, a claimant advancing design or warning defect theories must meet the traditional negligence elements: duty, breach, and injury causation.[50] Although the IPLA has for nearly twenty years made clear that "strict" liability applies only in cases involving alleged manufacturing defects, some courts have been slow to recognize that concept.[51]

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al., *supra* note 43 at 1157. "Although claimants are free to assert any of the three theories, or a combination, for proving that a product is in a 'defective condition,' the IPLA provides explicit statutory guidelines for 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 (2013). In addition, '[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.' *Id.* § 34-20-4-4. " Alberts et al., *supra* note 43 at n.85.

46. IND. CODE. § 34-6-2-146 (2013); *see also Baker*, 799 N.E.2d at 1140.

47. *See* Moss v. Crosman Corp., 136 F.3d 1169, 1174-75 (7th Cir. 1998); *Baker*, 799 N.E.2d at 1140.

48. *See* Bourne v. Marty Gilman, Inc., No. 1:03-CV-1375-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).

49. *See* Mesman v. Crane Pro Svs., 409 F.3d 846, 849 (7th Cir. 2008); *Inlow II*, 378 F.3d at 689 n.4; Conley v. Lift-All Co., No. 1:03-CV-1200-DFH-TAB, 2005 WL 1799505, at *6 (S.D. Ind. July 25, 2005); *Bourne*, 2005 WL 1703201, at *3.

50. The 2009 Indiana Supreme Court decision in *Kovach v. Caligor Midwest*, 913 N.E.2d 193, 197-99 (Ind. 2009), articulates 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.

51. *See, e.g.*, Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995); Vaughn v. Daniels Co. (W. Va.), Inc., 841 N.E.2d 1133, 1138-39 (Ind. 2006); Warriner v. DC Marshall Jeep,

Courts in Indiana have been fairly active in the past few years when it comes to dealing with concepts of unreasonable danger and causation in Indiana product liability actions.[52] The 2013 Survey period added three more decisions in this area.

In *Beasley v. Thompson/Center Arms Co.*,[53] the plaintiff was injured when a muzzle-loading rifle exploded in his face.[54] He received the rifle as a gift from his father, who had acquired it from a friend.[55] The plaintiff testified that when he received the rifle, it appeared to be in relatively good shape, but he did not disassemble it, inspect it, or replace any parts.[56] The remains of the rifle were not fully recovered after the accident, so the plaintiff could not reassemble it to determine if it was defective.[57] Moreover, the plaintiff designated no evidence proving that the rifle reached the plaintiff without substantial alteration of the condition in which the defendant sold it.[58] The plaintiff relied on a *res ipsa loquitur*-type theory and argued that the mere fact that the rifle exploded proved that it was defective.[59] The court found that even if such a theory was sufficient to establish a defective condition, the plaintiff failed to show that the rifle had not undergone a substantial alteration between the time the defendant sold it and the time it entered the plaintiff's hands.[60] Without any evidence suggesting that the rifle was in a defective condition when it left the manufacturer, the plaintiff could not survive the manufacturer's motion for summary judgment.[61]

The next case addressing the "unreasonably dangerous" requirement was *Stuhlmacher v. The Home Depot U.S.A., Inc*., wherein the plaintiff alleged personal injuries as a result of a fall from a ladder.[62] In a motion for summary judgment, the defendant argued that the plaintiff failed to establish that the ladder was unreasonably dangerous.[63] However, after concluding that the plaintiff's

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962 N.E.2d 1263 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 155 (Ind. 2012).

52. Price v. Kuchaes, 950 N.E.2d 1218, 1232-33 (Ind. Ct. App. 2011), *trans. denied*, 962 N.E.2d 650 (Ind. 2011); Roberts v. Menard, Inc., No. 4:09-CV-59-PRC, 2011 WL 1576896 (N.D. Ind. Apr. 25, 2011). *See, e.g.*, Hathaway v. Cintas Corp. Servs., Inc., 903 F. Supp. 2d 669 (N.D. Ind. 2012).

53. No. 2:11-CV-3-WTL-WGH, 2013 WL 968234, at *1 (S.D. Ind. Mar. 12, 2013).

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*. at *2.

58. *Id*. ("A plaintiff asserting a claim for a manufacturing or design defect must show, *inter alia*, that (1) the product in question was in a defective condition unreasonably dangerous to the user; and (2) the product reached the plaintiff without substantial alteration of the condition in which the defendant sold the product.").

59. *Id*.

60. *Id.*

61. *Id*.

62. Stuhlmacher v. Home Depot U.S.A., Inc., No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572 (N.D. Ind. June 21, 2013).

63. *Id*. at *13.

expert's testimony was admissible,[64] the court found that the expert "presented evidence that the ladder was both defective because it was not built to design specifications and dangerous because the defect caused cracking and the spreader bar to separate."[65] The expert testified that the ladder's rivets were over-tightened, which led to cracks, and, ultimately, to failure of the spreader bar when pressure was applied.[66] Thus, the plaintiff designated evidence sufficient to create a question of fact with regard to the "unreasonably dangerous" requirement because ". . . the over-tightening of the rivets and the consequential weakening of the rail was not observable to the user, nor was it obvious how much force the user was applying given the flexibility of the ladder. Therefore, the potential risk was not observable to the reasonably [sic] user."[67]

The third case addressing this topic was *Bell v. Par Pharmaceutical Companies, Inc*.[68] As discussed above, the plaintiff in *Bell* alleged she was exposed to foreign objects in her medication.[69] Bell essentially argued that the can of cholestyramine powder that she received contained a manufacturing defect because something must have gone wrong in the manufacturing process to cause two latex glove fingertips, and what appeared to be blood, to be included in her medication.[70] The court addressed the issue of defective condition in the context of the rebuttable presumption of non-defectiveness set forth in Indiana Code section 34-20-5-1[71] and found that Bell was not able to overcome this presumption.[72] Specifically, the court found that Bell could not show that the product was in a defective condition when it left Par's control because she had no evidence of the latex pieces or the blood she alleged were in the product.[73] Although Bell argued that the latex glove tips had disintegrated in the glass she retained containing the foreign objects, Par presented expert testimony showing that it would have been impossible for the latex pieces, if present, to disintegrate or degrade under the conditions in which the mixture was stored.[74] In contrast,

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64. *Id.* at *3-11.

65. *Id.* at *13.

66. *Id*.

67. *Id*.

68. No. 1:11-CV-01545-TWP-MJD, 2013 WL 2244345, at *1 (S.D. Ind. May 21, 2013).

69. *Id.* at *1. *See supra* Part I.B.

70. *Bell*, 2013 WL 2244345, at *6.

71. *See infra* Part II.

72. *Bell*, 2013 WL 2244345, at *7 ("To overcome the presumption that the cholestyramine powder was not defective, Ms. Bell [had to] present evidence to prove the following elements: (1) she was harmed by a product; (2) the product was sold 'in a defective condition unreasonably dangerous to any user or consumer'; (3) she was a foreseeable user or consumer; (4) Par was in the business of selling the product; and (5) the product reached Ms. Bell in the condition it was sold.") (internal citations omitted)). *See infra* Part II.

73. *Bell*, 2013 WL 2244345, at *7.

74. *Id*. At the direction of her attorney, Bell put the cup with the mixture in a plastic bag and stored it in her refrigerator until her deposition three years after the incident. *Id*. at *2. At the time of the deposition, the cup only contained the evaporated mixture. *Id*. Bell did not dispute the fact

Bell failed to present any expert testimony or otherwise explain what happened to the missing latex glove pieces or to prove that there was blood in the powder mixture.[75] However, the court noted that even if it were to accept Bell's unsupported assertion that there were pieces of latex and blood in the powder on the day of the incident, she had not set forth any evidence that the latex pieces had come from Par.[76] Although Bell argued that she could use "inferential evidence" to prove this necessary element of causation, the court rejected the argument.[77] Because the can of cholestyramine powder was under Bell's control at the time of the alleged injury, and she had previously opened and consumed medication from the can, the court held that Bell had failed to present any admissible evidence that would create a question of fact as to whether the latex pieces were present in the powder at the time it was sold.[78] In fact, the opposite was true. Par presented undisputed evidence that the packaging process would have detected the presence of foreign objects, that the manufacturing facility did not use latex gloves, and that there were no reported accident or work stoppages during the manufacturing process of the particular lot number.[79]

D. Decisions Involving Specific Defect Theories

1. Warning Defect Theory.—The IPLA contains a specific statutory provision covering the warning defect theory:

> 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.[80]

For a cause of action to attach in failure to warn cases, the "unreasonably dangerous" inquiry is very similar to the requirement that the danger or alleged defect be latent or hidden.[81]

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that she had been unable to produce the latex pieces she alleged were in the powder. *Id*.

75. *Id*. at *7.

76. *Id*.

77. *Id*. at *8 (quoting Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1207 (7th Cir. 1995)) ("Ms. Bell claims that she has [introduced inferential evidence] by introducing the photographs of the cup and related testimony, creating a fact for the jury to decide. Aside from the fact that this purported evidence has already been stricken by the Court, Ms. Bell misapplies this test, as the court in *Whitted* was applying the theory of *res ipsa loquitur* to prove that a manufacturing defect existed, which necessarily requires that 'the injuring instrumentality be in the exclusive control of the defendant at the time of the injury.").

78. *Id*.

79. *Id*.

80. Alberts et al., *supra*, note 43 at 1165; *see also* IND. CODE § 34-20-4-2 (2013).

81. *See* First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 690 n.5 (7th Cir. 2004).

Courts interpreting Indiana warning defect theories have been quite active in the past decade or so.[82] This Survey will focus on three warning defect cases, all of which were decided by federal courts during the 2013 Survey period. First, in *Weigle v. SPX Corp*.,[83] the plaintiffs were injured when a semi-truck trailer fell off its support stand during an attempt to rebuild the trailer's braking system.[84] The support stand had a conical base with an extension tube.[85] The base was fully stabilized only when a support pin was inserted through holes bored in the extension tube.[86] If the support pin was not used, the extension tube retracted into the conical base and touched the ground; thus, any weight placed on the support stand was carried by the narrow tip of the extension tube—not distributed evenly onto the conical base.[87] The plaintiffs failed to insert the support pin, which caused the support stand to become unstable and tip over.[88] The support stand came with a "Parts List and Operating Instructions" booklet and a warning decal affixed to the product, both of which warned users to prevent personal injury by always using the support pin.[89] Plaintiffs alleged that the warnings were inadequate.[90]

The Seventh Circuit noted that the adequacy of warnings is generally a question of fact; however, it can be determined as a matter of law when the facts are undisputed.[91] Although the warnings clearly provided that users must insert the support pin to avoid personal injury, plaintiffs argued that the warnings were inadequate because they failed to explain why the support pin was mechanically important to the stability of the stand.[92] The Seventh Circuit concluded that the warnings unequivocally required the use of the support pin.[93] The manufacturer was not required to provide the plaintiffs with a "physics lesson" on the mechanics of the support pin—"it is enough that [the manufacturer] instructed users on how to use the stand properly . . . and warned users of the inherent dangers of not following those instructions.[94] Accordingly, the court concluded that the warnings were adequate as a matter of law, defeating plaintiffs' warning

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82. Federal courts in Indiana decided two cases involving warning defect theories during the 2012 Survey period: Tague v. Wright Med. Tech., Inc., No. 4:12-CV-13-TLS, 2012 WL 1655760 (N.D. Ind. May 10, 2012), and Hathaway v. Cintas Corp. Servs., Inc., 903 F. Supp. 2d 669 (N.D. Ind. 2012).

83. Weigle v. SPX Corp., 729 F. 3d 724 (7th Cir. 2013).

84. *Id*. at 726-27.

85. *Id*. at 727.

86. *Id*.

87. *Id*.

88. *Id*.

89. *Id*. at 727-28.

90. *Id*. at 728.

91. *Id*. at 731.

92. *Id*. at 732.

93. *Id*.

94. *Id*. at 733-34.

defect theory.[95]

In the second case, *Stuhlmacher v. The Home Depot U.S.A., Inc.*, defendants argued that summary judgment should be granted on the issue of warning defect because the plaintiff failed to provide evidence to support the allegation that a lack of warning caused the plaintiff's fall from the subject ladder.[96] Although issues of causation are typically questions of fact for the jury, the court agreed with defendants' claim, finding that the plaintiff had failed to present *any* evidence tending to show that the warnings and instructions accompanying the ladder were deficient.[97] Namely, the plaintiff had not pointed "to any omissions or errors in the warnings [sic] labels or presented any argument on how additional warnings may have resulted in a different outcome."[98] In fact, the plaintiff had even stated in response to defendants' motion in limine that "this is not a case involving defective design and inadequate warnings."[99] In addition, the plaintiff testified in his deposition that "any warning would not have prevented him from climbing on or handling the ladder."[100] Based on these facts, the Northern District of Indiana ultimately granted defendants' motion for summary judgment.[101]

In the last of the 2013 warning defect federal cases, *Hartman v. Ebsco Industries, Inc.*,[102] the plaintiff was injured when a muzzle-loading rifle unexpectedly discharged, causing a bullet and ramrod to pass through his hands and right arm.[103] In 2008, the plaintiff purchased and installed a conversion kit for the rifle, which was supposed to deliver a spark with a higher temperature to ignite Pyrodex pellets—a form of ammunition that was an alternative to the black powder charge typically used in the rifle at issue.[104] The plaintiff's expert opined that the accident was caused by the presence of a "latent ember" left in the barrel of the gun between shots.[105]

The plaintiff argued that the conversion kit was defective under a warning defect theory because it did not contain an express warning to swab the barrel between shots to eliminate latent embers.[106] The plaintiff conceded, however, that the conversion kit did not create the latent ember; rather the spark that caused the accident was generated by a Pyrodex pellet still smoldering in the barrel after a

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95. *Id*.

96. Stuhlmacher v. Home Depot U.S.A., Inc., No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572, at *14 (N.D. Ind. June 21, 2013).

97. *Id*. at *15.

98. *Id*.

99. *Id*. (internal citation omitted).

100. *Id*.

101. *Id*.

102. No. 3:10-CV-528-TLS, 2013 WL 5460296, at *1 (N.D. Ind. Sept. 30, 2013).

103. *Id*.

104. *Id*.

105. *Id*. at *8.

106. *Id*. at *9

previous shot.[107] Because the conversion kit did not cause the accident, the manufacturer of the conversion kit had no obligation to warn about the danger of an accident caused by another manufacturer's product—in this case, a smoldering Pyrodex pellet.[108] The court declined to impose a duty on the conversion kit's manufacturer to warn about "every possible propellant that could be used in conjunction with the [conversion kit]."[109] The court thus found that the plaintiff failed to show a warning defect in the conversion kit.[110]

2. Design Defect Theory.—State and federal courts have been busy in recent years when it comes to addressing design defect theories under Indiana law.[111] The 2013 Survey period added one more. Recall the *Weigle* case, which we discussed above in the context of an alleged warning defect.[112] It also presented a design defect theory. As noted above, the support stand was fully stabilized only when used in conjunction with a support pin.[113] If the support pin was not used, the extension tube retracted into the conical base and touched the ground; thus, any weight placed on the support stand was carried by the narrow tip of the extension tube—not distributed evenly onto the conical base.[114] The plaintiffs opposed the manufacturer's summary judgment motion by asserting that the support stand differed from most other support stands on the market in that the extension tubes could touch the ground when the support pin was not in place.[115] In most other support stands on the market, the extension tube could not reach the ground in a fully retracted state.[116] Given that industry standards suggested that the safest way to use a support stand was to set it at the lowest possible height, the plaintiffs argued that it was reasonably foreseeable that a user would retract the extension tube to a point where it might touch the ground.[117] The plaintiffs also argued that the support stand did not meet the American Society of Mechanical Engineer's ("ASME") Portable Automotive Lifting Device standards because the extension tube could touch the ground in a retracted position if the user did not insert the support pin.[118]

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107. *Id*. at *10.

108. *Id*.

109. *Id*. The court decided the defect issue in connection with an exception to the statute of repose, which allows the statute to be "reset" where a defective component is incorporated into an old product. *Id*. at *4.

110. *Id*. at *12.

111. *See, e.g.*, Green v. Ford Motor Co., 942 N.E.2d 791 (Ind. 2011); TRW Vehicle Safety Sys., Inc. v. Moore, 936 N.E.2d 201 (Ind. 2010); Lapsley v. Xtek, Inc., 689 F.3d 802 (7th Cir. 2012); Mesman v. Crane Pro Servs., Inc., 409 F.3d 846 (7th Cir. 2005); Hathaway v. Cintas Corp. Servs., Inc., 903 F. Supp. 2d 669 (N.D. Ind. 2012).

112. *See* discussion *supra* Part I.D.1.

113. *See* Weigle v. SPX Corp., 729 F. 3d 724, 727 (7th Cir. 2013).

114. *Id*.

115. *Id*. at 729.

116. *Id*.

117. *Id*.

118. *Id*.

The Seventh Circuit noted that a plaintiff alleging a design defect under the IPLA must show that the product was in a condition "'(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.'"[119] The first requirement focuses on the manufacturer's negligence and is met when the plaintiff shows "that the defendant failed 'to take precautions that are less expensive than the net costs of the accident.'"[120] The second element focuses on the reasonable expectations of the consumer and is met when the plaintiff shows that "'the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer.'"[121]

The court found that the plaintiffs raised a genuine issue of material fact regarding negligence in the design process because there was a dispute regarding whether the support stand complied with ASME standards, and there was a lack of evidence that the manufacturer performed a hazard-risk analysis.[122] The court also found that the plaintiffs raised a genuine issue of material fact with regard to the "unreasonably dangerous" element because the support stand differed in design from other support stands on the market, tending to show "that their design is not contemplated by reasonable persons among those considered expected users."[123] Thus, the court concluded that a reasonable fact finder could find the support stand to be in a defective condition and unreasonably dangerous.[124]

The manufacturer also argued that the adequacy of the product warnings precluded the court from considering the issue of design defect because a manufacturer should not be "required to design a safer product in anticipation of users ignoring adequate warnings."[125] In making this argument, the manufacturer relied on *Marshall v. Clark Equipment Co*., a case in which the Indiana Court of Appeals determined that adequate warnings may be used to defeat a design defect claim.[126] In something akin to a leap of faith, the *Weigle* court opined that the Indiana Supreme Court probably would not follow *Marshall*,[127] largely because the IPLA does not specifically set forth an "adequate warnings" defense.[128] The *Weigle* court also posits that "nothing in the IPLA indicates that [a finding of adequacy with regard to warnings] precludes a finding of a [design defect]."[129]

There does not appear to be an objectively compelling reason why the

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119. *Id*. at 734 (quoting IND. CODE § 34-20-4-1 (2013)).
120. *Id*. (quoting McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 657 (7th Cir. 1998)).
121. *Id*. at 735 (quoting IND. CODE § 34-6-2-146 (2013)).
122. *Id*. at 735.
123. *Id*.
124. *Id*.
125. *Id*. at 736.
126. Marshall v. Clark Equip. Co, 680 N.E.2d 1102, 1106 (Ind. Ct. App. 1997).
127. *Weigle*, 729 F.3d at 736-38.
128. *Id*. at 737.
129. *Id*. at 738.

Indiana Supreme Court would choose not to follow *Marshall*; it is a well-reasoned and well-articulated decision. As a result, the Indiana Supreme Court may wish to resolve this split of authority should the opportunity present itself.

E. Regardless of the Substantive Legal Theory

The Indiana General Assembly carved out a limited exception to the IPLA's exclusive remedy in Indiana Code section 34-20-1-2.[130] The exception occurs where the defendant would otherwise satisfy the IPLA's definition of "seller" and the harm suffered by the claimant is not sudden, major property damage, personal injury, or death.[131] When these criteria are met, recovery theories can constitute the "other" actions not limited by Indiana Code section 34-20-1-2.[132] Indiana Code section 34-20-1-2 does not permit any claim against a "seller" that involves purely economic losses sounding on the common law of contracts, warranty, or the Uniform Commercial Code ("UCC") or gradually developing property damage where all elements needed to demonstrate a typical contract-like claim are met.[133] "In practical effect, application of the economic loss doctrine to tort-based warranty and negligence claims is simply another way of giving effect to the 'regardless of the substantive legal theory' language in Indiana Code section 34-20-1-1.[134] When claims for "physical harm" caused by a product arise, the exclusive IPLA-based cause of action subsumes remedies found in common law or the UCC.[135] Some courts have referred to the subsuming of those claims as "merger."[136] Regardless of terminology, "merged" or "subsumed" claims fail. The IPLA controls those claims, and only IPLA sanctioned recovery (claims asserting either manufacturing, design, or warning defects) survive. "The best examples of claims that should be subsumed are those seeking recovery for

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130. 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." IND. CODE § 34-6-2-77(a) (2013). "'Seller' . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption." *Id.* § 34-6-2-136.

131. *See id.* § 34-20-1-2.

132. *Id.*

133. Such a reading of the statute is consistent with the "economic loss doctrine" cases that preclude 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); Fleetwood 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). *See also* Corry v. Jahn, 972 N.E.2d 907 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 1017 (Ind. 2013).

134. Alberts et al., *supra* note 43 at 1169.

135. *Gunkel*, 822 N.E.2d at 152; *Progressive*, 749 N.E.2d at 495.

136. *See, e.g.*, Atkinson v. P&G-Clairol, Inc., 813 F. Supp. 2d 1021, 1027 (N.D. Ind. 2011); Ganahl v. Stryker Corp., No. 1:10-cv-1518-JMS-TAB, 2011 WL 693331, at *3 (S.D. Ind. Feb. 15, 2011).

common law negligence not rooted in design or warning defects and tort-based breaches of warranty."[137] Several recent cases recognize and follow that approach, including a well-reasoned 2013 case, *Stuhlmacher v. The Home Depot U.S.A., Inc.*[138]

Several recent decisions have disregarded the IPLA's exclusive remedy where a product causes "physical harm."[139] In some cases, courts have allowed "users" or "consumers" to utilize common law theories of recovery where "physical harm" has occurred against "manufacturer" or "seller" *in addition* to IPLA sanctioned recovery options.[140] Courts have also allowed claimants to

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137. Alberts et al., *supra* note 43 at 1169.

138. No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572, at *15-16, (N.D. Ind. June 21, 2013) (merging common law negligence claims into IPLA-based claims and dismissing tort-based breach of implied warranty claims). *See, e.g.*, Hathaway v. Cintas Corp. Servs, Inc., 903 F. Supp. 2d 669, 673 (N.D. Ind. 2012). Another 2012 federal decision, *Lautzenhiser v. Coloplast A/S*, No. 4:11-CV-86-RLY-WGH, 2012 WL 4530804 (S.D. Ind. Sept. 29, 2012), also recognized the concept that tort-based implied warranty claims should be "merged" with the IPLA-based claims, but, in a perplexing twist, the court nonetheless refused to dismiss the tort-based implied warranty claims. The court first concluded that the tort-based warranty claims "survive[d]" the defendant's motion to dismiss because vertical privity is not required. *Id.* at *4. Instead of dismissing those claims, the court "merged" them with the "ordinary negligence," "defective design," and "failure to warn" claims. *Id.* at *5. An alternative way of dealing with those claims would have been to dismiss them as the *Hathaway* court did because the weight of authority in this area holds that tort-based warranty claims are no longer viable in Indiana in and of themselves and are, instead, subsumed into the claims recognized by the IPLA as either manufacturing defect, design defect, or warning defect claims.

139. *See, e.g.*, Deaton v. Robison, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007).

140. *See, e.g.*, *id.* (permitting the "user" of an allegedly defective black powder rifle to pursue "physical harm" claims against the rifle's "manufacturer" under *both* the IPLA *and* section 388 of the Restatement (Second) of Torts); Ritchie v. Glidden Co., 242 F.3d 713, 726-27 (7th Cir. 2001) (allowing 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)). The two most recent examples where courts and the parties appeared to overlook the "merger" rule entirely are *Warriner v. DC Marshall Jeep*, 962 N.E.2d 1263 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 155 (Ind. 2012) and *Brosch v. K-Mart Corp.*, No. 2:08-CV-152, 2012 WL 3960787 (N.D. Ind. Sept. 10, 2012). In *Warriner*, although the claimant's "negligent marketing" claim failed for lack of evidence, neither the parties nor the court addressed the key, threshold issue of whether the so-called "negligent marketing" claim could be pursued in the first place in light of the IPLA's exclusivity. *Warriner*, 962 N.E.2d at 1268-69. In *Brosch*, the court allowed a plaintiff to maintain a claim for "physical harm" against the retail seller of an allegedly defective kitchen island under a common law negligence theory pursuant to section 400 of the Restatement (Second) of Torts. *Brosch*, 2012 WL 3960787, at *5-6. The *Brosch* court addressed the so-called "apparent manufacturer" theory of recovery after first concluding that there was a fact question precluding summary judgment as to whether the court "could hold jurisdiction over" the overseas manufacturer of the allegedly defective kitchen island pursuant to Indiana Code section 34-20-2-4. *Id.* at *4-5. The court referred to Indiana Code section 34-20-2-4's requirements as the "domestic distributor rule." *Id.* at *4-5.

utilize common law recovery theories when a product caused physical harm but the claimant was not a "user" or "consumer" or the defendant was not a "manufacturer" or "seller."[141] Some cases also allowed personal injury common law negligence when no "physical harm" occurred.[142] These cases do not fall under the IPLA because there was no "physical harm."

II. EVIDENTIARY PRESUMPTION

The IPLA, via Indiana Code section 34-20-5-1, entitles a manufacturer or seller to "a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product" conformed with the "generally recognized state of the art" or with applicable government codes, standards, regulations, or specifications.[143] Several decisions in recent years have addressed this rebuttable presumption,[144] including three more during the 2013 Survey period.

The first case, *Gresser v. The Dow Chemical Co.*,[145] involved allegations of

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Brosch is the most recent in a line of Indiana cases noted above that are very difficult to explain or reconcile with the Indiana General Assembly's intent that the IPLA provide the exclusive remedy for all claims that allege "physical harm" caused by a product.

141. *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); Kennedy v. Guess, Inc., 806 N.E.2d 776, 783-84 (Ind. 2004) (permitting a claimant to pursue a claim pursuant to section 400 of the Restatement (Second) of Torts against an entity that could not be treated as a "seller" or "manufacturer" for purposes of the IPLA when an allegedly defective product caused the "physical harm").

142. *See, e.g.*, 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); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 424, 426, 434-35 (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 was the result of the increased availability or supply of handguns). A case decided in 2012, *Corry v. Jahn*, 972 N.E.2d 907, 911-12 (Ind. Ct. App. 2012), also includes breach of warranty and negligence claims stemming from allegedly faulty construction of a residence. The court's opinion refers to the plaintiffs' allegations as including claims for "defective" construction materials. *Id*. at 913. However, the court does not conduct an IPLA analysis, but rather it assesses the alleged "defect" as one arising "from failure to employ adequate construction techniques." *Id*. at 915. Thus, the case does not appear to implicate the IPLA.

143. IND. CODE § 34-20-5-1 (2013).

144. *See*, *e.g.*, Schultz v. Ford Motor Co., 857 N.E.2d 977, 980-81 (Ind. 2006); Wade v. Terex-Telelect, Inc., 966 N.E.2d 186, 191-95 (Ind. Ct. App. 2012), *trans denied*, 984 N.E.2d 219 (Ind. 2013); Miller v. Bernard, 957 N.E.2d 685, 695-96 (Ind. Ct. App. 2011); Flis v. Kia Motors Corp., No. 1:03-CV-1567-JDT-TAB, 2005 WL 1528227, at *1-4 (S.D. Ind. June 20, 2005).

145. 989 N.E.2d 339 (Ind. Ct. App. 2013).

personal injuries following an application of an insecticide called "Dursban TC" at the plaintiffs' residence. Because the insecticide at issue had been properly registered for use by the United States Environmental Protection Agency ("EPA") in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), the court recognized that the insecticide's manufacturer is entitled to Indiana's statutory presumption of non-negligence:

> [C]ompliance with FIFRA and Indiana law has a significant impact under IPLA's consumer expectation-based product liability regime because the risk of harm has been evaluated by agencies charged with the duty of monitoring the effects of Dursban TC. Furthermore, Dursban TC's labeling and warnings have been approved by agency experts.[146]

In an effort to rebut the presumption, the Gressers tried to use evidence of a dispute between Dursban TC's manufacturer and the EPA concerning the reporting of earlier claim settlements.[147] As the *Gresser* court correctly pointed out, however, such evidence "does not establish that Dursban TC was ever unregistered."[148] "Indeed," as the court also noted, "the Dursban TC label was amended to contain stronger warnings than past labels" as a result of the issue involving the disputed claim settlements and, thus, "the Gressers arguably benefitted from" the very dispute they tried to use to rebut the presumption.[149]

The second statutory presumption case, *Stuhlmacher v. The Home Depot U.S.A., Inc*.,[150] involved allegations of personal injuries suffered as a result of a fall from a ladder.[151] Other ladders taken from the same production batch as the one involved were tested and found to conform with the "authoritative safety guidelines," ANSI A14.5 and OSHA.[152] The ladder also was labeled in conformity with the ANSI requirements.[153] Plaintiffs conceded that the "design" of the ladder complied with applicable requirements.[154] This compliance, according to the court, created "a rebuttable presumption that the ladder was not defective."[155] The plaintiffs, however, offered opinions of a mechanical engineer to rebut that presumption with respect to the specific ladder at issue.[156] Stuhlmacher's engineer contended that the specific ladder at issue "was not produced in accordance with the design standards both because it used defective rivets and the rivets were over-tightened."[157] "For these reasons," the court

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146. *Id*. at 345.
147. *Id*. at 346.
148. *Id*.
149. *Id*.
150. No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572, at *1 (N.D. Ind. June 21, 2013).
151. *Id*. at *1-2.
152. *Id.* at *1.
153. *Id*.
154. *Id*. at *13.
155. *Id*. at *14.
156. *Id*.
157. *Id*.

concluded, "it cannot be determined whether the subject ladder would have complied with the ANSI standards," adding that "[c]ertainly, the ANSI would not approve the condition of a ladder that had cracks and would buckle under the type of use [the user] testified to conducting."[158] Thus, sufficient evidence had been presented to rebut the presumption of non-defectiveness and the case could proceed.

The third case involving statutory presumption issues decided during the 2013 Survey period was *Bell v. Par Pharmaceutical Cos*.[159] We previously discussed the *Bell* case above in the context of the IPLA's "physical harm," "defective condition," and "unreasonably dangerous" requirement.[160] Here, we address only that portion of the decision that involved Indiana's statutory presumption. Recall that Bell claimed to have suffered "anxiety and worry" as a result of allegedly finding the tips of two latex gloves and blood in some prescription medication powder she had attempted to take after mixing it with water.[161] The prescription medication contained cholestryamine powder, which is designed to lower high levels of cholesterol in the blood and act as a digestive aid.[162] The named defendant in the case sold cans containing the powder that had been manufactured in bulk and packaged into cans by other entities.[163] The bulk manufacturing and packaging of cholestryamine is governed by Good Manufacturing Practices approved by the United States Food and Drug Administration ("FDA").[164]

The *Bell* court first determined that the statutory presumption applied because the defendant submitted unopposed declarations from quality assurance personnel indicating that the cholestryamine powder at issue was manufactured and packaged in accordance with practices approved by the FDA.[165] The court also noted that the batch records showed no indications that there was any deviation from these practices at the time the product at issue was manufactured or packaged.[166] Bell failed to present any evidence that the cholestryamine powder contained any type of a defect and, as a result, she could not rebut the presumption of non-negligence.[167]

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158. *Id*.

159. No. 1:11-cv-01454-TWP-MJD, 2013 WL 2244345 (S.D. Ind. May 21, 2013).

160. *See supra* Parts I.B. & C.

161. *Bell*, 2013 WL 2244345, at *1-2.

162. *Id*. at *1.

163. *Id*.

164. *Id*.

165. *Id*. at *7.

166. *Id*.

167. *Id*. Recall that Bell alleged that the medication she was given was defective because it contained pieces of two latex gloves. *Id.* at *1-2. Bell was, however, unable to produce those pieces. *Id*. at *7. Although Bell thought they may have disintegrated over time, there was "expert testimony showing that it would have been impossible for the latex pieces to disintegrate or degrade under the conditions which the cholestryamine mixture was stored since the date of the incident." *Id.* Bell did not present any expert testimony or other evidence that would have provided an

III. STATUTES OF LIMITATION AND REPOSE

The IPLA contains a statute of limitation and a statute of repose for product liability claims.[168] The limitations period is two years from the date of accrual.[169] The repose period is ten years from the date the product at issue was first delivered to the initial user or consumer.[170] If, however, the action accrues more than eight years, but less than ten years, after initial delivery, then the claimant's full two year limitations period is preserved even if the repose period would otherwise expire in the interim.[171]

Although Indiana courts have issued a handful of cases in the last decade or so involving the statutory limitations and repose periods,[172] there have not been any significant cases in this area in the past two or three years. There was, however, one decision during the 2013 Survey period that examined the applicability of the statute of repose. In that case, *Hartman v. Ebsco Industries, Inc.*,[173] the plaintiff was injured when a muzzle-loading rifle unexpectedly discharged.[174] The rifle was manufactured in 1994.[175] In 2008, the plaintiff purchased and installed a conversion kit.[176] The accident occurred on November 29, 2008, approximately fourteen years after the rifle was manufactured.[177]

The manufacturer argued that the plaintiff's claim was barred by Indiana's ten-year statute of repose.[178] The court noted two exceptions to the statute of repose.[179] The first one arises where there has been a reconstruction or recondition of the product that lengthens the "useful life of a product beyond what was contemplated when the product was first sold."[180] The second exception arises where a defective component is incorporated into an old product. The presence of the new, defective component starts the statute of repose running

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alternative explanation as to what happened to the missing latex pieces. *Id*. She also offered no expert testimony that there was any blood in the cholestryamine mixture. *Id.*

168. IND. CODE § 34-20-3-1 (2013).

169. *Id*. § 34-20-3-1(b)(1).

170. *Id*. § 34-20-3-1(b)(2).

171. *Id.*

172. *See, e.g.*, Technisand, Inc. v. Melton, 898 N.E.2d 303 (Ind. 2008); Ott v. AlliedSignal, Inc., 827 N.E.2d 1144 (Ind. Ct. App. 2005); C.A. v. Amli at Riverbend, L.P., No. 1:06-CV-1736-SEB-JMS, 2008 U.S. Dist. LEXIS 2558, at *8 (S.D. Ind. Jan. 10, 2008); Campbell v. Supervalu, Inc., 565 F. Supp. 2d 969, 977 (N.D. Ind. 2008).

173. No. 3:10-CV-528-TLS, 2013 WL 5460296, at *1 (N.D. Ind. Sept. 30, 2013).

174. *Id*.

175. *Id*.

176. *Id*.

177. *Id*.

178. *Id*. at *2.

179. *Id*. at *4.

180. *Id*.

anew.[181] The plaintiff argued that the installation of the conversion kit turned the rifle at issue into "an entirely new rifle."[182]

The court disagreed. Nothing about the conversion kit served to lengthen the useful life of the rifle; it merely improved performance.[183] Moreover, the court noted that the conversion kit was installed by the plaintiff, not the manufacturer.[184] The court found that the "statute of repose is reset under the first exception only when the manufacturer, as opposed to the consumer, performs the reconstruction or reconditioning that lengthens the useful life of the product."[185] With regard to the second exception, the court found that the plaintiff failed to show that the conversion kit was defective under either a design[186] or warning defect theory; accordingly, the statute of repose did not begin anew with the installation of the conversion kit.[187]

IV. STATUTORY DEFENSES

The IPLA identifies three statutory defenses: (1) "use with knowledge of danger" (incurred risk);[188] (2) misuse;[189] and (3) modification/alteration.[190] Two

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181. *Id*.

182. *Id*.

183. *Id*.

184. *Id*. at *6.

185. *Id*.

186. *Id*. at *9. The court concluded that the plaintiff's expert's opinion regarding an alternate design was inadmissible under *Daubert*.

187. *Id*. at *12. *See supra* Part I.D.

188. Indiana Code section 34-20-6-3 provides that "[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured." IND. CODE § 34-20-6-3 (2013). Incurred risk is a defense that "involves a mental state of venturousness on the part of the actor, and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk." Beckett v. Clinton Prairie Sch. Corp., 504 N.E.2d 552, 554 (Ind. 1987) (citing Power v. Brodie, 460 N.E.2d 1241, 1243 (Ind. Ct. App. 1984). It is a "complete" defense in that it precludes a defendant's IPLA liability (in design and warning defect cases) if it is found to apply to a particular set of factual circumstances. *See, e.g.*, Vaughn v. Daniels Co. (W. Va.), Inc., 841 N.E.2d 1133, 1146 (Ind. 2006); Baker v. Heye-Am., 799 N.E.2d 1135, 1145 (Ind. Ct. App. 2003); Hopper v. Carey, 716 N.E.2d 566, 575-76 (Ind. Ct. App. 1999).

189. Indiana Code section 34-20-6-4 provides a defense in a product liability case under Indiana law if the "cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party." IND. CODE § 43-20-6-4 (2013). Stated in a slightly different way, misuse is a "use for a purpose or in a manner not foreseeable by the manufacturer." Henderson v. Freightliner, LLC, No. 1:02-CV-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005) (quoting Barnard v. Saturn Corp., 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003). The facts required to prove the misuse defense may be similar to (but are not necessarily identical as) those necessary to prove either that the product is in a condition "not contemplated by reasonable"

cases decided during the 2013 Survey period involve the concept of product misuse. In addition to substantive warnings and design defect issues, *Weigle v. SPX Corp.*,[191] also discusses the misuse defense in some limited detail. There, the court examined whether the plaintiffs' failure to read and follow a product's warnings constituted a misuse.[192] The products at issue were support stands that were used to support a truck trailer while mechanics performed repairs.[193] The plaintiffs were injured when the trailer fell off the stands.[194] The manufacturer had provided instructions that support pins were to be inserted completely through both walls of the extension tube.[195] A separate warning advised users to "[a]lways use the support pin."[196] Although it was undisputed that neither plaintiff read the instructions or inserted a support pin,[197] the court refused to grant summary judgment based upon the misuse defense because it found plaintiffs to "have designated evidence from which a fact finder could determine that use of the support stands without the pin was reasonably foreseeable."[198] That portion of the *Weigle* case that discusses misuse seems illogical when viewed in isolation because the manufacturer intended the product to be used with the support pins and plaintiffs unquestionably disregarded that warning. But the court already had determined before it reached the misuse issue that the manufacturer's warnings were adequate as a matter of law and that the plaintiffs could not pursue a warnings defect claim against the manufacturer.[199]

Stuhlmacher v. The Home Depot U.S.A., Inc.[200] also includes a discussion of misuse. This case, discussed in a number of different contexts above, involved an allegedly defective ladder. The defendants argued that the plaintiff did not use the ladder in the way it was intended because he had situated it such that he

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users or consumers under Indiana Code section 34-20-4-1(1) or that the injury resulted from "handling, preparation for use, or consumption that is not reasonably expectable" under Indiana Code section 34-20-4-3. IND. CODE §§ 34-20-4-1(1) & -3 (2013).

190. Indiana Code section 34-20-6-5 applies when "any person" makes a modification or an alteration to a product after it has been delivered to the initial user or consumer so long as the modification or alteration: (1) is the "proximate cause of the physical harm"; and (2) is "not reasonably expectable to the seller." IND. CODE § 34-20-6-5 (2013). It is important to note that the modification/alteration defense is also largely built into the basic premise for product liability as set forth in Indiana Code section 34-20-2-1, which contemplates that the product be "expected to" reach and does, in fact, reach the user or consumer "without substantial alteration." *Id*. § 34-20-2-1.

191. 729 F.3d 724 (7th Cir. 2013).

192. *Id*. at 739-40.

193. *Id*. at 727-28.

194. *Id*.

195. *Id*. at 728.

196. *Id*.

197. *Id*.

198. *Id*. at 739.

199. *Id*. at 734. *See supra* Part I.D.

200. No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572, at *1 (N.D. Ind. June 21, 2013).

"squeezed the front and rear legs together," thus buckling the spreader.[201] The defendants argued that such a misuse would create the same amount of pressure as a 600-pound person during normal use and the ladder was intended for someone who weighed less than 300 pounds.[202] According to the court, however, the plaintiff "shook the ladder to make sure it was level and that all the feet were on the ground."[203] Although the court recognized that the plaintiff's actions "may have caused an impact greater than that created by a person climbing up the ladder . . . [w]hether it was reasonably foreseeable that a user would shake the ladder to assure its stability in the manner [in which plaintiff] did is a question better reserved for the jury."[204]

V. FEDERAL PREEMPTION

Federal laws preempt state laws in three circumstances: "(1) when the federal statute explicitly provides for preemption; (2) when Congress intended to occupy the field completely; and (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[205] A handful of cases decided by courts in Indiana have taken on the topic in recent years.[206] The 2013 Survey period produced yet another.

In *Wilgus v. Hartz Mountain Corp.*,[207] plaintiffs asserted several claims against Hartz and Wal–Mart for damages they allegedly suffered after using a Hartz flea and tick product to treat their dogs. After applying the flea and tick product to their dogs, one dog died and one became violently ill.[208] Defendants moved for the dismissal based on federal preemption under FIFRA, which imposes regulations on the sale and distribution of pesticides in the United States.[209] As the Hartz UltraGuard ("Hartz") line of products contained pesticides, defendants argued that the sale and distribution of the product was regulated solely by FIFRA and the EPA.[210] The court found that plaintiffs' claims were based on Hartz's failure to warn of potential dangers associated with the product, despite the fact that the labeling complied with all FIFRA and EPA

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201. *Id*. at *14.

202. *Id*.

203. *Id*.

204. *Id*.

205. Thornburg v. Stryker Corp., No. 1:05-CV-1378-RLY-TAB, 2007 U.S. Dist. LEXIS 43455, at *5 (S.D. Ind. June 12, 2007) (quoting JCW Invs., Inc. v. Novelty, Inc. 482 F.3d 910, 918 (7th Cir. 2007)).

206. *See, e.g.,* Cook v. Ford Motor Co., 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*; Roland v. Gen. Motors Corp., 881 N.E.2d 722, 727 (Ind. Ct. App. 2008), *trans. denied*; Tucker v. SmithKline Beecham Corp., 596 F. Supp. 2d 1225, 1238 (S.D. Ind. 2008).

207. No. 3:12-CV-86, 2013 WL 653707, at *1 (N.D. Ind. Feb. 19, 2013).

208. *Id.*

209. *Id*. at *4.

210. *Id*.

regulations.[211] Citing a recent decision on the same question issued by the Northern District of Ohio, the court found that because plaintiffs' claims were based on a failure to warn, they were preempted by FIFRA.[212] The court found that FIFRA contained strict guidelines for pesticide labeling and clearly proscribed any state-law labeling requirement that would impose a labeling requirement that diverged from those set out in FIFRA and its implementing regulations.[213] Because the EPA mandated the warnings required on the Hartz line of products, a challenge based on the adequacy of those warnings was appropriately preempted by FIFRA.[214]

CONCLUSION

Although there were not as many significant product liability decisions during the 2013 Survey period as there have been in recent years, the number of topics and overall scope of the decisions seemed to increase. Indeed, a couple of the 2013 cases addressed an impressive number of different product liability issues in the same opinion. It seems clear both from the arguments being made and the decisions being issued that judges and practitioners are becoming increasingly familiar with product liability landscape as we near the twentieth anniversary of the rather sweeping 1995 amendments to the IPLA.

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211. *Id*. at *6-7.

212. *Id*. at *7 (citing Smith v. Hartz Mountain Corp., No. 3:12-CV-00662, 2012 WL 5451726, at *2-4 (N.D. Ohio Nov. 7, 2012)).

213. *Id*.

214. *Id*.

DEVELOPMENTS IN PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

This Survey Article examines developments in the Indiana law of professional responsibility from October 1, 2012 to September 30, 2013. A few cases captured attention during the survey period with bizarre fact patterns. Readers may remember (1) the lawyer who wrote a tell-all book about a former client;[1] (2) the lawyer who distributed flyers about "bloodsucking shylocks";[2] or (3) the law firm partner who sent a fake e-mail to humiliate an associate that spurned his romantic advances.[3] These cases—and several less scandalous examples—remind all lawyers of their ethical obligations to clients, courts, and other lawyers. This Article also discusses trends in attorney discipline that may be linked to newly appointed Indiana Supreme Court Justices and Disciplinary Commission staff.

I. CHANGING OF THE GUARD

New Justices have been appointed to Indiana's Supreme Court since 2010. While the change may not affect long-standing procedures, there is speculation that the new court may adopt a stricter view of lawyer regulation. The new cast, and particularly Justices David and Rush, are visible in the survey year.

As background, the Indiana Supreme Court governs the practice of law and exercises original and final jurisdiction over cases involving the admission, discipline, and disbarment of attorneys and judges—as well as the unauthorized practice of law by lay persons.[4] The makeup of the supreme court was remarkably stable from 1999, when Justice Rucker replaced Justice Myra Selby, to 2010. The panel of Justices Randall Shepard, Brent Dickson, Frank Sullivan, Jr., Theodore Boehm, and Robert Rucker sat together for more than decade. Justice Boehm retired from the bench in 2010 and was replaced by Justice Steven David. In 2012, Chief Justice Randall Shepard, who had served on the supreme court since 1985, retired from that position. Justice Sullivan stepped down from

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The opinions expressed herein are solely those of the authors and not those of the Indiana Law Review or other lawyers at Bingham Greenebaum Doll.

1. *In re* Smith, 991 N.E.2d 106 (Ind. 2013).
2. *In re* Dempsey, 986 N.E.2d 816 (Ind. 2013).
3. *In re* Usher, 987 N.E.2d 1080 (Ind. 2013).
4. IND. CONST. art. 7, § 3.

the bench four months later—and the pair was succeeded by Justices Mark Massa and Loretta Rush.[5]

The Disciplinary Commission assists the supreme court by investigating grievances against attorneys and charging attorneys with misconduct. The Executive Secretary of the Commission administers its work, supervises the Commission's staff of eleven lawyers, and is charged with large quantities of discretion and responsibility in the investigation of grievances against attorneys.[6] Stability existed here too, as Donald Lundberg served as the Commission's Executive Secretary from 1991 to 2010. In 2010, Lundberg stepped down and was succeeded by G. Michael Witte (former Judge in Dearborn County).

How will the new guard differ from the old? One place to look for change is in the sanctions meted out for common misconduct (*e.g.* client neglect, lack of client communication, and criminal behavior). Mr. Lundberg, who is now in private practice, suggested the supreme court may be tightening its treatment of first-time Operating-While-Intoxicated convictions, which traditionally were handled without formal discipline.[7] Similarly, an unnamed federal law clerk noted that upon joining the bench, Justice David often dissented from his colleagues in favor of more severe sanctions for attorney misconduct. The clerk cited a handful of decisions and argued: "Not only is Justice David unlikely to show leniency to disciplined attorneys, but his proposed punishments are growing harsher. . . . I wonder if Justice David will be able to cobble together a coalition of Justices who share his approach."[8]

Notably, the supreme court published eleven disciplinary orders in the survey period where one or more justices dissented from the majority position. While Justice David was a frequent dissenter (five times), Justice Rush and Chief Justice Dickson dissented just as often (five and six times, respectively), in each case proposing a more severe sanction.[9] Eleven dissents is not extraordinary. The

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5. The State of Indiana hosts a list and biography of each of its justices at http://www.in.gov/judiciary/supreme/2332.htm.

6. IND. ADMISSION & DISCIPLINE R. 23 §§ 9, 10, 12 (2013).

7. Donald R. Lundberg, RES GESTAE, *The Disappearing First Free Bite of the DUI Apple* 33-36 (May 2012).

8. Marcia Oddi, *Ind. Decisions–Observations on Some Supreme Court Disciplinary Rulings*, INDIANA LAW BLOG (May 8, 2013, 10:53 AM), http://indianalawblog.com/archives/2013/05/ind_decisions_o_215.html.

9. *In re* Weldy, 989 N.E.2d 1252, 1256 (Ind. 2013) (Dickson, C.J. and Rush, J., dissenting); *In re* Holcomb, 989 N.E.2d 1250, 1252 (Ind. 2013) (David and Rush, JJ., dissenting); *In re* Eyster, 988 N.E.2d 264, 265 (Ind. 2013) (Dickson, C.J., and Rush, J., dissenting); *In re* Compton, 988 N.E.2d 262, 263 (Ind. 2013) (Dickson, C.J., and Rush, J., dissenting); *In re* Usher, 987 N.E.2d 1080, 1091 (Ind. 2013) (David, J, dissenting); *In re* Dempsey, 986 N.E.2d 816, 818 (Ind. 2013) (David, J., dissenting); *In re* Watson, 985 N.E.2d 1094, 1095 (Ind. 2013) (Dickson, J., dissenting); *In re* Robison, 985 N.E.2d 336, 336 (Ind. 2013) (Dickson, C.J., and Rush, J., dissenting); *In re* Denney, 983 N.E.2d 571, 574 (Ind. 2013) (Rucker, J. dissenting in favor of a more lenient sanction, and David, J., dissenting in favor of disbarment); *In re* Muse, 980 N.E.2d 838, 839 (Ind. 2013) (Dickson, C.J., dissenting); *In re* Engebretsen, 976 N.E.2d 1225, 1227 (Ind. 2012) (David, J,

average for the 1999-2010 period was between nine and ten dissents per year for disciplinary opinions.[10] But the character of the dissents is remarkable. In all but one dissent during the survey period, the dissenters lobbied for a more-severe sanction (the lone exception being *In re Denney*, in which Justice Rucker sought a shorter suspension but Justice David sought disbarment). In prior years, a number of dissenting votes sought a less severe sanction or a finding of no misconduct.[11]

It remains to be seen whether the addition of Justices David and Rush will tip the balance of the court, but the possible consequences are grave for lawyers traveling through the disciplinary system. Many first-time or comparatively mild forms of misconduct are punished with a reprimand—which does not interrupt one's practice (aside from the potential stigma).[12] The next step up is a short suspension from the practice of law (usually thirty days), which poses a greater interruption and requires the disciplined lawyer to inform his or her clients about the suspension.[13] For lawyers who have committed more serious offenses (or multiple offenses), sanctions include terms of 90 days or less, which may allow automatic reinstatement. Suspensions longer than 90-days are *without* automatic reinstatement and require a lawyer to file a petition for reinstatement, which not only delays re-entry into the profession but means the lawyer must then demonstrate his or her fitness to practice.[14] These decisions—reprimand or suspension, automatic reinstatement or not—have big implications for practitioners, and lie within the supreme court's discretion.

The perception of the supreme court's attitude is also likely affect the type of plea agreement the Disciplinary Commission will offer to lawyers in the great many disciplinary cases that are settled.[15] Any plea agreement must be approved by the supreme court. If the Commission senses the supreme court is leaning towards harsher sanctions, then it may offer less-forgiving conditional agreements to improve the chances of court approval.

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dissenting).

10. Donald R. Lundberg, RES GESTAE, *Chief Justice Randall T. Shepard: An Appreciation, Reminiscence and Retrospective* 18 & 21 (Jan./Feb. 2012).

11. *Id.* (showing a total of 18 votes for "lesser sanction," primarily from Justices Rucker and Boehm, and a total of 12 votes for "no misconduct" during the period of 1999–2010).

12. *See* IND. ADMISSION & DISCIPLINE R. 23, § 3 (2013) (types of discipline and suspension).

13. *Id.* at 23(26) (duties of disbarred or suspended attorneys, and attorneys who have resigned).

14. *Id.* at 23, §§ 4, 18 (procedure and grounds for reinstatement); *see, e.g.*, *In re* Relphorde, 949 N.E.2d 355, 355–356 (Ind. 2011) ("We note, however, that regardless of the date on which Respondent is eligible to petition for reinstatement, reinstatement is discretionary and his petition would be granted only if he meets the most stringent requirements of proving by clear and convincing evidence that his rehabilitation is complete and he can safely reenter the legal profession.").

15. IND. ADMISSION & DISCIPLINE R. 23, § 11 (2013) (describing the conditional agreement for discipline) ("It is the intent of this rule to encourage appropriate agreed dispositions of disciplinary matters.")

II. BIAS AND DISCRIMINATION

Turning to the first case of interest in the survey period, the Indiana Supreme Court described the following behavior:

> In 2010, Respondent authored a book purporting to be a true autobiographical account of Respondent's relationship from roughly 1990 through 2010 with a former client ("FC"), who was active in politics and at one point held a high-level job in the federal government. A sexual relationship between FC and Respondent began around 1990 and continued until about 2001. After their sexual relationship began, Respondent represented FC on various legal matters during these years. They maintained a personal relationship for a time thereafter. Respondent's professed motivation for writing the book was at least in part to recoup legal fees FC owed him and money FC had obtained from him over the years.[16]

The Commission charged misconduct under six rules, including improper divulgence of information relating to representation of a former client.[17] At the hearing, the lawyer offered the defense that the subject of his memoir gave informed consent, to the effect of: "That is a great idea! Write a book and make me famous!"[18] The Hearing Officer and Court disagreed.

It should be noted that consent is a valid defense to telling war stories. Professional Conduct Rule 1.9(c) allows disclosure of information "as these Rules would permit," and a lawyer may reveal information when authorized by a client (which authorization need not be in writing).[19] But the consent must be "informed consent," a defined term that demands that *adequate* information and explanation flow from client to lawyer.[20] For this reason, an off-the-cuff client approval cannot justify lengthy exposition.[21] Lawyers who tell detailed stories are well-advised to take stronger precautions, particularly when—as appears to be the case here—the story is unflattering.[22]

In re Smith is also noteworthy for being one of few published decisions to

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16. *In re* Smith, 991 N.E.2d 106, 107 (Ind. 2013).

17. *Id.*

18. *Id.* at 108.

19. IND. R. PROF'L CONDUCT 1.6(a) (2013).

20. *Id.* at 1.0(e).

21. *Smith*, 991 N.E.2d at 108 ("The hearing officer concluded, however, that Respondent has not demonstrated that FC gave the level of informed written consent necessary to permit Respondent to disclose and publish the confidential information in the book.").

22. Online retailer Amazon lists a book by a "Joseph Stork Smith, Esq." with a contemporaneous publication date. Its title is *Rove-ing Her Way Into the White House, Machiavelli's Sexy Twin Sister: How to Lie and Steal Your Way into Full Security Clearance at the White House*. http://www.amazon.co.uk/Rove-Ing-Her-Way-White-House/dp/1770672753 (visited Aug. 10, 2014).

find misconduct through name-dropping. When discussing his former client's bail, the book author claim to have "'dropped the names' of several people, including a person he knew who used to work for the [Marion County Bail Commissioner's] Project and a criminal court judge who was a friend of his."[23] This conduct implied an ability to influence improperly a government official.[24]

Another unusual decision, *Matter of Usher*, saw the deterioration of the friendship between a male law firm partner and a woman who was a summer associate when they first met. She consistently rebuffed the partner's romantic advances and eventually broke off their friendship.[25] "Respondent then began attempting to humiliate [the associate attorney] and to interfere with her employment prospects."[26] He eventually drafted a lengthy, fictitious e-mail purporting to show several legal professionals criticizing the woman for acting in a horror film in which she appeared to (but did not actually) appear nude.[27] He recruited his paralegal to send the e-mail from a phony address to 51 persons, many of whom were employed at law firms around Indianapolis.[28] The phony address was chosen to create the impression that the e-mail came from a senior partner at an Indianapolis firm.[29]

This conduct did not lead to any discipline by the court,[30] but the lawyer's later conduct did. The associate attorney filed a civil lawsuit against Usher and asked him to admit in discovery that he composed the e-mail, caused it be sent, directed someone else to send the e-mail, and knew who sent it. Usher responded "Deny" to all requests.[31] The supreme court's discussion of this conduct is worth reading:

> Respondent expends much effort in trying to defend his responses to the [requests for admissions]. For example, he argues that he was justified in denying a RFA that he "composed" the email because he interpreted "composed" to mean preparing the email that was actually transmitted, that he was justified in denying that he asked or directed another person to send the email because he did not select the recipients or the email

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23. *Smith*, 991 N.E.2d at 109.

24. IND. R. PROF'L CONDUCT 8.4(e) (2013).

25. *In re* Usher, 987 N.E.2d 1080, 1083 (Ind. 2013).

26. *Id.*

27. *Id.* at 1083-85.

28. *Id.* at 1085.

29. *Id.*

30. *Id*. at 1089. Although the lawyer was charged with a violation of Professional Conduct Rule 8.4(g) (conduct "in a professional capacity, manifesting bias or prejudice based upon gender"), the supreme court held that the Commission did not meet its burden on this charge because the e-mail was "motivated by personal anger at [the associate attorney] in particular rather than by bias or prejudice in general." It is notable that the court did not sanction the lawyer for what one commentator has described as "slut shaming" despite its readiness to acknowledge that his speech wasn't necessarily protected by the First Amendment. *See infra* note 32.

31. *In re Usher*, 987 N.E.2d at 1085-86.

> account name, and that he was justified in denying that he knew who sent the email because [the paralegal] might have asked someone else to send it. In defense of his disclaimer of any knowledge about whether the email was sent at his "suggestion," he testified that he "merely put the idea out there for" [the paralegal], and whether this was a "suggestion" went to [the paralegal's] mental state, which he could not know. Respondent asserts he was entitled to "exploit the infirmities of the discovery requests."
>
> Hyper-technical parsing of ordinary English words and sentences has been rejected in prior cases. Respondent's hide-and-seek approach to the RFAs reflects a gaming view of the legal system, which this court has soundly rejected.[32]

Although the Rules of Professional Conduct are broad enough to capture a wide variety of dishonest activity,[33] it is unusual to see the supreme court devote disciplinary attention to a discovery dispute. The trial court, after all, had powers under Trial Rule 37 (or its federal equivalent) to impose sanctions upon the lawyer.

In re Usher demonstrates the supreme court's and Commission's willingness to act upon untruthful statements. Common sense tells us that civil litigants are often tempted to "exploit the infirmities" of opposing requests when they respond to written discovery. This ruling suggests lawyers who verify pleadings or discover responses risk more than just sanctions from the trial court.

III. FREE SPEECH

In re Usher also introduces an area of repeated and recent probing in the Indiana Supreme Court. Usher argued that while his e-mail was intended to shame, it was speech protected from government regulation under the First Amendment of the U.S. Constitution.[34] This argument, apparently unsupported by precedent, was not well-taken. The supreme court announced that speech and other unethical activities "outside the professional arena" were not beyond its disciplinary orbit.[35]

In re Dempsey, another factually-striking case, saw a lawyer personally enter

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32. *Id.* at 1088 (internal citations omitted).

33. *E.g.*, IND. R. PROF'L CONDUCT 8.4(c) (2013) (prohibiting conduct "involving dishonesty, fraud, deceit or misrepresentation").

34. *In re Usher*, 987 N.E.2d at 1086. Usher's story was picked up by USA Today and a few other national outlets. The most incendiary headline predictably came from the online legal tabloid *Above The Law*. *See* Staci Zaretsky, *Lawyer Claims His 'Slut-Shaming' Is Protected By the First Amendment—Just Like the Founders Intended*, ABOVE THE LAW (May 20, 2013, 1:15 PM), http://abovethelaw.com/2013/05/lawyer-claims-his-slut-shaming-is-protected-by-the-first-amendment-just-like-the-founders-intended/.

35. *In re Usher*, 987 N.E.2d at 1086-87 (collecting authorities).

into a land contract with a pair of sellers.[36] After Dempsey defaulted, the sellers wanted foreclosure, and Dempsey sought bankruptcy protection.[37] Dempsey objected to the proceedings in the foreclosure and bankruptcy actions and initiated four appeals. After receiving unfavorable results, Dempsey embarked on a grass-roots campaign:

> In 2009, Respondent handed out flyers entitled "Stop the Plunder in Bankruptcy Court" in downtown Indianapolis. The flyer, which was based upon Respondent's Chapter 13 bankruptcy case, called Sellers (without naming them) "slumlords," called their attorneys (naming the firm) "bloodsucking shylocks" who were part of a "heavily Jewish (sic) . . . reorganization cartel," and made free-ranging disparaging remarks about Jews generally, from the fall of Jericho, through 1925 Berlin, to their alleged involvement in the 9/11 attacks.[38]

During his disciplinary prosecution, Dempsey sent discovery to determine whether members of the Disciplinary Commission had any Jewish affiliations. The supreme court summarily concluded that no part of his "virulent bigotry" fell "within Respondent's broad constitutional right to freedom of speech and expression."[39] Dempsey violated Professional Conduct Rule 8.4(g), which prohibits a lawyer from "in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors."[40] The court did not reach the question of when a lawyer's self-representation is in

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36. *In re* Dempsey, 986 N.E.2d 816 (Ind. 2013).

37. *Id.*

38. *Id.*

39. *Id.* at 817.

40. The "manifesting bias" provision is somewhat anomalous. The ABA includes this warning only in a comment to Model Rule 8.4. Several states make the warning a visible part of the rule, like Indiana does, but the wording is not consistent from state to state. Am. Bar Ass'n CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct*, *Rule 8.4: Misconduct* (Aug. 16, 2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf.

For example, Maryland has a "knowingly manifest" element—which presumably means the conduct must be subjectively prejudicial or biased. Washington State prohibits any conduct "that a reasonable person would interpret as manifesting prejudice or bias," which suggests an objective test.

The American Bar Association recommends that a lawyer should steer clear of prejudice based upon the traditional suspect classifications of strict-scrutiny review: "race," "religion," and "national origin." To that list, the ABA adds "sex," "disability," and "age" (all of which are subject to significant federal protections), as well as the more progressive "sexual orientation" and "socioeconomic status." Minnesota also prohibits discrimination based on "marital status," but only if the lawyer is "harass[ing] a person" on that basis. New Jersey adds the classification of "language," which is probably intended to protect non-English speakers. Indiana's rule also prohibits bias based upon "similar factors."

a professional versus personal capacity.[41]

Another case with First Amendment implication is *In re Davis*. Davis, a lawyer in private practice, ran as a candidate to be judge of the Franklin Circuit Court.[42] Candidates for judicial office fall within the jurisdiction of the Judicial Qualifications Commission,[43] whose members are elected and appointed as provided by the Indiana Constitution.[44] Davis made several statements about her opponent and his relationship to and treatment of a felon he sentenced (who murdered five people after being released from prison).[45] The Commission argued that these statements were untrue. Notably, it criticized Davis for failing to request a retraction or correction of a statement incorrectly attributed to her during a newspaper interview.[46] The Commission also informed Davis that it believed statements in her campaign literature about the criminal's release date were incorrect (the supreme court's order does not state whether this was formal or informal notice).[47] The order continues: "Rather than complying with the Commission's request, from late August through late October 2012, Respondent continued to post information on her campaign website implying that [the criminal] would have been in jail and could not have committed the Ohio crimes if [the judge] had not issued his July 15, 2010 sentence modification order."[48]

The disciplinary case against Davis ended with an agreed resolution. The supreme court did not reach potential questions with First Amendment significance, such as "When is a lawyer responsible for a statement made by a third party?" or "Is non-compliance with a Commission directive a fact that will lead to a more severe sanction if the lawyer disagrees with the Commission's position?" The short order is nevertheless worth reading for lawyers who are contemplating or assisting with a judicial campaign.

The scope of permissible "lawyer speech" would continue to confront the court. After the survey year, it issued a sixteen-page opinion in *In re Dixon*[49]and a shorter, recent opinion in *In re Ogden*.[50] In both cases, the lawyer was alleged to have made statements about the qualifications or integrity of a judge "with reckless disregard as to [their] truth or falsity."[51] Unlike the lawyers in the survey

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41. *In re Kelly*, approaches this same issue. There a female lawyer was disciplined for inappropriately taunting a telemarketer by calling him "gay" and asking if he was "sweet," who called her home asking to speak with her husband. The lawyer indicated that she represented her husband, bringing the conversation into the realm of professional communication. 925 N.E.2d 1279 (Ind. 2010).

42. *In re* Davis, 2013 Ind. LEXIS 345 (Ind. May 7, 2013).

43. ADM. DISC. R. 25(I)(E).

44. IND. CONST. art. 7, § 9.

45. *In re* Davis, 2013 Ind. LEXIS 345.

46. *Id.*

47. *Id.*

48. *Id.*

49. *In re* Dixon, 994 N.E.2d 1129 (Ind. 2013).

50. *In re* Ogden, 10 N.E.3d 499. (Ind. 2014)

51. IND. R. PROF'L CONDUCT 8.2(a) (2013).

year, Dixon was cleared of misconduct and Ogden was partially-cleared for statements with some basis in fact.[52]

IV. LIMITS ON ADVOCACY

A divorced father reported that the mother was refusing to share time with their children. The father's lawyer composed the following letter:

> [Father] told me this week that he has only seen his baby . . . one day all year. Your client doesn't understand what laws and court orders mean I guess. Probably because she's an illegal alien to begin with.
>
> I want you to repeat to her in whatever language she understands that we'll be demanding she be put in JAIL for contempt of court.
>
> I'm filing a copy of this letter with the Court to document the seriousness of this problem.[53]

On TV shows about lawyers, hard-nosed litigators frequently make intimidating statements like this one. The Respondent was charged with a violation of Rule 8.4(g).[54] The Respondent argued that his letter effectively connected the mother's violation of immigration laws with her current violation of the parenting-time arrangement.[55] The supreme court disagreed: "regardless of the frustration Respondent might have felt in the circumstances, we conclude that accusing Mother of being in the country illegally is not legitimate advocacy concerning the legal matter at issue and served no purpose other than to embarrass or burden Mother."[56]

Using a perceived violation of other criminal or civil law need not always create a disciplinary violation. In an unpublished decision, the Court approved a hearing officer's finding in favor of the lawyer under the following circumstances:

> In 2009, Respondent represented a client who wished to end a relationship with his girlfriend. After the girlfriend reported an incident of domestic violence, the client was arrested for battery and a court entered a no-contact order prohibiting him from any contact with the girlfriend.

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52. The court found that the Commission had not met its burden of proof with respect to 3 of the 4 charged statements made by Ogden. It also found that Ogden had not committed misconduct by distributing information to judges about a perceived change in forfeiture law. Ogden was disciplined for accusing a judge of malfeasance during the early stage of a proceeding. The court found that the accusations "were impossible because [the judge] was not even presiding over the Estate at this time—a fact Respondent could easily have determined." *Id.*

53. *In re* Barker, 993 N.E.2d 1138, 1139 (Ind. 2013).

54. *Id.*

55. *Id.*

56. *Id.*

> The client had personal property, including tools of his auto mechanics business, at the home owned by the girlfriend. Because the client was concerned that she was damaging his property, Respondent filed a motion to modify the no-contact order to permit the client to retrieve his property. After a telephonic conference, the judge refused the modification request but encouraged the parties to cooperate to resolve the personal property issues.
>
> The client discovered that the girlfriend had written checks on his account of close to $1,000, forging the client's signature. With the client present, Respondent called the girlfriend and told her that he would press for theft and forgery charges unless she agreed to: (1) repay the money represented by the checks; and (2) request the prosecutor to dismiss the battery charge and to dismiss the non-contact order. The girlfriend denied forging the checks or taking the client's funds and refused to further discuss a possible resolution of all issues. Once the girlfriend indicated she was not interested in Respondent's proposal, he ended the conversation.
>
> Respondent's purpose in making the phone call was to try to resolve all pending issues between the parties to avoid unnecessary civil and criminal litigation. When the girlfriend refused the request, the client, on the Respondent's advice, filed a criminal complaint against the girlfriend.[57]

A potential fact distinguishing this case, *In re R.W.G.*, from *In re Barker* is the relationship between the threat of action and the issues on the table. In *R.W.G.*, "the client and the girlfriend were facing intertwined civil and criminal issues, all of which had emerged since their breakup in July 2009."[58] It is not clear that the same connection existed between the perceived violation of immigration law and violation of a parenting-time arrangement in *Matter of Barker*.

In the 1970s and 1980s, the ABA promulgated and many states adopted an outright ban on such activity. The old model code instructed: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."[59] The ABA intentionally abandoned this provision in the newer Model Rules of Professional Conduct,[60] and when Indiana adopted the Model Rules of Professional Conduct, it also abandoned its version of this prohibition.

The new ABA regime recognizes that calling attention to potential criminal charges is often a "legitimate negotiation technique."[61] "In reality, many

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57. *In re* R.W.G., Supreme Court Cause No. 21S00-1206-DI-362 (Ind. Jun. 28, 2013).

58. *Id.*

59. AM. BAR ASSOC., MODEL CODE OF PROF'L RESPONSIBILITY, DR 7-105(A) (1983).

60. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 40.4 (2008 Supp.).

61. *See* AM. BAR ASSOC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL

situations arise in which a lawyer's communications on behalf of a client cannot avoid addressing conduct by another party that is both criminal and tortious."[62] An example is the child-support context, in which a lawyer for an aggrieved spouse might tell the non-supporting spouse that he or she faces criminal non-support charges if he fails to comply with a support order. Another example involves a business that has discovered an employee embezzling and wishes to make clear its position that it will pursue criminal charges if the funds are not returned. "In these circumstances it is counterproductive to prohibit the lawyer from [discussing criminal charges]. Indeed, competent representation would seem to *require* the lawyer to press ahead with such full-ranging negotiations."[63] Despite the softened ABA position,[64] the Indiana Supreme Court has not comprehensively addressed the law in this area.

It is clear that all threats are not created equal. While *Barker* and *R.W.G.* stake out opposite positions with respect to threats of criminal reporting, the case *In re Dimick* shows that the Disciplinary Commission frowns upon threats to refer another lawyer to the Commission itself.[65] Lawyer Dimick believed her opposing counsel had committed misconduct and, in part, had converted money that belonged to her client. She sent the opposing lawyer a letter laying out these charges, and gave him a set amount of time to resolve the matter. "Respondent stated that if she did not hear from him within that time, 'I will file [the client's] claims with the Indiana Disciplinary Commission and in state court.' Thus, the letter implied that Respondent would file a grievance against [the opposing lawyer] unless [he] made a settlement offer."[66] Like many cases, Dimick's was resolved by agreement with the Disciplinary Commission and with approval from the court. It contains limited legal analysis. The law on lawyer threats continues to develop in Indiana.

A final case on the limits of responsible advocacy is *In re Schalk*.[67] Schalk represented a criminal defendant charged with possession of methamphetamine. He wanted to discredit the government's confidential information by showing that the informant was himself dealing drugs.[68] The defendant put Schalk in touch with two of his friends. Schalk gave the friends $200 and a tape recorder and told them to set up a drug buy with the informant, and he also promised the friends would encounter no legal trouble as a result of their actions.[69] Perhaps predictably, the friends testified that they purchased $50 worth of marijuana,

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RESPONSIBILITY § 71:603 (Supp. 2012).

62. HAZARD ET AL., *supra* note 61, § 40.4.

63. *Id.* § 40.4 (emphasis in original).

64. *See* AM. BAR ASS'N STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 92-363 (1992).

65. *In re* Dimick, 969 N.E.2d 17 (Ind. 2012).

66. *Id.* at 18.

67. *In re* Schalk, 985 N.E.2d 1092 (Ind. 2013).

68. *Id.* at 1092.

69. *Id.*

smoked it themselves, and kept the remaining $150.[70] Schalk was disqualified from representing the criminal defendant and was personally charged with and convicted of attempted possession of marijuana.[71]

Schalk's actions were no doubt intended to benefit his client and seem like the type of creative lawyering that would play well in Hollywood. Without intending disrespect to the courts or Respondent Schalk, the whole event calls to mind the movie cliché of the rogue police detective. The sergeant calls the detective to his office and orders him off the big case. The detective turns in his badge and gun, but heroically defies protocol to pursue the villains. In the end, justice is done, and the grizzled sergeant forgives the detective's unauthorized activities.

Not so in Indiana. While the friends that Schalk recruited apparently succeeded in obtaining drugs from the informant, the court rebuked him for his "illegal attempt at a drug sting without the assistance of law enforcement" and found, in aggravation of the offense, that he "has no appreciation for the wrongfulness of his conduct."[72] The court suspended Schalk from the practice of law for nine months without automatic reinstatement.[73]

V. FEE AGREEMENTS

The supreme court has discussed the propriety of flat fees in several opinions, notably in *In re O'Farrell*[74] and *In re Kendall*.[75] In 2013, it issued another development in *In re Canada*.[76] Unlike previous decisions, the court cleared Respondent Canada of the charged misconduct.

Canada represented a client accused of the Class A Felony of conspiracy to deal methamphetamine. The client said he wanted to resolved the matter through a plea agreement. Canada charged a flat fee of $10,000 that was "non-refundable unless there is a failure to perform the agreed legal services."[77] He spent about 20 hours working on the file and obtained an offer for the client to plead to a Class B Felony. The client said he would try to get a better deal with a new lawyer, but—through new counsel—eventually agreed to a similar plea agreement.[78]

The hearing officer and the supreme court agreed that $10,000 was a reasonable fee.[79] In this case, the rate worked out to $500 per hour. While that could be on the high side for the Evansville market, common sense suggests it

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70. *Id.*
71. *Id.*
72. *Id.* 1092-93.
73. *Id.* at 1093.
74. *In re* O'Farrell, 942 N.E.2d 799 (Ind. 2011).
75. *In re* Kendall, 804 N.E.2d 1152 (Ind. 2004).
76. *In re* Canada, 986 N.E.2d 254 (Ind. 2013).
77. *Id.* at 254.
78. *Id.*
79. *Id.*

might easily have taken Canada 30 hours ($333 per hour) or 40 hours ($250 per hour) to secure an offer from the State. The precise amount of time needed for a legal representation is necessarily unknown at its beginning.

Under the *O'Farrell* and *Kendall* standards, the remaining issue was whether any part of the fee was unearned.[80] The court found that Canada had earned the entire fee. The opinion reasons that Canada had accomplished the client's goal—*i.e.* to obtain a reasonable plea agreement—and it was the client who chose to turn his back on this result and select new counsel. While the client was free to engage a new lawyer, he could not keep the benefits of Canada's work (the first plea agreement offer) *and* obtain a refund.[81]

VI. MONITORING AGREEMENTS

JLAP, the Judges and Lawyers Assistance Program, is a regular feature of Indiana disciplinary orders.[82] The mission of JLAP "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."[83] JLAP's website suggests an approximate split of the calls it receives is: 45% substance abuse, 41% mental health, 7% physical impairment, 7% age related or other.[84] Attorneys who reach a conditional plea agreement with the Commission frequently include JLAP monitoring for substance abuse as one of the conditions.

Monitoring, however, need not occur only in the substance-abuse context. During the survey period, a lawyer facing no substance-abuse charges agreed to a more novel "law practice" monitoring agreement to resolve several charges related to client communications, fee agreements, etc.[85] The terms of the lawyer's probation included that he "shall cooperate with a monitor, who will supervise Respondent and submit quarterly reports to the Commission."[86]

The law-practice monitor has potential to be a helpful solution for conditional agreements resolving charges of poor client communication or management. Those charges may result from (1) a busy, profitable law office, (2) a lawyer who is new to a practice area, or (3) a lawyer who is new to the practice of law and lacks a formal mentor or support structure. In each case, the arrangement has the potential to show the Commission that client interests are being protected while the same time helping the lawyer to avoid a suspension (or a lengthier suspension).

The law-practice monitor is sufficiently unusual to rate as a development in

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80. *Id.* at 255.

81. *See id.*

82. *E.g.*, *In re* Stewart, 973 N.E.2d 563, 564 (Ind. 2012)

83. IND. ADMISSION & DISCIPLINE R. 31, § 2 (2013).

84. *About JLAP*, IND. JUDICIAL BRANCH: JUDGES AND LAWYERS ASSISTANCE PROGRAM, http://www.in.gov/judiciary/ijlap/2361.htm (last visited Aug. 10, 2014).

85. *In re* Weldy, 989 N.E.2d 1252, 1255 (Ind. 2013).

86. *Id.*

the law. But it is not unprecedented. The court approved a similar arrangement in *In re Peoples*, which was not a plea-agreement case.[87] To resolve several counts of client neglect, it ordered a 90-day suspension and two years of probation. The terms included:

> 1) That prior to resuming the practice of law, the Respondent seek out and arrange for an attorney or attorneys to supervise her practice of law under the terms set forth in this order and advise the Indiana Supreme Court Disciplinary Commission of the name or names of attorneys who agree to supervise her practice.
>
> . . .
>
> 3) That once resuming the practice of law, the Respondent shall prepare and submit to her supervising attorney a quarterly (three month) report detailing, without designation by name, clients, nature of representation, actions taken on behalf of each client, fees charged, pending work, scheduled hearings, and litigation status. Such reports shall be presented to the supervising attorney no later than ten (10) days following the end of the quarter.
>
> 4) That within twenty days after the end of the quarter, the supervising attorney shall review the report, counsel Respondent as deemed appropriate, and forward the report with comment to the Disciplinary Commission.
>
> 5) That Respondent shall permit the supervising attorney to review any file or other office record at any time to determine compliance with the terms of probation and that the supervising attorney shall review such records in the event the supervising attorney deems it necessary to monitor the Respondent during the period of probation.[88]

In addition to JLAP and law-practice monitors, the court sometimes approves the use of a Certified Public Accountant monitor for attorneys who have had issues with their trust accounts. Like other monitors, the CPAs are expected to report to the Commission as part of probation.[89]

VII. MISCELLANEOUS DEVELOPMENTS IN INDIANA DISCIPLINARY CASES

Two other orders remind us that, despite the obvious discomfort, lawyers

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87. *In re* Peoples, 614 N.E.2d 555, 558 (Ind. 1993).

88. *Id.*

89. *In re* Suarez, 984 N.E.2d 1233, 1234 (Ind. 2013); *In re* Aguilar, 984 N.E.2d 1235, 1236 (Ind. 2013); *see also In re* Bergdoll, 894 N.E.2d 526, 527 (Ind. 2008); *In re* Starkes, 894 N.E.2d 504, 504 (Ind. 2008); *In re* Geller, 828 N.E.2d 1288, 1288 (Ind. 2005); *In re* Cassady, 814 N.E.2d 247, 249 (Ind. 2004).

have a duty to alert clients when personal issues will severely limit the representation. In one case, the Commission charged, "Respondent knew he was suffering from depression and other health related issues that interfered with his ability to attend to his clients' needs."[90] In another, the lawyer was charged with "failing to inform clients that medical problems would severely limit his ability to represent them."[91] Similarly, the Professional Conduct Rules require a lawyer to withdraw (or at least seek judicial approval for withdrawal) where "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."[92]

In *In re Godshalk*, a lawyer represented criminal defendant RM against charges that he battered victim JB.[93] During the same time frame, JB was arrested for operating while intoxicated and went to Godshalk's office to hire him. A non-lawyer assistant agreed to the representation and filed an appearance for JB using a rubberstamp of Godshalk's signature (which appearance created a conflict of interest and, ultimately, disqualification).[94] The supreme court observed that Indiana's Professional Conduct Guidelines regarding the use of non-lawyer assistants prohibited using an assistant for both (1) establishing the attorney-client relationship and (2) establishing the amount of the lawyer's fee.[95]

Finally, in *In re Robison*, the Respondent was assisting two sisters to administer an estate.[96] While one sister was in his office, Robison gave her a number of forms to sign. He later discovered that the sister had neglected to sign one of the forms; so he signed it and forwarded the stack to the second sister for signature (who then discovered the forgery).[97] The court acknowledged that the lawyer's misconduct "was not due to a dishonest or selfish motive, but rather was motivated by a desire to avoid inconvenience to a client."[98] A three-justice majority approved the agreed sanction of a public reprimand. The remaining two (Justices Dickson and Rush) wrote that a "substantial period of suspension" would have been more appropriate for the offense:

> Much of our legal system is predicated on the authenticity and reliability

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90. *In re* Dittrich, 980 N.E.2d 836, 836 (Ind. 2013).

91. *In re* Engebretsen, 976 N.E.2d 1225, 1225 (Ind. 2012).

92. IND. R. PROF'L CONDUCT 1.16(a)(2) (2013).

93. *In re* Godshalk, 987 N.E.2d 1095, 1095 (Ind. 2013).

94. *Id.*

95. *Id.* A lawyer also may not delegate the responsibility for a legal opinion to a non-lawyer. IND. R. PROF'L CONDUCT GUIDELINE 9.3(c) (2013). Other tasks normally performed by the lawyer may be delegated to a non-lawyer assistant or paralegal. *Id.* at 9.2. However, the lawyer must take reasonable measures to assure any assistant acts consistently with the lawyer's duties under the Professional Conduct Rules. *Id.* at 9.1. The lawyer could not, for example, tell his assistant to prepare an entire summary judgment response if that task was beyond the assistant's abilities. *See* IND. R. PROF'L CONDUCT 1.1 (2013).

96. *In re* Robison, 985 N.E.2d 336, 336 (Ind. 2013).

97. *Id.*

98. *Id.*

> of signatures. For a lawyer to affix a false signature is a deception that gravely undermines public trust, respect, and confidence in the legal profession. Such inexcusable misconduct is not justified or excused by considerations of client convenience, expediency, or lack of personal gain. Affixing a false signature is manifestly dishonest and an absolute ethical transgression.[99]

The difference between a public reprimand and a six-month suspension is monumental in terms of its effect on a lawyer's ability to continue his or her practice. Members of the bar should be wary that—in future cases—Justices Dickson or Rush may be able to sway a third vote to their position although as Justice Dickson is retiring, it is hard to predict the court's tolerance of this behavior.

VIII. OTHER DEVELOPMENTS RELATED TO LEGAL ETHICS

The survey period saw only modest changes to Indiana's court rules dealing with legal ethics. The court provided minor clarifications to Professional Conduct Rule 5.5, which governs the multi-state or multi-jurisdictional practice of law.[100] The court modified the Admission and Discipline rules regarding the application for CLE credit.[101] On the national front, the American Bar Association's Commission on Ethics 20/20 finished its work, with the ABA's house of delegates adopting nearly all of the 20/20 Commission's remaining proposals on February 11, 2013. The 20/20 Commission proposed changes to the ABA's model rules to:

- address the effect of technological changes on client confidentiality (Resolution 105A);
- clarify the rules of lead-generation, referral services, solicitation, and prospective-client contact (Resolution 105B);
- identify a position on the use of both lawyer and non-lawyer contract services outside of a law firm (Resolution 105C);
- improve the multijurisdictional practice rules (Resolution 105D);
- enable the sharing of client information and detection of conflicts of interest between two firms, in situations such as change of employment, merger, and sale of a law practice (Resolution 105F);

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99. *Id.* (Dickson, C.J., dissenting; Rush, J., joining in the dissent).

100. Order Amending Indiana Rules of Professional Conduct, 94S00-1205-MS-275 (Ind. Oct. 26, 2012).

101. Order Amending Indiana Rules for the Admission to the Bar and the Discipline of Attorneys, 4S00-1301-MS-30 (Ind. Sep. 13, 2013).

- better regulate the work of foreign lawyers in the United States (Resolutions 107A, 107B, and 107C); and

- allow lawyers and clients to select the jurisdiction's law that will apply for purposes of conflict-of-interest analysis (Resolution 107D).[102]

The resolutions are the product of three years of work within the American Bar Association. These revisions to the Model Rules may serve as a guide or consideration for future amendments by the Indiana Supreme Court to its rules of practice.

The 2012–2013 period did not include significant developments in Indiana appellate courts in the field of legal malpractice. Several malpractice actions made it to the court of appeals,[103] but most applied established law on the statute of limitations—and all but one were unpublished.[104]

The period did, however, include an unusual case regarding the unauthorized practice of law.[105] In *State ex rel. Indiana Supreme Court Disciplinary Commission v. Farmer*, the Commission lost its bid for a permanent injunction to keep Ohio attorney Farmer from practicing law or soliciting clients in Indiana.[106] A man named Ivy was convicted and sentenced to sixty-five years for murder in Indiana. Ivy's grandparents, who lived in Ohio, retained Farmer to provided certain work on Ivy's case. The work included first a "preliminary

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102. AM. BAR ASS'N, HOUSE OF DELEGATES FILINGS (Aug. 6, 2012 & Feb. 11, 2013), *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/house_of_delegates_filings.html (last visited Aug. 10, 2014).

103. Dickes v. Felger, 981 N.E.2d 559 (Ind. Ct. App. 2012); Edsall v. Benson, Pantello, Morris, James, & Logan, No. 02A05-1210-SC-508, 2013 Ind. App. Unpub. LEXIS 889 (Ind. Ct. App. July 16, 2013); Dudley v. Estate of Studtmann, No. 46A03-1204-PL-147, 2012 Ind. App. Unpub. LEXIS 1403 (Ind. Ct. App. Nov. 7, 2012); Cecil v. Fisk Excavating, Plumbing and Septic Servs., No. 33A05-1112-MI-686, 2012 Ind. App. Unpub. LEXIS 1308 (Ind. Ct. App. Oct. 10, 2012); Smith v. Williams, No. 06A01-1201-CT-20, 2012 Ind. App. Unpub. LEXIS 1304 (Ind. Ct. App. Oct 12, 2012); Grandview Mem'l Gardens, LLC v. Eckert, No. 49A02-1111-PL-992 , 2012 Ind. App. Unpub. LEXIS 1292 (Ind. Ct. App. Oct. 10, 2012).

104. *See* IND. APP. R. 65(D) (2013) ("Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case.").

105. The supreme court has original jurisdiction over matters involving the unauthorized practice of law. IND. CONST. art. 7, § 4. Original actions to restrain the unauthorized practice of law may be brought by any one of several concerned actors: the Indiana Attorney General, the Disciplinary Commission, the Indiana State Bar Association, or (with leave of court) any local bar association. IND. ADMISSION & DISCIPLINE R. 24 (2013).

106. State *ex rel.* Ind. Supreme Court Disciplinary Comm'n v. Farmer, 978 N.E.2d 409 (Ind. 2012).

review" to determine whether "viable legal avenues" existed for post-conviction relief.[107] Next, the Ivys agreed to hire farmer to scour reports and interview witnesses to search for new evidence.[108] Farmer visited Indiana to copy court documents, visit the murder scene, and meet with Ivy. Later, after being suspended in Ohio on unrelated grounds, Ivy attempted to drive to Indiana to meet with witnesses—but later discovered the witnesses were unavailable.[109]

The Commission argued that Farmer's representation was unauthorized because it fell outside the Professional Conduct Rules' allowance for "temporary services." Specifically, it argued that providing legal services for three years (as Farmer did before his suspension) was not "temporary."[110] The court disagreed and observed that "temporary" must be understood as a term of art in the context of the legal profession. A comment in the Professional Conduct Rules explains: "Services may be 'temporary' even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation."[111] Farmer's occasional visits to Indiana involved a single client in a single case and therefore did not run afoul of the unauthorized practice of law rules.

The court also found that Farmer's activity while suspended—i.e. the attempted witness interview in Indiana—failed to raise to the level of the "practice of law," as there was no evidence that Farmer actually interviewed the witness or collected an affidavit.[112] The court reiterated that it has the Constitutional power to determine what actions constitute the practice of law. While the phrase resists a precise definition, "it is clear that the core element of practicing law is giving legal advice to a client, and that the practice of law has been described as making it one's business to act for others in legal formalities, negotiations, or proceedings."[113]

In sum, the *Farmer* opinion is a boon for out-of-state attorneys (and their in-state colleagues) who wish to engage in pre-litigation activities in the State on a limited basis and without fear of official reprimand.

CONCLUSION

Our supreme court is busy. In its July 1, 2012 to June 30, 2013 fiscal year, it disposed of over 1,000 cases, including 137 attorney discipline matters.[114] Its Disciplinary Commission processed almost 1,500 grievances submitted by

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107. *Id.* at 400-11.

108. *Id.* at 411.

109. *Id.* at 411-12.

110. *Id.* at 414.

111. IND. R. PROF'L CONDUCT 5.5(c)(2).

112. State *ex rel.* Ind. Supreme Court Disciplinary Comm'n v. Farmer, 978 N.E.2d 409, 415 (Ind. 2012).

113. *Id.* (quoting *In re* Patterson, 907 N.E.2d 970, 971 (Ind. 2009)).

114. IND. SUPREME COURT, ANNUAL REPORT: 2012-2013, at 16, *available at* http://www.in.gov/judiciary/supreme/files/1213report.pdf.

members of the public (including other attorneys).[115] With so much activity, the court will continue to confront new ethics scenarios on a yearly basis, will continue to develop the law, and will continue to provide guidance for members of the Bar.

115. *Id.* at 49.

RECENT DEVELOPMENTS IN INDIANA TAXATION SURVEY 2013

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INTRODUCTION: SOME REFERENCES USED IN THIS ARTICLE

This Article highlights the major tax developments that occurred during the calendar year of 2013. Whenever the term "GA" is used in this Article, the term refers only to the 118th 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 term refers only to the Indiana Board of Tax Review. Whenever the term "Department" or "DOR" is used, the term refers only to the Indiana Department of State Revenue. Whenever the term "IC" or "Indiana Code" is used, the term refers only to the Indiana Code, which is in effect at the 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 term "IRC" or "Code" is used, the term refers only to the Internal Revenue Code, which is in effect at the time of the publication of this Article. Whenever the term "section" is used in this Article, the term refers only to a section of the Indiana Code, unless the reference is clearly 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.

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I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 118th General Assembly passed several pieces of legislation affecting various areas of state and local taxation. As in 2012, the most significant statutory changes were in the area of inheritance taxes. This Part also highlights the majority of the GA's changes from 2013 in the areas of property taxes, state gross retail and use taxes, incomes taxes, and excise taxes.

A. Inheritance Taxes

In 2013, the GA finished what it started a year earlier by accelerating repeal of the inheritance tax to December 31, 2012.[1] Prior to this change, the inheritance tax was scheduled for gradual elimination over a ten-year period ending on December 31, 2021.[2] For good measure, the GA went on to repeal the Indiana estate tax[3] and the Indiana generation-skipping tax,[4] both taking effect on January 1, 2013.

Despite the dramatic nature of these changes, the transition rules accompanying these significant repeals are relatively modest. The state treasurer was required to make one, final inheritance tax replacement distribution to eligible counties no later than August 15, 2013, based on inheritance tax collections for the state's 2012 fiscal year.[5] Inheritance tax mistakenly paid "with respect to an individual whose death occurs in 2013" must be refunded to the taxpayer by the DOR in its entirety, even if a county holds some of those taxes.[6] And, the DOR must recoup any inheritance tax retained by a county resulting from a death in 2013 using payment offsets against the inheritance tax replacement amount due in 2013 to that county (or any other revenue owed to the county if no inheritance tax replacement is due).[7]

B. Property Taxes

Although the GA's legislative activity on property taxes in 2013 lacked the dramatic effect of its inheritance tax legislation, the GA made a variety of important changes in numerous property tax areas. Beginning in 2014, the property tax calculation for agricultural land will use new soil productivity factors to determine the land's true tax value.[8] The DLGF must develop those new

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1. Pub. L. No. 205-2013, §§ 99-110, 2013 Ind. Acts 2141, 2512-16 (cutting off application of chapters 1 to 9 of IND. CODE § 6-4.1 for decedents dying after 12/31/2012).

2. Lawrence A. Jegen III et al., *Recent Developments in Indiana Taxation Survey 2012*, 46 IND. L. REV. 1235, 1236-37 (2013).

3. Pub. L. No. 205-2013, §§ 114-19, 121, 2013 Ind. Acts at 2517-21 (repealing IND. CODE §§ 6-4.1-11-0.1 to -5, -7).

4. *Id.* § 122, 2013 Ind. Acts at 2521-22 (repealing chapter 11.5 of IND. CODE § 6-4.1).

5. *Id.* § 120, 2013 Ind. Acts at 2519-20 (amending IND. CODE § 6-4.1-11-6).

6. *Id.* § 112, 2013 Ind. Acts at 2516 (codified as IND. CODE § 6-4.1-10-1.5).

7. *Id.*

8. Pub. L. No. 1-2013, § 1, 2013 Ind. Acts 1, 1-2 (amending IND. CODE § 6-1.1-4-13).

factors and announce them in a report due by November 1, 2013.[9] Although it remains to be seen how much impact this change will have, Governor Mike Pence announced that it should "prevent an estimated $57 million property tax increase on Hoosier farmers."[10]

For new homeowners of recently constructed homes, the GA created a home-construction exception that allows qualifying homeowners to claim the standard deduction even though they lacked the required homestead interest on the assessment date. Generally speaking, a homeowner can now qualify for the deduction if: (1) the required homestead interest is conveyed to the homeowner after the assessment date, but during the same calendar year, or the homeowner contracts to purchase the homestead after the assessment date but during the same calendar year; (2) the homestead was under construction, or was still vacant land, on the assessment date; (3) the required certified statement, or qualifying sales disclosure form, is filed before the end of the calendar year containing the relevant assessment date; and (4) the homeowner files a statement before the end of the calendar year that cancels the deduction for any other property that the homeowner could have claimed for the year in question.[11] The county auditor receiving the homeowner's cancellation statement must cancel the deduction for any property within the auditor's county and, if necessary, forward the statement to the auditors for any counties containing affected properties.[12]

An owner of real property in a residentially distressed area who rehabilitates or redevelops that property can now qualify for a deduction over a time period set by the area's designated body that can be up to ten years instead of five years under prior law.[13] Furthermore, after June 30, 2013, the deduction's amount is determined by multiplying the increase in the property's assessed value by a percentage set by the designated body.[14] The GA made similar changes for rehabilitation and redevelopment in economic revitalization areas that are not residentially distressed areas,[15] and for occupation of eligible vacant buildings in such areas.[16]

The GA took steps to improve the counties' collective ability to effectively assess property taxes on a mobile home after it relocates by requiring the county

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9. *Id.* § 2, 2013 Ind. Acts at 2.

10. *Pence Signs First Bill into Law to Prevent $57 Million Tax Increase on Hoosier Farmers*, IN.GOV, http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2013&todate=12/31/2013&display=Year,Month&type=public&eventidn=88516&view=EventDetails&information_id=175800 (last visited Aug. 13, 2014).

11. Pub. L. No. 288-2013, § 3, 2013 Ind. Acts at 4400-01 (amending IND. CODE § 6-1.1-12-37).

12. *Id.*

13. *Id.* § 5, 2013 Ind. Acts at 4406 (amending IND. CODE § 6-1.1-12.1-2).

14. *Id.* § 9, 2013 Ind. Acts at 4418-19 (amending IND. CODE § 6-1.1-12.1-4.1).

15. *See id.* §§ 7-8, 20, 2013 Ind. Acts at 4413, 4415-17, 4444 (amending IND. CODE §§ 6-1.1-12.1-3, -4, -17).

16. *See id.* §§ 12, 20, 2013 Ind. Acts at 4413, 4428-31, 4444 (amending IND. CODE §§ 6-1.1-12.1-4.8, -17).

treasurer of the county that the mobile home is leaving to report the move to the township or county assessor with jurisdiction over the mobile home's new location.[17] As a further backstop, the DLGF is ordered to develop a statewide mobile home tracking system before January 1, 2015.[18]

The GA continued to deal with the problems that result when a county fails to assess and collect property taxes for three or more years.[19] Specifically, new legislation addressed the problem created when a homeowner is currently assessed property taxes from prior years when the homeowner did not qualify for deductions from the homestead's assessed value.[20] The legislative solution treats the homeowner as automatically qualifying for those deductions to the extent the homeowner qualifies for them in the current year.[21] The current owner also qualifies for the circuit breaker credit and other applicable credits if the homestead qualifies for the standard deduction in the year containing the delayed assessment date.[22] Note that, beginning on May 11, 2013, only a homestead that has actually been granted a standard deduction will be eligible for the homestead version of the circuit breaker credit found in Indiana Code section 6-1.1-20.6-7.5(a)(1).[23]

On the procedural front, the GA made several significant property tax changes. First, the GA shifted the burden of proof from the taxpayer to the county/township assessor for establishing the gross assessed value of real property when (1) the value of that property was reduced by the PTABOA for an earlier assessment period and (2) the current assessed value exceeds the value from the latest assessment period covered by the PTABOA's decision.[24] Second, the GA standardized and clarified that the applicable annual interest rate payable to a taxpayer on property tax refunds due to (1) duplicate tax payments, (2) math errors, (3) illegality,[25] and (4) assessment reductions shall be the rate established under Indiana Code section 6-8.1-10-1 "for each particular year covered by the refund or credit."[26] A similar clarification was made for interest on amounts owed by a taxpayer due to a post-due date assessment adjustment by administrative or judicial action.[27]

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17. Pub. L. No. 203-2013, § 1, 2013 Ind. Acts 2101, 2102 (amending IND. CODE § 6-1.1-7-10).

18. *Id.* § 3, 2013 Ind. Acts at 2102 (codified at IND. CODE § 6-1.1-7-16).

19. *See* IND. CODE §§ 6-1.1-22.6-1 to -27.

20. Pub. L. No. 11-2013, § 1, 2013 Ind. Acts 24, 25 (codified at IND. CODE § 6-1.1-22.6-26.5).

21. *Id.*

22. *Id.*

23. Pub. L. No. 257-2013, § 28, 2013 Ind. Acts 3486, 3521-22 (amending IND. CODE § 6-1.1-20.6-2).

24. Pub. L. No. 235-2013, § 1, 2013 Ind. Acts 3344, 3344 (codified at IND. CODE § 6-1.1-4-4.3).

25. *Id.* § 2, 2013 Ind. Acts at 3344-45 (amending IND. CODE § 6-1.1-26-5).

26. *Id.* § 4, 2013 Ind. Acts at 3347-48 (amending IND. CODE § 6-1.1-37-11).

27. *Id.* § 3, 2013 Ind. Acts at 3345-46 (amending IND. CODE § 6-1.1-37-9).

On the tax resale front, the GA expanded the definition of "vacant parcel" that may be sold by a county to include vacant or abandoned properties that contain a residential-use structure[28] and eliminated the five-year property tax exemption for vacant parcels that are consolidated into the acquirer's contiguous property after June 30, 2013.[29]

In what must be a sign of the times, the GA added another way that a township may become a distressed political subdivision requiring oversight by an emergency manager. Specifically, the distressed unit appeal board now has the power to designate any township as a distressed political subdivision when its property tax rate for township assistance is more than twelve times the statewide average determined by the DLGF.[30] The distressed unit appeal board is similarly authorized to terminate that status when either (1) the distressed township's property tax rate for township assistance drops below twelve times the statewide average or (2) the distressed township gets a new executive who adopts a plan to lower its township assistance property tax rate.[31]

The GA also spent time on the property tax benefits of intergovernmental cooperation and, in the most extreme form of cooperation, local government consolidation (e.g., township mergers). The DLGF is instructed to select up to three counties for participation in a pilot program in which the counties will go through a "more thorough nonbinding review" of their taxing units' "budgets, property tax rates, and property tax levies" to help increase cooperation among taxing units.[32] Each year, the DLGF must prepare an analysis of the taxing units' data for each pilot county and the county must review and issue a nonbinding recommendation before the taxing units finalize their "budgets, property tax rates, and property tax levies" for the year.[33] Each year, the DLGF must also submit a report to the commission on state tax and financing policy discussing whether the pilot program's nonbinding review "is fostering cooperation among taxing units in the adoption of their budgets, property tax rates, and property tax levies."[34] For new consolidations, the resulting political subdivision is now guaranteed power to "[i]mpose any tax levy or adapt any tax that one (1) or more of the reorganizing political subdivisions were authorized to impose or adopt before the reorganization."[35] The consolidating subdivisions' plan of reorganization must state the amount, if any, that the DLGF shall decrease the new consolidated

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28. Pub. L. No. 118-2013, § 6, 2013 Ind. Acts 836, 840-41 (amending IND. CODE § 6-1.1-24-6.8(b)).

29. *Id.* § 6, 2013 Ind. Acts at 844 (amending IND. CODE § 6-1.1-24-6.8(m)).

30. Pub. L. No. 234-2013, § 3, 2013 Ind. Acts 3329, 3331-32 (codified at IND. CODE § 6-1.1-20.3-6.7).

31. *Id.* § 7, 2013 Ind. Acts at 3335-36 (amending IND. CODE § 6-1.1-20.3-13).

32. Pub. L. No. 257-2013, § 8, 2013 Ind. Acts 3486, 3500-01 (codified at IND. CODE § 6-1.1-17-3.7).

33. *Id.* § 8, 2013 Ind. Acts at 3503 (codified at IND. CODE § 6-1.1-17-3.7(f)).

34. *Id.* § 8, 2013 Ind. Acts at 3504 (codified at IND. CODE § 6-1.1-17-3.7(h)).

35. Pub. L. No. 255-2013, § 9, 2013 Ind. Acts 3447, 3454-55 (amending IND. CODE § 36-1.5-4-38).

subdivision's maximum permissible tax levies, maximum permissible property tax rates, and budgets on account of (1) eliminated double taxation for services or goods provided by the subdivision and (2) excess taxation unnecessary to provide those services or goods.[36] The DLGF can no longer set these maximum amounts and must follow the political subdivision's plan in this respect.[37] In the event that the reorganization terminates, the DLGF retains the power to restore the taxing power of the then-separated political subdivisions by adjusting their maximum permissible tax levies, maximum permissible property tax rates, and budgets accordingly.[38]

Finally, the GA made a number of township- and county-specific changes during 2013. For example, the GA increased the city of Gary's maximum permissible *ad valorem* property tax levy after December 31, 2013 by over $4 million, while concurrently reducing the Gary Sanitary District's levy to $0,[39] and permitted the town of Williams Creek in Marion County to borrow money so that the town can recoup the 2013 property tax shortfall resulting from the town's failure to properly publish its 2013 budget and property tax levy.[40] Although a complete review of these localized changes is beyond the scope of this Article, these changes may be important for the affected areas and governing units.

C. State Gross Retail and Use Taxes

The most substantial statutory change in the state gross retail and use tax area was the GA's creation of a new use tax on gasoline,[41] which will replace the existing gross retail tax on gasoline on July 1, 2014.[42] Although a comprehensive explanation of the new gasoline use tax would be excessive in a survey article like this one, the tax's main contours are outlined here. Depending on the path that the gasoline takes from the refinery to the consumer, a different member of the supply chain is charged with collecting and remitting the gasoline use tax. If a refiner or terminal operator sells or ships gasoline to a non-qualified distributor, the refiner or terminal operator is required to collect the tax from that distributor and to remit it.[43] However, if a qualified distributor is involved and sells or ships the gasoline to a retail merchant, then the qualified distributor must collect the tax

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36. *Id.* § 7, 2013 Ind. Acts at 3452-53 (amending IND. CODE § 36-1.5-3-5).

37. *Id.* § 3, 2013 Ind. Acts at 3450 (amending IND. CODE § 36-1-8-17).

38. *Id.* § 6, 2013 Ind. Acts at 3451-52 (amending IND. CODE § 36-1.5-3-4).

39. Pub. L. No. 230-2013, § 3, 2013 Ind. Acts 3227, 3228-29 (codified at IND. CODE § 6-1.1-18.5-22.5).

40. Pub. L. No. 257-2013, § 16, 2013 Ind. Acts 3486, 3512-13 (codified at IND. CODE § 6-1.1-18-19).

41. Pub. L. No. 227-2013, § 1, 2013 Ind. Acts 3164, 3164-72 (codified at IND. CODE § 6-2.5-3.5).

42. *Id.* §§ 4-17, 2013 Ind. Acts 3164, 3174-83 (amending or repealing IND. CODE §§ 6-2.5-7-1 to -15).

43. *Id.* § 1, 2013 Ind. Acts 3164, 3166-67, 3169-70 (codified at IND. CODE §§ 6-2.5-3.5-16, -19).

from that merchant and remit it.[44] Finally, if a retail merchant manages to obtain gasoline for resale without anyone in the supply chain paying the use tax, then the party that delivered the gasoline to the merchant is required to pay the tax.[45] A distributor that imports gasoline from outside Indiana for use within the state is also subject to the tax.[46] Exemptions exist for retail purchasers who buy gasoline from a metered pump,[47] and for distributors that purchase gasoline for sale outside of the state.[48] In addition, the Indiana Code section 6-2.5-5 gross retail tax exemptions apply to the new gasoline use tax.[49]

The amount of gasoline use tax due is calculated by multiplying the gasoline use tax rate per gallon by the number of gallons purchased or shipped during the relevant month.[50] The gasoline use tax rate per gallon is seven percent of the statewide average retail price per gallon of gasoline.[51] The DOR is required to calculate and publish the gasoline use tax rate per gallon for each month no later than the 22nd day of the preceding month and must also provide the data that it uses in its calculation.[52] Taxpayers having a duty to collect and remit the new use tax must remit the collected taxes on a semi-monthly basis and file an accompanying electronic report.[53] Failure to do so will result in application of the standard penalties and interest found in Indiana Code section 6-8.1-10.[54] To cover collection costs, taxpayers having a duty to collect and remit the new use tax may retain a collection allowance equal to the allowance permitted for retail merchants under the gross retail and use tax.[55]

The GA also made two substantive changes to the gross retail tax's application to mail delivery services. The first change is that separately stated postage charges (i.e., "the purchase price of stamps or similar charges for mail or parcel delivery through the United States mail"[56]) are excluded from the delivery charges that are subject to the tax.[57] Non-separately stated postage charges, and other delivery charges using delivery services providers other than the United

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44. *Id.* The procedure for becoming a qualified distributor is outlined in Indiana Code §§ 6-2.5-3.5-17 and -18. *Id.* § 1, 2013 Ind. Acts at 3167-69 (codified at IND. CODE §§ 6-2.5-3.5-16, -18).

45. Pub. L. No. 227-2013, § 1, 2013 Ind. Acts 3164, 3169-70 (codified at IND. CODE § 6-2.5-3.5-19).

46. *Id.* § 1, 2013 Ind. Acts at 3171 (codified at IND. CODE § 6-2.5-3.5-22).

47. *Id.* § 1, 2013 Ind. Acts at 3169-70 (codified at IND. CODE § 6-2.5-3.5-19).

48. *Id.* § 1, 2013 Ind. Acts at 3171 (codified at IND. CODE § 6-2.5-3.5-22).

49. *Id.* § 1, 2013 Ind. Acts at 3172 (codified at IND. CODE § 6-2.5-3.5-26).

50. *Id.* § 1, 2013 Ind. Acts at 3169-70 (codified at IND. CODE § 6-2.5-3.5-19).

51. *Id.* § 1, 2013 Ind. Acts at 3166 (codified at IND. CODE § 6-2.5-3.5-15).

52. *Id.* § 1, 2013 Ind. Acts at 3169-70 (codified at IND. CODE § 6-2.5-3.5-19).

53. *Id.* § 1, 2013 Ind. Acts at 3170 (codified at IND. CODE § 6-2.5-3.5-20).

54. *Id.* § 1, 2013 Ind. Acts at 3171 (codified at IND. CODE § 6-2.5-3.5-23).

55. *Id.* § 3, 2013 Ind. Acts at 3173-74 (amending IND. CODE § 6-2.5-6-10).

56. Pub. L. No. 265-2013, § 2, 2013 Ind. Acts 3800, 3802 (codified at IND. CODE § 6-2.5-1-7.5).

57. *Id.* § 1, 2013 Ind. Acts at 3800-02 (amending IND. CODE § 6-2.5-1-5).

States mail, remain subject to the tax.[58] The second change brings Indiana's treatment of direct mail in line with the Streamlined Sales and Use Tax Agreement by dividing direct mail into two groups—"advertising and promotional direct mail" and "other direct mail"—and sourcing the resulting sales accordingly for gross retail tax and use tax purposes. For "advertising and promotional direct mail," if the direct mail's purchaser provides the seller with a direct mail form or a certificate of exemption, then the purchaser must source the sale using the recipients' jurisdictions.[59] Alternatively, if the purchaser can provide the seller with information regarding the direct mail recipients' jurisdictions, then the seller must collect and remit the tax using the recipients' jurisdictions.[60] Finally, if the purchaser provides the seller with no form, certificate, or information, then the seller must collect and remit taxes using the sourcing rules in Indiana Code section 6-2.5-13-1(d)(5).[61] For "other direct mail," if the direct mail's purchaser provides the seller with a direct mail form or a certificate of exemption, then the purchaser must source the sale using the recipients' jurisdictions.[62] In all other cases, the sale of other direct mail is sourced under the normal sourcing rules in Indiana Code section 6-2.5-13-1(d)(3).[63]

The GA expanded several existing gross retail tax exemptions and created a few new ones, too. After July 1, 2013, the existing exemption for sales of "research and development equipment," which covered five specific types of property, expands to cover "research and development property," which can mean any tangible personal property if used in a qualifying manner.[64] Also effective on that date, the existing exemption for sales of tangible personal property in connection with "the repair, maintenance, refurbishment, remodeling, or remanufacturing of an aircraft or an avionics system of an aircraft" is not limited to aircraft registered outside of the United States and of a certain size and propulsion type.[65] Aviation fuel is the subject of a new gross retail tax

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58. *Id.*

59. *Id.* § 8, 2013 Ind. Acts at 3807-09 (amending IND. CODE § 6-2.5-13-3).

60. *Id.*

61. *Id.* Thus, "the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold)." IND. CODE § 6-2.5-13-1(d)(5).

62. Pub. L. No. 265-2013, § 8, 2013 Ind. Acts at 3807-09 (amending IND. CODE § 6-2.5-13-3).

63. *Id.* Thus, "the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith." IND. CODE § 6-2.5-13-1(d)(3).

64. Pub. L. No. 288-2013, § 29, 2013 Ind. Acts 4391, 4452-53 (amending IND. CODE § 6-2.5-5-40).

65. *Id.* § 30, 2013 Ind. Acts at 4453-54 (amending IND. CODE § 6-2.5-5-46).

exemption,[66] but is subject to a new excise tax.[67] Transactions involving alternative fuels used in motor vehicles providing public transportation are also exempt.[68] In a housekeeping measure, the gross retail tax exemption for blood glucose monitoring supplies, whether sold or provided without charge, was consolidated into one statutory section.[69]

Finally, the GA addressed a specific area of use tax noncompliance by ordering the DOR "to establish an amnesty program for taxpayers having an unpaid use tax liability for a claiming transaction occurring before June 1, 2012."[70] (In claim horse racing, the horses in the race are all offered for sale at close to the same price shortly before the race begins and the purchaser of the winning horse pockets the purse.) The amnesty program must require the participants to voluntarily pay the unpaid use tax liability before January 1, 2014 and must offer relief from interest, penalties, collection fees, existing liens, and threat of civil or criminal prosecution.[71]

D. Income Taxes

In 2013, the GA significantly changed the state income tax rate and tax base. First, it installed a gradual tax rate reduction for individuals, trusts, and estates that will lower the rate from 3.4% for taxable years beginning before January 1, 2015, to 3.3% for taxable years beginning after December 31, 2014 and before January 1, 2017, and finally to 3.23% for taxable years beginning after December 31, 2016.[72] Second, effective on January 1, 2013, the GA updated the state income tax base to use key definitions (e.g., "adjusted gross income" for individuals and "taxable income" for corporations) from the IRC in effect on January 1, 2013 instead of the one in effect on January 1, 2011.[73] The GA also more closely aligned the Indiana Code definitions with those in the IRC by removing a number of Indiana-specific adjustments that the GA had passed in prior years to specifically reject certain provisions in the IRC.[74] Some of those

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66. *Id.* § 31, 2013 Ind. Acts at 4454 (amending IND. CODE § 6-2.5-5-49).

67. *Id.* § 67, 2013 Ind. Acts at 4473-75 (codified at IND. CODE § 6-6-13); *see also infra* notes 115-25 and accompanying text (discussing the new Aviation Fuel Excise Tax).

68. Pub. L. No. 277-2013, § 31, 2013 Ind. Acts 4137, 4141 (amending IND. CODE § 6-2.5-5-27).

69. Pub. L. No. 265-2013, §§ 5-6, 2013 Ind. Acts 3800, 3803-04 (amending IND. CODE §§ 6-2.5-5-18, -19.5).

70. Pub. L. No. 205-2013, § 79, 2013 Ind. Acts 2141, 2479-80 (codified at IND. CODE § 6-2.5-14).

71. *Id.*

72. *Id.* § 82, 2013 Ind. Acts at 2505-06 (amending IND. CODE § 6-3-2-1); IND. CODE § 6-3-1-14 (defining "person").

73. Pub. L. No. 205-2013, § 81, 2013 Ind. Acts at 2503-05 (amending IND. CODE § 6-3-1-11). As noted in prior versions of this Article, the Indiana income tax "piggybacks" off the IRC for many key statutory definitions. Jegen et al., *supra* note 2, at 1242.

74. Pub. L. No. 205-2013, § 80, 2013 Ind. Acts at 2480-2503 (amending IND. CODE § 6-3-1-

removals took effect for taxable years beginning after December 31, 2012, while others retroactively apply to taxable years beginning after December 31, 2011.[75] Because of their length, these adjustments are listed in the footnote that accompanies this sentence.[76]

3.5).

75. *Id.* § 361, 2013 Ind. Acts at 2742.

76. The GA adjusted the Indiana-specific version of the IRC's "taxable income" definition for corporations, insurance companies, and trusts and estates in the following manner, effective for the following taxable years:

1. Removal of the add back that neutralized the classification of "qualified restaurant property" as 15-year property under I.R.C. § 168(e)(3)(E)(v) for taxable years beginning after 12/31/2012,
2. Removal of the add back that neutralized the classification of "qualified retail improvement property" as 15-year property under I.R.C. § 168(e)(3)(E)(ix) for taxable years beginning after 12/31/2012,
3. Removal of the add back that neutralized the I.R.C. § 198 deduction for expensing of environmental remediation costs for taxable years beginning after 12/31/2012,
4. Removal of the add back that neutralized the I.R.C. § 179E deduction for expensing of any qualified advanced mine safety equipment property for taxable years beginning after 12/31/2011,
5. Removal of the add back that neutralized the classification of "qualified leasehold improvement property" as 15-year property under I.R.C. § 168(e)(3)(E)(iv) for taxable years beginning after 12/31/2012,
6. Removal of the add back that neutralized the classification of a "motorsports entertainment complex" as 7-year property under I.R.C. § 168(e)(3)(C)(ii) for taxable years beginning after 12/31/2012, and
7. Removal of the add back that tied the I.R.C. § 195 deduction for start-up expenditures to the pre-P.L. 111-240 version of that section for taxable years beginning after 12/31/2012.

For trusts and estates, the add back that tied the I.R.C. § 1374(d)(7) net recognized built-in gain recognition for S corporations to the pre-P.L. 111-240 version of that section was also removed for taxable years beginning after 12/31/2012.

The GA also adjusted the Indiana-specific version of the IRC's "adjusted gross income" definition used for individuals in the following manner, effective for the following taxable years:

1. Removal of the add back that neutralized the classification of "qualified restaurant property" as 15-year property under I.R.C. § 168(e)(3)(E)(v) for taxable years beginning after 12/31/2011,
2. Removal of the add back that neutralized the classification of "qualified retail improvement property" as 15-year property under I.R.C. § 168(e)(3)(E)(ix) for taxable years beginning after 12/31/2011,
3. Removal of the add back that neutralized the I.R.C. § 198 deduction for expensing of environmental remediation costs for taxable years beginning after 12/31/2012,
4. Removal of the add back that neutralized the I.R.C. § 408(d)(8) gross income exclusion for charitable deductions from individual retirement plans for taxable years beginning after 12/31/2011,

The GA also acted to clarify existing law on the sourcing rules for "receipts derived from motorsports racing" by providing that (1) prize money, purses, etc. are sourced to Indiana if the race is conducted in Indiana, (2) sponsorship receipts are apportioned using the ratio of sponsored racing events in Indiana to all sponsored racing events for the taxable year, and (3) placement or participation incentives are attributed to Indiana "in the proportion of the races that occurred in Indiana."[77] Furthermore, for services provided by a race team member, the team member must apportion total income (i.e., total compensation received including salaries, wages, bonuses, etc.) to Indiana using the ratio of duty days in Indiana to total duty days.[78]

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5. Removal of the add back that neutralized the I.R.C. § 222 deduction for qualified tuition and related expenses for taxable years beginning after 12/31/2011,
6. Removal of the add back that neutralized the I.R.C. § 62(a)(2)(D) deduction for certain expenses of elementary and secondary school teachers for taxable years beginning after 12/31/2012,
7. Removal of the add back that neutralized the I.R.C. § 127 gross income exclusion for employer-provided education expenses for taxable years beginning after 12/31/2012,
8. Removal of the add back that neutralized the I.R.C. § 179E deduction for expensing of any qualified advanced mine safety equipment property for taxable years beginning after 12/31/2011,
9. Removal of the add back that neutralized the I.R.C. § 132(f)(1) gross income exclusion for qualified transportation fringe benefits in excess of $100 per month for taxable years beginning after 12/31/2011,
10. Removes the add back that tied the I.R.C. § 221 deduction for interest on education loans to the pre-P.L. 111-312 version of that section for taxable years beginning after 12/31/2012,
11. Removal of the add back that neutralized the classification of "qualified leasehold improvement property" as 15-year property under I.R.C. § 168(e)(3)(E)(iv) for taxable years beginning after 12/31/2011,
12. Removal of the add back that neutralized the classification of a "motorsports entertainment complex" as 7-year property under I.R.C. § 168(e)(3)(C)(ii) for taxable years beginning after 12/31/2011,
13. Removal of the add back that tied the I.R.C. § 195 deduction for start-up expenditures to the pre-P.L. 111-240 version of that section for taxable years beginning after 12/31/2012, and
14. Removal of the add back that tied the I.R.C. § 1374(d)(7) net recognized built-in gain recognition for S corporations to the pre-P.L. 111-240 version of that section was also removed for taxable years beginning after 12/31/2011.

Pub. L. No. 205-2013, §§ 80, 361, 2013 Ind. Acts at 2480-2503, 2742 (amending IND. CODE § 6-3-1-3.5).

77. Pub. L. No. 233-2013, § 7, 2013 Ind. Acts 3290, 3317-24 (amending IND. CODE § 6-3-2-2).

78. *Id.* § 8, 2013 Ind. Acts at 3324-27 (codified at IND. CODE § 6-3-2-3.2).

E. State Tax Liability Credits

State tax liability credits also received some attention from the GA in 2013. Four tax credits—the Military Base Recovery Tax Credit, the Military Base Investment Cost Credit, the Capital Investment Tax Credit, and the Coal Combustion Product Tax Credit—were repealed. [79] The GA also created the Tax Credit for Natural Gas Powered Vehicles, which provides a credit for placing a qualified vehicle in service after December 31, 2013 and before January 1, 2017.[80] A qualified vehicle is a natural gas powered vehicle with a gross vehicle weight rating of more than 33,000 pounds.[81] The credit is available against the individual's (or legal entity's) adjusted gross income tax, financial institutions tax, and insurance premiums tax.[82] A pass-through entity's credits flow-through to its owners in proportion to their shares of flow-through income.[83] The amount of the credit is 50% of the price increase needed to go from a similarly equipped gasoline or diesel vehicle of the same make and model to the qualified vehicle, subject to a $15,000 maximum.[84] The annual credit per person is capped at $150,000.[85] The total credit for all persons in a given year is equal to the gross retail and use tax on transactions involving alternative fuels for the year, but may not exceed $3 million.[86] The cumulative total credit over its three-year lifetime may not exceed three times the per year maximum amount for the year in question.[87] Credits must be claimed on state tax returns and will be approved on a taxpayer-by-taxpayer basis in chronological order (i.e., if the per year or cumulative maximum is exceeded for a given year, all later credit claims for that year will be rejected).[88] Credits in excess of the taxpayer's state tax liability carry forward for an additional six years, but the credits cannot be sold or otherwise transferred.[89]

A number of other tax credits were amended in 2013. First, the Industrial Recovery Tax Credit was modified to remove the restriction on qualified investments that limited them to those that are made under an approved plan.[90] That credit was also changed to remove the requirement that a "vacant industrial

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79. Pub. L. No. 288-2013, § 44-46, 48, 2013 Ind. Acts 4391, 4460-61 (repealing IND. CODE §§ 6-3.1-11.5, -11.6, -13.5, -25.2).

80. Pub. L. No. 277-2013, § 6, 2013 Ind. Acts 4137, 4142-45 (codified at IND. CODE § 6-3.1-34.6).

81. *Id.* § 6, 2013 Ind. Acts at 4142 (codified at IND. CODE § 6-3.1-34.6-6).

82. *Id.* § 6, 2013 Ind. Acts at 4143 (codified at IND. CODE §§ 6-3.1-34.6-7, -8(a)).

83. *Id.* § 6, 2013 Ind. Acts at 4144 (codified at IND. CODE § 6-3.1-34.6-11).

84. *Id.* § 6, 2013 Ind. Acts at 4143 (codified at IND. CODE § 6-3.1-34.6-8(b)).

85. *Id.* § 6, 2013 Ind. Acts at 4143 (codified at IND. CODE § 6-3.1-34.6-9).

86. *Id.* § 6, 2013 Ind. Acts at 4143-44 (codified at IND. CODE § 6-3.1-34.6-10).

87. *Id.*

88. *Id.* § 6, 2013 Ind. Acts at 4144 (codified at IND. CODE § 6-3.1-34.6-12).

89. *Id.* § 6, 2013 Ind. Acts at 4144-45 (codified at IND. CODE §§ 6-3.1-34.6-13, -14).

90. Pub. L. No. 288-2013, § 37, 2013 Ind. Acts 4391, 4457-58 (amending IND. CODE § 6-3.1-11-10).

facility" be vacant for at least one year, or apparently that it be vacant at all.[91] In addition, the GA removed two factors—the desirability of intended use, including whether it will improve the economic or employment conditions in the surrounding community, and evidence that the municipality or county made efforts to implement a plan without financial assistance—from the six factors that the corporation must consider when evaluating applications.[92] Second, the Headquarters Relocation Tax Credit was expanded (1) to include research and development centers and the principal offices of divisions or subdivisions under the definition of "corporate headquarters"[93] and (2) to extend eligibility to otherwise-qualified businesses with annual worldwide revenues of at least $50 million instead of the $100 million that was formerly required.[94] Third, the GA expanded the Hoosier Business Investment Tax Credit to include a 25% credit for qualified logistics investments,[95] which generally include real property improvements related to improving a transportation or logistical distribution facility; certain ways of improving transportation of goods on Indiana highways, railways, waterways, and airways; and improving warehousing and logistical capabilities.[96] To claim the credit for a logistics investment, the taxpayer's proposed project must "substantially enhance the logistics industry by creating new jobs, preserving new jobs that otherwise would be lost, increasing wages in Indiana, or improving the overall Indiana economy."[97] The maximum aggregate logistics investment credit available for all taxpayers during a state fiscal year is capped at $10 million.[98] The maximum aggregate Hoosier Business Investment Tax Credit for all other qualified investments in a state fiscal year is $50 million.[99] Finally, the School Scholarship Tax Credit's maximum amount was increased from $5 million to $7.5 million per state fiscal year[100] and, starting with taxable years beginning after December 31, 2012, taxpayers may carryover excess credits for up to nine additional years.[101] Also on the education front, the GA removed buddy system projects from the Tax Credit for Computer Equipment Donations.[102]

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91. *Id.* § 38, 2013 Ind. Acts at 4458 (amending IND. CODE § 6-3.1-11-15).

92. *Id.* § 40, 2013 Ind. Acts at 4459-60 (amending IND. CODE § 6-3.1-11-19).

93. *Id.* § 60, 2013 Ind. Acts at 4471 (amending IND. CODE § 6-3.1-30-1).

94. *Id.* § 62, 2013 Ind. Acts at 4471 (amending IND. CODE § 6-3.1-30-2).

95. *Id.* § 51, 53, 2013 Ind. Acts at 4461-62, 4464-65 (amending IND. CODE §§ 6-3.1-26-1, -14).

96. *Id.* § 52, 2013 Ind. Acts at 4462-64 (codified at IND. CODE § 6-3.1-26-8.5).

97. *Id.* § 56, 2013 Ind. Acts at 4466-67 (amending IND. CODE § 6-3.1-26-18).

98. *Id.* § 57, 2013 Ind. Acts at 4467-68 (amending IND. CODE § 6-3.1-26-20).

99. *Id.*

100. Pub. L. No. 205-2013, § 84, 2013 Ind. Acts 2141, 2506 (amending IND. CODE § 6-3.1-30.5-13).

101. Pub. L. No. 211-2013, § 2, 2013 Ind. Acts 2802, 2803 (codified at IND. CODE § 6-3.1-30.5-9.5).

102. Pub. L. No. 286-2013, §§ 4-6, 2013 Ind. Acts 4301, 4304-05 (repealing IND. CODE § 6-3.1-15-1 and amending IND. CODE §§ 6-3.1-15-12, -17).

F. Local Taxes

Although the GA made a number of statutory changes affecting local taxation, those changes were largely procedural in nature and were not particularly significant.[103] For that reason, they will not be discussed further here.

G. Taxation of Financial Instruments

In 2013, the GA significantly changed the tax base and tax rate for the franchise tax on corporations transacting the business of a financial institution in Indiana. First, it installed a gradual tax rate reduction that will lower the rate from 8.5% for taxable years beginning before January 1, 2014, to 8.0% for taxable years beginning after December 31, 2013 and before January 1, 2015, to 7.5% for taxable years beginning after December 31, 2014 and before January 1, 2016, to 7.0% for taxable years beginning after December 31, 2015 and before January 1, 2017, and finally to 6.5% for taxable years beginning after December 31, 2016.[104] Second, effective on January 1, 2013, the GA updated the financial institutions tax base to use key definitions (e.g., "adjusted gross income") from the IRC in effect on January 1, 2013 instead of the one in effect on January 1, 2011.[105] The GA also removed a number of Indiana-specific adjustments to the IRC "adjusted gross income" definition, which the GA had passed in prior years to specifically reject certain provisions in the IRC.[106] Some of those removals took effect for taxable years beginning after December 31, 2012, while others retroactively apply to taxable years beginning after December 31, 2011.[107] Because of their length, these adjustments are listed in the footnote that accompanies this sentence.[108]

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103. For example, the GA amended the County Motor Vehicle Excise Surtax and the County Wheel Tax so that a county council or a county income tax council, as appropriate, can pass an ordinance imposing those taxes. Pub. L. No. 205-2013, §§ 85-87, 92-94, 2013 Ind. Acts 2141, 2506-07, 2509-10 (amending IND. CODE §§ 6-3.5-4-1 to -2 and IND. CODE §§ 6-3.5-5-1 to -2).

104. Pub. L. No. 93-2013, § 5, 2013 Ind. Acts 713, 721-23 (amending IND. CODE § 6-5.5-2-1).

105. The tax on financial institutions uses definitions from Indiana Code § 6-3-1-11. IND. CODE § 6-5.5-1-11. As noted above, the GA revised that section to update the applicable IRC version. *See supra* note 73 and accompanying text.

106. Pub. L. No. 205-2013, § 124, 2013 Ind. Acts 2141, 2522-28 (amending IND. CODE § 6-5.5-1-2).

107. *Id.* § 362, 2013 Ind. Acts at 2743-44.

108. The GA adjusted the Indiana-specific version of the IRC's "adjusted gross income" definition used in the tax on financial institutions in the following manner, effective for the following taxable years:

1. Removal of the add back that neutralized the classification of "qualified restaurant property" as 15-year property under I.R.C. § 168(e)(3)(E)(v) for taxable years beginning after 12/31/2011,
2. Removal of the add back that neutralized the classification of "qualified retail improvement property" as 15-year property under I.R.C. § 168(e)(3)(E)(ix) for

H. Excise Taxes and Other Miscellaneous Taxes

Finally, the GA worked on a number of excises taxes and other miscellaneous taxes during 2013. While most of the affected taxes were connected to motor vehicles and fuel, the GA also created a new admissions fee for certain motorsports events,[109] made it clear that the tax imposed on distributing tobacco products in Indiana applies to persons "sell[ing] tobacco products through an Internet website,"[110] and modified the taxes applicable to certain types of gambling activities in Indiana.[111] Finally, the GA tweaked a few city-specific food and beverage taxes[112] and extended the Liquor Excise Tax to permittees holding an "artisan distiller's permit."[113]

On the motor vehicle and fuel front, the GA repealed The Special Fuel Tax in Chapter 2.1 of Indiana Code section 6-6 effective January 1, 2014.[114] The GA also created the Aviation Fuel Excise Tax for purchases after June 30, 2013.[115]

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taxable years beginning after 12/31/2011,

3. Removal of the add back that neutralized the I.R.C. § 198 deduction for expensing of environmental remediation costs for taxable years beginning after 12/31/2012,
4. Removal of the add back that neutralized the I.R.C. § 179E deduction for expensing of any qualified advanced mine safety equipment property for taxable years beginning after 12/31/2011,
5. Removal of the add back that neutralized the classification of "qualified leasehold improvement property" as 15-year property under I.R.C. § 168(e)(3)(E)(iv) for taxable years beginning after 12/31/2011,
6. Removal of the add back that neutralized the classification of a "motorsports entertainment complex" as 7-year property under I.R.C. § 168(e)(3)(C)(ii) for taxable years beginning after 12/31/2011,
7. Removal of the add back that tied the I.R.C. § 195 deduction for start-up expenditures to the pre-P.L. 111-240 version of that section for taxable years beginning after 12/31/2012, and
8. Removal of the add back that tied the I.R.C. § 1374(d)(7) net recognized built-in gain recognition for S corporations to the pre-P.L. 111-240 version of that section was also removed for taxable years beginning after 12/31/2011.

Id. §§ 124, 362, 2013 Ind. Acts at 2522-28, 2743-44 (amending IND. CODE § 6-5.5-1-2).

109. *See infra* notes 137-41 and accompanying text.

110. Pub. L. No. 205-2013, § 129, 2013 Ind. Acts 2141, 2538 (amending IND. CODE § 6-7-2-7). The Internet distributor must also obtain a license before it begins distribution into the state. *Id.* § 130, 2013 Ind. Acts at 2538-39 (amending IND. CODE § 6-7-2-8).

111. *See infra* notes 142-51 and accompanying text.

112. *See, e.g.*, Pub. L. No. 157-2013, § 2, 2013 Ind. Acts 1150, 1152-55 (creating the Town of Fishers Food and Beverage Tax and codified at IND. CODE § 6-9-44).

113. Pub. L. No. 109-2013, § 7, 2013 Ind. Acts 798, 805 (amending IND. CODE § 7.1-4-3-2).

114. Pub. L. No. 277-2013, § 7, 2013 Ind. Acts 4137, 4145 (repealing IND. CODE § 6-6-2.1).

115. Pub. L. No. 288-2013, § 67, 2013 Ind. Acts 4391, 4473-75 (codified at IND. CODE § 6-6-13).

This new excise tax equals $0.10 per gallon "on the gross retail income received by a retailer on each gallon of aviation fuel purchased in Indiana."[116] Gross retail income excludes any federal excise taxes,[117] and a retailer is one whose business is to sell or distribute aviation fuel to an end user within Indiana.[118] The excise tax does not apply if the fuel "is placed into the fuel supply tank of an aircraft owned by: (1) the United States or an agency or instrumentality of the United States; (2) the state of Indiana; (3) the Indiana Air National Guard; or (4) a common carrier of passengers or freight."[119] In such cases, the exempt purchaser may provide an exemption certificate to the retailer, which relieves the retailer of its duty to collect and remit the tax.[120] Remission of collected taxes through electronic funds transfer before the 16th day of the next month is required (less 1.6% of the taxes to cover the retailer's collection costs).[121] For entities, "each officer, employee, or member of the employer who is in that capacity" is personally liable for tax, penalty, and interest if the collections are not deposited to the DOR.[122] Also, knowing failure to collect and timely remit the tax due leads to "a penalty equal to [100%] of the uncollected tax."[123] Knowing, reckless, or intentional failure to remit, or the fraudulent withholding of, the state's money is a Class D felony.[124] Mere negligence in this respect yields a $500 civil penalty for each occurrence.[125]

Also in the motor vehicle and fuel area, the GA modified several existing taxes. First, it added liquid natural gas products to the list of alternative fuels that are now included among the "special fuels" subject to the license tax contained in Indiana Code section 6-6-2.5 ("Special Fuel Tax").[126] A new "diesel gallon equivalent" and "gasoline gallon equivalent" were created for use in calculating that tax for liquid natural gas and compressed natural gas, respectively.[127] Second, the tax rate for the Motor Carrier Fuel Tax found in Indiana Code section 6-6-4.1 was modified to distinguish between alternative fuels and other fuels, and to use the rate per diesel gallon equivalent from Indiana Code section 6-6-2.5 as the tax rate for liquid natural gas and the rate per gasoline gallon equivalent from Indiana Code section 6-6-2.5 as the tax rate for compressed natural gas and certain other alternative fuels.[128] In addition, use of diesel gallon equivalents for

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116. *Id.* § 67, 2013 Ind. Acts at 4473-74 (codified at IND. CODE § 6-6-13-6(a)).

117. *Id.* § 67, 2013 Ind. Acts at 4474 (codified at IND. CODE § 6-6-13-6(b)).

118. *Id.* § 67, 2013 Ind. Acts at 4473 (codified at IND. CODE § 6-6-13-5).

119. *Id.* § 67, 2013 Ind. Acts at 4474 (codified at IND. CODE § 6-6-13-7).

120. *Id.* § 67, 2013 Ind. Acts at 4474 (codified at IND. CODE § 6-6-13-8).

121. *Id.* § 67, 2013 Ind. Acts at 4474 (codified at IND. CODE §§ 6-6-13-9, -10, -11).

122. *Id.* § 67, 2013 Ind. Acts at 4474-75 (codified at IND. CODE § 6-6-13-12).

123. *Id.* § 67, 2013 Ind. Acts at 4475 (codified at IND. CODE § 6-6-13-13(a)).

124. *Id.* § 67, 2013 Ind. Acts at 4475 (codified at IND. CODE § 6-6-13-13(b)).

125. *Id.* § 67, 2013 Ind. Acts at 4475 (codified at IND. CODE § 6-6-13-13(c)).

126. Pub. L. No. 277-2013, §§ 8-10, 2013 Ind. Acts 4137, 4145-47 (amending IND. CODE §§ 6-6-2.5-1, -22, -28).

127. *Id.* § 10, 2013 Ind. Acts at 4145-47 (amending IND. CODE § 6-6-2.5-28).

128. *Id.* § 12, 2013 Ind. Acts at 4148-49 (amending IND. CODE § 6-6-4.1-4).

liquid natural gas and gasoline gallon equivalents for compressed natural gas and certain other alternative fuels are now used in the motor carrier fuel surcharge tax.[129] Third, the Motor Vehicle Excise Tax now extends to dealers or manufacturers for that portion of the total year that the dealer's or manufacturer's designee operates the motor vehicle under a dealer designee license.[130]

Finally, the GA created a new Road Tax Credit effective on January 1, 2014.[131] The new tax credit is refundable[132] and is available to carriers that are "taxed on the consumption of motor fuel under [Indiana Code section] 6-6-4.1."[133] Such carriers may claim a credit in the current year equal to 12% of the road taxes imposed upon the carrier's consumption of compressed natural gas in the previous state fiscal year.[134] For this purpose, road taxes include: (1) the Gasoline Tax found in Indiana Code section 6-6-1.1, (2) the Special Fuel Tax found in Indiana Code section 6-6-2.5, and (3) the Motor Carrier Fuel Tax found in Indiana Code section 6-6-4.1.[135] The carrier must claim the credit on the proper form and it is a Class C infraction to knowingly make a false statement, or present a fraudulent road tax receipt, in an attempt to obtain a road tax credit, whether successful or not.[136]

In other areas, the GA created a new Motorsport Admissions Fee that imposes an admissions fee on each person who pays to enter a qualified motorsports facility on race day.[137] The fee equals the admission price, excluding parking, multiplied by an applicable percentage that ranges from 6% for admission prices of at least $150 down to 2% for those below $100.[138] The admissions fee is collected with the admission price and must be remitted to the DOR before the 15th day of the next month.[139] The organizers or sponsors of professional motorsports racing events at qualified facilities also must provide the DOR with a list of persons or entities that received prize money, purses, or other similar amounts when requested to do so by the DOR.[140] Recipients of that prize money, purse, or another similar amount must also provide the DOR with a list of persons or entities that received the awards when the DOR requests one.[141]

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129. *Id.* § 13, 2013 Ind. Acts at 4149-50 (amending IND. CODE § 6-6-4.1-4.5).

130. Pub. L. No. 262-2013, § 92, 2013 Ind. Acts 3709, 3752 (amending IND. CODE § 9-18-27-0.5).

131. Pub. L. No. 277-2013, § 14, 2013 Ind. Acts 4137, 4150-51 (codified at IND. CODE § 6-6-12).

132. *Id.* § 14, 2013 Ind. Acts at 4151 (codified at IND. CODE § 6-6-12-8).

133. *Id.* § 14, 2013 Ind. Acts at 4150 (codified at IND. CODE § 6-6-12-1).

134. *Id.* § 14, 2013 Ind. Acts at 4150 (codified at IND. CODE §§ 6-6-12-5, -6).

135. *Id.* § 14, 2013 Ind. Acts at 4150 (codified at IND. CODE § 6-6-12-4).

136. *Id.* § 14, 2013 Ind. Acts at 4151 (codified at IND. CODE §§ 6-6-12-7, -9).

137. Pub. L. No. 233-2013, § 9, 2013 Ind. Acts 3290, 3327-28 (codified at IND. CODE § 6-8-14).

138. *Id.* § 9, 2013 Ind. Acts at 3327 (codified at IND. CODE § 6-8-14-4).

139. *Id.* § 9, 2013 Ind. Acts at 3327-28 (codified at IND. CODE §§ 6-8-14-6, -7).

140. *Id.* § 10, 2013 Ind. Acts at 3328-29 (codified at IND. CODE § 6-8.1-5-5(a)).

141. *Id.* § 10, 2013 Ind. Acts at 3328-29 (codified at IND. CODE § 6-8.1-5-5(b)).

Finally, the GA updated the tax laws applicable to certain riverboat and racetrack gambling activities. For riverboat gambling, beginning after June 30, 2013,[142] the GA created a new graduated tax table for riverboats that have implemented flexible scheduling and that received less than $75 million of adjusted gross receipts in the preceding state fiscal year. In the new tax table, the tax rate imposed on the first $25 million of adjusted gross receipts is reduced from 15% to 5%, but all other rates remain the same.[143] However, a riverboat benefitting from the lower tax rate in a given year, that then receives more than $75 million of adjusted gross receipts in that year, must pay an additional $2.5 million tax.[144] The additional tax effectively neutralizes the tax savings provided by the reduced rate. At racetracks, the tax base for the graduated slot machine wagering tax was reduced from 99% of adjusted gross receipts to 91.5% of those receipts beginning on July 1, 2013.[145] In addition, racetrack licensees subject to the tax are allowed to deduct receipts from "qualified wagering" received after May 10, 2013 and before July 1, 2016 from the adjusted gross receipts subject to the tax.[146] Qualified wagering in this context is promotional wagering using "noncashable vouchers, coupons, electronic credits, or electronic promotions" provided by racetrack licensees.[147] In no event may a licensee deduct more than $2.5 million under this provision in a state fiscal year ending before July 1, 2013 or more than $5 million for a state fiscal year ending after June 30, 2013 and before July 1, 2016.[148] This deduction also applies to the licensee's obligation to distribute funds in support of the Indiana horse racing industry, to pay a county slot machine wagering fee, and to remit the supplemental fees due under Indiana Code section 4-35-8.9.[149] A riverboat's licensed owner or operating agent who is subject to the wagering taxes mentioned above may take a deduction for receipts from "qualified wagering" received after May 10, 2013 and before July 1, 2016, which is similar to the deduction described above for racetrack licensees.[150] During the time period that these two promotional wagering deductions are in effect at racetracks and on riverboats, the Indiana gaming commission is charged with studying "the use of complimentary promotional credit programs" at those gambling facilities and the programs' impact on state

142. Pub. L. No. 229-2013, § 38, 2013 Ind. Acts 3194, 3226.

143. *Id.* § 20, 2013 Ind. Acts at 3211-14 (amending IND. CODE § 4-33-13-1.5).

144. *Id.* § 20, 2013 Ind. Acts at 3213 (amending IND. CODE § 4-33-13-1.5(d)).

145. Pub. L. No. 210-2013, § 18, 2013 Ind. Acts 2786, 2801-02 (amending IND. CODE § 4-35-8-1). The slot machine wagering tax is only imposed on "a permit holder holding a gambling game license issued under IC 4-35-5," which only covers licenses for racetracks. IND. CODE §§ 4-35-1-1, -5-1.

146. Pub. L. No. 229-2013, § 36, 2013 Ind. Acts 3194, 3224-25 (codified at IND. CODE § 4-35-8-5).

147. *Id.* § 36, 2013 Ind. Acts at 3225 (codified at IND. CODE § 4-35-8-5(b)).

148. *Id.* § 36, 2013 Ind. Acts at 3225 (codified at IND. CODE § 4-35-8-5(d)).

149. *Id.* § 36, 2013 Ind. Acts at 3225 (codified at IND. CODE § 4-35-8-5(e)).

150. *Id.* § 22, 2013 Ind. Acts at 3219-20 (codified at IND. CODE § 4-33-13-7).

gaming revenues.[151]

II. INDIANA TAX COURT DECISIONS

The Tax Court rendered a variety of opinions from January 1, 2013 to December 31, 2013. Specifically, the Tax Court issued twenty published opinions and decisions: eleven concerned the Indiana real property tax, two concerned Indiana local tax, one concerned the Indiana inheritance tax, four concerned the Indiana sales and use tax, and two concerned the Indiana corporate income tax. The Tax Court also issued one unpublished opinion concerning Indiana real property tax. A summary of each opinion and decision appears below.

A. Real Property Tax

1. Indianapolis Public Transportation Corp. v. Indiana Department of Local Government Finance.[152]—Indianapolis Public Transportation Corporation ("IndyGo") appealed the DLGF's final determination denying its excess property tax levy request for the 2007 budget year.[153] IndyGo, as a public transportation corporation, pays its operating costs and expenditures from the collection of local property taxes.[154] In November 2008, pursuant to Indiana Code section 6-1.1-18.5-16, IndyGo requested the DLGF's permission to impose an excess property tax levy because it had suffered property tax revenue shortfalls in budget years 2006 and 2007.[155] The DLGF referred the request to the Local Government Tax Control Board for a recommendation.

The Tax Control Board held a hearing where both IndyGo and a DLGF representative presented documentation showing the property tax revenue shortfall (or lack thereof) for 2006 and 2007. Each used a different method for its computation.[156] The DLGF representative found no shortfall existed in

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151. *Id.* § 39, 2013 Ind. Acts at 3226 (requiring that a report from the commission must be submitted to the budget committee before November 1, 2015).

152. 988 N.E.2d 1274 (Ind. T.C. 2013).

153. *Id*. at 1275.

154. *Id*. at 1277.

155. *Id*. at 1275.

156. *Id*. at 1275-76. IndyGo calculated its shortfall: "first it computed the total amount of property taxes (both real and personal) *charged* in Marion County for the 2006 (pay 2007) assessment as **$1,234,203,346;** from that figure, it subtracted $65,534,933, which it determined represented the total amount of property taxes (both real and personal) *charged* for the 2006 (pay 2007) assessment within Lawrence, Southport, and Speedway for a result of **$1,168,667,813;** it next computed the total amount of property taxes (both real and personal) *paid* in Marion County for the 2006 (pay 2007) assessment as **$1,147,620,620;** from that figure, it subtracted $58,429,384, which it determined represented the total amount of property taxes (both real and personal) *paid* for the 2006 (pay 2007) assessment within Lawrence, Southport, and Speedway, for a result of **$1,089,189,357;** by subtracting the "paid" from the "charged," IndyGo concluded that in budget year 2007, Marion County suffered a property tax revenue shortfall in the amount of **$79,478,456**

2007.[157] Nevertheless, the Tax Control Board recommended to the DLGF that IndyGo's excess property tax levy request for both 2006 and 2007 be approved. The DLGF issued a final determination approving IndyGo's 2006 request but denying its 2007 request.[158] IndyGo appealed this final determination to the Indiana Tax Court, arguing the DLGF's determination was unlawful, not supported by the evidence, and an abuse of discretion.[159]

On appeal, IndyGo claimed the DLGF's final determination was contrary to the law, because the DLGF did not follow the correct statutory procedure in determining the lack of property tax revenue shortfall in 2007.[160] IndyGo acknowledged that neither the Code nor any DLGF regulation prescribes a method for calculating a property tax revenue shortfall, but nevertheless argued the DLGF's calculation did not comply with clearly stated legislative policy.[161] The Tax Court declined to overturn the DLGF's final determination on this ground, as it would have required a reweighing of the evidence, which is not proper in reviewing administrative agency final determinations.[162] IndyGo also challenged the DLGF's final determination, because it was "not supported by the evidence" since the DLGF granted IndyGo's 2006 request, which was computed using the same methodology as in the 2007 request.[163] The Tax Court also declined to overturn the final determination on this ground because the administrative records showed the DLGF's calculation found a shortfall in 2006 in the amount of $469,535.[164] IndyGo only requested $344,478. Accordingly, the DLGF "simply used IndyGo's requested amount as its starting point and then reduced that amount by $125,479 to account for IndyGo's receipt of too much levy for budget year 2008."[165] As such, the Tax Court affirmed the DLGF's final determination denying IndyGo's 2007 excess property tax levy request.

2. Kooshtard Property VIII, LLC v. Shelby County Assessor.[166]—During the

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(*i.e.,* $1,168,667,813 minus $1,089,189,377); of that shortfall, IndyGo determined that **$770,941,** or .00971%, was its own. IndyGo arrived at this amount by dividing Center Township's tax rate of 3.7166% by IndyGo's tax rate of .0361% and then applying that result (*i.e.,* .00971%) against the $79,478,456.2."

The DLGF presented "documentation that showed the amount of the certified levy, the actual collections, and the delinquent tax collections regarding IndyGo's general fund for both 2006 and 2007. Based on that documentation, the DLGF representative explained that IndyGo did not have a property tax revenue shortfall in 2007: its certified levy was $15,229,898 and it actually collected $15,315,930."

157. *Id*. at 1276.

158. *Id*. at 1276-77.

159. *Id*. at 1275.

160. *Id*. at 1278.

161. *Id*. at 1278-79.

162. *Id*. at 1279.

163. *Id*. at 1279-80.

164. *Id*. at 1280.

165. *Id*.

166. 987 N.E.2d 1178 (Ind. T.C.), *review denied,* 995 N.E.2d 620 (Ind. 2013).

2006 and 2007 tax years, Kooshtard owned two acres of land in Shelbyville, Indiana on which a convenience store and gas station were located.[167] In valuing the property, assessing officials applied a positive influence factor of 100%, which increased the value by $200,000 per acre. Kooshtard filed two petitions for review of the assessment, one with the Shelby County PTABOA and one with the Indiana Board.[168] The petitions were consolidated, a hearing was held, and the Indiana Board issued a final determination upholding the assessments.[169] The Indiana Board determined Kooshtard failed to establish a *prima facie* case that its land had been over assessed.[170] Kooshtard then filed an appeal with the Indiana Tax Court.[171]

On appeal, Kooshtard claimed, as it had at the Indiana Board hearing, that the application of the 100% positive influence factor to its land was erroneous because adjacent properties did not have the factor applied.[172] Accordingly, Kooshtard argued uniformity required the positive influence factor be applied to all similar land and maintained that sales data from similar properties indicated Kooshtard's land had been over assessed. Kooshtard also presented two new arguments for the first time on appeal, but the Tax Court refused to review the arguments because "there would [have been] no written findings in the record for the Court to review."[173]

With respect to the uniformity claim, the Indiana Tax Court agreed with the Indiana Board that Kooshtard had not presented sufficient evidence to establish a *prima facie* case, because it did not present any market-based evidence to support its claim.[174] Instead, Kooshtard had "merely *concluded* that because the Assessor did not apply the same positive influence factor of 100% to a nearby office building, automotive sales/service center, and fast-food restaurant, the factor should be removed from its assessment."[175] The Tax Court went on to state, "conclusory statements are insufficient to make a *prima facie* case because they are not probative evidence."[176] Accordingly, the Tax Court affirmed the Indiana Board's final determination upholding the assessments.[177]

3. Hamilton County Assessor v. Allisonville Road Development, LLC.[178]— Beginning in the 1990's, several land developers purchased and owned two vacant land parcels located in Fishers, Indiana.[179] Prior to the purchase, the land

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167. *Id*. at 1179.
168. *Id*.
169. *Id.* at 1179-80.
170. *Id*. at 1179.
171. *Id*. at 1180.
172. *Id*. at 1181.
173. *Id*. at 1182.
174. *Id*. at 1181.
175. *Id*.
176. *Id*.
177. *Id*. at 1182.
178. 988 N.E.2d 820 (Ind. T.C.), *review denied,* 995 N.E.2d 619 (Ind. 2013).
179. *Id*. at 821.

was actively farmed. In its 2002 general reassessment, the Assessor changed the property's classification from agricultural land to "undeveloped, useable commercial land."[180] Allisonville Road Development, LLC ("Allisonville Development") purchased the parcels in April 2006. Allisonville Development appealed the property's 2008 assessment to the Hamilton County PTABOA, who reduced the assessment from $2,237,300 to $1,427,400.[181]

Allisonville Development was unsatisfied with the reduction and filed a petition for review with the Indiana Board, asserting the 2008 assessment was incorrect because "the Assessor's 2002 reclassification of the property from agricultural to commercial contravened Indiana Code [section] 6-1.1-4-12."[182] Specifically, the statue "precluded reassessments based on new classification until land was subdivided, rezoned, purchased by a non-developer, construction of a building commenced, or a building permit was issued."[183] On March 15, 2012, the Indiana Board issued a final determination announcing while land could be reassessed based on a change in the land's use, "cessation of farming activities did not constitute a change in use sufficient to warrant reassessment under Indiana Code [section] 6-1.1-4-12."[184] Therefore, the Indiana Board determined the property's assessment as commercial land was in error and reduced Allisonville Development's 2008 assessment accordingly. The Assessor filed an appeal with the Indiana Tax Court.[185]

On appeal, the Assessor first argued the Indiana Board had applied the wrong version of the Indiana statute.[186] The Tax Court determined the argument moot, as the Indiana Board had done, because "none of the events that would trigger a reassessment under either version of the statute [had] occurred [.]"[187] Next, the Assessor argued the cessation of farming activities was sufficient to trigger a "change in use" under the statute.[188] The Assessor specifically argued the Indiana Board had misinterpreted the holding from *Aboite Corp. v. State Board of Tax Commissioners*.[189] The Tax Court disagreed, pointing to the underlying rationale from *Aboite* and Indiana Code section 6-1.1-4-12. [190] The Court explained the statute was designed to promote "commercial development by allowing a developer's land to be assessed on the basis of its original (i.e., its pre-purchase) classification until an objective event signaling the commencement of development occurs."[191] As such, because no action had been taken yet to

180. *Id*.
181. *Id*.
182. *Id*.
183. *Id*.
184. *Id*. at 822.
185. *Id*.
186. *Id*.
187. *Id*. at 823.
188. *Id*.
189. 762 N.E.2d 254 (Ind. T.C. 2001).
190. *Allisonville Rd. Dev., LLC*, 988 N.E.2d at 823.
191. *Id*.

commence development, the property should still be classified on the basis of its original classification as agricultural land.[192] Accordingly, the Tax Court affirmed the Indiana Board's final determination.[193]

4. Washington Township. Assessor v. Verizon Data Services, Inc.[194]—This matter pertains to Verizon's motion to dismiss the Assessors' appeal pursuant to Indiana Tax Court Rule 4 and Indiana Trial Rules 12(B)(1), (2), (4), and (5). [195] In December 2010, the Indiana Board issued a final determination granting summary judgment to Verizon with respect to its 2005 personal property tax assessment appeal. The Indiana Board's courier was delayed in mailing the final determination and Confidentiality Order to Verizon by more than three weeks. Both parties conferred over e-mail and telephone regarding the delayed receipt and the Assessor's' intention to file an appeal, which resulted in the Indiana Board issuing a *nunc pro tunc* order, deeming the date the courier mailed the documents to be the date they were issued. As such, the Assessor timely filed an appeal of the Indiana Board's final determination with the Indiana Tax Court. The same day of the filing, the Assessor mailed a copy of the Petition to Verizon's attorneys, Bradley Hasler and Jeffrey Bennett, who accepted service of the Petition and summons a week later. On March 11, 2011, Verizon's attorneys entered their appearance and moved to dismiss the Assessors' appeal pursuant to Indiana Tax Court Rule 4 and Indiana Trial Rules 12(B)(1), (2), (4), and (5), alleging failure by the Assessor to serve the summons and petition directly on Verizon. As such, the sole question before the Tax Court was whether this failure to serve directly on Verizon barred the Assessor's appeal.[196]

Verizon argued the appeal must be dismissed because "the Assessor initially served a copy of the Petition and summons on a non-party law firm whose attorneys were not the attorneys of record in the Tax Court rather than serving Verizon directly."[197] The Tax Court acknowledged there could be no attorney of record for the respondent when a petitioner appeals a final determination of the Indiana Board to the Tax Court until after the respondent's attorney enters an appearance.[198] However, the Court also pointed to Indiana Trial Rule 4.15(F), which establishes that "non summons or service of process shall not be set aside if either is reasonably calculated to inform the person to be served of the impending action before him."[199] As such, because Hasler and Bennett had a "long history" of representing Verizon with the Assessor, it was reasonable for the Assessor to believe the service on Verizon's attorneys would inform Verizon of the impending action against it.[200] The Court also noted that Verizon conceded

192. *Id*. at 824.
193. *Id*.
194. 985 N.E.2d 376 (Ind. T.C. 2013).
195. *Id*. at *1.
196. *Id*.
197. *Id*. at *2.
198. *Id*. at *3.
199. *Id*.
200. *Id*.

it had "timely knowledge of this original tax appeal, which suggests that the Assessors' manner of service, while not made on Verizon directly, was likely to inform."[201] Therefore, the Tax Court denied Verizon's motion to dismiss.

5. Indiana MHC, LLC v. Scott County Assessor.[202]—Indiana MHC owns Amberly Pointe in Scottsburg, Indiana, which is a manufactured home community on approximately 33 acres of land and contains 205 rentable pads.[203] For the 2007 assessment, the Assessor assigned Amberly Point an assessed value of $5,400,300.[204] Indiana MHC believed the assessment was too high and filed an appeal with the Scoot County PTABOA, who reduced the assessment to $3,377,000. Indiana MHC still believed the assessment was too high and appealed to the Indiana Board. At the hearing before the Indiana Board, Kurtis Keeney, Indiana MHC's managing partner, testified that "due to the manufactured home industry's 'credit crisis' of 2005, only 85 of Amberly Pointe's 205 pads (i.e., 40%) were rented and generating income between 2005 and 2008."[205] Keeney contended only the 85 pads that were rented should be considered in determining value for the 2007 assessment. Keeney also argued that approximately 2.6 acres of Amberly Point had no value because that acreage was zoned as "green space" and could not generate income. As such, Keeney contended the property assessment should be reduced using the income capitalization approach and submitted a worksheet applying the approach to Amberly Pointe. While the income capitalization approach may be used to determine value, Indiana MHC's income capitalization approach failed to take into account any market data. As such, the Indiana Board determined it lacked probative value and issued a final determination announcing Indiana MHC failed to demonstrate its 2007 assessment was erroneous. Indiana MHC filed an appeal with the Indiana Tax Court.[206]

On appeal, Indiana MHC argued the Indiana Board's determination was "arbitrary and capricious because it disregarded the 'substantial evidence' it presented demonstrating that Amberly Pointe's 2007 assessment should have been much lower: it had an occupancy rate of only 40% and its green space was 'worthless.'"[207] The Tax Court disagreed, determining that Indiana MHC's income capitalization approach failed to comply with generally accepted appraisal principles since it did not consider occupancy rate of comparable properties in the market.[208] The Court also highlighted that the administrative record contained "evidence that indicate[d] Amberly Pointe's low occupancy rate of 40% was

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201. *Id*. at *4.

202. 987 N.E.2d 1182 (Ind. T.C. 2013).

203. *Id*. at 1183. An individual owning a manufactured home may rent a pad to place the home, which includes a driveway off the street, footers on which the home is placed, and utility hook-up. *Id*. at 1183 n.1.

204. *Id*. at 1184.

205. *Id*.

206. *Id*.

207. *Id*. at 1185.

208. *Id*. at 1185-86.

actually the anomaly in the market place."[209] As such, the Tax Court affirmed the Indiana Board's final determination, concluding Indiana MHC's income capitalization approach lack probative value and the 2007 assessment of Amberly Pointe was proper.[210]

6. Shelby County Assessor v. CVS Pharmacy, Inc. #6637-02.[211]—This case concerns a CVS general retail store and pharmacy located in Shelbyville, Indiana.[212] Hook-SupeRx, Inc. ("Hooks") leased the CVS from SCP 2001A-CSF-19 LLC (SCP), pursuant to a twenty-two year lease term in which Hooks paid monthly lease payments of $27.20 per square foot. Hooks was responsible for the property's annual property tax liabilities. For the 2007 and 2008 tax years, the Assessor assessed the subject property at $2,375,600 and $2,459,700. CVS filed appeals with the Shelby County PTABOA, alleging the values were too high. The PTABOA affirmed the assessments and CVS subsequently filed appeals with the Indiana Board. The Indiana Board conducted a hearing where both parties agreed the income capitalization method was the most reliable method by which to value the property. However, in presenting their income capitalization method calculations, the parties "differed in one major aspect: CVS used market rents and the Assessor used contractual rent."[213] The Indiana Board was not persuaded by either party's calculation and issued a final determination upholding the Assessor's *original* assessments.[214] The Indiana Board explained "it was 'not convinced' that either party presented 'a more credible or reliable indication of market value-in-use for the subject property than the assessments . . . [originally] established for 2007 and 2008.'"[215] The Assessor, not CVS, appealed the Indiana Board's final determination to the Indiana Tax Court.[216]

On appeal, the Assessor argued the contractual rent of $27.20 per square foot should have been used in the income approach, and by failing to do so the Indiana Board "completely ignored the subject property's utility as a fully-functioning CVS store."[217] The Tax Court acknowledged the Indiana Board had determined CVS provided probative evidence demonstrating there was a significant difference between the subject property's market rent and contractual rent.[218] Due to this evidence, the Indiana Board explained that "the Assessor's use of the subject property's contractual rent in her income approach likely was capturing more than the value of the real property (*i.e.,* the 'sticks and bricks') in her computation."[219] As such, the Indiana Board did not give the Assessor's approach

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209. *Id*. at 1186.
210. *Id*.
211. 994 N.E.2d 350 (Ind. T.C. 2013).
212. *Id*. at 351.
213. *Id*.
214. *Id*. at 351-53.
215. *Id*. at 352.
216. *Id*. at 353.
217. *Id.*
218. *Id*. at 354.
219. *Id*.

any weight. The Tax Court agreed with the Indiana Board and explained that case law supported such a decision. Accordingly, the Tax Court affirmed the Indiana Board final determination.[220]

7. Orange County Assessor v. Stout.[221]—James E. Stout owns 9.12 acres of land in West Baden Springs, Indiana, which was assessed at $8,000 for the 2008 tax year.[222] For the 2009 tax year, his land's assessed value increased to $45,600 because the Assessor reclassified 8.12 acres of "agricultural" land to "residential excess" land. In May 2010, Stout filed an appeal with the Orange County PTABOA, but when the PTABOA failed to issue a decision after 120 days, Stout sought relief from the Indiana Board. During the Indiana Board's hearing, Stout argued Indiana Code section 6-1.1-15-17 required the Assessor to prove the assessment was correct because it had increased by more than 5% from 2008 to 2009. Conversely, the Assessor claim that because Indiana Code section 6-1.1-15-17 only applied to assessment appeals involving March 1, 2012 assessments because the statue was first effective July 1, 2011. As such, because Stout was appealing his 2009 assessment, the Assessor argued Indiana Code section 6-1.1-15-17 did not apply, which meant Stout bore the burden of proving that his assessment was incorrect. The Indiana Board determined both that the Assessor bore the burden of proving the land assessment was proper and the Assessor had failed to meet this burden. The Assessor appealed to the Indiana Tax Court.[223]

On appeal, the Assessor contended the Indiana Board incorrectly applied the new burden of proof statute.[224] The Tax Court disagreed, explaining Indiana Code section 6-1.1-15-17 was not a "new" statute because its content had already been codified at Indiana Code section 6-1.1-15-1(p). Specifically, the General Assembly repealed Indiana Code section 6-1.1-15-1(p) and enacted section 6-1.1-15-17 to clarify its original intent in enacting Indiana Code section 6-1.1-15-1(p), which was "the 5% burden-shifting rule was to be applied not solely at the preliminary level of the administrative process (i.e., the PTABOA level), but throughout the entire appeals process."[225] Therefore, the Tax Court determined that "*as early as 2009,* the General Assembly deemed an annual increase in the assessed value of property in excess of 5% to automatically shift the burden of proof from the taxpayer (to demonstrate that the assessment was incorrect) to the assessing official (to demonstrate that the assessment was correct)."[226] Furthermore, the Court disagreed with the Assessor that the statutory "trigger" for the burden shifting is the assessment date.[227] Instead, the Court found the statute applied to the date the taxpayer challenges the assessment. When Stout appealed the assessment to the PTABOA on in May 2010, Indiana Code section 6-1.1-15-

220. *Id*.
221. 996 N.E.2d 871 (Ind. T.C. 2013).
222. *Id*. at 872.
223. *Id*.
224. *Id*. at 874.
225. *Id*.
226. *Id*.
227. *Id*. at 875.

1(p) was in effect, placing the burden of proof on the Assessor to establish the propriety of the assessment increase.

In the alternative, the Assessor argued she had met the burden because she provided a reasonable basis for reclassifying Stout's land.[228] The Court determined the Assessor had "changed the classification on Stout's land from 'agricultural' to 'residential excess' solely on the basis that she did not have a forest management plan or a timber harvesting plan for the property."[229] As such, the Tax Court found the Assessor failed to provide any evidence Stout was not using his property for an agricultural purpose and affirmed the final determination of the Indiana Board.[230]

8. Kildsig v. Warrick County Assessor.[231]—During the 2009 tax year, Douglas G. Kildsig owned 12.648 acres of land housing his residence, two pole barns, a lake, and just over eleven acres of woods.[232] The Warrick County Assessor assessed the property at $192,600, which Kildsig appealed first to the Warrick County PTABOA and then to the Indiana Board. At the Indiana Board hearing, Kildsig claimed that because his 2009 assessment was more than 5% greater than his 2008 assessment, the Assessor bore the burden of establishing the validity of his 2009 assessment pursuant to Indiana Code section 6-1.1-15-1(p). Kildsig also contended his assessment was incorrect because 11.648 acres were improperly classified as residential excess acreage rather than agricultural land. Conversely, the Assessor maintained the classification was proper because Kildsig did not use his land for any qualifying agricultural purpose. The Indiana Board issued a final determination finding Kildsig bore the burden of establishing the invalidity of his 2009 assessment because Indiana Code section 6-1.1-15-1(p) applied exclusively to PTABOA proceedings. The Indiana Board also determined Kildsig's land classification was proper and upheld his assessment. Kildsig appealed to the Tax Court.[233]

On appeal, Kildsig contended the Indiana Board's determination finding Indiana Code section 6-1.1-15-1(p) applied exclusively to PTABOA proceedings was incorrect as a matter of law.[234] The Tax Court explained it had recently decided a case finding "the burden-shifting rule contained in Indiana Code [section] 6-1.1-15-1(p), as clarified by Indiana Code [section] 6-1.1-15-17, applied throughout the entire appeals process, not just in the initial proceedings."[235] As such, the Court determined the Indiana Board's determination that Indiana Code section 6-1.1-15-1(p) did not apply to its proceedings was contrary to the law. Next, Kildsig claimed the Indiana Board's determination that 11.648 acres of his land was "excess residential acreage" was not supported by

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228. *Id*.
229. *Id*. at 876.
230. *Id*. at 876-77.
231. 998 N.E.2d 764 (Ind. T.C. 2013).
232. *Id*. at 765.
233. *Id*.
234. *Id*. at 766.
235. *Id*. (citing Orange Cnty. Assessor v. Stout, 996 N.E.2d 871, 872-75 (Ind. T.C. 2013)).

substantial evidence. The Tax Court noted the Assessor and Kildsig had presented conflicting evidence at the Indiana Board hearing, and the Indiana Board found the Assessor's evidentiary presentation more persuasive.[236] As such, the Tax Court determined Kildsig was simply asking the Court to reweigh the evidence, which it would not do.[237] Accordingly, the Tax Court reversed the Indiana Board's determination with respect to the application of Indiana Code section 6-1.1-15-1(p) but affirmed the Indiana Board's determination with respect to the classification of Kildsig's property.[238]

9. Kellam v. Fountain County Assessor.[239]—In July 2009, Roderick E. Kellam and Carol Meyers, an unmarried couple, bought a house together in Fountain County.[240] When applying for homestead and mortgage deductions at the Fountain County Auditor's office, Kellam and Myers were instructed to only print their names, addresses, and sign the application for the homestead deduction.[241] An Auditor's employee informed them the Auditor's office "would fill everything else out."[242] As such, neither Kellam not Myers filled out the section on the homestead deduction application pertaining to other properties owned by the applicant in other counties. Kellam and Myers were instructed to complete the entire mortgage deduction application, which required them to list the other properties they owned in Indiana. Kellam received a homestead deduction on the Fountain County property in 2009 and the March 2011 Fountain County property tax statement included the homestead deduction for the 2010 tax year as well. On March 16, 2011, "the Fountain County Treasurer sent a letter to Kellam and Myers stating that the 'Assessor has requested a C of E to correct your parcel' . . . [and] 'a new tax statement [is enclosed] for the above mentioned parcel.'"[243] The new property tax statement did not include the homestead deduction, and Kellam was informed it was because he still had a homestead deduction on his Wells County property. On May 9, 2011, Kellam "faxed the Fountain County Assessor a 'corrected' Wells County property tax statement indicating that he had successfully removed the Wells County homestead deduction."[244] Regardless, the Auditor denied Kellam's homestead deduction because "Myers already had a homestead deduction on her Grant County residence and had signed the Fountain County application."[245] Kellam filed a Petition for Correction of Error but the Fountain County PTABOA denied the petition. Kellam appealed to the Indiana Board, a hearing was conducted, and a

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236. *Id*. at 766-67.
237. *Id*. at 767.
238. *Id*.
239. 999 N.E.2d 120 (Ind. T.C. 2013).
240. *Id.* at 120-21.
241. *Id* at 121.
242. *Id.*
243. *Id*.
244. *Id*.
245. *Id*.

final determination was issued denying Kellam's deduction.[246] Kellam subsequently appealed to the Tax Court.[247]

On appeal, Kellam argued the Indiana Board's final determination was unsupported by substantial evidence and contrary to the law.[248] The Tax Court agreed, finding the Indiana Board incorrectly determined Kellam was not individually eligible for a homestead deduction on the co-owned Fountain County property.[249] The Court determined Kellam presented sufficient evidence he was eligible for a homestead deduction for the Fountain County property.[250] Specifically, Kellam presented a document demonstrating he did not receive a homestead deduction for his Wells County property in 2010. "[A]lthough the document indicated that [Kellam] received a $29,760 homestead deduction in 2010 [for the Wells County property], it also showed that he paid $477.08 in property taxes: the total amount of property tax due if the $29,760 homestead deduction was not applied."[251] At the Indiana Board hearing, the Assessor agreed with Kellam and presented no contradictory evidence. As such, the Court determined "a finding that Kellam did not qualify for a homestead deduction on the 2010 Fountain County property because he had a 2010 homestead deduction on a Wells County property is unsupported by substantial or reliable evidence."[252] Accordingly, the Tax Court reversed and remanded the Indiana Board's final determination.

10. Hutcherson v. Ward.[253]—In May 2003, the Hutchersons filed for the homestead standard deduction with the Hamilton County Auditor.[254] When the Hutchersons paid their property taxes on November 9, 2012, they were informed their homestead deduction was not "active." Upon further investigation, the Hutchersons discovered they had not received the homestead deduction for the years since they filed their application.[255] The County Auditor corrected the error for the immediately preceding three tax years (2008, 2009, 2010).[256] To correct the error for the 2004 through 2007 tax years, the Hutchersons filed four petitions to correct error with the County Auditor, claiming that through an error of omission by a county official, they were not given credit for the homestead deduction as permitted by law. The Hutchersons did not file any claims for refund with the petitions. The Hamilton County PTABOA denied all four petitions and the Hutchersons appealed to the Indiana Board. Likewise, the Indiana Board denied the petitions, stating they were not timely filed within the three-year

246. *Id*. at 121-22.
247. *Id* at 122.
248. *Id*.
249. *Id*. at 122-24.
250. *Id* at 124.
251. *Id*.
252. *Id.*
253. 2 N.E.3d 138 (Ind. T.C. 2013).
254. *Id*. at 139.
255. *Id*. at 139-40.
256. *Id*. at 140.

statute of limitation. The Hutchersons appealed to the Tax Court and the Assessor subsequently filed a motion to dismiss pursuant to Indiana Trial Rules 12(B)(1) and 12(B)(6).[257]

In its motion, the Assessor argued both that the Tax Court lacked subject matter jurisdiction and the Hutchersons failed to state a claim upon which relief could be granted because the Hutchersons had failed to timely file.[258] The Tax Court determined it had subject matter jurisdiction despite the Hutchersons failure to timely file because such a failure does "not rob the Court of subject matter jurisdiction, but would merely prevent the Court from exercising its subject matter jurisdiction to resolve the matter."[259] Next, the Tax Court determined that, unlike Indiana's Refund Statute, "no statutory language limiting the time in which to file a petition to correct error exists" in the Petition to Correct Error Statute.[260] Therefore, the Court refused to read into the statute a three-year limitation requirement when one did not exist.

Although the Hutchersons had not filed a claim for refund with their petition to correct error, the Assessor contended the Hutchersons claim was nonetheless time barred by the Refund Statute, which expressly imposes a three year limitation period for filing a refund.[261] The Court noted several distinctions between the Refund Statute and the Petition to Correct Error Statute and determined these "disparate requirements . . . suggest their independence."[262] Therefore, because the Hutchersons had not filed a refund, the Court refused to apply the Refund Statute to their case.[263] The Court acknowledged it was "well aware that this decision has the potential to open the floodgates for petition to correct error appeals."[264] However, the Court explained that while it supports the public policy favoring limitations of claims, it "declines to invade the domain of the Legislature and write in a limitations period where none exists."[265] Accordingly, the Tax Court denied the Assessor's motion to dismiss.

11. Grabbe v. Carroll County Assessor.[266]—Vern Grabbe owns two contiguous parcels of agricultural land in Carroll County, one consisting of 3.664 acres and containing one hog building and the other parcel consisting of 19.266 acres and containing two hog buildings and a utility shed.[267] For the 2009 tax year, the subject property was assessed at $274,500, which Grabbe challenged first with the Carroll County PTABOA and then with the Indiana Board. At the Indiana Board hearing, Grabbe "presented four self-prepared analyses to

257. *Id*.
258. *Id*. at 140-41.
259. *Id*. at 141.
260. *Id*. at 142.
261. *Id*. at 143.
262. *Id*. at 143-44.
263. *Id*. at 144.
264. *Id*.
265. *Id*.
266. 1 N.E.3d 226 (Ind. T.C. 2013).
267. *Id*. at 227.

demonstrate that the assessed value of the subject property should only be $218,262."[268] The Indiana Board issued a final determination finding Grabbe's analyses lacked probative value and upholding the assessment. Grabbe appealed to the Tax Court.

On appeal, Grabbe contended that "because he presented probative evidence consisting of his analyses using an allocation approach, a cost approach, an income approach, and a market data approach, the Indiana Board erred in upholding his property's $274,500 assessment."[269] The Tax Court analyzed each of Grabbe's approaches in turn. First, the Court noted Grabbe's allocation approach "appeared to incorporate two different appraisal methodologies, the allocation method and the abstraction method," but the administrative record did not indicate whether "these two methodologies comported with any generally accepted appraisal principles, which is required to rebut the presumption of accuracy accorded to an assessment made pursuant to Indiana's assessment guidelines."[270] As such, the Court determined Grabbe's allocation approach lack probative value.

With respect to his cost approach, Grabbe estimated the value of the property "by taking an obsolescence depreciation adjustment for the hog buildings' antiquated designs and use of lagoon manure storage systems."[271] The Tax Court determined the Indiana Board was correct in finding "that Grabbe's cost approach lacked probative value because it failed to link the identified causes of obsolescence to an actual loss in property value."[272] Similarly, the Tax Court determined the Indiana Board properly rejected Grabbe's income approach "because Grabbe improperly deducted property taxes as an expense and he did not support his use of a 20% capitalization rate."[273]

Finally, the Indiana Board had found Grabbe's market data approach lacked probative value "because he neither explained nor submitted any documentary evidence to indicate how he determined the value of the homes, the other land, and the tool sheds on the comparison farms."[274] Grabbe contended the certified administrative record contained evidence of the values and items, but because Grabbe had failed to present such evidence to the Indiana Board, the Tax Court was not permitted to consider it. Accordingly, the Tax Court determined all four of Grabbe's approaches lack probative value and affirmed the Indiana Board's determination.[275]

12. Grabbe v. Carroll County Assessor.[276]—Vern Grabbe owns two contiguous parcels of agricultural land in Carroll County, one consisting of 3.664

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268. *Id.*
269. *Id*. at 228.
270. *Id*. at 229.
271. *Id*.
272. *Id*. at 230.
273. *Id*. at 230-31.
274. *Id*. at 232.
275. *Id*. at 232-33.
276. 1 N.E.3d 233 (Ind. T.C. 2013).

acres and containing one hog building and the other parcel consisting of 19.266 acres and containing two hog buildings and a utility shed.[277] For the 2010 tax year, the subject property was assessed at $306,900, which was an 11% increase over the previous year's assessment of $274,500.[278] Grabbe challenged the assessments first with the Carroll County PTABOA and then with the Indiana Board.[279] At the Indiana Board hearing, Grabbe presented "four self-prepared analyses as evidence to demonstrate that the assessed value of the subject property should only be $218,862. In response, the Assessor conceded that the valuations of the hog buildings on [one] parcel were incorrect, but argued that the original assessment should nonetheless be upheld."[280] The Indiana Board issued a final determination, which valued Grabbe's property for 2010 the same as its 2009 assessed value of $274,500. Grabbe appealed to the Tax Court.

On appeal, Grabbe requested the Tax Court reduce his assessment to $218,862 for the 2010 tax year, the value for which Grabbe argued before the Indiana Board.[281] First, Grabbe argued the Indiana Board incorrectly determined his evidence lacked probative value and thus incorrectly found he had failed to make a *prima facie* case.[282] The Tax Court noted Grabbe had previously appealed an assessment before the Tax Court using the same four-factor analyses.[283] In the previous case, the Court determined Grabbe's evidence lacked probative value because "he failed to show that his analyses comported with generally accepted appraisal principles."[284] Therefore, given Grabbe used the same four analyses to estimate the property's 2010 value, the Tax Court agreed with the Indiana Board that the evidence lacked probative value. Next, Grabbe argued the Indiana Board's determination that the 2010 assessment should be the same as the 2009 assessment was contrary to the law. The Court disagreed, explaining it was reasonable for the Indiana Board to apply the property's 2009 assessment "given that neither of the parties presented probative evidence as to the subject property's market value-in-use for the 2010 tax year."[285] Accordingly, the Tax Court affirmed the Indiana Board's final determination.

B. Local Tax

1. Brown v. Department of Local Government Finance.[286]—Gregg Township is a rural township located in Morgan County, Indiana with a population of

277. *Id*. at 233.
278. *Id*. at 233-34.
279. *Id*. at 234.
280. *Id*.
281. *Id*. at 234-35.
282. *Id*. at 234.
283. *Id*. at 235.
284. *Id*.
285. *Id*. at 236.
286. 989 N.E.2d 386 (Ind. T.C. 2013).

approximately 3,000 and no incorporated municipalities within its boarders.[287] The Township contracts with a private volunteer fire department for its fire protection services. In June 2009, the Gregg Township Board issued a resolution authorizing the Township to incur a loan for the purchase of a fire engine to replace the Township's current 1992 Darley.[288] The loan proceeds were not to exceed $400,000. Dora Brown, Ben Kindle, and Sonjia Graf, as residents of Gregg Township, filed an objection petition.[289] The petition argued the Township's current fire engine was sufficient to service the Township's needs and, even if the fire engine needed replaced, Gregg Township taxpayers should not bear the entire cost of the loan for the fire engine since it would also be used by the fire department to service other townships.[290] The DLGF held a hearing and issued a final determination approving the loan in its entirety.[291] The Petitioners appealed to the Indiana Tax Court.[292]

On appeal, Petitioners raised three arguments.[293] First, the Petitioners asserted the DLGF's final determination failed to consider the eight factors set forth in Indiana Code section 36-6-6-14(d) in concluding the Township was authorized to borrow money.[294] The Tax Court determined the DLGF was not required to consider these eight factors because it approved the Townships loan under a different statute, Indiana Code section 36-8-13, which did not require analysis of the eight factors.[295] Second, the Petitioners argued the DLGF'S final determination was not supported by substantial evidence.[296] The Tax Court declined to entertain this argument because it determined the Petitioners were asking the Court to reweigh the evidence, which it would not do.[297] Finally, the Petitioners contended the DLGF's final determination violated article 1, section 23 and article 10, section 1 of the Indiana Constitution because it required Gregg Township taxpayers to bear the entire cost of the loan even though the fire department would use the new fire engine to respond to calls outside of Gregg Township.[298] Although the Petitioners had raised this argument at the administrative hearing, the DLGF failed to address it in its final determination and the Tax Court noted the parties had presented competing evidence on the issue.[299] Therefore, the Tax Court remanded the issue to the DLGF to review the evidence and make a final determination regarding the constitutionality issue. As

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287. *Id*. at 387.
288. *Id*.
289. *Id*. at 386-87.
290. *Id*. at 387.
291. *Id*. at 387-88.
292. *Id*. at 388.
293. *Id*.
294. *Id*. at 388-89.
295. *Id*. at 389.
296. *Id*.
297. *Id*. at 390.
298. *Id*.
299. *Id*. at 391.

such, the Tax Court affirmed in part and remanded in part the DLGF's final determination.[300]

2. Board of Commissioners of County of Jasper v. Vincent.[301]—On June 7, 2010, the Jasper County Board of Commissioners issued a resolution seeking to establish a cumulative building fund and levy for equipping and remodeling the Jasper County Hospital.[302] The Commissioner's resolution requested Jasper County Council "to levy a tax, not to exceed $0.007 on each $100 of assessed value, on all taxable property within the county for up to three years."[303] The Council approved the Commissioners request but the DLGF subsequently denied it. The Commissioners filed an appeal with the Tax Court and moved for summary judgment.[304]

On appeal, the Commissioners argued the plain language of Indiana Code section 16-22-5-4[305] does not limit the number of times a county hospital board may seek to establish a cumulative building fund and levy.[306] The DLGF's interpretation of the statute was that it provides for only one cumulative building fund and levy during the service life of a county hospital.[307] The DLGF raised three arguments in support of its interpretation: (1) "because other cumulative building fund statutes lack term limits entirely and use lower tax rates, the term limits and higher tax rates in Indiana Code [section] 16-22-5-4 necessarily create a one-time, non-renewable fund and levy;"[308] (2) "because the county hospital cumulative building fund's statutory scheme provides alternative financing options (i.e., bonds and loans), Indiana Code [section] 16-22-5-4 must restrict county hospital cumulative building funds to one 12 year period;"[309] and (3) a restrictive interpretation of the statute protects taxpayers from continually paying for large cumulative building fund levies.[310] However, the Tax Court was not persuaded. Instead, the Court looked to the statutory history of Indiana Code section 16-22-5-4, determining the statute's purpose intended to allow recurring cumulative building funds and levies and did not seek to limit the number of funds and levies that may be established during the life of a county hospital.[311] As such, the Tax Court reversed and remanded the DLGF's final determination

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300. *Id*.

301. 988 N.E.2d 1280 (Ind. T.C. 2013).

302. *Id*. at 1281.

303. *Id*.

304. *Id*.

305. "To provide for the cumulative building fund, a tax on all taxable property within the county may be levied annually for not more than twelve (12) years and may not exceed eleven and sixty-seven hundredths cents ($0.1167) on each one hundred dollars ($100) of assessed valuation of property in the county." IND. CODE § 16-22-5-4 (2010).

306. *Vincent*, 988 N.E.2d at 1281.

307. *Id*. at 1282.

308. *Id*. at 1283.

309. *Id*. at 1284.

310. *Id*.

311. *Id*. at 1282-83.

denying the Commissioner's request.[312]

C. Inheritance Tax

1. Odle v. Indiana Department of State Revenue.[313]—On February 12, 2009, Floyd L. Odle died testate.[314] Because Odle's wife preceded him in death and the couple never had children of their own, Floyd left his entire estate to several collateral relatives, including nephews, great nieces, and great nephews. The Estate filed its Indiana inheritance tax return classifying each beneficiary as either Class B or Class C transferees. After remitting its inheritance tax payment, the Estate filed a refund claim with the Department, alleging all of Odle's beneficiaries should have been classified as Class A transferees. The Department denied the refund claim and the Estate appealed to the probate court. The probate court determined Odle's beneficiaries had been properly classified as Class B and Class C transferees. The Estate subsequently appealed to the Indiana Tax Court.[315]

On appeal, the Estate argued "the creation of 'classes' for the determination and collection of inheritance tax that base both the amount of exemption and tax rate on the relationship between a decedent and a transferee violates Indiana's Constitution Article 1, Sections 1, 12, 23, and Article 4, Section 22."[316] The Department maintained the Indiana Supreme Court had found the inheritance tax classification scheme constitutional in *Crittenberger v. State Savings & Trust Company,* over ninety years ago. The Tax Court agreed with the Department in so much as the holding in *Crittenberger* resolved the Estate's Article 1, Section 1 and Article 1, Section 23 claims in favor of the Department.[317] Specifically, *Crittenberger* provided that inheritance tax classification schemes distinguishing between lineal relatives, collateral relatives, and strangers are both equitable and reasonable when the classifications and statutory schemes operate on the classes uniformly.[318]

With respect to the Estate's remaining constitutional claims, the Tax Court determined the inheritance tax classification scheme did not violate Section 12 by imposing inequitable administration costs and remedies because the Legislature had "provided the Estate with four alternative remedies by which to challenge the determination and collection of inheritance tax."[319] The Court expressly noted the Estate had already taken advantage of one such remedy, the claim for refund process. The Tax Court also determined the inheritance tax classification scheme did not violate Article 4, Section 22 by enacting "special"

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312. *Id*. at 1284.
313. 991 N.E.2d 631 (Ind. T.C.), *review denied,* 997 N.E.2d 356 (Ind. 2013).
314. *Id*. at 633.
315. *Id*.
316. *Id*. at 634.
317. *Id*. at 635.
318. *Id*.
319. *Id*. at 636.

laws regarding "the assessment and collection of taxes for State, county, township, or road purposes."[320] Specifically, the Tax Court explained the inheritance tax classification scheme was a general law because it applies to beneficiaries throughout the entire state in the same manner.[321] Accordingly, the Court determined the Estate failed to prove the inheritance tax classification scheme violated the Indiana Constitution.[322] As such, the Court affirmed the probate court's determination that Odle's beneficiaries were properly classified as Class B and Class C transferees.[323]

D. Sales and Use Tax

1. Miller Pipeline Corp. v. Indiana Department of State Revenue.[324]—On September 10, 2009, the Department completed an audit of Miller Pipeline for tax years 2005 through 2007.[325] The Department issued proposed assessment against Miller Pipeline for tax years 2006 and 2007, which Miller Pipeline paid in their entirety. On March 24, 2010, Miller Pipeline filed a claim with the Department seeking a refund of sales and use taxes it paid between 2005 and 2007. The Department denied the refund claim and Miller Pipeline appealed to the Indiana Tax Court.[326] Miller Pipeline subsequently filed a motion for summary judgment asserting its refund claim had been erroneously denied and provided the Tax Court with 15 documents, exhibits 13 through 27, to show there was no genuine issue of material fact.[327]

The Tax Court did not reach the merits of Miller Pipeline's motion, but instead denied the motion due to "numerous infirmities" with Miller Pipeline's designated evidence, exhibits 13 through 27.[328] To address the infirmities yet conserve judicial resources, the Tax Court only specifically addressed two of Miller Pipeline's issues. In the first issue addressed by the Court, Miller Pipeline designated Exhibits 13, 14, and 15 as its evidence.[329] However, (1) Miller Pipeline did not identify the specific parts of those exhibits containing the material fact or facts upon which it relied; (2) none of the exhibits were paginated, despite being six and eleven pages long; and (3) none of the exhibits or any of the documents within each of the exhibits were sworn to in any way.[330] Due to these infirmities, the Tax Court determined Exhibits 13, 14, and 15 were inadmissible. In the second issue addressed by the Court, Miller Pipeline

320. *Id*.
321. *Id*. at 636-37.
322. *Id*. at 637.
323. *Id*.
324. 995 N.E.2d 733 (Ind. T.C. 2013).
325. *Id*. at 734.
326. *Id*.
327. *Id*. at 734-35.
328. *Id*. at 735.
329. *Id*. at 735-36.
330. *Id*. at 736.

designated Exhibit 26, a photocopy of a one-page form letter, as its designated evidence.[331] The Court determined Exhibit 26 did not provide any facts that would support the "legal conclusion" Miller Pipeline was advancing.[332] The Court also noted the "mere fact that the letter was signed and affirmed does not make it an affidavit."[333] Due to these infirmities, the Court determined Exhibit 26 was inadmissible. As such, the Tax Court denied Miller Pipeline's motion for summary judgment because the evidence submitted in support of the motion had not been properly designated and was inadmissible.[334]

2. Orbitz, LLC v. Indiana Department of State Revenue.[335]—At issue in this matter was Orbitz, LLC's request to have certain documents within the judicial record placed under seal so the general public could not access them.[336] Orbitz is a Delaware corporation providing online travel reservation services with its principal place of business in Chicago, Illinois.[337] Between 2004 and 2006, Orbitz's customers booked hotel rooms in Indiana through Orbitz's website ("bookings at issue"). In 2007, the Department completed an audit of Orbitz, determined Orbitz had been deficient in remitting Indiana's gross retail sales and county innkeeper taxes on the bookings at issue, and issued proposed assessments against Orbitz. Orbitz protested the assessments, but the Department, in two Letters of Findings, denied Orbitz's protest. Orbitz appealed to the Tax Court. Orbitz subsequently filed a motion for summary judgment with designated evidence in support thereof. Orbitz also requested the Court to hold a hearing and issue an order, pursuant to Indiana Code section 5-14-3-5.5(c), declaring certain designated evidence was "confidential information" and restricting it from public access.[338] Orbitz explained its designated evidence included contracts it had with three Indiana hotels, which contained trade secrets and financial information to which the public should not have access.[339]

On September 17, 2013, the Court held a hearing on Orbitz's request and issued an order determining whether Orbitz's contracts are, or contain, "trade secrets."[340] The Court determined Orbitz's contracts had four characteristics of trade secrets: (1) the contracts contain and are thus "information";[341] (2) Orbitz derived "independent economic value from this pricing information";[342] (3) "the pricing information contained in the contracts is not readily ascertainable through proper means by others who can obtain economic value from the information's

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331. *Id*. at 737.
332. *Id*. at 738.
333. *Id*.
334. *Id*.
335. 997 N.E.2d 98 (Ind. T.C. 2013).
336. *Id*. at 98-99.
337. *Id*. at 99.
338. *Id*. at 99-100.
339. *Id*. at 99.
340. *Id*. at 100.
341. *Id*. at 101.
342. *Id*.

disclosure or use";[343] and (4) Orbitz had taken reasonable steps to maintain the confidentiality of the information contained within the contracts.[344] Therefore, because the contracts had four characteristics of trade secrets, the Court determined "they fall within the mandatory exceptions to the general rule of public access set forth in APRA and Administrative Rule 9."[345] As such, the Court granted Orbitz's request to prohibit public access to the information in the court record.[346]

3. Garwood v. Indiana Department of State Revenue.[347]—This case was Virginia Garwood's second appeal to the Indiana Tax Court.[348] On June 2, 2009, the Department served Garwood and her daughter with several jeopardy tax assessments, stating Garwood and her daughter owed over $250,000 in sales tax, interest, and penalties on their sales of dogs for the January 1, 2007 through April 30, 2009 tax period. After Garwood and her daughter indicated that they could not immediately pay the liability, the Department seized all 240 dogs on their premises pursuant to jeopardy tax warrants and subsequently sold them to the U.S. Humane Society for a total of $300.00. The Department applied $175.48 of the proceeds to Garwood's purported tax liability.[349]

On June 29, 2009, Garwood filed her first appeal with the Tax Court and the Department moved to dismiss, alleging the Court lacked subject matter jurisdiction because the same action was pending in Harrison Circuit Court.[350] The Tax Court denied the Department's motion. On August 19, 2011, the Tax Court affirmed its holding in *Garwood I* and found the jeopardy assessments void as a matter of law because they were not issued in accordance with Indiana Code section 6-8.1-5-3. Accordingly, on August 29, 2011, Garwood filed a refund request with the Department for $122,684.50.[351] While Garwood's claim was pending, the Department filed a Petition for Review with the Indiana Supreme Court. Although the Petition was initially granted, five days after oral arguments, the Supreme Court vacated its order granting review because it had been "improvidently" granted.[352]

In June 2012, Garwood received a refund check from the Department for $175.48.[353] The next month, the Department "issued several proposed assessments to Garwood, providing that she owed nearly $60,000 in sales tax, interest, and penalties for the January 1, 2007 through June 30, 2009 tax

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343. *Id*. at 102.
344. *Id*.
345. *Id*.
346. *Id*. at 103.
347. 998 N.E.2d 314 (Ind. T.C. 2013).
348. *Id*. at 316.
349. *Id.*
350. *Id.*
351. *Id*. at 317.
352. *Id*.
353. *Id.*

period."[354] Garwood protested the assessments and the Department held a hearing, but it did not issue a final determination. On August 27, 2012, Garwood filed her second appeal with the Tax Court, claiming the Department had failed to rule on her claim. The Department filed a motion to dismiss, alleging the Tax Court did not have subject matter jurisdiction of Garwood's case.[355]

In its motion to dismiss, the Department claimed the Court lacked subject matter jurisdiction because Garwood's case did not satisfy the "arising under" requirement of Indiana Code section 33-26-3-1.[356] Specifically, the Department maintained Garwood's case was neither a "valid" refund claim nor involving the collection of a tax. The Department argued Garwood's case, instead, sought to recover monies allegedly not paid or credited to her by mistake. The Tax Court was not persuaded by the Department's claims, explaining "Indiana Code [section] 6-8.1-9-1 provides, in relevant part, '[i]f a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department.'"[357] Not only did the Court determine Garwood's case fell within the statute, but the Court also noted that "in petitioning the Indiana Supreme Court to review *Garwood II,* the Department acknowledged that Garwood had already filed a refund claim."[358] Furthermore, the Court explained the Indiana Supreme Court has held "that the 'arising under Indiana's tax law' requirement is to be broadly construed."[359] Accordingly, the Court determined Garwood's case was both a valid refund claim and arose under the Indiana tax laws.

Finally, the Court explained that although the Department had yet to issue a final determination in Garwood's case, Indiana Code section 6-8.1-9-1 allows a claim to be filed with the Tax Court if the Department has failed to issue a final determination within 180 days of the claim's filing.[360] Given Garwood filed her second appeal with the Tax Court more than 180 days following the filing of her claim with the Department, she satisfied the final determination or exhaustion of administrative remedies requirement of Indiana Code section 33-26-3-1.[361] Therefore, the Court denied the Department's motion to dismiss.

E. Corporate Income Tax

1. Vodafone Americas Inc. v. Indiana Department of State Revenue.[362]— During 2005 through 2008, Vodafone was a Delaware corporation not domiciled in Indiana, owning a 45% interest in Cellco Partnership, a general partnership

354. *Id*.
355. *Id*.
356. *Id*. at 318.
357. *Id*. at 319.
358. *Id*.
359. *Id*. at 320.
360. *Id*. at 320-21.
361. *Id*. at 321.
362. 991 N.E.2d 626 (Ind. T.C. 2013).

also organized in Delaware.[363] Cellco, which was doing business as Verizon Wireless, provided wireless voice and date services and communication equipment to customers throughout the United States, including Indiana.[364] After receiving its distributive shares of Cellco income, Vodafone filed Indiana adjusted gross income tax returns as a portion of its income was attributable to and taxable in Indiana. Vodafone subsequently amended its returns, seeking a refund on the basis it had erroneously determined its income was derived from sources in Indiana. The Department denied the claim for refund. Vodafone appealed to the Indiana Tax Court and filed a motion for summary judgment.[365]

On appeal, Vodafone argues it did not have adjusted gross income derived from sources within Indiana, under Indiana Code section 6-3-2-2(a)(1)-(5),[366] because its interest in Cellco was intangible personal property and such income was not attributable to Indiana under Indiana Code section 6-3-2-2.2(g).[367] Indiana Code section 6-3-2-2.2(g) provides that "[r]eceipts in the form of dividends from investments are attributable to this state if the taxpayer's commercial domicile is in Indiana."[368] Being that Vodafone was not commercially domiciled in Indiana, it argued its income received from Cellco was not derived from sources within Indiana and thus not taxable.[369] The Tax Court determined "dividends from investments" as used in Indiana Code section 6-3-2-2.2(g) was different than the general term "dividends" as used in Indiana Code section 6-3-2-2, which is Indiana's sourcing statute. Specifically, "'dividends from investments' reflects the distinction between operational income and investment income, a key constitutional concept in the attribution of income among the states."[370] As such, the Court determined the key question was whether the income from Cellco "had the character of operational income or investment income because if it was operational income, it was not income in the form of 'dividends from investments' under Indiana Code [section] 6-3-2-2(g)."[371]

The Tax Court determined that because Vodafone was a partner in Cellco, a general partnership, the income received from the partnership has the character of operational income, making Vodafone's income not income in the form of

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363. *Id*. at 626.

364. *Id*. at 627.

365. *Id*.

366. "[A]djusted gross income derived from sources within Indiana" meant: "(1) income from real or tangible personal property located in [Indiana]; (2) income from doing business in [Indiana]; (3) income from a trade or profession conducted in [Indiana]; (4) compensation for labor or services rendered within [Indiana]; and (5) income from . . . intangible personal property if the receipt from the intangible [was] attributable to Indiana under [Indiana Code § 6-3-2-2.2]." IND. CODE § 6-3-2-2(a)(1)-(5) (2005) (amended 2011).

367. *Vodafone*, 991 N.E.2d at 627.

368. IND. CODE § 6-3-2-2.2(g) (2005).

369. *Vodafone*, 991 N.E.2d at 628.

370. *Id*.

371. *Id*.

"dividends from investment" under Indiana Code section 6-3-2-2(g).[372] The Court further noted Vodafone was not a "passive investor" in Cellco, contrary to Vodafone's assertion, because it participated in Cellco's management by appointing Cellco's chief financial officer and it held certain veto rights by which it could block Cellco from taking specifically identified actions, such as entering new lines of business.[373] Therefore, the Court concluded Vodafone's income received as a partner of Cellco was not income in the form of "dividends from investments" under Indiana Code section 6-3-2-2(g).[374] As such, the Court denied Vodafone's motion for summary judgment.

2. United Parcel Serv., Inc. v. Indiana Department of State Revenue.[375]—United Parcel Service, Inc. ("UPS"), a package delivery company, excluded the income of its two foreign reinsurance companies, UPINSCO, Inc. and UPS Re Ltd ("the Affiliates"), on its 2001 consolidated Indiana corporate income tax returns.[376] UPS also amended its 2000 Indiana return to exclude the income of the Affiliates, requesting a refund in income tax initially paid. The Department audited UPS's tax returns and disallowed UPS's exclusion of the Affiliates' income, denying UPS's refund and issuing a proposed assessment for underpaid taxes. After protesting the assessment, UPS filed an appeal with the Tax Court, which issued summary judgment in UPS's favor, stating because UPS was "subject to" the premium tax, it was exempt from the adjusted gross income tax.[377] The Department appealed the Tax Court's decision to the Indiana Supreme Court. In June 2012, the Indiana Supreme Court reversed the Tax Court's grant of summary judgment to UPS, explaining the "the plain language of Indiana Code section 27-1-18-2 requires that all insurance companies—like UPINSCO and UPS Re—not 'organized under the laws of this state' must, at the very least, show they are 'doing business within this state' before the companies are entitled to an exemption from adjusted gross income [tax]."[378] The Indiana Supreme Court remanded the case for further proceeding after determining the evidence failed to show whether the Affiliates were doing business within Indiana.[379] In April 2013, UPS moved again for summary judgment and the Department filed a cross motion for summary judgment.

In ruling on the motions, the Tax Court was presented with two questions to resolve: "(1) whether foreign reinsurance companies must be physically present in Indiana to satisfy the statutory requirement of 'doing business' under Indiana Code [section] 27-1-18-2;" and (2) if so, whether providing an exemption from Indiana's corporate income tax to those companies "doing business" in Indiana

372. *Id*. at 628-29.
373. *Id*. at 629-30.
374. *Id*. at 630.
375. 995 N.E.2d 20 (Ind. T.C. 2013).
376. *Id*. at 21.
377. *Id*.
378. *Id*. at 21-22.
379. *Id*. at 22.

violates the Commerce Clause of the United States Constitution.[380] First, the Tax Court reviewed U.S. Supreme Court case law, Indiana case law, and other jurisdictions case law in determining a physical presence standard applies for purposes of a premiums tax.[381] Accordingly, the Tax Court "conclude[d] that foreign reinsurers must be physically present in Indiana to satisfy the statutory requirement of 'doing business' under Indiana Code [section] 27-1-18-2."[382] Next, the Tax Court determined the exemption provided in Indiana Code section 6-3-2-2.8(4) did not violate the Commerce Clause because insurance transactions were protected from commerce clause challenges.[383] Specifically, Congress's enactment of the McCarran-Ferguson Act and the U.S. Supreme Court's interpretation of the Act demonstrated the exemption provide in Indiana Code section 6-3-2-2.8(4) is not subject to commerce clause challenges.[384] Accordingly, the Tax Court denied UPS's motion for summary judgment and granted summary judgment to the Department.[385]

3. Caterpillar, Inc. v. Indiana Department of State Revenue.[386]—This case concerned the proper calculation of net operating losses (NOLs) available for carryover when a corporation receives dividend income from its foreign subsidiaries.[387] Caterpillar is a Delaware corporation commercially domiciled in Illinois.[388] Caterpillar manufactures construction and mining equipment, conducting its operations from several international and domestic locations, which includes a manufacturing plant in Lafayette, Indiana. During 2000 through 2003, Caterpillar directly or indirectly owned over 250 subsidiaries. Caterpillar received dividends from both its domestic subsidiaries and its foreign subsidiaries in each of the loss years at issue. When Caterpillar calculated its Indiana adjusted gross income tax liability for the loss years, it started with its federal taxable income, which did not include its U.S. Source Dividends but did include its Foreign Source Dividends (FSDs). As such, Caterpillar took the Foreign Source Dividend deduction under Indiana Code section 6-3-2-12 and reported Indiana NOLs on a separate company basis in each of the loss years. After an audit by the Department, it was determined Caterpillar's Indiana NOL deductions were inaccurate because they deducted Caterpillar's FSD income. The Department recalculated Caterpillar's NOLs for the loss years at issue by adding back the FSD income, which reduced the NOL amount available for carryback and carryforward.[389] Caterpillar protested the recalculation and the Department issued

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380. *Id*. at 21.

381. *Id*. at 23-24.

382. *Id*. at 24.

383. *Id*. at 24-26.

384. *Id*. at 25-26.

385. *Id*. at 26.

386. 988 N.E.2d 1269 (Ind. T.C. 2013), *trans. granted, opinion vacated*, 2014 WL 519607 (Ind. Feb. 6, 2014).

387. *Id*. at 1269-70.

388. *Id.* at 1270.

389. *Id.*

its Letter of Findings denying Caterpillar's protest.[390] Caterpillar appealed to the Tax Court and moved for summary judgment.[391] The Department subsequently filed a cross-motion for summary judgment.

On appeal, the only dispute was whether the deduction of FSDs under the FSD Statute applies when calculating Indiana NOLs under the NOL Statute.[392] The Department claimed "Caterpillar was not entitled to deduct its FSDs in calculating its Indiana NOLs because the NOL Statute neither expressly incorporates the FSD Statute nor specifically references deducting FSDs as a modification in Indiana Code [section] 6-3-1-3.5."[393] Conversely, Caterpillar argued "the method of calculating Indiana NOLs necessarily triggered the statutory deduction of FSDs because its FSD income was included in its adjusted gross income in calculating its Indiana NOL for each of the Loss Years."[394] The Tax Court determined it must answer two questions to determine whether deduction of FSD income is proper in calculating Indiana NOLs: (1) "is 'adjusted gross income' a component of the Indiana NOL Statute and, if so, (2) is Caterpillar's FSD income included in that adjusted gross income."[395]

Although "adjusted gross income" does not appeal in the Indiana NOL Statute, the Tax Court determined the components of the NOL calculation established its presence.[396] Specifically, Indiana Code section 6-3-1-3.5(b) provides that a corporation's adjusted gross income "is the same as '[federal] taxable income' as modified under Indiana Code [section] 6-3-1-3.5."[397] As such, the Tax Court determined "adjusted gross income" is a component of the Indiana NOL Statute if the calculation includes "federal taxable income" that is modified by Indiana Code section 6-3-1-3.5.[398] Accordingly, "adjusted gross income" is indirectly present in the NOL Statute.[399] Next, the Court determined Caterpillar's FSDs were included in its federal taxable income, in its federal NOL, and in its adjusted gross income within the Indiana NOL Statute.[400] Therefore, Caterpillar was entitled to deduct its FSD income under Indiana Code section 6-3-2-12 in

390. *Id.* at 1270-71.
391. *Id.* at 1271.
392. *Id.*
393. *Id.*
394. *Id*. at 1272.
395. *Id*.
396. *Id*.
397. IND. CODE § 6-3-1-3.5(b) (2003).
398. *Caterpillar*, 988 N.E.2d at 1272.
399. *Id*.
400. *Id*. at 1272-73.

calculating its Indiana NOLs.[401] Accordingly, the Tax Court granted summary judgment to Caterpillar and denied summary judgment to the Department.[402] On February 6, 2014, the Indiana Supreme Court granted transfer and vacated the Tax Court's opinion.[403]

401. *Id*. at 1273.

402. *Id*. at 1274.

403. Caterpillar, Inc. v. Ind. Dep't of State Revenue, 2014 WL 519607 (Ind. Feb. 6, 2014).

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A LOOK BACK: DEVELOPING INDIANA LAW POST-BENCH REFLECTIONS OF AN INDIANA SUPREME COURT JUSTICE

SELECTED DEVELOPMENTS IN THE INDIANA CONSTITUTIONAL LAW (1993-2012)

FRANK SULLIVAN, JR.[*] [**]

As a Justice of the Indiana Supreme Court for almost nineteen years (from late-1993 until mid-2012), I participated in the adjudication of claims implicating the Indiana Constitution. In this Article, I will describe some selected developments in Indiana Constitutional law during this timeframe. I will not attempt to try to cover everything, but instead will identify and detail several major themes and also discuss the varying approaches to answering constitutional questions deployed by my fellow justices and me.

I ask the reader to appreciate that this Article contains some highly personal reflections. It is not an argument but neither is it entirely objective.

I. THE RENAISSANCE IN STATE CONSTITUTIONAL LAW

When I joined the Indiana Supreme Court in November, 1993, a Renaissance in State Constitutional Law was underway. I call it a Renaissance (others have called it a Revolution[1]) because state constitutions had always been the subject of attention by lawyers and courts. Indiana re-wrote its Constitution from scratch in 1851, and the Indiana Supreme Court was routinely called on to interpret it.

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** This Article is dedicated collectively to former Chief Justice Randall T. Shepard, Justice Brent E. Dickson, former Justice Theodore R. Boehm, and Justice Robert D. Rucker, my cherished colleagues on the Indiana Supreme Court, whose careful and wise interpretation of the Indiana Constitution will be to the great benefit of future generations of Hoosiers. The five of us served together from November 19, 1999, until September 30, 2010.

1. Jack L. Landau, "*Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*," 79 OR. L. REV. 793 (2000).

Some of those decisions, like *Callender v. State*,[2] vindicating individual rights as a matter of state constitutional law, presaged by decades equivalent holdings by the United States Supreme Court under the United States Constitution.

It was nevertheless true that by the 1960s, state constitutions or, to be more precise, state constitutions' bills of rights, were not being invoked by courts, lawyers, or litigants as sources of individual liberties. It was 1969 when the first article appeared championing the use of state constitutions for such purposes and it should be a source of Hoosier pride that this absolutely seminal (and I do not exaggerate one whit) piece was written by an Indiana law professor, Robert Force of the Indiana University Robert H. McKinney School of Law, and published by an Indiana law journal, the *Valparaiso University Law Review*. Indeed, I borrow my characterization of the state of Indiana constitutional law in November, 1993, from Professor Force's title: "State 'Bill of Rights': A Case of Neglect and the Need for a Renaissance."[3]

The next big thing that happened was Justice William Brennan's unabashed call for state courts to construe their own state constitutions to protect individual liberties in the face of decreased United States Supreme Court activism to that end.[4] The Brennan argument, published in the Harvard Law Review, is the starting point for every discussion of modern state constitutionalism.[5]

The kindling for Indiana's Renaissance (Revolution if you prefer) in state constitutionalism was Chief Justice Randall T. Shepard's address to the Indiana Civil Liberties Union on September 17, 1988.[6] Entitled "Second Wind for the Indiana Bill of Rights," Shepard worked through a long list of Indiana Supreme Court decisions in which individual rights were vindicated based upon provisions of the Indiana Constitution.[7] "The story of the Indiana Supreme Court for most of the 1970s and 1980s, however, has been a different one," Shepard declared. "Until recently, our attention has been diverted from the jurisprudence of the Indiana Constitution."[8] And he called on Indiana lawyers to help assure "that the Indiana Constitution and the Indiana Supreme Court be strong protectors of civil

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2. 138 N.E. 817 (Ind. 1923) (holding that evidence discovered pursuant to an invalid search warrant could not be introduced over the objection of the defendant). The United States Supreme Court did not apply the exclusionary rule against the states until 1961. Mapp v. Ohio, 367 U.S. 643 (1961).

3. 3 VAL. U. L. REV. 125 (1969). For a tribute recognizing the Force article as beginning the contemporary discussion in State Constitutional interpretation, see Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 175 n. 17 (1970). To the same effect, see Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV., at xiii (1996).

4. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

5. *See* Landau, *supra* note 1, at 809 n.50 (collecting references to the Brennan article as the genesis of the state constitutional "revolution").

6. The address is published at 22 IND. L. REV. 575 (1989).

7. *Id.* at 577-80.

8. *Id.* at 580.

liberties."[9]

Shepard is the single most influential figure in all of Indiana legal history and this speech is likely his most influential contribution to it. From the moment of its delivery to today, its frank invitation to Indiana lawyers to press constitutional claims has been enthusiastically embraced by lawyers of all ideologies. Though a quarter-century-old, it is routinely referenced in legal brief and conversation alike.[10]

The Renaissance was not to come immediately, however, as Professor Patrick Baude—the Indiana Supreme Court's most clear-eyed and fearless critic[11]—made clear when he wrote four years later that while there was "no shortage of rhetorical commitment" to state constitutionalism, "[t]he striking fact [was] that in 1992 no Indiana appellate court found any state statute to be unconstitutional."[12] Baude went on to tweak the Indiana Supreme Court and Court of Appeals for interpreting "the state constitution . . . so narrowly to parallel the federal, even when the language and history of the two documents are so different."[13]

Not for long. Soon after the Baude article appeared, the Indiana Supreme Court handed down its decision in *Price v. State*.[14] In a scholarly tour de force, Chief Justice Shepard interpreted the Free Speech Clause, Art. I, § 9, of the Indiana Constitution without a nod to its First Amendment counterpart. "[T]here is within each provision of our Bill of Rights," Shepard wrote for the Court, "a cluster of essential values which the legislature may qualify but not alienate. A right is impermissibly alienated when the State materially burdens one of the core values which it embodies. Accordingly . . . the State may not punish expression when doing so would impose a material burden upon a core constitutional value."[15]

The "core constitutional value" at stake in *Price* was asserted to be political expression and the Court went to some length to "confirm that § 9 enshrines pure political speech as a core value."[16]

The words of *Price* are important. At the substantive level, they explicate the meaning of § 9. At a higher level of abstraction, they elucidate a method for

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9. *Id.* at 586.

10. The maxim that humor is the sincerest form of flattery demonstrates the importance of the "Second Wind" speech. More than a few wags have wondered whether "Second Wind" was strong enough to change Indiana jurisprudence or "whether it is merely rhetorical hot air." *See, e.g.*, Thomas J. Herr, *Will 2000 Census Create Indiana Constitutional Crisis?*, 43 RES GESTAE 15, 16 (Aug. 1999).

11. Patrick Baude, *Indiana's Constitution in a Nation of Constitutions*, *in* THE HISTORY OF INDIANA LAW 21 (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006).

12. Patrick Baude, *Recent Constitutional Decisions in Indiana*, 26 IND. L. REV. 853, 853 (1993).

13. *Id.* at 863.

14. 622 N.E.2d 954 (Ind. 1993).

15. *Id.* at 960.

16. *Id.* at 963.

constitutional interpretation. But what really gives any decision its bite is its result, not its words. *Price*'s result was breathtaking: the Court held that Colleen Price had the constitutional right under § 9 to call Indianapolis police officers "motherfuckers" in a late-night encounter; her conviction for disorderly conduct was held unconstitutional.[17] The Renaissance in Indiana Constitutional law was underway.[18]

Price was handed down on the morning of November 1, 1993. Later that day, I was sworn in as a member of the Court.

II. OF MIRRORS AND LOCK STEPS

The advocates of Renaissance direct their harshest scorn at judges who interpret parallel state and federal constitutional provisions in accordance with federal constitutional analysis. Their claim is that state constitutional analysis that no more than mirrors federal, that no more than marches in lock-step with it, fails to recognize the independence significant of state constitutions.[19]

Now at least a quarter-century into the Renaissance, not many voices are raised in defense of "lock-stepism." Even the troglodyte acknowledges the "independent significance of state constitutions." But I want to raise a note of caution. States should not take a different approach from the federal in interpreting a parallel state constitutional provision solely for the sake of taking a different approach.

There are some reasons why mirror interpretation often makes sense. First and foremost, many state constitutional provisions were meant to mirror their federal counterparts. Article I, § 11, of the Indiana Constitution is the same as the Fourth Amendment. The Framers of our two Constitutions (both the original one adopted in 1815 and the new one adopted in 1851) could have provided different language but they didn't. Isn't it reasonable to infer that the original intent was to provide Hoosiers with the same protection against unreasonable searches and seizures as did the federal Constitution—no more and no less?

Second, the mirror interpretation is often precedent. Now I have written elsewhere[20] that it is appropriate to overrule precedent in certain circumstances. But stare decisis is the default position in American jurisprudence for reasons well-known to anyone who would read an Article like this.

Third, at least under the current state of the law, state constitutional interpretation operates only as a ratchet.[21] While states are free to interpret their

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17. *Id.* at 964-65.

18. Sharp with his criticism in the past, Professor Baude was quick with his praise, noting the similarities between *Price* and (no less than) *Marbury v. Madison*. Patrick Baude, *Has the Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849 (1994).

19. *See, e.g.*, Linde, *supra* note 3.

20. Frank Sullivan, Jr., Lecture, *What I've Learned About Judging*, 48 VAL. U. L. REV. 195, 205 (2013).

21. The notion of "ratchet" (a wrench that turns in only one direction) in constitutional law is primarily attributed to the implication, drawn from Justice Brennan's footnote in his opinion for

own constitutions to extend greater protections to their citizens than the federal Constitution, the states cannot interpret their constitutions to restrict federal constitutional guarantees.[22] This creates a very slippery slope. The only outcome determinative way that Art. I, § 11, of the Indiana Constitution can be interpreted differently than the Fourth Amendment is by reading it to extend greater protection; if § 11 is read to provide less protection than the Fourth Amendment, the Fourth Amendment dictates the result. In other words, at least when it comes to individual liberties, an independent state constitutional interpretation only makes a difference if it produces a more liberal result.

This should not shock; it is why, after all, Justice Brennan wrote his article in the first place. Distressed at the Burger Court's curtailment of the Warren Court's expansiveness, he saw state constitutionalism as a possible buffer against retrenchment.[23]

This is not an argument against liberal results but it is an argument against result-driven decision-making. Nor should this be taken as an unequivocal defense of lock-stepism. There are plenty of questions of constitutional law on which the United States Supreme Court has not spoken or where its words are ambiguous. A state court most assuredly, in my view, need not bend over backwards in such circumstances to try to divine what the federal approach would be and then apply it to its own constitution. But the common history of many federal and state constitutional provisions, the importance of precedent, and concern over result-driven decision-making has led me to conclude that categorical rejection of lock-stepism goes too far.

My own voting record in this regard is not consistent. Early on, the Court faced a § 11 claim in *Brown v. State*[24] where the police had searched an apparently abandoned automobile without a warrant. Justice DeBruler's opinion for a four-Justice majority took the position that while the Fourth Amendment may impose a warrant requirement, the test of the constitutionality of a search under § 11 is its reasonableness.[25] My dissent argued for a "mirror" rule. "In my view, we would be well advised to follow precedent and not chart a new course that will cause substantial uncertainty both for police when they conduct criminal investigations and for defense counsel when they assess the admissibility of evidence . . . . These practical considerations are among the reasons why federal and Indiana courts have found warrant requirements in both the Fourth Amendment and Article 1, § 11. There is no reason to change that now."[26]

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the United States Supreme Court in *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966), that Congress can increase constitutional protections but not "restrict, abrogate, or dilute" them. I first heard the expression "Brennan ratchet" as a restriction on state constitutional jurisprudence in a speech by Charles Fried to the Seventh Circuit Bar Association in Indianapolis in, I believe, 1999.

22. Cooper v. California, 386 U.S. 58, 62 (1967).

23. Brennan *supra* note 4, at 495.

24. 653 N.E.2d 77 (Ind. 1995).

25. *Id.* at 79.

26. *Id.* at 82 (Sullivan, J., concurring in result).

Ten years later in *Litchfield v. State*,[27] the Court considered a marijuana possession conviction where the evidence was obtained from the warrantless search of the defendants' trash. There was no Fourth Amendment violation here—there was clear Supreme Court precedent on point.[28] Nevertheless, the Court reversed the conviction, finding a violation of § 11. I concurred without comment.

III. *DARLINGTON*, *ASHWANDER*, AND PASSIVE VIRTUES

The Indiana Supreme Court has long taken the position that it will not decide questions of state constitutional law unless the case cannot be decided on any non-constitutional grounds. The classic formulation of this doctrine of judicial restraint comes from the Court's 1899 decision in *State v. Darlington*.[29]

> [C]ourts will not pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. This court has repeatedly held that questions of this character will not be decided unless such decision is absolutely necessary to a disposition of the cause on its merits.[30]

There are many interesting examples of the Court avoiding state constitutional questions and deciding cases on non-constitutional grounds as dictated by *Darlington*'s avoidance rule. A sampling will suffice.

In 1939, *Roth v. Local Union No. 1460 of Retail Clerks Union*[31] included a claim that the Indiana Anti-Injunction Act, a statute placing limitations on the jurisdiction of courts to grant injunctions in labor disputes, constituted an "unconstitutional encroachment[ ] by the legislative branch of the government upon the powers of the judiciary" in violation of Art. III, § 1 (separation of functions). [32] But the Court resolved the case without reaching the constitutional issue because, Justice Shake wrote, "Courts will not pass upon a constitutional question or decide whether a statute is invalid, unless such decision is absolutely necessary to a disposition of the cause on its merits."[33]

In 2001, I wrote *Owens Corning Fiberglass Corp. v. Cobb*[34] where a jury found that asbestos manufactured by the defendant caused the plaintiff serious illness and awarded compensatory and punitive damages. The trial court reduced the punitive damages pursuant to statutory limits.[35] The plaintiff argued on

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27. 824 N.E.2d 356 (Ind. 2005)

28. *See* California v. Greenwood, 486 U.S. 35 (1988).

29. 53 N.E. 925 (Ind. 1899).

30. *Id.* at 926.

31. 24 N.E.2d 280 (1939) (Shake, J.).

32. *Id.* at 368-69.

33. *Id.* at 369.

34. 754 N.E.2d 905 (Ind. 2001).

35. IND. CODE §§ 34-4-6, 34-4-34-3, and 34-4-34-5 (1993), recodified in 1998 as IND. CODE §§ 34-51-3-5, 34-51-31-3, and 34-51-3-6.

appeal that the punitive damage limitations violated the Indiana Constitution in several respects.[36] Because we set aside the judgment of the trial court in its entirety, we explicitly refrained from addressing the constitutional claims.[37]

In 2013, following my departure, the Court decided *Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc.*,[38] in which a scouting organization claimed the Indiana Constitution's Contracts Clause[39] had been violated by a statute[40] limiting reversionary clauses in land transactions to a maximum of thirty years. The statute had been invoked to block enforcement of a condition in a deed that pre-dated enactment of the statute.[41] The deed conveyed a campground from one scouting organization to another on the condition that scouting use would continue for 49 years but that ownership of the campground would revert to the grantor if the scouting-use condition was breached during that time.[42] The Court explicitly addressed a potentially dispositive non-constitutional claim first in order to "avoid addressing constitutional questions if a case can be resolved on other grounds."[43] Only after it determined that "the parties' non-constitutional arguments [could not] resolve [the] case," did the Court address the constitutional question.[44]

There are, however, examples as well of the Court articulating a fully sufficient non-constitutional ground for disposing of the case but nevertheless addressing the constitutional claims on the merits.

One such case was *State ex rel. Attorney General v. Lake Superior Court*,[45] where a trial court had enjoined mailing bills for property taxes due in 2003 in Lake County after determining that two 2001 property tax assessment statutes[46] that applied only in Lake County violated the Indiana Constitution in several

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36. The plaintiff claimed that the statutory limits on punitive damages violated Art. I, § 12 (right to remedy by due course of law), § 20 (right to trial by jury), § 21 (right to compensation for property), § 23 (right to equal privileges and immunities); Art III, § 1 (separation of functions); and Art. VII, § 1 (judicial power). Brief for Appellees/Cross-Appellants at 50-63, Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905 (Ind. 2001) (No. 49A04-9801-CV-46), 1998 WL 35152647.

37. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d at 916 (quoting State v. Darlington, 53 N.E. 925, 926 (1899)). The Court later addressed these claims in Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003), discussed below.

38. 988 N.E.2d 250 (Ind. 2013).

39. Art. I, § 24.

40. IND. CODE § 32-17-10-2 (2013).

41. *Girl Scouts of S. Ill.*, 988 N.E.2d at 252.

42. *Id.* at 252-53.

43. *Id.* at 254.

44. *Id.* at 255.

45. 820 N.E.2d 1240 (Ind. 2005).

46. IND. CODE § 6-1.1-4-32 (2004) (authorizing the Indiana Department of Local Government Finance (DLGF) to employ private firms to assess real property in Lake County), and IND. CODE § 6-1.1-8.5-1 et seq. (providing for the DLGF itself to assess industrial properties in Lake County with an estimated assessed value in excess of $25 million).

respects.[47] The Indiana Supreme Court was unanimously of the view that the trial court should have dismissed the case because the Indiana Tax Court had exclusive jurisdiction over its subject matter.[48]

Even though this provided for a complete disposition of the case, three members of the Court proceeded to address the merits of the constitutional claims. Justices Dickson, Boehm, and Rucker "recognize[d] that ordinarily lack of jurisdiction of the trial court would preclude deciding any other issues."[49] But because the "case present[ed] a challenge to the entire assessment process in Indiana's second most populous county[,]" and because the three thought it "clear that the [taxpayers would] ultimately fail in their effort to enjoin the tax bills produced by the 2002 countywide reassessment," they concluded that it was "not in anyone's interest to preserve false hopes by resolving this appeal on jurisdictional grounds alone. In short," they said, "there is broad public interest in a prompt resolution of this case, and the parties ask us to address the merits of the plaintiffs' claims without regard to jurisdiction."[50]

This was a highly understandable and perhaps correct basis for deviating from *Darlington*'s avoidance rule. But I (joined by Chief Justice Shepard) was of the view that the Court should not reach the constitutional claims. My separate opinion recognized that if the Court had not decided the constitutional claims, the taxpayers would have been required to advance them through "several layers of administrative review before being allowed to appeal to the Tax Court" and that this appeared "unwieldy if not unfair."[51] I took the position that that "sound reasons explain[ed] why the Legislature established this procedure."[52]

> Protests over taxes are frequent and yet taxes are needed to provide public safety and other public services. A system that channels tax protests through an orderly system of administrative and Tax Court review without risking abrupt stoppages in tax collections by order of any one of the state's hundreds of trial courts protects the interests of both taxpayers and of all of us who rely on government services. Furthermore, utilizing an orderly system of administrative and Tax Court review allows the executive and legislative branches to effect compromises of tax controversies, rather than have the answers dictated by (a variety of) courts.[53]

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47. The taxpayers claimed that the statutes violated Art. IV, § 22 (prohibited local and special laws), and § 23 (uniform law); Art. X, § 1 (uniform and equal rate of property assessment and taxation), and Art. I, § 21 (right to compensation for property). The taxpayers also claimed a constitutional right, not clearly tied to any specific constitutional provision, to have locally elected officials perform the assessments. *State ex rel. Atty. Gen.*, 820 N.E.2d at 1248-51.

48. *State ex rel. Atty. Gen.*, 820 N.E.2d at 1247.

49. *Id.* at 1244.

50. *Id.*

51. *Id.* at 1257 (Sullivan, J., concurring in part and concurring in result).

52. *Id.*

53. *Id.*

It was in part because I believed that taxpayers and the executive and legislative branches should have maximum freedom to effect compromise of this tax controversy that I thought the Court was wrong to reach the merits of the various constitutional claims advanced.[54]

There is another situation where the applicability of *Darlington*'s avoidance rule is called into question: certified questions from federal courts on issues of state constitutional law.

Perhaps some background is required here. From time to time, the federal courts are called upon to make determinations of state law. This can occur when the federal court is hearing a case in the exercise of its "diversity jurisdiction," i.e., its power to hear lawsuits between citizens of different states where the amount in controversy exceeds $75,000.[55] It can also occur in bankruptcy cases.[56] Rather than decide the issues of state law themselves, federal courts often take advantage of state rules that allow federal courts to "certify" questions of state law to state courts of last resort for decision. Indiana Rule of Appellate Procedure 64(A) authorizes any federal court to "certify a question of Indiana law to the Supreme Court when it appears to the federal court that a proceeding presents an issue of state law that is determinative of the case and on which there is no clear controlling Indiana precedent."

When certified questions from federal courts raise—as they often do—questions of whether a particular state statute or procedure violates the Indiana Constitution, the Indiana Supreme Court faces some special challenges. In one opinion, Chief Justice Shepard identified two problems "with certified questions involving constitutional claims."[57] First, the Court is not given the opportunity to exercise *Darlington*'s avoidance rule because the federal court

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54. *Id.*

55. 28 U.S.C. § 1332(a) (2014). For purposes of the statute, a corporation is treated as a citizen of the state in which it is incorporated. *Id.* § 1332(c). Thus, a federal court has jurisdiction to adjudicate a contract dispute or a tort claim between, e.g., an individual resident of Indiana and any corporation incorporated in any state other than Indiana. "Except in matters governed by the federal Constitution or by acts of Congress, the law to be applied" by the federal court is the applicable state statutory or common law. In fact, "[t]here is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state . . . be they commercial law or a part of the law of torts." Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (Brandeis, J.).

56. Bankruptcy cases are required by federal statute to be adjudicated in federal court. *See* 28 U.S.C. § 1334(a) (2014). For the most part, however, creditors' and debtors' rights and obligations in bankruptcy are governed by state law, not federal law. Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 746 (2000) (citing John D. Ayer, *Through Chapter 11 with Gun or Camera, but Probably Not Both: A Field Guide*, 72 WASH U. L.Q. 883, 886 (1994) ("It is axiomatic that bankruptcy respects rights established under state law."); Vern Countryman, *The Use of State Law in Bankruptcy Cases* (pts. 1 & 2), 47 N.Y.U. L. REV. 407, 631 (1972)).

57. Citizens Nat'l Bank of Evansville v. Foster, 668 N.E.2d 1236, 1241 (Ind. 1996).

does not identify in its certification order any "unresolved non-constitutional grounds on which the case might be resolved."[58] Second, "such questions tend to separate the constitutional claim from the specifics of the case," putting the Court in a position of having to "speculate about hypothetical applications of a statute challenged on constitutional grounds" without the "issues [having been] fully vetted by the adversarial process."[59] In a later law review article, Shepard added a third: "The creation of precedent-setting law without a well-developed factual background before the state supreme court may very well undermine and dilute state case law."[60]

Having identified these challenges, the Court nevertheless has been willing to answer the questions.[61] The interests of efficiency and establishing clear precedent seem to outweigh the very strong justification for *Darlington*'s avoidance rule in the certified question circumstance.

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Justice Louis D. Brandeis's classic formulation from his concurring opinion in *Ashwander v. Tennessee Valley Authority* bears a striking resemblance to *Darlington*'s avoidance rule, both in substance and tone: "[C]onsiderations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function . . . ."[62]

Professor Alexander Bickel wrote that "one of the truly major themes in Brandeis's judicial work [was] the conviction that the Court must take the most pains to avoid precipitate decisions of constitutional issues, and that it must above all decide such issues only when it is absolutely unable to dispose of the case properly before it."[63] In *Ashwander*, Brandeis synthesized two decades of thinking and writing by setting forth "a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[64]

In his 1962 book *The Least Dangerous Branch*,[65] Bickel took Brandeis's seven *Ashwander* rules and created a grand narrative about "techniques . . . for

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58. *Id.*

59. *Id.*

60. Honorable Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions A Good Idea or A Bad Idea?*, 38 VAL. U. L. REV. 327, 346 (2004).

61. *See* Snyder v. King, 958 N.E.2d 764, 786-88 (Ind. 2011); A Woman's Choice-E. Side Women's Clinic v. Newman, 671 N.E.2d 104, 113 (Ind. 1996) (Selby, J., concurring and dissenting); Citizens Nat. Bank of Evansville v. Foster, 668 N.E.2d 1236, 1242 (Ind. 1996); Shepard, *supra* note 60, at 351.

62. Ashwander v. T.V.A., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

63. ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 2-3 (1957).

64. Ashwander v. T.V.A., 297 U.S. 288, 346 (1936) (Bradeis, J., concurring).

65. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

staying the Court's hand,"[66] i.e., for, in Brandeis's formulation, refraining from passing on constitutionality. Bickel famously called these techniques of restraint the "passive virtues."[67]

What follows are a few thoughts about the "passive virtues" in the context of Indiana constitutional jurisprudence.

In *Ashwander*, Brandeis said that courts should "not anticipate constitutional questions, but decide them only when legitimately in front of the [c]ourt."[68] This is the passive virtue of "ripeness." Ripeness, in other words, "relates to the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities, and are capable of being adjudicated on an adequately developed record."[69]

My best example of the Indiana Supreme Court's discussion of ripeness in connection with a state constitutional claim is Justice Roger O. DeBruler's 1994 opinion, *Indiana Department of Environmental Management v. Chemical Waste Management, Inc.*[70] Following the Legislature's adoption in 1990 of a statute conditioning solid and hazardous waste disposal permits on extensive disclosures by applicants and granting the Indiana Department of Environmental Management broad powers to deny such permits,[71] the owner and operator of an enterprise in Indiana that treated and disposed of hazardous waste filed suit claiming that the statute violated the Indiana Constitution in several respects.[72]

The State took the position that judicial intervention was unwarranted because the Commissioner of Environmental Management had not even begun the decision-making process regarding the hazardous waste disposal enterprise's application. And it was certainly true that the enterprise had neither been denied

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66. *Id.* at 71.

67. *Id.* at 111.

68. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 709 (2009) (paraphrasing Ashwander v. T.V.A., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)).

69. Ind. Dep't of Envtl. Mgmt. v. Chem. Waste Mgmt., Inc., 643 N.E.2d 331, 336 (Ind. 1994).

70. *Id.*

71. IND. CODE § 13-7-10.2-3 (1993). Among the disclosures required was a description of all civil, criminal, and administrative complaints alleging a violation of an environmental law, convictions for environmental crimes, or convictions for crimes of moral turpitude within the five years before the date of submitting the permit application. *Id.* Under the statute, the Commissioner of Environmental Management was allowed to deny a permit application even if the alleged violation is never proven, the applicant or responsible party denied any wrong-doing, the alleged violation did not threaten public health or the environment, or a settlement was entered solely for the purpose of settling a disputed claim. *Id.*

72. The hazardous waste disposal enterprise claimed that the statute violated Art. I, § 1 (inalienable rights), § 12 (remedy by due course of law for injury to reputation), § 23 (equal privileges and immunities), § 25 (effective date of laws), and § 31 (right of assembly); Art. III, § 1 (separation of functions); Art. IV, § 1 (legislative authority) and § 23 (general and uniform laws). Corrected Brief of Appellee, Ind. Dep't of Envtl. Mgmt. v. Chem. Waste Mgmt., Inc., 643 N.E.2d 331 (No. 49-S00-9310-CV-1143), 1994 WL 16462161.

a permit nor had an opportunity to exhaust administrative remedies. The State also made the telling point that any "as applied" analysis of the statute's constitutionality on the sparse record developed to that point depended on hypothetical harms and that such an approach did not support the serious act of striking down a law passed by the Legislature.[73]

The Court agreed with the result advocated by the State and held that the case was not ripe for the Court's review.[74] But before announcing that result, Justice DeBruler's (unanimous) opinion distanced itself from strict enforcement of a "ripeness" requirement:

> The Indiana Constitution lacks the well known "cases" and "controversies" language of Art. III, § 2 of the U.S. Constitution. This Court can and does issue decisions which are, for all practical purposes, "advisory" opinions. However, it is also true that the separation of powers language in Art. III, § 1 fulfills an analogous function in our own judicial activity, or lack thereof. While this Court respects the separation of powers, we do not permit excessive formalism to prevent necessary judicial involvement. Where an actual controversy exists we will not shirk our duty to resolve it.[75]

The Court did not stop there. In full advisory opinion mode, it went on to address virtually all of the constitutional claims, in order "to provide clarification as the Commissioner attempts to apply the [s]tatute."[76] In doing so, the Court for all practical purposes decided all of the constitutional claims in favor of the State.[77] While reciting that it was deciding the case against the hazardous waste disposal enterprise on grounds of ripeness, the Court in fact decided the case against the enterprise on the merits. Looking at *Chem. Waste Mgmt.* twenty years on, I think the Court should have enforced the passive virtue of ripeness more firmly and wish I had taken that position at the time.

In *Ashwander*, Brandeis also said that courts should "not pass upon the validity of the statute unless the complaining party can show that it is injured by its operation."[78] This is the passive virtue of "standing." Standing, in other words, requires that "courts act in real cases, and eschew action when called upon to engage only in abstract speculation."[79]

In 1992, the Legislature enacted a law[80] that coupled an increase in legislative pensions with provisions amending the Indiana Code to bring the Code into

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73. *Ind. Dep't of Envtl. Mgmt.*, 643 N.E.2d at 336.

74. *Id.*

75. *Id.* at 336-37 (footnotes omitted).

76. *Id.* at 337.

77. *Id.* at 337-42.

78. UROFSKY, *supra* note 68, at 709 (paraphrasing Ashwander v. T.V.A., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)).

79. Pence v. State, 652 N.E.2d 486, 488 (Ind. 1995).

80. P.L. 4-1992.

accord with the Americans with Disabilities Act (ADA).[81] I was State Budget Director at the time the bill was passed and still remember the howls of outrage over what was perceived to be a too-clever-by-half maneuver by legislators to increase their benefits. Governor Bayh refused to sign the bill but did permit it to become law without his signature because of the importance of bringing the state into compliance with the federal ADA.[82]

Now-Governor Mike Pence, then a private citizen, challenged the constitutionality of the statute on grounds that it violated the Indiana Constitution's requirement that statutes be limited to a single subject.[83] Again Justice DeBruler wrote for the Court. Although he used language similar to *Chem. Waste Mgmt.* in emphasizing that the Court would not yield to excessive formalism to refuse to adjudicate constitutional questions, he was more affirmative in enforcing the passive virtue of standing:

> Standing is a key component in maintaining our state constitutional scheme of separation of powers. *See* Ind. Const. art. III, § 1. The standing requirement is a limit on the court's jurisdiction which restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury. That a particular statute is invalid is almost never a sufficient rationale for judicial intervention; the party challenging the law must show adequate injury or the immediate danger of sustaining some injury.[84]

We held that Pence did not have standing because he was unable to show that he had or would sustain any direct injury as a result of the Legislature's (admittedly distasteful) action.[85]

A few more words need to be said about standing in general and *Pence* in particular.

Pence was not a unanimous decision. Justice Dickson wrote the proverbial "vigorous dissent." His was a double-barreled attack. First, he found in the Open Courts Clause of the Indiana Constitution's Art. I, § 12, a broad constitutional right of any "Indiana taxpayer to challenge the constitutionality of the expenditure of public funds by state officials under [any] statute."[86] Second, he argued that the Court should begin to enforce what he termed the "constitutional imperative" of the Single Subject Matter Clause of Art. IV, § 19.[87]

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81. 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

82. *Pence*, 652 N.E.2d at 487.

83. *Id.* (citing IND. CONST. art. IV, § 19).

84. *Id.* at 488 (quotation marks and citations omitted).

85. *Id.*

86. *Id.* at 489 (citing Marshall v. Dye, 231 U.S. 250 (1913); Graves v. City of Muncie, 264 N.E.2d 607, 609 (Ind. 1970); Zoercher v. Agler, 172 N.E. 186, 189 (Ind. 1930); Dudley v. Sears, Roebuck & Co., 109 N.E.2d 620, 623-24 (Ind. Ct. App. 1952); Ellingham v. Dye, 178 Ind. 336, 414 (1912), *appeal dismissed*)).

87. *Pence*, 652 N.E.2d at 489 (Ind. 1995). Justice Dickson and I would exchange views at some length on this topic in our respective separate opinions in a later case. A.B. v. State, 949

In 2003, Justice Dickson's unanimous opinion in *State ex rel. Cittadine v. Indiana Department of Transportation*[88] held that a motorist had standing to require the Indiana Department of Transportation to enforce Indiana's Clear View Statute[89] by virtue of the "public standing exception" to the "general doctrine of standing." There Justice Dickson wrote that there are "certain situations in which public rather than private rights are at issue and [where] the usual standards for establishing standing need not be met . . . . [W]hen a case involves enforcement of the public rather than private right the plaintiff need not have a special interest in the matter . . . ."[90]

After *Cittadine*, Chief Justice Shepard wrote that Justice Dickson's opinion in that case constituted the "triumph" of Justice Dickson's position on standing in *Pence*.[91] I think that Chief Justice Shepard is wrong on this score. First, *Cittadine* did not involve any constitutional challenge to the expenditure of public funds as was the case in *Pence* nor was the plaintiff held to have standing by virtue of being a taxpayer. Second, Justice Dickson goes to some length in *Cittadine* to recite the general rule that "only those persons who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct will be found to have standing.[92] (It was the inclusion of this language that accounts for my vote for the majority opinion in *Cittadine* while continuing to believe that *Pence* was correctly decided.) Finally, the narrowness of the *Cittadine* exception to the general rule that standing requires a showing of direct injury was demonstrated by a post-*Cittadine* unanimous decision of the Court, *Huffman v. Indiana Office of Environmental Adjudication*.[93] In *Huffman*, the Court held that the language of the Administrative Orders and Procedures Act precluded the plaintiff from asserting "public standing." That is to say, public standing constituted principle of common law that could be overridden by statute, not a principle of constitutional law which, of course, could not.[94]

N.E.2d 1204, 1221 (Ind. 2011) (Dickson, J., concurring); *id.* at 1225 (Sullivan, J., concurring in part).

88. 790 N.E.2d 978, 979 (Ind. 2003).

89. IND. CODE § 8-6-7.6-1 (2003) (generally providing at the time that railroads must maintain crossings so that motorists would have unobstructed views for 1500 feet in both directions along the tracks). The statute has since been amended and the Court held that the amendment rendered the case moot.

90. *State ex rel. Cittadine*, 790 N.E.2d at 979 (quoting Schloss v. City of Indianapolis, 553 N.E.2d 1204, 1206 n.3 (Ind.1990)).

91. Randall T. Shepard, *What Can Dissents Teach Us?*, 68 ALB. L. REV. 337, 345 (2005).

92. *State ex rel. Cittadine*, 790 N.E.2d at 979 (citing Oman v. State, 737 N.E.2d 1131, 1135 (Ind. 2000); Hammes v. Brumley, 659 N.E.2d 1021, 1029-30 (Ind. 1995); Shourek v. Stirling, 621 N.E.2d 1107, 1109 (Ind. 1993); Higgins v. Hale, 476 N.E.2d 95, 101 (Ind. 1985)).

93. 811 N.E.2d 806 (Ind. 2004).

94. I acknowledge that Justice Dickson treats "taxpayer standing" as equivalent "public standing" in his opinion in *Embry v. O'Bannon*, 798 N.E.2d 157, 160 (Ind. 2003). But it is not

IV. TORT REFORM AND THE CONSTITUTION

"Tort reform" became a rallying cry of the business and insurance community during the last quarter of the 20th century and has continued unabated into the 21st. Willing legislatures in many states have enacted statutory limitations on common law rights to recover damages in tort. In turn, those interested in preserving such rights—consumer groups, labor unions, and lawyers who represent injured persons—have looked to state constitutions for refuge.

An early example of state constitutional litigation provoked by tort reform was the critically important 1980 decision of the Indiana Supreme Court, *Johnson v. St. Vincent Hospital, Inc.*[95] In 1975, Indiana had become the first state in the nation to enact comprehensive medical malpractice reforms.[96] The Medical Malpractice Act[97] contained a number of dramatic limitations on common law medical malpractice procedures. First, before filing suit in court, plaintiffs would now be required to submit their complaints to the State Insurance Commissioner for consideration by a medical review panel. The panel would then render an opinion admissible at trial. Second, recovery in medical malpractice cases would now be limited to $500,000 in respect of health care providers that elected to come under the Act. Third, attorney fees to be paid plaintiffs' attorneys would now be limited. Fourth, the time in which a malpractice action could be brought would be severely limited. And fifth, a new patient's compensation fund was created.[98] These provisions were all challenged as violating multiple provisions of the Indiana Constitution.[99]

In a comprehensive opinion for a unanimous Court, Justice DeBruler held against the plaintiffs on all of the constitutional claims. It is beyond the scope of this Article to examine his analysis but it is important to point out that the factual record documenting the "conditions in the healthcare and insurance industries which gave rise to the Act" was described by the Court with some particularity.[100] The Court took the position that "[t]hroughout the State premiums for medical

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clear to me that there were three votes for that proposition, Justice Boehm's vote being opaque on that point. And in any event, Embry preceded Huffman. If "public standing" can be overridden by statute, as Huffman unanimously held, it does not seem to me that it can be of constitutional dimension. (Embry is discussed in the context of Art. I, § 6 (no funds for religious institutions) below.)

95. 404 N.E.2d 585 (Ind. 1980).

96. *Medical Malpractice*, INDIANA STATE MEDICAL ASSOCIATION, http://www.ismanet.org/legal/malpractice/ (last visited Aug. 11, 2014).

97. IND. CODE § 34-18-1-1 et seq.

98. *Johnson*, 404 N.E.2d at 590-91.

99. The plaintiffs claimed that the statute violated Art. I, § 9 (right to free speech), § 20 (right to jury trial), § 12 (due course of law), and § 23 (equal privileges and immunities); Art. III, § 1 (separation of functions); Art. IV, § 23 (general and uniform laws); and Art. IX, § 12 (prohibition on state loan of its credit in aid of any person). *Id.*

100. *Johnson*, 404 N.E.2d at 589.

malpractice insurance were high and a large number of private companies were withdrawing their product from the market. These circumstances and conditions particularly affected health care providers and created the danger that health care services would not be maintained at their existing level contrary to the public interest."[101] The Court held these facts to constitute a constitutionally sufficient basis for the legislation notwithstanding the claimed infringements of constitutional rights.[102]

One of the toughest provisions of the Medical Malpractice Act, alluded to above, was the limitation on the time in which a malpractice action could be brought.[103] In contrast to standard tort statutes of limitation, which measure the time for filing from the date on which the plaintiff discovers the injury, the Act measured the time of filing from the date the injury occurred and then limited that time to two years. The constitutionality of this "occurrence" statute of limitations was explicitly held not to violate the rights provided in Art. I, § 12, of "open courts" and of "every person, for injury done to him in his person, property, or reputation, [to] remedy by due course of law."

During my tenure, the Indiana Supreme Court was presented with a plethora of cases challenging the constitutionality of tort reform enactments. The most important were *Martin v. Richey* in 1999; *McIntosh v. Melroe Co.* in 2000; and *Cheatham v. Pohle* in 2003.

In *Martin v. Richey*,[104] the plaintiff had consulted a physician after self-detecting a lump in her breast and experiencing "shooting pains" from the lump. The plaintiff contended that, after performing certain procedures, the physician advised her that "he thought the lump was benign . . . and that she had nothing to worry about."[105] Her version of the facts was corroborated by the physician's nurse practitioner who testified that she was in the room with the plaintiff and the physician when the foregoing conversation took place.[106]

The "nothing to worry about" conversation occurred on March 20, 1991. In April, 1994, the plaintiff experienced increased pain from the lump; a biopsy resulted in a diagnosis of breast cancer that required both surgery and chemotherapy.[107]

She filed her medical malpractice claim against the physician on October 14, 1994, well beyond the two-year period from the March 20, 1991, "occurrence" of the malpractice and the physician sought dismissal of her complaint on that

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101. *Id.* at 606.

102. *Id.*

103. IND. CODE § 34-18-7-1(b) (1980).

104. 711 N.E.2d 1273 (Ind. 1999). An interesting feature of this case was the appearance pro hac vice at oral argument for the plaintiff of noted constitutional scholar Lawrence H. Tribe. I remember his impressive mastery of the Indiana constitutional issues at stake, totally belying my initial skepticism on this point.

105. *Id.* at 1276.

106. *Id.* The Court's opinion describes the factual record in detail, presenting both sides' version of the facts.

107. *Id.* at 1276-77.

basis. She replied that to enforce the statute in her circumstances would violate Art. I, § 12 (open courts; remedy by due course of law), and § 23 (equal privileges and immunities).[108]

Justice Myra C. Selby wrote the opinion of the Court, holding that to enforce the occurrence-based statute of limitations in these circumstances would be unconstitutional. Again a detailed discussion of the Court's analysis is beyond the scope of this Article. In brief, the Court concluded that the Equal Privileges and Immunities Clause had been violated because the statute precluded this particular plaintiff, "unlike many other medical malpractice plaintiffs," from pursuing a claim because her disease had a long latency period.[109] And it concluded that the Open Courts and Right to Remedy guarantees had been violated because the "plaintiff [had had] no meaningful opportunity to file an otherwise valid tort claim within the specified statutory time period because, given the nature of the asserted malpractice and the resulting injury or medical condition, [she had been] unable to discover that she [had] a cause of action."[110]

A challenge to the constitutionality of a central feature of the Indiana products liability act[111] was the subject of the Indiana Supreme Court's 2000 opinion, *McIntosh v. Melroe Co.*[112] The plaintiff in this case had been injured in an accident involving a "skid steer loader," a machine akin to a forklift, manufactured by the defendant and placed in service approximately 13 years before the accident. One of the requirements of the Indiana Products Liability Act is that "a products liability action must be commenced . . . within ten years after the delivery of the product to the initial user or consumer."[113]

The plaintiff did not dispute that his claim had been brought outside the limit of this "statute of repose" but maintained, not unlike the plaintiff in *Martin v. Richey*, that its enforcement violated Art. I, §§ 12 and 23.[114] The Court held that the statute of repose was constitutional.[115]

Justice Boehm's majority opinion contains an extraordinarily interesting comparative analysis of the "remedy by due course of law" guarantee of Art. I, § 12, and the "due process" guarantees of the federal Constitution, including discussions of their procedural and substantive prongs. In the end, the majority concluded that because the Legislature had determined that injuries occurring ten years after a product is placed in service are not legally cognizable, the plaintiff was not entitled to a remedy under § 12. "Thus, the statute of repose does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action from ever arising."[116] Nor did the majority find a violation of § 23,

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108. *Id.* at 1277.
109. *Id.* at 1282.
110. *Id.* at 1284.
111. IND. CODE § 34-20-1-1 et seq. (2000).
112. 729 N.E.2d 972 (Ind. 2000).
113. IND. CODE § 34-20-3-1(b) (2000).
114. *McIntosh*, 729 N.E.2d at 973.
115. *Id.* at 984.
116. *Id.* at 978 (internal quotation marks and citation omitted).

holding that the statute of repose was reasonably related to the inherent characteristics of the affected class and did not distinguish among members of the class.[117]

Justice Dickson, joined by Justice Rucker, wrote a stirring dissent that begins with what I find to be the most memorable assertion of judicial authority written by any member of the Court during my tenure: "This case presented us with an opportunity to restore to Indiana's jurisprudence important principles of our state constitution. By doing so, *we could have vividly exemplified the Rule of Law notwithstanding the allure of pragmatic commercial interests*."[118]

The dissenters went on to make a strong case that the ten-year statute of repose provision in the Indiana Products Liability Act violated both the Right to Remedy and the Equal Privileges and Immunities Clauses of the Indiana Constitution. As was his style, Justice Boehm methodically responded to each of the dissenters' claims.[119] I cast my vote with Justice Boehm.[120]

The third of the three principal cases challenging the constitutionality of Indiana tort reform enactments was *Cheatham v. Pohle*.[121] Implicated was Indiana's punitive damages allocation statute[122] that mandated that any award of punitive damages was to be paid to the clerk of the court, and the clerk was to pay 75% of it to the State's Violent Crime Victims' Compensation Fund and 25% to the plaintiff. A plaintiff who had received a reduced punitive damages award contended that the statute violated Art. I, § 21 (right to compensation for property), and Art. X, § 1 (uniform and equal rate of property assessment and taxation).

As to Art. I, § 21, the plaintiff first contended that the statute constituted an unconstitutional "taking" of the plaintiff's property.[123] Justice Boehm's majority opinion rejected that claim, holding that a punitive damages award "is not the property of the plaintiff . . . . Rather, the claim [the plaintiff] had before satisfaction was, pursuant to statute, a claim to only one fourth of any award of punitive damages. As a result, there is no taking of any property."[124]

There was a second dimension to the plaintiff's § 21 argument, grounded in its requirement that "[n]o person's particular services shall be demanded, without just compensation," contending that the statute placed in unconstitutional demand on the plaintiff's attorney's "particular services."[125] Justice Boehm's opinion also found no constitutional violation, saying that "[m]any legal doctrines serve to reduce the potential recovery by a civil plaintiff. The lawyer and the client get to

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117. *Id.* at 984.

118. *Id.* at 985 (Dickson, J., dissenting) (emphasis supplied).

119. *Id.* at 985-94 (Dickson, J., dissenting).

120. *Id.* at 979 (§ 12); *id.* at 981-84 (§ 23).

121. 789 N.E.2d 467 (Ind. 2003).

122. IND. CODE § 34-51-3-6 (1995).

123. *Cheatham*, 789 N.E.2d at 470.

124. *Id.* at 473.

125. *Id.* at 476.

play the hand the legislature deals them, no more and no less."[126]

Finally, Justice Boehm's opinion also rejected the plaintiff's taxation contention, explaining that Art. X, § 1, only applied to property taxes.[127]

As they had in *McIntosh*, Justices Dickson and Rucker dissented. Justice Dickson's opinion would have adopted the plaintiff's contention that the punitive damages allocation statute constituted an unconstitutional taking of the plaintiff's property, an unconstitutional demand on the plaintiff's attorney's particular services, and a violation of the Uniform and Equal Rate of Property Assessment and Taxation Clause.[128]

V. OF JUSTICIABILITY[129]

When a court declares a statute unconstitutional, the court says this: "Legislature, notwithstanding your Separation of Powers authority to make the laws, this law is beyond your power to make." As such, declaring a statute unconstitutional can place highly controversial subject matter beyond legislative compromise. And when highly controversial subject matter cannot be compromised, dire consequences can flow from the inability of the contending legislative factions to compromise.

The prototypical example of this phenomenon is, of course, *Dred Scott v. Sandford*.[130] I focus here on Chief Justice Taney's holding that it was unconstitutional for Congress to prohibit slavery in the territories, thereby invalidating the "Missouri Compromise."[131] And just what was the "Missouri Compromise"? It was, in fact, an act of Congress that effected a compromise between North and South on slavery. In *Dred Scott*, slavery was declared "a national institution; there was . . . no legal way in which it could be excluded from any territory."[132] Congress could no longer compromise on the most divisive issue of the day.

Not as cataclysmic as *Dred Scott*, to be sure, but I offer our Court's property tax case, *State Board of Tax Commissioners v. Town of St. John*,[133] as another example where declaring a statute unconstitutional placed highly controversial subject matter beyond legislative compromise. At the time this litigation began, real property in Indiana was assessed based on its "true tax value." "True tax value" was not market value but rather was based on "cost schedules" that took into account replacement cost, physical depreciation, and obsolescence, and so varied depending upon whether the property was industrial, commercial, agricultural, or residential. This was alleged to violate Art. X, § 1, that mandates

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126. *Id.* at 475.

127. *Id.* at 475-76.

128. *Id.* at 477-78 (Dickson, J., dissenting).

129. I have previously made this argument. *See* Sullivan, *supra* note 19, at 207-11.

130. 60 U.S. 393 (1857).

131. *Id.* at 452.

132. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 118 (1993).

133. 702 N.E.2d 1034 (Ind. 1998)

the General Assembly provide "for a uniform and equal rate of property assessment and taxation."[134] The Indiana Supreme Court held the "true tax value" system to be unconstitutional. (To be precise, the Court declared unconstitutional the "cost schedules" used to calculate true tax value because they did not meet the requisite uniformity and equality requirements.)[135]

The Court's decision placed beyond the power of the Legislature the ability to compromise the competing interests of industrial and commercial, agricultural, and residential taxpayers in ways that had occurred for many decades.
My concern about interference with the Legislature's ability to compromise was at the core of my approach to claims that statutes were unconstitutional. As to the property tax case, I said in my dissent:

> [that I could] think of no area where we can be more confident of the ability of the normal democratic processes working as they should than in taxation. Residential, commercial, industrial and agricultural interests can well pursue and protect their respective interests in state tax policy before the executive and legislative branches without judicial intervention.[136]

In *City of South Bend v. Kimsey*,[137] the Court struck down a statute that restricted the ability of cities in St. Joseph County to annex suburban territory because it violated the requirement of "general and uniform laws" contained in Art. IV, § 22.[138] My answer was this: "The legislation at issue here represents a political struggle between suburban and urban interests. While the geographic focus of this particular law was St. Joseph County, the legislative history shows a hard-fought battle in which the suburban interests narrowly prevailed."[139] The Court had "intervene[d] to turn those who lost a close fight in the Legislature into winners."[140]

Now I personally did not like assessing property based on true tax value rather than fair market value. And I would have voted "no" on the law at issue in *Kimsey* had I been a legislator. But my view of these cases was that Separation of Powers demanded that the Court not intervene to invalidate statutes where it was clear that the majoritarian political process had worked in exactly the way the Constitution intended. Competing interest groups had brought their views to the Legislature and the Legislature had acted on those views, making compromises it deemed appropriate along the way.

Now the counterargument to my position is straightforward—that when presented with a constitutional question, courts have the duty to answer it. And this point was forcefully made by Justice Boehm, writing for the majority in

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134. *Id.* at 1035-37.
135. *Id.* at 1043.
136. *Id.* at 1044 (Sullivan, J., dissenting).
137. 781 N.E.2d 683 (Ind. 2003).
138. *Id.* at 697.
139. *Id.* at 698 (Sullivan, J., dissenting).
140. *Id.*

Kimsey:

> Justice Sullivan in substance argues for a doctrine of nonjusticiability of Article IV issues. But for over seventy years precedent has uniformly rejected [his] view . . . . As we held in *Dawson v. Shaver* [in 1822], citing *Marbury v. Madison*: "The task is delicate and unpleasant, but the duty of the Court is imperative, and its authority is unquestionable, to declare any part of a statute null and void that expressly contravenes the provisions of the constitution, to which the legislature itself owes its existence."[141]

Justice Boehm is right that I argue for a doctrine of non-justiciability when it comes to judicial review of legislative enactments where there is no suggestion that the majoritarian process did not work properly. (He maintained that the majoritarian process had not worked properly in *Kimsey*, and I contended that there was no way a Court could reach that conclusion. But all of this is at a level of detail that is beyond the scope of this Article.)

But taking Justice Boehm's point, suppose the majoritarian process has not worked properly in a particular case. Would I still treat the claim as non-justiciable?

In arguing against my position, Justice Boehm deploys the reapportionment decisions of the 1960s to attempt to demonstrate the necessity for judicial review of the constitutionality of statutes.[142] "What, Sullivan, do you say about this?," Justice Boehm's position asks. "Shouldn't the Court have intervened to rectify malapportionment? And if your answer to that is "yes," how do you justify not intervening in cases like *Town of St. John* and *Kimsey*?"

I find my answer in Justice Harlan F. Stone's Footnote 4 in his 1938 opinion for the United States Supreme Court in *United States v. Carolene Products Co.*[143] *Carolene Products* is an otherwise little-known case in which a federal statute blatantly protecting the milk industry was challenged on grounds that it violated the Commerce Clause and the Fifth Amendment. The Court rather summarily dismissed the constitutional challenges, citing its obligation to presume that Congress had acted rationally. But the Court added a footnote—Footnote 4—at this point, saying that scrutiny of a statute for constitutionality may be warranted in one of three circumstances:

- Where the statute appears on its face to conflict with a specific prohibition of the Bill of Rights.
- Where the statute "restricts those political processes that can ordinarily be expected to bring about repeal of undesirable legislation."
- Where the statute reflects prejudice against particular religious, national, racial, or other discrete and insular minorities.[144]

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141. *Id.* at 695-96.

142. *Id.*

143. 304 U.S. 144, 152 n.4 (1938).

144. *Id.*

It is important to recognize what happens in these three circumstances. In the first, the Court is in a position where it cannot avoid ruling on constitutionality. If the Legislature takes action that facially violates a constitutional provision, the Court can hardly defer to the Legislature as the Legislature has no authority to make a statute in violation of the plain language of the Constitution.

As to the second, Separation of Powers demands the proper functioning of the majoritarian process and so it is entirely appropriate for a Court to assure that the Legislature's exercise of its lawmaking authority does not extend to undermining the majoritarian process. As Footnote 4 says, the Legislature's lawmaking authority does not extend to "restrict[ing] those political processes that can ordinarily be expected to bring about repeal of undesirable legislation."[145] The proper functioning of the majoritarian process must not restrict the Legislature's ability to pass self-correcting legislation. Justice Boehm's malapportionment example falls snugly into this category.

As to the third, legislation prejudicing religious, national, racial, or other discrete and insular minorities, the point is that courts may need to step in to assure that the majoritarian political process respects the constitutional rights of minorities. Why? Simply because their being in a minority may prevent them from having sufficient political influence to protect those rights in a majoritarian process.

My position is that in judicial review for constitutionality, Separation of Powers counsels—if not demands—that it is the legislative branch that has free reign when it comes to political and policy preferences, including those regarding taxes and annexation. The Court's power of judicial review should be constrained to instances where the Legislature has tread upon the very face of the Constitution; or tread upon the self-correcting features of the majoritarian process; or tread upon the rights of those whom the Constitution, but not the majoritarian process, protects.

VI. THE CONSTITUTION ACCORDING TO . . .

Despite the extensiveness of the foregoing, it has touched upon a bare fraction of the Indiana Supreme Court's state constitutional jurisprudence during my tenure. Rather than try to categorize any more of it, I will conclude this Article with a brief tour of some selected state constitutional decisions of the five justices—Shepard Dickson, Boehm, Rucker, and myself—who served together during the decade-plus from Justice Rucker's arrival in November 1999, to Justice Boehm's departure at the end of September 2010.

This is not meant to be a "greatest hits" list—indeed many of the Court's most significant constitutional decisions during this period are discussed above. Rather, it is a smorgasbord of cases that each of us wrote, and a limited one at that: I arbitrarily chose five decisions for each of us (except for Justice Dickson whose body of work defies limitation to that number).

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145. *Id.*

Randall T. Shepard

Chief Justice Shepard's extraordinary contribution to Indiana constitutional adjudication has infused this entire article, starting with the "Second Wind" speech and seminal decision of *Price v. State*. And his influence has been noted in the discussion of many of the other cases discussed above. What follows is a small sampling of the remaining body of his work.

In 1993, the Court received a certified question from a federal court asking whether the Indiana Constitution imposed any upper limit on the Indiana statutory exemption from bankruptcy estates of funds held in retirement accounts. Chief Justice Shepard's opinion in *In re Zumbrun*[146] responded that Art. I, § 22,[147] contains three requirements: (1) the Legislature must enact exemptions; (2) exemption statutes much balance reasonably the interests of lenders and debtors; and (3) statutes (such as the one at issue in *Zumbrun*) which create unlimited exemptions are inconsistent with § 22 and, therefore, unconstitutional.[148]

That same year, the Court was presented with an appeal from a defendant who had been convicted of distributing grass—real grass!—but which the defendant had held out to be marijuana. The defendant stood convicted of a class C felony for distributing a non-controlled substance represented to be a controlled substance; had he been convicted of distributing an equivalent amount of real marijuana, he would have been guilty only of a misdemeanor. In *Conner v. State*,[149] Chief Justice Shepard held the conviction violated Art. I, § 16: "In its direction that '[a]ll penalties shall be proportioned to the nature of the offense,'" Shepard wrote, § 16 "makes clear that the State's ability to exact punishment for criminal behavior is not without limit. This provision goes beyond the protection against cruel and unusual punishment contained in the Eighth Amendment to the U.S. Constitution."[150]

During its 1993 session, the Legislature authorized (over the veto of Governor Evan Bayh) casino gambling in Indiana so long as it took place on "riverboats."[151] Legalized gambling was to produce a number of notable cases for the Court in the ensuing two decades, the first of which was *Indiana Gaming*

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146. 626 N.E.2d 452 (Ind. 1993).

147. Art. I, § 22, provides: "The 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 . . . ."

148. *In re* Zumbrun, 626 N.E.2d at 455. Justice Dickson and I were of the view that this provision required the Legislature only to enact minimum reasonable exemption laws, not to impose any maximum limitation on exemption laws. *Id.* (Dickson, J., dissenting); *id.* (Sullivan, J., dissenting).

149. 626 N.E.2d 803 (Ind. 1993).

150. *Id.* at 806. Justice Richard M. Givan dissented: "I see no constitutional violation in the legislature determining that perpetrating a fraud by purporting to sell drugs when the content of the package in fact is not a drug should be punished more severely than the actual dealing in marijuana." *Id.* (Givan, J., dissenting). In retrospect, I agree with Justice Givan.

151. P.L.277-1993(ss), § 124.

Commission v. Moseley.[152] Four Porter County residents, disappointed after residents of their county voted against having a casino in Portage,[153] challenged the statute as violating Art. I, (equal privileges and immunities), and Art. IV, § 23 (general and uniform laws). Chief Justice Shepard's opinion found no violation of either the constitutional requirement of equal privileges and immunities or the constitutional prohibition on special legislation.[154]

David Malinski was arrested at 10 p.m. one evening in the summer of 1999 in connection with the disappearance of a young woman.[155] After having been given his Miranda advisements, he gave the police two statements over the course of the night and early morning.[156] Malinski did not request or otherwise seek the assistance of an attorney.[157] At about 9:45 a.m. in the morning, a local attorney secured by Malinski's wife and brother arrived at the jail and asked to speak with Malinski.[158] The attorney was denied access to Malinski and Malinski was not informed that there was an attorney at the jail trying to reach him.[159] The attorney petitioned to the trial court for access to Malinski and for an end to the interrogation, but these requests were denied.[160]

In *Malinski*, Chief Justice Shepard wrote for a unanimous Court that Art. 1, § 13 (right of criminal defendant to counsel), provides an incarcerated suspect a constitutional right to be informed that an attorney hired by the suspect's family to represent him the suspect present at the station and wishes to speak to the suspect.[161] However, Malinski himself did not benefit from the new rule; the Court concluded that under the totality of the circumstances of the case, the constitutional violation did not require reversal of Malinski's conviction.[162]

Alpha Psi Chapter of Pi Kappa Alpha v. Monroe County Auditor[163] put an exclamation point on *Kimsey*, a case discussed at length above. Three fraternities at Indiana University in Bloomington failed to make an annual filing required to obtain an exemption from property taxation.[164] When the Monroe County attempted to collect the taxes due, the brothers asked the Legislature to enact a

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152. 643 N.E.2d 296 (Ind. 1994).

153. Voters in Portage voted for gambling but were outnumbered by opponents in other parts of the county. *Id.* at 298.

154. *Id.* at 302, 305. Justice Givan dissented. He would have found the Riverboat Gambling Act unconstitutional special legislation. *Id.* at 305 (Givan, J., dissenting).

155. Malinski v. State, 794 N.E.2d 1071, 1074 (Ind. 2003).

156. *Id.* at 1074-75.

157. *Id.* at 1075.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1079. The United States Supreme Court has held that neither the Fifth or Sixth Amendments are violated in such circumstances. Moran v. Burbine, 475 U.S. 412 (1986).

162. *Malinski*, 794 N.E.2d at 1073.

163. 849 N.E.2d 1131 (Ind. 2006).

164. *Id.* at 1133.

statute allowing them to make the filing retroactively.[165] The Legislature passed the statute but made it applicable only to fraternities at Indiana University. [166] Following *Kimsey*, Chief Justice Shepard's opinion held the statute to be unconstitutional special legislation in violation of Art. I, § 23 (general and uniform laws).[167]

Brent E. Dickson

The state constitutional jurisprudence of Justice Brent E. Dickson warrants an article (if not a book) of its own and I hope that a keen observer of Indiana constitutional law like Jon Laramore or Professor Joel Schumm—or perhaps one of Justice Dickson's fabulously capable law clerks like Michael DeBoer, Andrea Kochert, or Maggie Smith—will compile one someday. But there is one really important thing to understand about constitutional adjudication before discussing Justice Dickson's contributions any further. And that is the distinction between judicial activism and ideology.

Over the lifetimes of baby boomer and the younger generations, the expression "judicial activist" has been nearly synonymous with ideological liberalism. Ideologically conservatives attacked the ideologically liberal decisions of United States Supreme Court during the tenures of Chief Justice Earl Warren and Justice William Brennan as improperly activist, by which they meant that the decisions had, in their view, infringed upon the constitutional prerogatives of the legislative and judicial branches by an overly active judiciary.

But in a different era, the shoe was on the other foot. In the first third of the 20th century, ideological liberals attacked the ideological conservative decisions of the United States Supreme Court on precisely the same terms. This was, after all, the Holmes and Brandeis critique of Lochnerism. And it was what gave some ideological liberals like Justice Frankfurter such difficulty with the approach of the Warren Court.[168]

Putting ideology aside altogether, Justice Dickson's constitutional jurisprudence reflects at times a particularly robust attitude toward the judicial review for constitutionality of the acts and actions of the political branches. His

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165. *Id.* at 1134.

166. P. L. 256-2003.

167. Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty., 849 N.E.2d at 1139. As in *Kimsey*, I dissented from the Court's opinion in Alpha Psi Chapter. At least one issue that I raised in my dissent remains open: whether striking a statute found in violation of § 23 is the proper remedy as opposed to requiring all those included in the class to benefit from it. For example, "[c]ould fraternities at other colleges (rather than the Monroe County Auditor) have brought this lawsuit contending that if the Legislature was going to extend this benefit to IU fraternities, the Constitution required that it be extended to them as well?" *Id.* at 1140 (Sullivan, J., dissenting).

168. For an exceptionally fine discussion of the history of the change in liberal attitudes toward judicial review, see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION (1999). It is the best book on constitutional law that I have ever read.

opinions discussed above striking the state's property tax assessment regulations and calling for invalidation of the products liability statute of repose are apt but by no means exclusive exemplars of my point. (As to the ideology that his opinions reflect, well, I would say that some are conservative and some are liberal.)

And even more than that, much of his work has fearlessly blazed entirely new paths of constitutional analysis.

A most noteworthy example is *Collins v. Day*.[169] For several decades before *Collins*, Indiana courts had deployed federal equal protection clause analysis when evaluating claimed violations of the guarantee of equal privileges and immunities contained in Art. I, § 23.[170] The future, said Justice Dickson, would be different. "[N]o settled body of Indiana law . . . compels application of a federal equal protection analytical methodology to claims alleging special privileges or immunities under [§] 23 . . . . Section 23 should be given independent interpretation and application."[171]

Holding that "[t]he formulation of a separate [§] 23 standard requires consideration of the circumstances of its adoption and its application in subsequent Indiana cases,"[172] Justice Dickson proceeded to develop a two-factor test. "First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[173] The point I need to stress is that this was an entirely original formulation; an act of total and complete judicial creativity on Justice Dickson's part, derived and synthesized by him alone from his analysis of the circumstances of § 23's adoption and its application in subsequent Indiana cases. Though guarantees of privileges and immunities go back at least as far as the Constitution itself,[174] no judge or court had ever before used this standard.

There was to be a qualification to the new standard, however, a "pop-off valve," if you will: the burden would be on the challenger to the constitutionality of the statute "to negative every conceivable basis which might have supported the classification."[175]

In *Collins* itself, the pop-off valve was triggered. The plaintiff had complained that the exclusion of agricultural workers from coverage under the Indiana workers compensation act[176] denied the plaintiff privileges and immunities guaranteed by § 23. Because it found that the plaintiff had not

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169. 644 N.E.2d 72 (Ind. 1994).

170. *See, e.g.*, Dortch v. Lugar, 266 N.E.2d 25, 39 (Ind. 1971). *Johnson v. St. Vincent Hospital., Inc.*, 404 N.E.2d 585, 600 (Ind. 1980), discussed at length above, also took this approach.

171. *Collins*, 644 N.E.2d at 75.

172. *Id.* at 75.

173. *Id.* at 80.

174. U.S. CONST. art. IV, § 2.

175. *Collins*, 644 N.E.2d at 80.

176. IND. CODE § 22-3-2-9 (1994).

"carr[ied] the burden placed upon the challenger to negative every reasonable basis for the classification," the Court held that the agricultural worker exclusion was constitutional.[177]

Collins has stood the test of time and its methodology has been used ever since to analyze § 23 claims.

Ratliff v. Cohn[178] is of a different character. Donna Ratliff was a juvenile convicted of a serious crime and incarcerated in the Indiana Women's Prison.[179] She challenged the constitutionality of her incarceration there on multiple grounds, both federal and state. The trial court had dismissed her complaint without comment, but the Indiana Court of Appeals, finding her incarceration in violation of Art. IX, § 2, [180] reversed.[181]

Justice Dickson's unanimous opinion for the Supreme Court set aside the finding made by the Court of Appeals of a violation of Art. IX, § 2—and then went on to affirm the dismissal of Ratliff's claims that her incarceration in the Women's Prison violated Art. 1, § 15 (prohibition on confinement with unnecessary rigor); § 16 (prohibition on cruel and unusual punishment); § 18 (penal code must be founded on principles of reformation, and not of vindictive justice); and § 23 (equal privileges and immunities). The opinion did, however, reverse the dismissal of her claims of violation of the federal constitutional prohibition on cruel and unusual punishment[182] and guarantee of equal protection.[183]

Standing with *Collins v. Day* as a testament to Justice Dickson's judicial creativity is *Richardson v. State*.[184] The facts of Richardson were simple enough. Robert Richardson had been convicted of the class C felony of robbery and the class B misdemeanor of battery. He contended that the convictions violated the Double Jeopardy Clause of the Indiana Constitution.[185]

Both the United States Supreme Court and the Indiana Supreme Court had struggled in recent years to define the scope of the protection against double jeopardy in the federal and state Constitutions. Not unlike *Collins v. Day*, Justice Dickson formulated a new test for analyzing state double jeopardy claims based on his analysis of the history of the Indiana Double Jeopardy Clause and its application in Indiana cases. Henceforth, convictions for "two or more offenses [would] violat[e § 14], if, with respect to either the statutory elements of the

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177. *Collins*, 644 N.E.2d at 81. I dissented in Collins and would have been content to continue to apply federal equal protection analysis. *Id.* (Sullivan, J., dissenting).

178. 693 N.E.2d 530 (Ind. 1998).

179. *Id.* at 533.

180. "The General Assembly shall provide institutions for the correction and reformation of juvenile offenders."

181. Ratliff v. Cohn, 679 N.E.2d 985, 988 (Ind. Ct. App. 1997), *rev'd*, 693 N.E.2d 530 (Ind. 1998).

182. U.S. CONST. amend. VIII.

183. U.S. CONST. amend. XIV, § 1.

184. 717 N.E.2d 32 (Ind. 1999).

185. IND. CONST. art. I, § 14.

challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense."[186] This too was an entirely new standard; no judge or court had ever used this formulation in analyzing double jeopardy before. And it is worth noting that Richardson received some relief: his convictions were found to violate double jeopardy and the battery conviction was vacated.

Richardson was not a unanimous opinion at the time[187] and its approach has arguably been altered in subsequent years[188] but there can be no questioning of its importance in Indiana constitutional jurisprudence.[189]

Justice Dickson's opinion in *City Chapel Evangelical Free, Inc. v. City of South Bend ex rel. Department of Development*.[190] examined whether a church congregation was entitled to a hearing on the plan of the City of South Bend to take the downtown storefront which housed the church as part of an urban redevelopment project. This was claimed to violate the protections of religious freedom provided in Art. I, § 2, 3, 4, and 7. A key issue was whether these protections extended to religious congregations or only to individuals. Justice Dickson's opinion concluded that:

> the framers and ratifiers of the Indiana Constitution's religious liberty clauses did not intend to afford only narrow protection for a person's internal thoughts and private practices of religion and conscience. By protecting the right to worship according to the dictates of conscience and the rights freely to exercise religious opinion and to act in accord with personal conscience, Sections 2 and 3 advance core values that restrain government interference with the practice of religious worship, both in private and in community with other persons.[191]

That is an important principle, well explicated.[192]

Embry v. O'Bannon[193] placed at issue another religion clause: the prohibition of Art. I, § 6, that "[n]o money shall be drawn from the treasury, for the benefit

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186. Richardson v. State, 717 N.E.2d at 49.

187. *Id.* at 55 (Sullivan, J., concurring); *id.* at 57 (Selby, J., concurring in result); *id.* (Boehm, J., concurring in result).

188. *See* Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002).

189. My own relationship with Richardson was complicated. I provided the third vote for the opinion itself in tribute to its excellent historical survey although I expressed my understanding of its holding in a separate concurrence. Justice Dickson later enunciated an understanding different from mine in Spivey v. State, 761 N.E.2d 831 (Ind. 2002), where I joined Justice Rucker's dissent. 761 N.E.2d 831, 836 (Ind. 2002) (Rucker, J., dissenting).

190. 744 N.E.2d 443 (Ind. 2001).

191. *Id.* at 450.

192. As a matter of relatively recent Indiana constitutional history, the opinion is interesting as well. Justice Dickson relies heavily on two sources for his methodology: the majority opinion in Price—from which, the reader may remember, Justice Dickson originally dissented!—and his own opinion in McIntosh—which, the reader may remember, was itself a dissent!

193. 798 N.E.2d 157 (Ind. 2003).

of any religious or theological institution." The plaintiffs in this case challenged a state statute pursuant to which public and parochial schools entered into so-called "dual-enrollment agreements" under which the public schools agreed to provide various secular instructional services to private school students in return for those students being included in the respective public school corporation enrollment counts for purposes of the state school funding formula.[194]

Justice Dickson's opinion found the practice passed constitutional muster. The Court acknowledged that "the text [of § 6] and its historical context do not inform us whether the framers intended to prohibit all public funds from providing merely incidental benefits to religious and theological institutions."[195] But it found that

> Indiana case law . . . [had] interpreted [§ 6] to permit the State to contract with religious institutions for goods or services, notwithstanding possible incidental benefit to the institutions, and to prohibit the use of public funds only when directly used for such institutions' activities of a religious nature. Because the dual-enrollment programs permitted in Indiana [did] not confer substantial benefits upon any religious or theological institution, nor directly fund activities of a religious nature,

the Court held, the dual-enrollment programs did not violate § 6.[196]

During my senior year in college forty years ago, the California Supreme Court held that whether the California public school financing system, because of its substantial dependence on local property taxes and resultant wide disparities in school revenue, violated the Equal Protection Clause.[197] But eighteen months later, in evaluating a virtually identical claim in respect of the Texas public school financing system, the United States Supreme Court found no equal protection violation.[198] Henceforth, any constitutional claim challenging funding disparities among public school districts would have to be waged under state constitutions.

In the intervening decades, many such cases made headlines around the country. As well known as any was a 1989 decision of the Kentucky Supreme Court holding that its public school funding system violated the Kentucky's Constitution's guarantee of "an efficient system of common schools throughout the state."[199] Such a case filed by more than 50 Indiana public school districts in 1987, claiming the Indiana public school funding formula violated Art I, § 23 (equal privileges and immunities), and Art. VIII, § 1 (general and uniform system of common schools), had been settled in 1992.[200]

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194. *Id.* at 158.

195. *Id.* at 167.

196. *Id.* Also at issue in Embry was the issue of standing, discussed above.

197. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

198. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973).

199. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 189 (Ky. 1989) (Stephens, C.J.).

200. Lake Cent. v. State, No. 56 C01-8704-CP81 (Newton Cir. Ct. 1987). *See* Marilyn R. Holscher, *Funding Indiana's Public Schools: A Question of Equal and Adequate Educational Opportunity*, 20 VAL. U. L. REV. 273, 293-94. As State Budget Director at the time, I participated

After a decade-and-a-half's quiescence, new litigation was initiated that reached the Indiana Supreme Court in 2009. Rather than challenging funding levels per se as had the earlier lawsuit, the plaintiffs in *Bonner v. Daniels*[201] sought relief from a claimed failure on the part of the state to meet a what the plaintiffs contended was a standard of quality education imposed by Art. VIII, § 1.[202] Justice Dickson's opinion for the Court held that Art. VIII, § 1, imposed only a general duty to provide for a system of common schools and did not require the attainment of any standard of resulting educational quality.[203]

Many cases decided during my tenure on the Court involved appellate review—and the proper approach to appellate review—of sentences imposed in criminal cases. Should—and when should—the sentence imposed by the trial court be reduced? Interlaced with our own examination of these questions were some dramatic developments in federal constitutional law affecting sentencing. Justice Rucker's *Anglemyer* opinion[204] discussed below (and Justice Boehm's *Cardwell* opinion[205] mentioned below) encompass these matters.

But after *Anglemyer* and *Cardwell* at least one issue remained unanswered. Could an Indiana appellate court increase a sentence imposed by a trial court? Justice Dickson's opinion in *McCullough v. State*[206] makes clear that Art. VII, § 4 (the Supreme Court shall have, in all appeals of criminal cases, the power . . . to review and revise the sentence imposed), includes the power to either reduce or increase a criminal sentence on appeal.[207] However, the Court said, only the defendant and not the State has the authority to request a sentencing revision.[208]

The last of Justice Dickson's prodigious output that I will discuss is *League of Women Voters of Indiana, Inc. v. Rokita*.[209] When the United States Supreme Court turned away the Indiana Democratic Party's challenge[210] to the constitutionality of a statute requiring voters to identify themselves at the polls using a photo ID,[211] the opponents of the statute filed new claims contending that it violated Art. I, § 23 (equal privileges and immunities), and Art. II, § 1 ("All elections shall be free and equal") and § 2 ("Every citizen" meeting age and

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in the negotiated settlement of this litigation along with Jane Magnus-Stinson, Governor Bayh's counsel at the time.

201. 907 N.E.2d 516 (Ind. 2009)

202. *Id.* at 518.

203. Justice Rucker dissented, arguing that it was premature to dismiss the plaintiffs' complaint. He would have found the plaintiffs entitled to present their evidence that the state's educational funding system "[fell] short of the constitutional mandate to provide for a general and uniform system of open common schools." *Id.* at 525 (Rucker, J., dissenting).

204. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007).

205. Cardwell v. State, 895 N.E.2d 1219, 1223 (Ind. 2008).

206. 900 N.E.2d 745 (Ind. 2009).

207. *Id.* at 750.

208. *Id.*

209. 929 N.E.2d 758 (Ind. 2010).

210. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

211. P. L. 109-2005.

residency requirements "shall be entitled to vote").

Noting that "[n]o individual voter has alleged that the Voter ID Law has prevented him or her from voting or inhibited his or her ability to vote in any way[,]"[212] the Court held that it "was within the power of the legislature to require voters to identify themselves at the polls using a photo ID."[213] The Court said, however, that it was not foreclosing "as-applied" claims in the future upon evidence that "reasonable government assistance was not actually available to adequately relieve either the cost or hardship of obtaining photo ID."[214]

Frank Sullivan, Jr.

A reader of this Article knows by now of my wariness about state constitutionalism. But the last four of the following five opinions, I think, show my openness to and recognition of state constitutional claims in the appropriate circumstances.

At the time I joined the court in 1993, it was not unusual to find high school students and high schools themselves engaged in litigation with the Indiana High School Athletic Association. *Indiana High School Athletic Association v. Carlberg*[215] was one such case—and a typical one. Jason Carlberg had transferred from Brebeuf Preparatory School to Carmel High School for reasons unrelated to athletics.[216] He sued the IHSAA to participate on the Carmel varsity swim team after the IHSAA held that its "transfer rule" would limit him to junior varsity participation for one year.[217] Among his claims was that this decision denied him his right to equal privileges and immunities under Art. I, § 23.[218] My opinion for the Court held that the IHSAA was subject to constitutional scrutiny (it had argued that as a "private membership organization," it was not required to comply with the Constitution),[219] and then applied the tests of *Collins v. Day* to the transfer rule, finding no constitutional violation.[220]

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212. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 761.

213. *Id.* at 772.

214. *Id.* at 769. Justice Boehm filed an intriguing dissent. He said that the issue in the case was not "a balancing of the relative benefits, if any, of a voter ID requirement against the problems that requirement creates for some citizens, if perhaps relatively few" but rather "who gets to resolve that issue under the Indiana Constitution." He took the position that this was a matter that could only be addressed by constitutional amendment. *Id.* at 773 (Boehm, J., dissenting).

215. 694 N.E.2d 222 (Ind. 1997).

216. *Id.* at 226.

217. *Id.*

218. *Id.* at 227.

219. *Id.* at 229.

220. *Id.* at 240. Justice Dickson concurred in the opinion's holding that the IHSAA was subject to constitutional scrutiny but dissented from the conclusion that the transfer rule was constitutional. *Id.* at 243 (Dickson, J., dissenting). Justice Dickson dissented from the Court's view in other cases involving the IHSAA, perhaps most sharply in *Indiana High School Athletic Association, Inc. v. Watson*, 938 N.E.2d 672, 683 (Ind. 2010) (Dickson, J., dissenting).

Seay v. State[221] implicated the mandate of Art. I, § 19, that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts." The Legislature had enacted a statutory scheme that provided for enhanced sentences for "habitual offenders." In brief, the statute entitles the State, after an offender is convicted of a crime,[222] to prove beyond a reasonable doubt that the offender had accumulated two prior unrelated felony convictions.[223] The statute goes on to provide that if the jury finds the defendant to be a habitual offender, the court is then required to sentence the defendant to an additional fixed term prescribed by statute.[224]

The unresolved question was this: Could the jury in such circumstances render a verdict that the defendant was not a "habitual offender" even if it found that the State had proven beyond a reasonable doubt that the defendant has accumulated two prior unrelated felonies? My unanimous opinion for the Court held that the jury was entitled to make a determination of habitual offender status as a matter of law independent of its factual determinations regarding prior unrelated felonies.[225]

The plaintiffs in *Baldwin v. Reagan*[226] contended that the Indiana Seatbelt Enforcement Act[227] authorized the police to stop motorists in violation of Art. I, § 11 (prohibition on unreasonable searches and seizures). My opinion for a unanimous Court held that an Indiana police officer may not stop a motorist to enforce the seat belt law unless the officer observes circumstances that would cause an ordinary person to agree that the driver or passenger is not wearing a seat belt.[228] However, because the Seatbelt Enforcement Act can be applied in conformity with this holding, we concluded that the statute was constitutional on its face.[229]

The Court was required to deal with the contentious issue of abortion on several occasions during my tenure. One was in *Humphreys v. Clinic for Women, Inc.*,[230] which involved a complicated interplay between the federal and state components of Indiana's Medicaid program. As required by federal law, Indiana's Medicaid program will pay for a poor woman to have an abortion but only if necessary to preserve her life or if rape or incest caused her pregnancy.[231] The plaintiffs in this case argued, and the trial court held, that because Medicaid

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221. 698 N.E.2d 732 (Ind. 1998).

222. IND. CODE § 35-50-2-8(b) (2014).

223. *Id.* § 35-50-2-8(c).

224. *Id.* § 35-50-2-8(d).

225. *Seay*, 698 N.E.2d at 733-34. My opinion actually adopted the formulation of Justice Dickson in an earlier case which had not drawn three votes. *See* Duff v. State, 508 N.E.2d 17, 24 (Ind. 1987) (Dickson, J., separate opinion).

226. 715 N.E.2d 332 (Ind. 1999).

227. IND. CODE § 9-19-10-2 (2014).

228. *Baldwin*, 715 N.E.2d at 337.

229. *Id.* at 340.

230. 796 N.E.2d 247 (Ind. 2003).

231. *Id.* at 248.

paid for some abortions that were medically necessary, Art. I, § 23 (equal privileges and immunities), required that Medicaid must pay for any abortion that was medically necessary.[232]

The Court's views were divided, resulting in a complicated decision. I was of the opinion that § 23 did not require Medicaid to pay for all medically necessary abortions. Chief Justice Shepard and Justice Dickson joined in that holding.[233] However, I was also of the opinion that, so long as the Indiana Medicaid program paid for abortions to preserve the lives of pregnant women and where rape or incest caused pregnancy, § 23 required that it must also pay for abortions in cases of pregnancies that create for pregnant women serious risk of substantial and irreversible impairment of a major bodily function. Justices Boehm and Rucker joined in that holding.[234]

I would say that *Snyder v. King*[235] was my most substantial constitutional project. David Snyder had been incarcerated following his conviction on a class A misdemeanor battery charge, and by statute, he was not permitted to vote while incarcerated.[236] Article II, § 8, authorizes the legislature to disenfranchise "any person convicted of an infamous crime." Snyder contended that his disenfranchisement violated Art. II, § 8 because, as he argued, misdemeanor battery was not an "infamous crime" and so his constitutional rights had been violated when was not permitted to vote after being convicted and incarcerated for that crime.[237] The Court unanimously agreed with my conclusion that the crime in this case was not an "infamous crime." Rather, the Infamous Crimes Clause was properly understood primarily as a measure "to regulate suffrage and elections."[238] As such, the Clause authorized the Legislature to disenfranchise

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232. *Id.*

233. *Id.* at 248-49. Justices Boehm and Rucker dissented from this holding, believing that § 23 required Medicaid to pay for any necessary abortion. *Id.* at 264 (Boehm, J., dissenting).

234. *Id.* at 248-49. Chief Justice Shepard and Justice Dickson dissented from this holding, believing that § 23 did not require Medicaid to pay for abortions in such circumstances. *Id.* at 260 (Ind. 2003) (Shepard, C.J., dissenting); *id.* (Dickson, J., dissenting).

Humphreys was decided on September 24, 2003. When the lawsuit was filed, Katherine Humphreys, the named defendant in the case, had been the Secretary of the Indiana Family & Social Services Administration (FSSA), the agency of state government that administered the Medicaid program. Ten days prior to the decision, Indiana Governor Frank O'Bannon had passed away and was succeeded by his Lieutenant Governor, Joe Kernan. On October 1, 2003, I learned that Governor Kernan would appoint my wife, Cheryl G. Sullivan, to be the new Secretary of FSSA. Had I learned of this while the case was still pending, I would have been required to recuse. IND. CODE OF JUDICIAL CONDUCT R. 2.11(A)(2)(a) (2014). Assuming no change in the voting alignment in the case, this would have produced a 2-2 vote on all of the issues. Under the Indiana Rules of Appellate Procedure, the decision of the trial court would have been affirmed. IND. APP. R. 59(B).

235. 958 N.E.2d 764 (Ind. 2011).

236. IND. CODE §§ 3-7-13-4, 3-7-13-5(a), & 3-7-46-2 (2014).

237. *Snyder*, 958 N.E.2d at 768.

238. *Id.* at 781.

permanently those who compromise the integrity of elections.[239] However, this did not entitle Snyder to relief. We went on to conclude that the Legislature has separate constitutional authority to cancel the registration of any person incarcerated following conviction, for the duration of incarceration.[240]

Theodore R. Boehm

No judge ever came to the Indiana Supreme Court with stronger credentials than Theodore R. Boehm. The fact that he had clerked for Chief Justice Warren made his openness to constitutional claims unsurprising. Yet the distinction between openness to constitutional claims and ideology that I made with respect to Justice Dickson must be made with respect to Justice Boehm as well. Like Justice Dickson, Justice Boehm's constitutional jurisprudence also reflects at times a particularly robust attitude toward the judicial review for constitutionality of the acts and actions of the political branches. Non-exclusive illustrations of my point discussed above include his *Kimsey* opinion and calling for invalidation of voter ID statute.

Much of the Boehm constitutional canon has already been discussed in this Article but I offer five more opinions following.

In *Pierce v. State*,[241] James Pierce challenged his conviction for child molesting on grounds that the use at trial of testimony of witnesses reporting the purported child victim's statements and of a videotape of an interview with the child violated the Indiana Constitution's Confrontation Clause.[242] The testimony and videotape were hearsay, and therefore generally inadmissible, Justice Boehm explained, because they were all made outside the courtroom and were offered to prove that Pierce molested the child. However, they had been admitted pursuant to the "protected person" statute, a set of special procedures created by the Legislature for introducing evidence that is "not otherwise admissible" in cases involving crimes against children and the mentally disabled.[243] On the critical issue of whether evidence properly admitted pursuant to the "protected person" statute nevertheless violated the Confrontation Clause, Justice Boehm wrote for a unanimous Court that it did not so long as the defendant was presented with a meaningful opportunity for cross-examination, even if that confrontation right was exercised outside the presence of the jury.[244] Pierce had had an opportunity to cross-examine the child and so the statute did not violate the Confrontation

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239. *Id.* at 782.

240. *Id.* at 786. I must acknowledge the extraordinary assistance of my law clerk, Aaron Craft, in writing Snyder.

241. 677 N.E.2d 39 (Ind. 1997).

242. Art. I, § 13, provides criminal defendants the right "to meet the witnesses face-to-face." Unlike the Sixth Amendment, it does not use the verb "confront." Justices Boehm says that he uses the expression "Confrontation Clause" to be consistent with precedent. Pierce v. State, 677 N.E.2d 39, 43 n.5 (Ind. 1997).

243. IND. CODE § 35-37-4-6 (2014).

244. *Pierce*, 677 N.E.2d at 48-49.

Clause either on its face or as applied.

In one sense, every case in which a court is asked to invalidate a statute is a Separation of Powers case in that it implicates extent of the judicial branch's authority to review the legislative branch's work. But even though that be so, *State v. Monfort*[245] implicated Separation of Powers in a particularly striking way: the statute at issue literally abolished a court!

Specifically, in 1995, the Legislature abolished Jasper Superior Court No. 2.[246] The presiding judge of that court, Judge Robert V. Montfort, contended that the statute violated Art. III, § 1 (separation of powers).[247] Justice Boehm's opinion for a unanimous court concluded that under the constitution, the Legislature has the authority to abolish courts but that by doing so, it could not interfere with the exercise of judicial functions.[248] In this respect, the statute, by terminating the existence of the court upon passage of the bill—in the middle of Judge Montfort's term—was an unconstitutional interference with the exercise of judicial functions.[249] However, the court held, the effective date provision of the statute was severable and the court would be construed to be abolished upon the expiration upon the expiration of Judge Montfort's term.[250]

In *Sanchez v. State*,[251] a defendant convicted of rape and criminal confinement appealed, contending that a statute that prohibits the use of evidence of voluntary intoxication to negate the mens rea requirement of a crime violates Art. I, § 12 (due course of law). The case raised a number of subtle and complicated issues.

I took the position in a separate opinion (joined by Justice Rucker) that the Indiana Constitution requires that a defendant have the opportunity to present evidence on a mens rea element or any other element or recognized defense.[252] Justice Boehm's majority opinion did not quarrel with the notion of a constitutional right to present evidence. But it took the position that the Constitution does not dictate mens rea requirements or, for that matter, other substantive criminal law constraints, and it was unwilling to infer them. Because "courts must be careful to avoid substituting their judgment for those of the more politically responsive branches," Justice Boehm wrote, "constitutional rights not grounded in a specific constitutional provision should not be readily discovered."[253] And if it is within the power of the Legislature to define whether there is a mens rea requirement to any particular offense, then the statute challenged in this case, which prohibits the use of voluntary intoxication evidence to negate mens rea, is constitutionally permissible because it does no more than

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245. 723 N.E.2d 407 (Ind. 2000).
246. P. L. 18-1995, §§ 17, 44-55, 125-26.
247. *Monfort*, 723 N.E.2d at 409.
248. *Id.* at 414.
249. *Id.*
250. *Id.* at 416.
251. 749 N.E.2d 509 (Ind. 2001).
252. *Id.* at 522 (Sullivan, J., concurring in result).
253. *Id.* at 516.

define the mens rea requirement itself."[254]

One of the signature initiatives of Governor Mitch Daniels following his election in 2004 was his "Major Moves" program that included privatizing the Indiana Toll Road, the major East-West super-highway running across the Northern Indiana. The constitutionality of the privatization act was challenged in *Bonney v. Indiana Finance Authority*,[255] where the claims were that it constituted special legislation in violation of Art. IV, § 23; that the proceeds of the transaction had not been applied to retire "public debt" in violation of Art. X, § 2; and that the exemption of the Toll Road from property taxes violated Art. X, § 1.[256] Justice Boehm's opinion for a unanimous Court rejected each of the claims.[257]

In 2004, the Legislature enacted the Frivolous Claim Law and the Three Strikes Law to screen and prevent abusive and prolific offender litigation in Indiana, after which Eric D. Smith filed three civil cases.[258] The trial court found that the Frivolous Claim Law barred his claims, and the court's order of dismissal included a ruling that under the Three Strikes Law, Smith was prohibited from filing a new complaint or petition without a determination that he is in immediate danger of serious bodily injury.[259] Justice Boehm's opinion for the Court in *Smith v. State* held that the Three Strikes Law violated Art. I, § 12 (open courts): "[A]lthough there is no right under the Open Courts Clause to any particular cause of action and the Legislature may create, modify, or abolish a particular cause of action, to the extent there is an existing cause of action, the courts must be open to entertain it."[260]

Robert D. Rucker

One of the unwritten but inviolable rules of the Indiana Supreme Court during my tenure was that in every initial discussion of every case, the junior-most justice always voted first, saying whatever he (or, in Justice Selby's case, she) wanted to about the case. For a longer period than any other justice in state history, Justice Robert D. Rucker was the junior-most justice. And the funny thing is that I can never remember a single instance in that nearly-eleven years that Justice Rucker asked for a pass; he never once was not prepared. The same for oral argument; Justice Rucker was always prepared, invariably the best prepared. And even more than that, I have never known a judge better able to compartmentalize principle and ideology.

Much has been written above about Justice Rucker's constitutional

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254. *Id.* at 515.

255. 849 N.E.2d 473 (Ind. 2006).

256. *Id.* at 484, 486, 488.

257. *Id.* at 473.

258. Smith v. Ind. Dep't of Correction, 883 N.E.2d 802 (Ind. 2008).

259. *Id.* at 803-04.

260. *Id.* at 810. Chief Justice Shepard and I dissented. *Id.* at 811 (Shepard, C.J., dissenting); *id.* (Sullivan, J., dissenting).

jurisprudence. But the following five cases help fill out the picture.

Holden v. State[261] is an object example of Justice Rucker's ability to put principle ahead of ideology. As an LLM student at the University of Virginia School of Law prior to his appointment to the Indiana Supreme Court, Justice Rucker had written a masters' thesis with the provocative title: "The Right to Ignore the Law."[262] His paper traced the history of the doctrine of "jury nullification" that allowed juries to determine both the law and the facts in criminal cases and concluded that "an instruction telling the jury that the constitution intentionally allows them latitude to 'refuse to enforce the law's harshness when justice so requires' would be consistent with the intent of the framers and give life [to Art. I, § 19,[263] which had become] a dead letter provision" in the Indiana Constitution.[264]

In *Holden*, the Court was presented with precisely that question. Acknowledging his thesis's conclusion, Justice Rucker nevertheless wrote for a unanimous Court that the Constitution did not authorize jury nullification. "'[I]t is improper for a court to instruct a jury that they have a right to disregard the law. Notwithstanding [§ 19] . . . a jury has no more right to ignore the law than it has to ignore the facts in a case.'"[265] The defendant's conviction was affirmed.

In 1996, the Indiana Supreme Court had issued an opinion in response to a certified question from Federal District Court Judge David F. Hamilton.[266] The issue arose in litigation challenging the federal constitutionality of amendments to the Indiana criminal abortion statute adopted by the Legislature in 1995. [267] The proponents of this legislation characterized it as materially identical to that held constitutional in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[268] The federal litigation was not resolved until 2003, when the United States Supreme Court denied certiorari after the Court of Appeals for the Seventh Circuit found the statute to be constitutional.[269]

At that point, the challengers initiated claims in state court that the statute violated Art. I, § 1 (inalienable rights), § 12 (open courts; remedy by due course of law), and § 9 (freedom of expression). When *Clinic for Women, Inc. v. Brizzi*[270] was decided in November, 2005, it presented a stark contrast between the positions of Justice Boehm and Justice Dickson. Justice Boehm's position was

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261. 788 N.E.2d 1253 (Ind. 2003).

262. Honorable Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449 (1999)

263. "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

264. Rucker, *supra* note 262, at 481.

265. *Holden*, 788 N.E.2d at 1255 (quoting Bivins v. State, 642 N.E.2d 928, 946 (Ind.1994)).

266. A Woman's Choice-E. Side Women's Clinic v. Newman, 671 N.E.2d 104 (Ind. 1996).

267. P. L.187-1995, § 4.

268. 505 U.S. 833, 881-87 (1992).

269. A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

270. 837 N.E.2d 973 (Ind. 2005).

that "the inalienable right to liberty enshrined in [§ 1] includes the right of a woman to choose for herself whether to terminate her pregnancy, at least where there is no viable fetus or her health is at issue."[271] On the other hand, Justice Dickson's position was that "the Indiana Constitution does not protect any alleged right to abortion."[272]

Justice Rucker's opinion for a three-justice majority that included Chief Justice Shepard and me took a more restrained approach. Assuming without deciding that § 1 includes a privacy right that would extend to the abortion decision, Justice Rucker wrote, the test of the statute's constitutionality would be whether, under *Price*, the enactment places a "material burden" on that right.[273] In *Casey*, the Supreme Court held that the standard of review for the constitutionality of restrictions on the abortion right would be whether the restrictions imposed an "undue burden" on a woman's ability to make the abortion decision.[274] The majority opinion then held that *Price*'s material burden test was the equivalent of *Casey*'s undue burden test for purposes of assessing whether the statute violated any abortion right that might exist under § 1.[275] And after reviewing cases from multiple jurisdictions examining this question, the Court concluded that the statute would not impose a material burden on any abortion right that might exist under § 1 and was, therefore, constitutional.[276]

For the 2002-2003 school year, the Evansville-Vanderburgh School Corporation imposed a $20 student services fee on all students in grades K through 12. In *Nagy v. Evansville-Vanderburgh School Corp.*,[277] parents of children in that school system challenged the fee as violating Art. VIII, § 1.[278] That provision of the Constitution requires in relevant part the Legislature "to provide, by law, for a general and uniform system of Common Schools, where intuition shall be without charge."[279] It was the argument of the parents that the

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271. *Id.* at 994 (Boehm, J., dissenting). In his dissent, Justice Boehm had to distinguish the position that he had taken in *Sanchez v. State*, 749 N.E.2d 509, 516 (Ind. 2001), discussed above, that "constitutional rights not grounded in a specific constitutional provision should not be readily discovered." *Clinic for Women, Inc.*, 837 N.E.2d at 1000 (Boehm, J., dissenting).

272. *Id.* at 988 (Dickson, J., concurring in result). "In addition," Justice Dickson said, "because the challenged statutory pre-abortion requirements not only discourage harm to fetal life, but also protect the health of pregnant women, particularly in light of the risks to women from post-abortion psychological harm, I am convinced that [the] requirements [of the challenged statute] not only are a proper exercise of legislative power but also are in direct harmony with and furtherance of core values of [§ 1], which declares the inalienable right of 'life' and the institution of government for the 'peace, safety, and well-being' of the people." *Id.* at 988 (Dickson, J., concurring in result).

273. *Id.* at 978 (citing Price v. State, 622 N.E.2d 954 (Ind.1993)).

274. *Id.* at 982 (citing Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992)).

275. *Id.* at 988.

276. *Id.* at 987-88 (Ind. 2005).

277. 844 N.E.2d 481 (Ind. 2006).

278. *Id.* at 482.

279. *Id.* at 483.

$20 fee was unconstitutional because it was used to pay for what amounts to "tuition." Justice Rucker's opinion for the Court agreed, finding that the fee constituted tuition because it was used to pay for what was "already . . . a part of a publicly-funded education in the state of Indiana."[280] The opinion went on to make clear that the Court's holding did not preclude public school systems "from offering programs, services or activities that are outside of or expand upon those deemed by the legislature or State Board [of Education] as part of a public education."[281]

In my view, Justice Rucker's *Anglemyer v. State*[282] opinion was the single most important decision of the Indiana Supreme Court during my tenure. Already relied upon in more than 2,000 subsequent Indiana appellate opinions, the decision is at once a comprehensive and cogent history of recent and substantial changes in federal and state sentencing jurisprudence and a detailed and clear explanation of the consequences of those changes. In its 2000 decision, *Apprendi v. New Jersey*,[283] the United States Supreme Court launched a new set of federal constitutional principles that ultimately led to the invalidation of the Indiana criminal sentencing scheme[284] and the enactment of a new sentencing regimen by the Legislature.[285] These developments were accompanied by significant changes in our Court's own understanding and exercise of its power under Art. VII, § 4, "in all appeals of criminal cases, . . . to review and revise the sentence imposed." Justice Rucker's unanimous opinion in *Anglemyer* carefully discusses all of these developments and then explains the way in which sentences must be imposed and reviewed on appeal to accord with their requirements.[286] Applying these principles to the case at hand, the defendant's sentence was affirmed.

A collection of statutes known as the Indiana Sex Offender Registration Act require defendants convicted of sex and certain other offenses to register with local law enforcement agencies and to disclose detailed personal information, some of which is not otherwise public. In *Wallace v. State*,[287] the defendant claimed that the registration act constituted retroactive punishment forbidden by Art. I, § 24 (prohibition on ex post facto laws).[288] Applying an "intent-effects"

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280. *Id.* at 493.

281. *Id.* My dissent did not quarrel with Justice Rucker's definition of "tuition" but that the trial court's findings in this case caused me to conclude that the matters for which the school corporation was charging the activity fee were, in fact, outside of those constitutionally required. *Id.* at 494 (Sullivan, J., dissenting).

282. 868 N.E.2d 482 (Ind. 2007).

283. 530 U.S. 466 (2000). *See also* Blakely v. Washington, 542 U.S. 296 (2004).

284. Smylie v. State, 823 N.E.2d 679 (Ind. 2005).

285. P. L.71-2005, § 6, eff. April 25, 2005.

286. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). In a helpful and often-cited opinion following Anglemyer, Justice Boehm further elaborated on these standards for appellate review of sentences. Cardwell v. State, 895 N.E.2d 1219, 1223 (Ind. 2008).

287. 905 N.E.2d 371 (Ind. 2009).

288. *Id.* at 373.

test derived from past precedent, Justice Rucker's opinion for a unanimous Court held that as applied in this case, the act violated the constitutional provision and the defendant's registration requirement was set aside.[289] Justice Rucker's opinion has been cited by courts in ten states and one federal circuit outside Indiana and an uncommon number of law review articles that praised it for its thoughtful analysis.[290]

CONCLUSION

Indiana lawyers and judges are well past even thinking about any such things as a "Renaissance " in state constitutional law. Decisions explicating the state charter's provision are now regularly forthcoming from trial and appellate courts alike. This Article has reviewed a selected group of those decisions in what I hope has been an informative and constructive way.

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289. *Id.* at 384.

290. *See, e.g.*, Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 62 (2010); Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1074 (2012); Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 354 (2014); Wayne A. Logan, *Populism and Punishment Sex Offender Registration and Community Notification in the Courts*, CRIM. JUST., Spring 2011, at 37, 40.