Doing Business in Indiana

A REFERENCE GUIDE TO BUSINESS LAW IN THE HOOSIER STATE

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Ch. 1: General Reference Information

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Below are useful governmental websites often accessed by Indiana businesses.

Governor	http://www.in.gov/gov/
Secretary of State	http://www.in.gov/sos/
Office of Attorney General	http://www.in.gov/attorneygeneral/
Department of Labor	http://www.in.gov/attorneygeneral/
Professional Licensing Agency	http://www.in.gov/pla/
Worker's Compensation Board of Indiana	http://www.in.gov/wcb/
Business Owner's Guide to State Government	http://www.in.gov/core/business_guide.html
Secretary of State's Guide to Starting a Business	http://www.in.gov/sos/business/2428.htm
Indiana Economic Development Corporation	http://www.iedc.in.gov/
Indiana Small Business Development Center	http://isbdc.org/
Department of Agriculture	http://www.in.gov/isda/
Department of Environmental Management	http://www.in.gov/idem/
Natural Resources Commission	http://www.in.gov/nrc/
Indiana Treasurer of State	http://www.in.gov/tos/
Indiana Auditor	http://www.in.gov/auditor/
Indiana General Assembly	https://iga.in.gov/
Bills for Session	https://iga.in.gov/legislative/2017/bills/
United District Court for the Northern District of Indiana	http://www.innd.uscourts.gov/
United District Court for the Southern District of Indiana	http://www.insd.uscourts.gov/
United Bankruptcy Court for the Northern District of Indiana	https://ecf.innb.uscourts.gov/
United Bankruptcy Court for the Southern District of Indiana	http://www.insb.uscourts.gov/
Indiana Judicial Branch	http://www.in.gov/judiciary/
Indiana Supreme Court	http://www.in.gov/judiciary/supreme/
Indiana Court of Appeals	http://www.in.gov/judiciary/appeals/
Indiana Tax Court	http://www.in.gov/judiciary/tax/
Clerk of the Appellate Courts (Supreme Court, Court of Appeals, and Tax Court)	http://www.in.gov/judiciary/cofc/2479.htm
Indiana Trial Courts and Clerk's Offices	http://www.in.gov/judiciary/2808.htm

Reading Indiana Statutes:

The Indiana Code consists of thirty-six Titles (three of which have been repealed), and further subdivided by Articles, Chapters, and Sections. Indiana statutes are written, as an example, as follows, Title 31, Article 12, Chapter 3, Section 1 is written as Ind. Code § 31-12-3-1. The Indiana Code as of the 2016 regular session is available here: http://iga.in.gov/legislative/laws/2016/ic/.

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Ch. 2: Business Entities: Forms and Filing Requirements

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The "Business Services" portion of the Indiana Secretary of State website is an extremely useful resource for information pertaining to businesses in Indiana and is available free of charge. *See* https://inbiz.in.gov/BOS/Home/Index. The website contains useful information pertaining to starting and maintaining various business forms in the state of Indiana and includes a searchable database of information filed with the state including corporate documents, UCC filings, and other financial disclosures.

A. Common forms of business entities and relevant statutory provisions

For-Profit Corporation (Indiana Code § 23-1-1-1 et seq.)

Nonprofit Corporation (Indiana Code § 23-17-1-1 et seq.)

Limited Liability Company (Indiana Code § 23-18-1-1 et seq.)

General Partnership (Indiana Code § 23-4-1-1 et seq.)

Limited Liability Partnership (Indiana Code § 23-4-1-44 et seq.)

Limited Partnership (Indiana Code § 23-16-1-1 et seq.)

Sole Proprietorship

B. Requirements for formation of each business entity

As a general note, many business forms in Indiana have requirements to file documents with the Indiana Secretary of State. A list of fees associated with those filings can be found at: https://secure.in.gov/sos/business/2435.htm.

1. For-Profit Corporation:

Indiana has adopted a pro-management version of the Revised Model Business Corporation Act entitled the "Indiana Business Corporation Law" ("IBCL") which can be found at Indiana Code § 23-1-1-1 *et seq*. To incorporate, an incorporator must file Articles of Incorporation with the Office of the Indiana Secretary of State. The Articles of Incorporation must show: (a) the corporation's name, which must be unique from other Indiana entities, (b) the number of shares it is authorized to issue and their voting rights and preferences, (c) the name of the corporation's registered agent and address of the corporation's registered office, and (d) the name and address of each incorporator. *See* Indiana Code § 23-1-21-2. Incorporators typically include within the articles of incorporation provisions defining the power of the corporation, the power of its directors and officers, shareholder's rights and strong indemnification provisions, but the articles of incorporation are not required to include these provisions. Indiana specifically allows the articles of incorporation to include a provision limiting personal liability of directors and indemnifying directors and officers.

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2. Nonprofit Corporation:

Indiana Code § 23-17-1-1 *et seq*. contains the Indiana Nonprofit Corporation Act of 1991. The State of Indiana recognizes three types of nonprofit corporations: Public benefit corporations, mutual benefit corporations, and religious corporations. *See* Indiana Code § 23-17-3-2. Generally: A public benefit corporation is exempt under 501(c)(3) of the Internal Revenue Code (applying to charities) or is restricted in how it may distribute its assets upon dissolution and is organized for a public or charitable purpose. A mutual benefit corporation is a nonprofit that is not a religious or public benefit corporation. A religious corporation is organized primarily for religious purposes. Indiana Code §§ 23-17-2-19, -23, -25; 26 U.S.C. §501(c)(3).

Registration as a nonprofit corporation in Indiana requires articles of incorporation to be filed with the Indiana Secretary of State. Indiana Code § 23-17-3-1. The requirements of the articles of incorporation are very similar to those for a for-profit corporation, except that the articles of incorporation for a nonprofit corporation must also state whether or not the nonprofit corporation will have members and whether it's a public benefit corporation, mutual benefit corporation, or a religious corporation. *See* Indiana Code § 23-17-3-2.

3. Limited Liability Company:

The Indiana Business Flexibility Act, Indiana Code § 23-18-1-1 *et seq*., governs the formation and operation of Indiana limited liability companies. Per Indiana Code § 23-18-2-4, one or more persons can form a limited liability company ("LLC") by filing a certificate of organization with the Secretary of State. The certificate must include the name of the LLC, name of the LLC's agent, the mailing address of the agent, and the LLC's initial registered office. Unless the certificate indicates a delayed date, the LLC is formed immediately upon receipt of the certificate by the Secretary of State. The name of the LLC must indicate that it is a limited liability entity. See Indiana Code § 23-18-2-8 for acceptable naming conventions. Indiana has authorized "series LLCs" as of January 1, 2017. See Indiana Code § 23-18.1-1-1. A series LLC is a master LLC with separate divisions that theoretically limits liability among the entities comprising the series. The arrangement is similar to an S corporation with qualified S Corporation subsidiaries or "Q-subs." The series LLC is created by filing Articles of Designation with the Indiana Secretary of State.

4. General Partnership:

Indiana has adopted the Uniform Partnership Act at Indiana Code § 23-4-1-1 *et seq*. Indiana Code § 23-4-1-6 provides that a partnership "is an association of two (2) or more persons to carry on as co-owners a business for profit." Partnerships form automatically upon such association and no filing of documents with the Secretary of State is required.

5. Limited Liability Partnership:

Any partnership may become a limited liability partnership by filing a registration statement with the Indiana Secretary of State. Indiana Code § 23-4-1-45. The registration statement must include the name of the partnership, the street address of the partnership's principal office, the name and address of the partnership's registered agent in Indiana, a brief statement of the partnership's business,

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and a statement that the partnership has elected to be a limited liability partnership. The name of the entity must indicate that it is a limited liability partnership.

6. Limited Partnership:

Indiana has adopted the Uniform Limited Partnership Act at Indiana Code §23-16-1-1 *et seq*. Under Indiana Code § 23-16-3-2, a limited partnership must file a certificate of limited partnership with the Indiana Secretary of State that contains the name of the limited partnership, the address and name of the limited partnership's agent for service of process, the name and address of each general partner, and the latest date the limited partnership will dissolve. The name of the entity must indicate that it is a limited partnership (and if applicable, a limited liability limited partnership).

7. Sole Proprietorship:

No state registration is required for an individual to operate a business as a sole proprietorship. However, sole proprietors are subject to unlimited personal liability for torts and contracts related to the business conducted.

C. Less common forms of business entities

1. Professional Corporation:

Formation of a professional corporation in Indiana is accomplished in the same manner as a for-profit corporation. *See* Indiana Code § 23-1.5-2-3. A professional corporation must be comprised of individuals licensed to practice one or more of the following professions: accountancy, architecture, health care, law, engineering, veterinary medicine, or real estate. Officers, directors and shareholders of the professional corporation must all hold a valid professional license.

2. Indiana Business Trust:

An Indiana Business Trust, permitted under the Indiana Business Trust Act of 1963, must file several documents and disclosures with the Indiana Secretary of State that are set forth in Indiana Code § 23-5-1-4. These entities are uncommon and have been largely supplanted by more modern corporate forms.

D. Internal Governing Documents

1. For-Profit, Professional and Non-Profit Corporations

Every corporation has the inherent power to adopt bylaws governing the internal workings of the corporation. While not required, bylaws define the election and powers of the board of directors, shareholder rights and priorities, meeting requirements for the board and annual shareholders meetings, and can provide important protections regarding the liability of officers and directors and the transfer of shares of the corporation to third parties. Bylaws may contain any provision not inconsistent with the Articles of Incorporation or the IBCL. If the bylaws do not address a matter covered by the default provisions of the IBCL, the IBCL provisions govern the

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internal workings of the corporation.

2. Limited Liability Company

In like fashion, an Indiana limited liability company generally adopts an Operating Agreement which covers the rights and responsibilities of members and managers of the LLC including meetings, rights or restrictions on transfers to third parties and indemnification of managers and members.

3. Partnerships

The internal workings of the various forms of partnerships are governed by a Partnership Agreement which may be entered into among the various partners, but is not required under Indiana law except for Limited Partnerships. In the absence of a valid partnership agreement, the provisions of the Uniform Partnership Act, the Limited Liability Partnership Act or the Uniform Limited Partnership Act apply.

E. Routine filings required for business entities

1. For-Profit Corporation:

In addition to its original Articles of Incorporation, a for-profit corporation authorized to do business in Indiana must file a biennial report with the Secretary of State that includes the name of the corporation, the state or county of incorporation, the address and name of its registered agent in Indiana, the address of its principal office, the names and address of the directors, secretary, and the highest executive officer of the corporation. Indiana Code § 23-1-53-3. The corporation also must pay a biennial registration fee. Those charged with corporate governance should also take note of routine record maintenance requirements under Indiana Code § 23-1-52-1 *et seq*.

2. Professional Corporation:

A professional corporation must generally comply with the same reporting, fee payment, and other requirements of a for-profit corporation.

3. Nonprofit Corporation:

A nonprofit corporation in Indiana is generally subject to the same reporting requirements as a for-profit corporation. Indiana Code § 23-17-27-8. Those charged with corporate governance should also take note of routine record maintenance requirements under Indiana Code § 23-17-27-1 et seq.

4. Limited Liability Company:

An Indiana limited liability company must file a biennial report with the Indiana Secretary of State that includes the name of the LLC, the address and name of its registered agent in Indiana, and the address of its principal office. The LLC must also pay a biennial registration fee. *See* Indiana Code § 23-18-12-11.

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5. General Partnership; Limited Liability Partnership; Limited Partnership; Sole Proprietorship:

Indiana general partnerships do not need to make any filing with the Indiana Secretary of State in order to remain in good standing.

Indiana limited liability partnerships do not need to make any filing with the Indiana Secretary of State in order to remain in good standing.

F. Limited Liability for Participants in Corporations, LLCs and LLPs

The primary purpose for forming a business entity as opposed to operating as a sole proprietorship or general partnership is to limit the personal liability of the participants in the business. Subject to certain exceptions (*See* Ch. 9: Liability of Corporate Fiduciaries) the officers, directors and shareholders of a corporation, and the managers and members of a limited liability company are not personally liable for the debts or torts of the corporation or LLC. This principle of "limited liability" means owners and operators of the business entity are liable only to the extent of their investment in the business entity.

G. Business Entity Selection and Taxation

1. Entity Selection

A wide variety of factors play into the selection of the proper business entity for your enterprise. Liability issues, tax matters, the type of business being conducted, the number of participants as owners or managers and similar factors can impact the decision to select one of the corporate entities, the limited liability company format or a partnership or sole proprietorship model. This is an area where experienced legal and accounting advice can point entrepreneurs in the right direction before a fundamental error occurs.

2. Tax Elections

In like fashion, if the corporate or limited liability company format is selected, the founders will elect the form of tax treatment by the Internal Revenue Service and Indiana taxing authorities. Corporations can be taxed as a separate entity distinct from its owners with shareholders only paying income tax on the corporation's profits when they are distributed ("C Corporation"). This creates what is referred to as "double taxation" because the entity pays taxes on the income, and then the owner pays taxes on the profits distributed to each of them. The tax law also permits certain corporations to be taxed like partnerships and yet retain the other advantages of the corporate form. Such corporations ("S Corporations") are not subject to double taxation, and file an information return with profits and losses flowing through the entity to the owners. Limited liability companies may also elect to be taxed as a partnership or a C or S Corporation. The deductibility of losses in early years, the likelihood and amount of profits after initial formation and many other factors play into this fundamental decision. Entrepreneurs are again encouraged to seek legal and accounting advice prior to making this foundational decision.

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H. Specific statutes relating to heavily regulated industries

Banking: Indiana Code § 28-1-1-1 et. seq.

Gaming: Indiana Code § 35-45-5-1 et. seq.

Health Care: Indiana Code § 16-1-1-1 et. seq.

Insurance: Indiana Code § 27-1-1-1 et. seq.

Alcohol and Tobacco: Indiana Code § 7-1-1-1 et. seq.

Livestock: Indiana Code § 15-5-1-1 et. seq.

Utilities: Indiana Code § 8-1-1-1 et. seq.

For further information on this section, please contact Brian Bosma, Justin Leverton, Ted Nolting or any of our other attorneys.

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Ch. 3: Minority and Women Owned Business Enterprises: Requirements and Certification Process

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The State of Indiana certifies business that may as either a minority owned business enterprise ("MBE") or a women's business enterprise ("WBE"). Benefits of obtaining certification include subcontracting opportunities on state contracts, training opportunities, networking events, and the appearance of the business in a special state directory.

A. Statutory Definitions

1. Minority Owned Business Enterprise ("MBE")

An MBE is an individual, partnership, corporation, limited liability company, or joint venture of any kind that is "owned and controlled" by one (1) or more persons who are:

(1) United States citizens; and
(2) members of a minority group or a qualified minority nonprofit corporation.

Ind. Code § 4-13-16.5-1. A "minority group" includes any of the following:

(1) Blacks;
(2) American Indians;
(3) Hispanics; and
(4) Asian Americans.

Ind. Code. § 4-13-16.5-1. A business is "owned and controlled" if the qualified person:

(1) owns at least fifty-one percent (51%) of the enterprise, including corporate stock of a corporation;
(2) controls the management and is active in the day-to-day operations of the business; and
(3) holds an interest in the capital, assets, and profits and losses of the business proportionate to the percentage of ownership.

Ind. Code § 4-13-16.5-1.

2. Women's Business Enterprise ("WBE")

Similarly, a WBE is characterized as one (1) of the following:

(1) A sole proprietorship owned and controlled by a woman.
(2) A partnership or joint venture owned and controlled by women in which:
    (A) at least fifty-one percent (51%) of the ownership is held by women; and
    (B) the management and daily business operations are controlled by at least one (1) of the women who owns the business.
(3) A corporation or other entity:
    (A) whose management and daily business operations are controlled by at least one (1) of the women who owns the business; and

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(B) that is at least fifty-one percent (51%) owned by women, or if stock is issued, at least fifty-one percent (51%) of the stock is owned by at least one (1) of the women.

(4) A qualified women's nonprofit corporation.

Ind. Code § 4-13-16.5-1.3.

B. Criteria for Certification

The Indiana Department of Administration ("IDOA" or the "Department") has established numerous criteria for qualifying a WBE or MBE. These include requirements include that the business be 1) owned by qualifying members, 2) independent, 3) controlled by qualifying members, and (4) must serve a commercially useful function, and (5) must have reasonable prospects for success in competing in the public sector. Each of these will be summarized in the following sections.

1. Ownership By Qualifying Members (25 Ind. Admin Code 5-3-5)

To be an eligible WBE or MBE, an enterprise must be at least fifty-one percent (51%) owned by qualifying members. In the case of a limited liability company, at least fifty-one percent (51%) of each class of membership interest must be owned by the qualifying members. An enterprise's ownership by qualifying members must be real, substantial, and continuing, going beyond any pro forma ownership reflected in ownership documents. The qualifying members must enjoy the customary incidents of ownership and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. The following are factors considered by the Department.

a. Capital Contributions

The contributions of capital or expertise by a qualifying member to acquire an ownership interest must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable either to the enterprise or an owner who is not a qualifying member, or mere participation in an enterprise's activities as an employee.

b. Contribution of Expertise

The following requirements apply to situations in which expertise is relied upon as part of a qualifying member's contribution to acquire ownership:

(1) The owner's expertise is:
- (A) In a specialized field.
- (B) Of outstanding quality.
- (C) In areas critical to the enterprise's operations.
- (D) Indispensable to the enterprise's potential success.
- (E) Specific to the type of work the enterprise performs.

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(F) Documented in the records of the enterprise. These records must clearly show the contribution of expertise and its value to the enterprise.

(2) The individual whose expertise is relied upon must have a significant financial investment in the enterprise.

c. Consideration for Business Interest

In evaluating enterprise ownership, the department disregards interests in a business or other assets obtained by a qualifying member as the result of a gift, or transfer without adequate consideration, from any non-qualifying individual or non-MBE or WBE enterprise that is:

(1) involved in the same enterprise, or an affiliate of the enterprise, for which MBE or WBE certification is sought; or
(2) involved in the same or a substantially similar line of business; or
(3) engaged in an ongoing business relationship with the enterprise, or an affiliate of the enterprise, for which MBE or WBE certification is sought.

To overcome this presumption and permit the interests or assets to be counted, the qualifying member must demonstrate that:

(1) the gift or transfer to the qualifying member was made for reasons other than obtaining certification as a MBE or WBE; and
(2) the qualifying member actually controls the management, policy, and operations of the enterprise, notwithstanding the continuing participation of a non-qualifying individual who made the gift or transfer.

d. Allowable but Scrutinized Capital Contributions

While the following factors are considered by the department, the department will not regard a contribution of capital as failing to be real and substantial, or find an enterprise ineligible, solely because:

(1) A qualifying member acquired her ownership interest as the result of a gift, or transfer without adequate consideration, other than as described above.
(2) There is a provision for the co-signature of a spouse who is not a qualifying member on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents.
(3) Ownership of the enterprise or its assets is transferred for adequate consideration from a spouse who is not a qualifying member to a spouse who is such an individual. In this case, the department will scrutinize the ownership and control of an enterprise to ensure that it is owned and controlled, in substance as well as in form, by a qualifying member.

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2. **Independence of Business** (25 Ind. Admin. Code 5-3-5)

Only an "independent" business may be certified as a WBE/MBE. An independent business is a business the viability of which does not depend on its relationship with another enterprise or enterprises. In determining whether a potential WBE/MBE is an independent business, the department will scrutinize relationships with non-WBE/MBE enterprises in such areas as *personnel, facilities, equipment, financial, bonding support, and other resources*. The department will also consider whether *present or recent employer/employee relationships* between the qualifying member of the potential WBE/MBE and non-WBE/MBE, or persons associated with non-WBE/MBE, compromise the independence of the potential WBE. The department will further examine the enterprise's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential WBE/MBE enterprise. In considering the foregoing factors, the consistency of relationships between he potential WBE/BME and non-WBE/MBE must conform with customary industry practice.

3. **Control by the Qualifying Member** (25 Ind. Admin. Code 5-3-5)

A WBE/MBE may not be subject to any formal or informal restrictions that limit the customary discretion of the qualifying members. For example, there can be no restrictions through corporate bylaws, contracts, or any other formal or informal devices, including, but not limited to employment contracts or restrictions on or assignments of voting rights that prevent the qualifying members, without the cooperation or vote of any nonqualifying individual, from making any business decision of the enterprise. Indeed, the qualifying members must possess the power to direct or cause the direction of the management and policies of the enterprise and to make day-to-day as well as long term decisions on matters of management, policy, and operations. Other requirements for "control" include:

(1) A qualifying member must hold the highest officer position in the enterprise.
(2) In a corporation, qualifying members must control the board of directors.
(3) In a partnership, one or more qualifying members must serve as general partners, with control over all partnership decisions.

Notwithstanding the foregoing, individuals who are not qualifying members may be involved in an MBE or WBE as owners, managers, employees, stockholders, officers, and directors. Such individuals must not, however, possess or exercise the power to control the enterprise or be disproportionately responsible for its operation. Ultimately, the managerial role of the qualifying members in the enterprise's overall affairs must be such that the department can reasonably conclude that the qualifying members actually exercise control over the enterprise's operations, management, and policy.

"Control" also requires that the qualifying members have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the enterprise is engaged and the enterprise's operations. The qualifying members are not required to have experience or expertise in every critical area of the enterprise's operations, or to have greater

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experience or expertise in a given field than managers or key employees. However, the qualifying members must have the ability to intelligently and critically evaluate information presented by other participants in the enterprise's activities and to use this information to make independent decisions concerning the enterprise's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the enterprise is insufficient to demonstrate control.

In determining whether a qualifying member ultimately exercises control, the department may consider other information as well, including: 1) whether an individual is required to have a particular license to control a particular enterprise; 2) the differences in remuneration between the qualifying members and other participants in the enterprise; 3) whether the qualifying member engages in outside employment that conflicts with the management of the enterprise or prevent the individual from devoting sufficient time and attention to the affairs of the enterprise to control its activities; 4) the ownership of the enterprise assets; and 5) the ability to control employees and make employment decisions.

4. **Commercially Useful Function** (25 Ind. Admin Code 5-3-6)

The department must also consider whether an enterprise performs a "commercially useful function" as part of the analysis about whether to certify an enterprise as a WBE/MBE. A WBE/MBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the WBE/MBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a WBE/MBE is performing a commercially useful function, one must evaluate the amount of work subcontracted, industry practices, whether the amount the enterprise is to be paid under the contract is commensurate with the work it is actually performing and the credit claimed for its performance of the work, and other relevant factors.

On the other hand, A WBE/MBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of WBE/MBE participation. In determining whether a WBE/MBE is such an extra participant, one must examine similar transactions, particularly those in which WBEs/MBEs do not participate.

5. Reasonable Prospects for Success (25 Ind. Admin Code 5-3-6)

Finally, the applicant for WBE/MBE certification must possess reasonable prospects for success in competing in the public sector. The department will deem an enterprise that has been in business for two full years immediately prior to its date of application as possessing reasonable prospects for success in competing in the public sector. *The department may waive the two years in business requirement if each of the following conditions is met*:

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(1) The qualifying member or members have demonstrated management experience.
(2) The qualifying member or members have demonstrated technical experience to carry out type of business for which certification is sought.
(3) The qualifying member has a record of successful performance on contracts from governmental or nongovernmental sources in its primary area of certification.
(4) The applicant for certification as a WBE/MBE has demonstrated, or can demonstrate, its ability to timely obtain the personnel, facilities, equipment, and any other requirements needed to perform contracts.

C. <u>Certification Process</u> (25 Ind. Admin Code 5-3-7).

The department may grant certification to an enterprise only for specific types of work in which the qualifying members have the ability to control the enterprise. To become certified in an additional type of work, the enterprise must have been certified for at least six (6) months in its current type of work, or certified by the department for at least one (1) year, and demonstrate that its qualifying members are able to control the enterprise with respect to the newly-requested type of work. The department may not, in this situation, require that the enterprise be recertified or submit a new application for certification, but it must verify the qualifying member's control of the enterprise in the additional type of work. However, the department must apply the same standards to additional types of work that were applied originally. Certification in these additional work areas is not guaranteed simply because the enterprise is currently certified.

At a minimum, the department will take the following steps in determining whether an enterprise meets the standards for certification as a WBE/MBE:

1) Make on-site visits during normal business hours to company headquarters with little or no advance notice in its efforts to make an accurate determination of the ownership and control of an enterprise. The department may interview the principal officers of the enterprise and review their resumes and work histories. The department may also perform an on-site visit to job sites if there are such sites on which the enterprise is working at the time of the eligibility investigation in its jurisdiction or local area.
(2) If the enterprise is a corporation, analyze the ownership of stock in the enterprise.
(3) Analyze the bonding and financial capacity of the enterprise.
(4) Determine the work history of the enterprise, including contracts it has received and work it has completed.
(5) Obtain a statement from the enterprise of the type of work it prefers to perform as part of the MBE or WBE program and its preferred locations for performing the work, if any.

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(6) Obtain or compile a list of the equipment owned by or available to the enterprise and the licenses the enterprise and its key personnel possess to perform the work it seeks to do as part of the program.

For further information on this section, please contact Ted Nolting or any of our other attorneys.

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Ch. 4: Labor & Employment

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A. Whistle blower protections

Indiana has whistleblower laws that protect state employees or employees of private employers under public contract who report a violation of a federal law or regulation, a violation of a state law or rule, a violation of an ordinance of a political subdivision (as defined in IC 36-1-2-13), or the misuse of public resources. Ind. Code § 4-15-10-4 and § 22-5-3-3.

Indiana does not have a provision that protects a whistleblower who is employed by a private entity that is not under public contract. Wrongful termination, however, is a valid cause of action when an employee is terminated for refusing to commit an illegal act for which the employee would be personally liable. *Ogden v. Robertson*, 962 N.E.2d 134, 145 (Ind. Ct. App. 2012) (citing *Baker v. Tremco,* 917 N.E.2d 650, 654 (Ind. 2009)).

B. State anti-discrimination laws

Indiana's civil rights statutes are codified in Title 22, Article 9. Indiana's stated public policy is to provide "all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations, and acquisition through purchase or rental of real property, including but not limited to housing, and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity." Ind. Code § 22-9-1-2

Indiana statutes specifically address age and disability discrimination (Ind. Code § 22-9-2 *et seq*. and § 22-9-5 *et seq*.)

C. What are the basic laws regarding wages, vacation pay and sick pay?

1. Minimum Wage:

Indiana has a minimum wage law (Ind. Code § 22-2-2 et seq.) but most employers are governed by the federal Fair Labor Standards Act (FLSA) which requires a minimum wage of $7.25 per hour.

For employers not otherwise covered by the FLSA (i.e., some small businesses), Indiana has incorporated the federal minimum wage requirements to ensure similar coverage for small business employers who employ at least two employees during a work week. Ind. Code § 22-2-2-4(h). Tips can be credited against the minimum wage, but the employee must be paid at least $2.13 per hour in non-tip wages, and if the employee's tips combined with the hourly wage do not equal the minimum wage, the employer must make up the difference. Ind. Code § 22-2-2-4(c). Like the FLSA (29 U.S.C. § 206(g)), Indiana also allows employers to pay a training wage of $4.25 per hour to employees under the age of 20 for the first 90 consecutive calendar days of their employment. Ind. Code § 22-2-2-4(j).

Additional information is available from the Indiana Department of Labor's Wage and Hour Division by email at wagehour@dol.in.gov, phone (317) 232-2655, or website at http://www.in.gov/dol/2345.htm.

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2. Overtime:

Employers in Indiana who employ at least two employees during a workweek must pay employees overtime for any hour in excess of 40 hours per week at a rate of 1.5 times their regular rate of pay. Ind. Code § 22-2-2-4(k). As with the FLSA, a number of exceptions apply. Ind. Code §§ 22-2-2-3 and -4.

3. Payments:

In Indiana, wages must be paid no later than ten (10) business days after the pay period in which they were earned. Ind. Code § 22-2-5-1. No amount may be deducted from an employee's pay unless all of the following three conditions are met: (1) the deduction is for one of the specific purposes authorized by the statute; (2) a deduction agreement is signed in writing by the employee and must be revocable by its terms; and (3) a copy of the deduction agreement must be provided to the employee within 10 days of its execution. Ind. Code § 22-2-6-2(a). The statutorily authorized purposes are listed in Ind. Code § 22-2-6-2(b).

4. Break and Rest Time:

Indiana generally does not require breaks or lunch. Under Indiana's child labor laws, however, minor employees (under 18 years of age) who work six or more hours in a shift must be given one or two breaks totaling at least 30 minutes, which may be taken at any point during the minor's shift. Ind. Code § 20-33-3-30(b). The employer must document its break policies relating to minors in writing and must communicate the policy to the minor employee at the time the employee is hired. 610 Ind. Admin. Code 10-3-2. The employer must also keep logs to document all breaks provided to minor employees. *Id.* There are various exemptions for camps, farm laborers, domestic service, golf caddies, newspaper carriers, or teens withdrawn from school. Questions relating to other child labor laws can be directed to the Indiana Department of Labor, Division of Child Labor, at childlabor@dol.in.gov or (317) 232-2655 or by visiting http://www.in.gov/dol/2401.htm.

Indiana law also requires employers with at least 25 employees to provide, to the extent reasonably possible, a private location other than a toilet stall for working mothers to express breast milk in privacy and to accommodate cold storage, either the employer's refrigerator or the employee's own portable cold storage device. Ind. Code § 22-2-14-2.

5. Vacation and Sick Pay:

Indiana law does not require employers to provide either vacation pay or sick pay. *See Indiana Department* of *Labor's Wage & Hour FAQs at http://www.in.gov/dol/2345.htm#2E.*

Vacation and sick leave is generally left to the employer's policies. However, the default rule in Indiana is that an employee who is promised vacation time is entitled to use that time or save it for use or payment at a later date. *Comm'r of Labor ex rel. Shofstall v. Int'l Union of Painters & Allied Trades AFL-CIO, CLC Dist. Council 91*, 991 N.E.2d 100, 103 (Ind. 2013). The employer may adopt a policy or express arrangement with the employee which may vary this default position either by placing a

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prerequisite on the employee's ability to use the promised vacation time or by preventing the employee from using the vacation time after a date certain or period of time (e.g., a use-it-or-lose-it policy). *Id.*

D. Employment at will and wrongful discharge

"Indiana follows the doctrine of employment at will, under which employment may be terminated by either party at will, with or without reason." *Wior v. Anchor Indus., Inc.,* 669 N.E.2d 172, 175 (Ind. 1996). There are exceptions to the at-will doctrine. The at-will doctrine will not be applied if there is adequate consideration to support the existence of a contract, or if there is a statutory expression of a right or duty, or if the employer made a promise that was relied upon to the employee's detriment (promissory estoppel). Further, an employee may not be fired for exercising a right, such as asserting worker's compensation claim, or for refusing to commit an illegal act for which the employee would be personally liable. *McClanahan v. Remington Freight Lines, Inc.,* 517 N.E.2d 390, 392–93 (Ind. 1988).

E. The use of polygraphs, drug tests and other pre-employment screenings

As a general proposition, an employer's authority regarding a polygraph examination is governed by federal law, the Employee Polygraph Protection Act of 1988 ("EPPA") and not state law. 29 USC § 2001. The EPPA provides that an employer shall not: (1) require, request, suggest or cause an employee to take or submit to any lie detector test, (2) to use, accept, refer to, or inquire about the results of any lie detector test of an employee, or (3) discharge, discipline, discriminate against, deny employment or promotion, or threaten to take any such action against an employee for refusal to take a test, or on the basis of the results of a test. 29 USC § 2002.

Notwithstanding the general prohibition, there are any number of exemptions to the EPPA. First, and most importantly, an exemption exists that provides an exclusion to its provisions for the United States Government, any State or local government, or any political subdivision of a State or local government, acting in the capacity of an employer. Further exemptions allow polygraphs for national defense and security personnel as well as employers authorized to manufacture, distribute, or dispense a controlled substance, and for ongoing investigations.

There are no contrary Indiana State provisions on this subject, and the one Indiana court case discovered on this topic is from 1985, before the EPPA went into effect. That said, that court case found "In the absence of statutory directives, we decline to find a violation of public policy in the dismissal of an employee who refuses to take a polygraph examination." *Hamblen v. Danners, Inc.*, 478 N.E.2d 926, 929 (Ind. Ct. App. 1985). While not dispositive in light of the subsequent Act, the *Hamblen* case is instructive on how an Indiana court might generally view an employer requiring an employee to submit to a lie detector test.

Indiana employers may drug test their employees, and testing is mandatory for certain careers such as child care workers (Ind. Code § 12-17.2-5-3.5) and random drug testing for public works contracts (Ind. Code § 4-13-18-6). Employers who choose to test employees must make sure the testing is non-discriminatory.

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F. Non-competition agreements and restrictive covenants

Nearly every Indiana court decision concerning non-compete agreements, or non-solicitation agreements, notes that such agreements are disfavored. *Pathfinder Communications Corp. v. Macy*, 795 N.E. 2d 1103, 1109 (Ind. Ct. App. 2003) ("covenants not to compete are in restraint of trade and are not favored by the law.") Nevertheless, such agreements are regularly enforced when an employer can demonstrate that the restriction is reasonable.

The reasonableness of a restriction is measured in two steps: 1) Whether the employer has a legitimate protectable interest, and 2) whether the covenants are reasonable in scope as to the time, geography and activity restricted.

1. Is the employer protecting a "legitimate interest"?

Generally, a business claims that the non-compete is the only way to protect the company's trade secrets or goodwill, including "names and addresses of customers and the advantage acquired through representative contact." *Unger v. FFW Corp*., 771 N.E.2d 1240, 1244 (Ind. Ct. App. 2002); *Titus v. Rheitone*, 758 N.E.2d 85, 92 (Ind. Ct. App. 2001). Indiana law permits a business to restrict its former employees from enticing away the employer's old customers and thereby protect its client relationships and income stream.

In *JAK Productions, Inc. v. Wiza*, 986 F.2d 1080 (7th Cir. 1993), the United States Court of Appeals for the Seventh Circuit held that there is a "presumption under Indiana law that a covenant cannot restrain employees from doing business with their ex-employer's past customers" and that a covenant which seeks to restrain business with customers that were not customers at the time of the employee's termination, is overly broad.

2. Is the restriction reasonable in scope?

a. Time

Courts have typically found that non-competition agreements of one to two years are reasonable. In cases where a non-competition agreement is entered into in conjunction with the sale of a business, courts have regularly upheld five year non-competition agreements for the selling party.

b. Geography

Whether the geographic restriction in a non-compete is reasonable is dependent on the facts of the case. Considering a physician's non-compete which prevented him from practicing in the same or contiguous counties, the Indiana Supreme Court upheld the restriction for the counties where the physician practiced, but struck down the contiguous-county provision. Cent. Indiana Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 730-31 (Ind. 2008). Conversely, in a sales context, non-competition agreements have been reasonable when applied to any state in which an employee served customers. Coates v. Heat Wagons, Inc., 942 N.E.2d 905 915 (Ind. Ct. App. 2011). No bright-line rule exists regarding geographic reasonableness. Rather, the court will consider the facts of the case, including

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the type of work performed and the interests the employer seeks to protect.

Importantly, Indiana law permits courts to modify an otherwise overly broad agreement by striking out the overly broad provisions. Known as the "blue pencil doctrine," the court cannot add words, but may strike out words in the agreement if doing so would render the contract enforceable- "unreasonable restraints are rendered reasonable by scratching out any offensive clauses to give effect to the parties' intention." *Smart Corp. v. Grider*, 650 N.E.2d 80, 82 (Ind. Ct. App. 1995).

c. Activity

Broadly stated, Indiana courts have traditionally required the prohibited activity to be that activity which the employee conducted for the former employer. *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235, 240-41 (Ind. 1955) (citing Roy v. Bolduc, 34 A.2d 479 480 (Me. 1943), 149 A.L.R. 630, 632-33) ("[A] covenant which would limit … employment with a competitor beyond the scope of his present employment is void"). An employer may not prevent an employee from competing with portions of the business with which he was never associated. *Donahue v. Permacel Tape Corp.*, 127 N.E.2d at 239.

d. Additional Considerations

This goes back to the point that the employee may only protect its legitimate business interests. A non-compete may not be used to punish a former employee or to prevent the employee from earning a living. Using a non-compete to prevent an employee "from working within portions of the business with which the employee was never associated [is] unreasonable because such restrictions extend beyond the scope of the employer's legitimate interest." *MacGill v. Reid*, 850 N.E.2d 926, 932 (Ind. Ct. App. 2006).

The Indiana Court of Appeals recently considered whether a provision that extended the time of the noncompete for the length of a breach was enforceable. See *Hannum Wagle & Cline Engineering, Inc. et al v. American Consulting, Inc., d/b/a American Structurepoint, Inc.*, found at http://www.in.gov/judiciary/opinions/pdf/11301601jsk.pdf)

In *Hannum*, the noncompete provided "that the 'Non-Compete Period' shall be extended by the duration of any violation by [Kuntz] of the terms of Paragraph 2 of this Agreement." These clauses are common and are important to former employers who know that litigation takes time and want the offending employee barred for competing for as long as possible. Without such clauses, an employee is incentivized to delay litigation as long as possible, because he or she can run out the clock of any inunction for the noncompetition period. The former employee does run the risk that he or she may later be held liable for breach and damages will have accrued. However, the whole point of seeking an injunction is because it is difficult to prove damages.

However, the Court affirmed *Kuntz v. EVI, LLC*, 999 N.E.2d 425 (Ind. Ct. App. 2013), holding that a preliminary injunction was not an appropriate vehicle to extend the term of a non-compete. The *Kuntz* court found, and *Hannum* agreed, that a preliminary injunction upholds the status quo pending a final determination, and that the status quo was the situation prior to litigation – the

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original timing of the noncompete. As a result, the noncompete period terminated on the date set forth in the agreement, irrespective of any breach by the former employee.

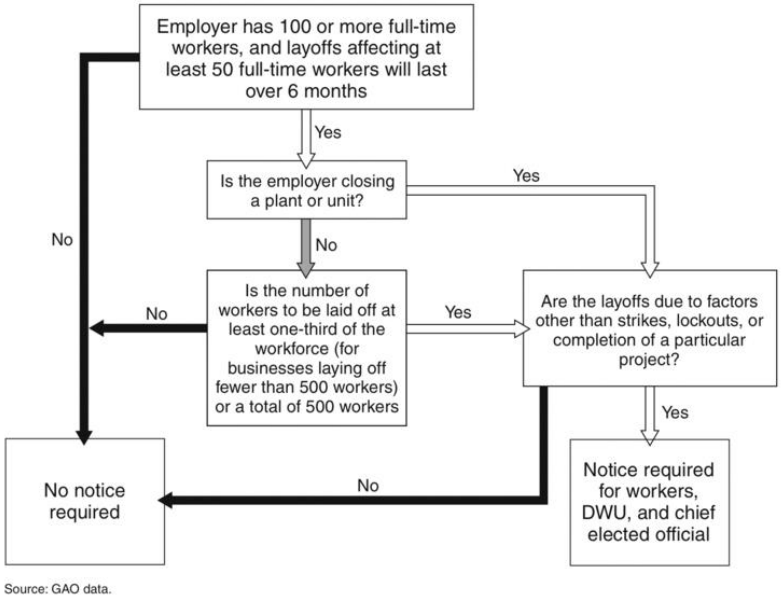
The Court did not address whether alternative language in the noncompete may support an extension, or whether after a full hearing on the merits, the Court would permit injunctive relief even after the noncompete period had expired.

G. Mass layoffs and plant closings

In 1988, the U.S. Congress passed the Worker Adjustment and Retraining Notification (WARN) Act to provide workers with sufficient time to prepare for the transition between the jobs they currently hold and new jobs. Indiana does not have a separate state law beyond the federal WARN Act. The WARN Act provides protection to workers, their families and communities by requiring employers to provide 60 days' notice in advance of covered plant closings and covered mass layoffs. This notice must be provided to either affected workers or their representatives (i.e. a labor union), to the state dislocated worker unit and the appropriate unit of local government.

The following decision matrix is used to determine whether a matter is covered by the WARN Act:

Figure 1: WARN Decision Matrix



Source: GAO data.

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Employers required to submit a WARN Notice should send the notification to:

Indiana Department of Workforce Development
Dislocated Worker Unit
10 North Senate Avenue
Indianapolis, IN 46204-2277

H. Officer and Director liability for employment related obligations

Generally, directors of a corporation are not liable for the consequences of actions taken in their capacity as director. Subject to some exceptions, directors are allowed to rely on the judgment of various experts in coming to their decisions. *See* Ind. Code § 23-1-35-1(e). Indiana expressly did not codify the business judgment rule for non-director officers. *See* Ind. Code § 23-1-36-2 and Official Comments. The official commentary notes that, rather than singling out officers as a special class of employees and imposing a codified standard of care, common law agency and contract principles generally remain the source of the duty of care owed to a corporation by an officer/employee. *Id.* Also, a corporation has the option, in its articles of incorporation or bylaws, to establish a higher standard of care for particular officers than exists under common law.

1. Indiana Business Corporations Act:

The Indiana Business Corporations Act (Ind. Code §§ 23-1) establishes that directors may be personally liable if the plaintiff can show that the director engaged in willful misconduct or recklessness, or acted in bad faith or adversely to the best interests of the company, or that the director had a conflict of interest in regard to an action taken by the company. *See* Ind. Code § 23-1-35-1. There are, however, many defenses at the disposal of the director, and liability will not attach if disinterested directors ratify the transaction with knowledge of the director's self-interest under Ind. Code § 23-1-35-2. Finally, Indiana has a fairly expansive "stakeholder law" that allows directors to consider the interests of the company's suppliers, customers, or the surrounding community as a whole (as opposed to a narrow focus on shareholders or "profit maximization") in deciding whether or not to take any corporate action. *See* Ind. Code § 23-1-35-1(d).

2. Torts (including wrongful discharge):

An officer or director may be individually liable for the torts he participates in, even if those torts occur while acting in his official capacity. *State, Civil Rights Comm'n v. Cty. Line Park, Inc.*, 738 N.E.2d 1044, 1050 (Ind. 2000); Ind. Code § 23-1-26-3 (no personal liability for shareholder except for his own acts or conduct). Ind. Code. § 23-1-37 describes indemnification options that may be available to officers, directors, or employees in such a position.

3. Crimes:

As a matter of general criminal law, an individual who participates in a criminal violation is criminally responsible even if acting in a corporate capacity. *Comm'r, Dep't of Envtl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556, 560 (Ind. 2001). A corporation may be prosecuted for any offense but may be

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convicted only if it is proven that the offense was committed by its agent acting within the scope of his authority. Ind. Code § 35-41-2-3.

4. Indiana Civil Rights Law

The Indiana Civil Rights Law (Ind. Code §§ 22-9-1 *et seq.*) prohibits the exclusion of a person from equal opportunities "relating to the acquisition or sale of real estate, education, public accommodations, employment, or the extending of credit" because of "race, religion, color, sex, disability, national origin, ancestry, or status as a veteran." Ind. Code § 22-9-1-3(*l*). The Indiana Court of Appeals has suggested that it would apply the same employer-liability rules that exist under Title VII of the federal Civil Rights Act. *Zeller Elevator Co. v. Slygh*, 796 N.E.2d 1198, 1212, n.3 (Ind. Ct. App. 2003) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)). Furthermore, the Indiana Supreme Court has held that the Civil Rights Law does not authorize the award of punitive damages. *Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 638 (Ind. 1999).

I. Indiana job safety and health programs

The Indiana Occupational Safety and Health Act, Ind. Code § 22-8-1.1 *et seq*, is intended to ensure safe and healthful working conditions for workers within Indiana. The Indiana Department of Labor ("IDOL") has primary responsibility for administering and enforcing the IOSH Act and the health and safety standards promulgated under the authority of the IOSH Act. Within IDOL, the Indiana Occupational Safety and Health Administration (IOSHA) is dedicated to ensuring workplace safety and health.

Workplace inspections are conducted by the Construction Safety Division and the Industrial Compliance Division. IOSHA also operates a Whistleblower Protection Unit and a voluntary Protection Program.

Further details regarding IOSHA can be found here: www.in.gov/dol/iosha.htm

J. Right to Work Law

Indiana is a right to work state. No person may be required to "(1) become or remain a member of a labor organization; (2) pay dues, fees, assessments, or other charges of any kind or amount to a labor organization; or (3) pay to a charity or third party an amount that is equivalent to or a pro rata part of dues, fees, assessments, or other charges required of members of a labor organization; as a condition of employment or continuation of employment." Ind. Code § 22-6-6-8.

The AFL-CIO and a number of its members sued claiming Indiana's Right to Work law violated Article 1, Section 21 of the Indiana constitution ("no person's particular services shall be demanded, without just compensation"). *Zoeller v. Sweeney*, 19 N.E.3d 749, 751 (Ind. 2014). The Indiana Supreme Court upheld the statute.

For further information on this section, please contact Steve Runyan or Kevin Koons, or any of our other attorneys.

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Ch. 5: Property Law: Including Estates, Mortgages, Liens & Sureties

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A. Ownership estates of real property

1. Freehold Estates

a. Fee Simple

Fee simple estate is the most common type of ownership and grants a complete interest in land for use. Indiana recognizes five subsets of fee simple estates:

i. Fee Simple Absolute:

An estate in fee simple absolute is the owner's to do with as wished and cannot be revoked. However, the land is subject to seizure due to non-ownership issues, such as taxes, settlement of a judgment, and the like.

ii. Fee Simple Determinable:

An ownership interest that reverts to the grantor upon the happening of a stated event. A fee simple determinable is also known as a "determinable fee." Commonly created with deeds that include words of limitation like "as long as," "so long as," "while," "during," or "until." Once the stated event occurs, or ceases to occur, the interest automatically reverts to the grantor. As an example, a deed that conveys property to a church so long as the property is used for church purposes, is a fee simple determinable. If the property ceases to be used as a church, ownership reverts to the grantor. *Lindsay v. Wigal*, 145 Ind. App. 338, 340, 250 N.E.2d 755, 757 (1969).

iii. Fee Simple Subject to a Condition Subsequent:

A condition subsequent, like a determinable interest, reverts title to the grantor. A fee simple title subject to a condition subsequent estate includes a conditional phrase such as "upon express condition that," "upon condition that," "on the condition that," "but if," "however if," "provided that," or "provided however that." This type of estate differs from a fee simple determinable because when the condition subsequent occurs, the estate does not automatically revert to the grantor, instead, the grantor *has a right of entry* and must take steps to re-establish possession of the land.

iv. Fee simple subject to an executory limitation:

In contrast to the determinable and condition subsequent estates, the fee simple subject to an executory interest has a future estate held by a third party. Similar to the fee simple determinable, this estate passes automatically (to the third party) upon the occurrence (or non-occurrence) of the stated event. For example, property is transferred to Abbot so long as the land is used for a hospital, but if used for anything else, then to Barbara. Barbara (the third party) holds the executory interest and if the property is not used for a hospital, it automatically transfers to Barbara.

v. Fee Simple Conditional:

Estates in fee simple conditional, like estates in fee tail "are estates of potentially infinite

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duration inheritable only by the issue of the first taker." *Restatement, Property* § 17. For a conditional fee, the donee receives the property subject to a condition, and once the condition is met, it becomes a fee simple absolute. As an example, in *Smith v. Hunter*, 23 Ind. 580 (Ind. 1864), property passed to son David, but "Should he die childless, the land should belong to [Sister] or her heirs." *Id.* at 581-82. David died childless, and therefore the property reverted to Sister. If a child had been born to David during his life, then the property would have become fee simple absolute and David would have owned the property and he could have alienated (i.e. sold or transferred) the property. Fee simple conditional is distinguished from a fee tail because the fee tail must pass to issue of the donee, whereas fee simple conditional merely requires that the donee have issue, but the property need not necessarily pass to the issue. Fee tails are discussed more below.

b. Life Estate:

A life estate provides the holder of the estate use for the duration of the life of the holder, or in some circumstances, for the life of another. As an example, to A for the life of B, then to C. A has title to the property for so long as B is alive, and upon B's death, title transfers to C.

c. Fee Tail:

Indiana has abolished estate tails. Ind. Code § 32-17-1-3. A fee tail traditionally limited passing of property to blood relations. As an example Sam may receive a deed "to Sam and the heirs of his body" which meant the property could only pass to Sam's descendants. If his family line ran out, it would revert to the original grantor (or descendants thereof).

Indiana law provides that an estate that was a fee tail is now fee simple, and if not limited by a valid remainder, is fee simple absolute. *Id.*

2. Non-Freehold Estates

A non-freehold estate gives possession of the property to the holder but not the right to hold title. Such estates may be a tenancy for years (fixed determined period of time with a start and end date), a periodic tenancy (continuous intervals such as a month-to-month lease); tenancy at will (no fixed duration and may be terminated at either party, generally with reasonable notice); or a tenancy at sufferance (a wrongful hold-over that lasts until eviction).

B. Methods of ownership of real estate by multiple parties

Indiana provides three forms of concurrent ownership of real estate, including joint tenancy, tenancy in common, and tenancy by the entirety. *Powell v. Estate of Powell*, 14 N.E.3d 46, 48-53 (Ind. Ct. App. 2014).

1. Tenants by the entireties

Tenancy by the entireties can exist only between husband and wife. Tenancy by the entireties is created when husband and wife purchase real estate together and the deed references owning it as husband and wife. There is no requirement that the deed include the phrase "tenancy by the

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entireties." If a deed says "John Doe and Jane Doe, husband and wife…" then the ownership is tenancy by the entireties.

A creditor cannot lien real estate owned by tenancy by the entireties unless both spouses owe the debt. 1 Tiffany, Real Property, 645 ("The most important incident of tenancy by the entireties is that the survivor of the marriage, whether the husband or the wife, is entitled to the whole, which right cannot be defeated by conveyance by the other to a stranger, as in the case of a joint tenancy, nor by sale under execution against the other"). Importantly, this also means that "husband and wife have no separable interest in entireties property, therefore, a conveyance by one tenant is ineffective to pass legal title." *Wienke v. Lynch*, 407 N.E.2d 280, 283 (Ind. Ct. App. 1980).

2. Tenants in common

Tenants in common hold property severally, rather than jointly. They are "united only by their right to possession of the property." *Underwood v. Bunger*, 52 N.E.3d 829, 832 (Ind. Ct. App. 2016), *reh'g denied* (May 25, 2016).

There is a statutory presumption in favor of tenants in common over joint tenancy (discussed below). A conveyance of land made to two or more persons creates an estate in common and not in joint tenancy unless: (1) the conveyance or devise expressly states that the grantees or devisees hold the land or interest in land in joint tenancy and to the survivor of them; or (2) the intent to create an estate in joint tenancy manifestly appears from the tenor of the instrument. *Powell v. Estate of Powell*, 14 N.E.3d 46, 48-53 (Ind. Ct. App. 2014); see Ind. Code § 32–1–2–7. An exception is made for executors or trustees who hold the property in joint tenancy.

If the instrument does not specify the relative stake in the real estate for each tenant in common, it is presumed that they hold the shares equally. *Baker v. Chambers*, 398 N.E.2d 1350 (Ind. Ct. App. 1980). When the parties disputing the share interest are the original grantees, the presumption is rebuttable. But if the parties disputing title are not the original grantees and there is no indication of the respective shares, then the presumption is conclusive. *Id.*

In circumstances where a deed is made to two individuals identified a husband and wife, when they were not in fact married, title vested as tenants in common, and each owns an undivided one-half of the realty. *Spanier v. Spanier*, 96 N.E.2d 346 (Ind. App. Ct. 1951).

Any tenant in common may sell his/her interests, although the tenant may not sell the interests of the other tenants.

3. Joint tenants

An additional method of ownership is joint tenancy. Upon the death of a tenant, the deceased's share passes to surviving tenant(s). *Poulson v. Poulson*, 691 N.E.2d 504, 506 (Ind. Ct. App. 1998). *Powell v. Estate of Powell*, 14 N.E.3d 46, 48-53 (Ind. Ct. App. 2014) ("survivorship is the salient feature of joint tenancy").

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When a joint tenancy is created, the ownership is a single estate in property owned by the joint tenants. "When a joint tenancy is created, each tenant acquires an equal right to share in the enjoyment of the land during their lives and each tenant is entitled to an equal share upon partition." *Ramer v. Smith*, 896 N.E.2d 563, 569 (Ind. Ct. App. 2008).

A joint tenant may dispose of the tenants' interest in the property, and if the tenant does so, it severs the joint tenancy and the tenants' ownership converts to a tenancy in common. While a tenant may dispose of the tenant's interest, no tenant may dispose of the interest of the other tenants.

For example, if Alan, Barb, and Charlie own a joint tenancy, Alan could sell his interest. If Alan sold his interest to Donna, then Barb, Charlie and Donna would all own equal interests in a tenancy in common. While Alan can sell his own interest, he cannot sell the interests of Barb or Charlie. If Alan did not sell his interest, but instead died still owning his interest, then Barb and Charlie would continue to own a joint tenancy with just the two of them as owners following Alan's death.

There are four requirements to create a joint tenancy:

(1) the tenants must have one and the same interest;
(2) the interests must accrue by one and the same conveyance;
(3) the interests must commence at one and the same time; and
(4) the property must be held by one and the same undivided possession.

Poulson v. Poulson, 691 N.E.2d 504, 506 (Ind. Ct. App. 1998); *Ramer v. Smith*, 896 N.E.2d 563, 569 (Ind. Ct. App. 2008) ("in order to create a joint tenancy, a conveyance must express that the grantees hold the land 'in joint tenancy and to the survivor of them' or the intent to create an estate in joint tenancy must manifestly appear from the 'tenor of the instrument.'").

C. Forms of deeds

Indiana uses general warranty deeds, special warranty deeds, quitclaim deeds, and special purpose deeds.

1. Warranty Deed

"A warranty deed is a deed in which the grantor warrants good clear title. The usual covenants of title are warranties of seisen, quiet enjoyment, right to convey, freedom from encumbrances, and defense of title as to all claims." *Windell v. Miller*, 687 N.E.2d 585, 588 (Ind. Ct. App. 1997) (internal citations omitted).

When the extent of the warranty is limited, the deed is a "special warranty deed" or a "limited warranty deed." *Windell v. Miller*, 687 N.E.2d 585, 588 (Ind. Ct. App. 1997). Limited warranty deeds are commonly used to transfer title from a lender to a third party following foreclosure and deed in lieu of foreclosure transactions.

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2. Quitclaim Deed

A quit claim deed conveys whatever interest or estate the grantor holds at the time the deed is executed. *Enderle v. Sharman*, 422 N.E.2d 686, 695 (Ind. Ct. App. 1981). A quit claim holder may only subsequently convey the interest conveyed by the quitclaim deed. However, if A holds title as a result of a quitclaim deed and conveys title via warranty deed to B, then B's property interest is limited to what was originally conveyed to A by quitclaim. A's use of a warranty deed, with its warranties, guaranties, and covenants to B, means A could be liable should B later be damaged by breach of the warranties, guaranties, and covenants. *Downing v. Owens*, 809 N.E.2d 444, 452 (Ind. Ct. App. 2004).

3. Special Purpose Deed

Special purpose deeds include personal representative's deeds (used in probate circumstances), sheriff's deeds (following foreclosure sales), tax deeds (following tax sales), and deeds in lieu of foreclosure (given by a borrower directly to lender as opposed to a foreclosure).

D. Mortgage rights and responsibilities

1. Title and usage of the property

A mortgagee (typically a lender) has a lien on the mortgaged real estate, but the mortgagee does not have the right to possess the real estate. *Merrillville 2548, Inc. v. BMO Harris Bank N.A.*, 39 N.E.3d 382, 394 (Ind. Ct. App.), *reh'g denied* (Aug. 27, 2015), *trans. denied sub nom. Merrillville 2548, Inc. v. BMO Harris Bank*, 42 N.E.3d 520 (Ind. 2015).

Instead, the mortgagor (typically a borrower) retains legal title as well as the right to possession, use and enjoyment of the property. The real estate is merely security for the debt and the mortgagee does not have an immediate right to possession. Rather, the mortgagee must pursue a judicial foreclosure, and purchase the real estate at the sheriff's sale. Indiana does not permit non-judicial foreclosure (see subsection D.3, below).

2. Elements of a mortgage

Indiana Code provides that a mortgage requires the following to be valid:

> (1) worded in substance as "A.B. mortgages and warrants to C.D." (here describe the premises) "to secure the repayment of" (here recite the sum for which the mortgage is granted, or the notes or other evidences of debt, or a description of the debt sought to be secured, and the date of the repayment); and
> (2) dated and signed, sealed, and acknowledged by the grantor[.]

Ind. Code § 32-29-1-5.

In *Commercial Bank v. Rockovits*, the holder of a second mortgage alleged that a mortgage required a dollar limitation on the amount of the debt in order for the mortgage to be valid. 499

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N.E.2d 765, 766 (Ind. Ct. App. 1986). The court reaffirmed that open-ended mortgages (a mortgage that specifies future advances on the given secured debt are secured by the mortgage) are valid. The court further held that the mortgage is only required to describe the debt, but does not have to "refer specifically to the amount of indebtedness or the notes which evidence the debt. It only requires the debt to be described." *Id.* at 767. Literal accuracy is not required. Instead, the description must merely be enough to direct the reader's attention to where the full information can be found. *Id.*

A mortgage may also secure future obligations or advances as well as modifications, extensions and renewals. In the event of such additions or changes, the priority of the mortgage remains the same as the mortgage had prior to the addition or change. Ind. Code § 32-29-1-10.

A mortgage may permit acceleration of the principal upon a failure of any condition (such as the failure to make an installment payment). Such a stipulation is deemed an agreement by the parties to determine the time and conditions when the debt is due, and not a forfeiture. However, in such cases, the mortgage holder must take affirmative action demonstrating the election to accelerate the debt. *First Fed. Sav. & Loan Ass'n of Gary v. Stone*, 467 N.E.2d 1226, 1232 (Ind. Ct. App. 1984).

3. Foreclosures

a. Process

A foreclosure must follow judicial procedure. A judgment of foreclosure should include a personal judgment against any party liable for the payment of sums due which are secured by the mortgage, an *in rem* judgment against the property, and should order the mortgaged premises (or some part thereof) sold. Ind. Code § 32-30-10-5.

The sale may not occur until at least three months after the complaint is filed unless the property has been abandoned. Ind. Code. § 32-29-7-3(a). Longer periods are required for mortgages recorded before July 1, 1975. A party seeking to have the property sold, must praecipe with the clerk of the court following the entry of judgment. *Ind. Code. § 32-29-7-3*(b).

Upon receipt of the *praecipe,* the clerk must issue the certified judgment to the sheriff who is required to sell the mortgaged property. Ind. Code § 32-30-10-8; Ind. Code § 32-29-7-3. Prior to sale, the location of the sale must be advertised in each county where the property is located. The advertisement must run once a week for three consecutive weeks and the first publication must be at least 30 days before the sale date. Ind. Code § 32-29-7-3(d). Mortgagees have the option of having a sheriff sale conducted by a private auctioneer, rather than via a traditional sale. Ind. Code § 32-29-7-4. Judgment creditors choose this option when the property has significant commercial value that would not be realized in a traditional sheriff sale. The foreclosure judgment should specify this option if desired.

Foreclosing mortgagees are required to pay any delinquent real property taxes and liens in favor of municipalities (such as sewer liens) prior to the sheriff sale. Ind. Code § 32-29-7-8.5.

Immediately after the sheriff's sale, the sheriff will execute and record a sheriff's deed

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transferring title of the property to the winning bidder at the sheriff's sale. If the winning bid amount is less than the debt owed by the mortgagor to the mortgagee, the mortgagee is permitted to collect the remaining amount owed (the "deficiency") from the mortgagor, but only if the judgment is against the mortgagor personally, rather than only *in rem*. A mortgagor may avoid liability on the deficiency with the consent of the mortgagee by filing a waiver of the 3 month "waiting period" discussed above. *See* I.C. § 32-29-7-5.

b. Deadline to seek foreclosure

Indiana's statute of limitations provides that a suit on a promissory note must be brought within 6 years after the cause of action accrues (i.e. six years after default). Ind. Code § 34-11-2-9. An action for breach of the mortgage securing the promissory note, however, must be brought within 10 years after the cause of action accrues. Ind. Code § 34-11-2-11. Consequently, if a mortgage secures a promissory note and the borrower defaults on the note on January 1, 2014, a suit for breach of the note must be brought by January 1, 2020, and a suit to foreclose the mortgage must be brought by January 1, 2024. In nearly all cases, the actions are brought together.

c. Redemption rights

Any owner (or part-owner) of real estate may redeem the real estate from a judgment before the sheriff's sale. Ind. Code § 32-29-7-7; *see also Wells Fargo Bank, N.A. v. Tippecanoe Associates, LLC*, 923 N.E.2d 423, 432–33 (Ind. Ct. App. 2010) ("every defendant in a mortgage foreclosure action has the right to redeem its property by paying off the amount due at any time before the property is sold at a sheriff's sale"). If the clerk has not yet issued the certified judgment and decree to the sheriff, the owner must pay the clerk the amount of the judgment, interest, and costs (the "Redemption Amount"). If the sheriff has received the judgment and decree, then the Redemption Amount must be paid to the sheriff.

If a part owner pays the Redemption Amount, then the part owner has a lien on the shares of the other owners for their respective shares of the Redemption Amount money, with interest at the rate of eight percent (8%) per annum, plus the costs of redemption. The part-owner's lien has the same force and effect as the judgment lien.

There is no right of redemption after the sheriff's sale by those persons who were a party to the judicial action. Ind. Code § 32-29-7-13; see also *Matter of M & L Marine Farms, Inc.*, 1996 WL 1031551, at *4 (Bankr. N.D. Ind. Apr. 1, 1996) ("a mortgagor does have a right of redemption under Indiana law [but] it must, however, exercise this right 'prior to the sale.' There is no post-sale right of redemption in Indiana") (internal citation omitted).

However, if a person claiming an interest in property was omitted from the foreclosure action, suit may be brought to determine the interest of the omitted person. Ind. Code § 32-29-8-4. The omitted person may have a right to redeem the property. In determining the right to redeem, the court will consider whether the omitted person had actual notice of the proceeding and the opportunity to intervene, and whether the party claiming ownership post-sale made improvements to the property, and the amount of taxes and other payments made by such person. *Id.*

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d. Nonjudicial foreclosure not permitted

All foreclosures of real estate in Indiana must occur through judicial proceedings. A mortgagee has no rights to nonjudicial foreclosure. Ind. Code § 32-29-1-3; see also *Ellsworth v. Homemakers Fin. Serv., Inc.*, 424 N.E.2d 166, 169 (Ind. Ct. App. 1981) (citing Ind. Code § 32-8-11-3, the precursor to Ind. Code § 32-29-1-3).

e. Deficiency judgment following sheriff's sale

A judgment creditor may bid its judgment instead of cash at a sheriff's sale. *Titan Loan Inv. Fund, L.P. v. Marion Hotel Partners, LLC*, 891 N.E.2d 74, 76 (Ind. Ct. App. 2008). If the judgment creditor bids the full amount of its judgment, then the judgment is fully satisfied. A judgment creditor may not bid its full judgment and then later claim that the property was actually worth less.

If the judgment creditor bids less than its full judgment, then the sale is only partial satisfaction of the judgment. The difference between the judgment and the credit bid remains as a deficiency subject to collection. However, if the result of the sale results in a deficiency that is "shocking to the court's sense of conscience and justice, the sale may be set aside or the request for a deficiency judgment denied." *Arnold v. Melvin R. Hall, Inc.*, 496 N.E.2d 63, 65 (Ind. 1986). It is the duty of the dispossessed landowner to bring this issue to the court. There is a presumption that the sheriff's sale price was adequate to determine value. Factors such as only one bidder and the difference alone do not rebut the presumption.

If the judgment was an in rem judgment and a deficiency remains after the sale of all of the real estate, the deficiency will not be collectible. Similarly, in most cases, if the note secured by the mortgage was nonrecourse, then the deficiency judgment will not be collectible.

E. The mechanic's lien process

1. Real Estate

As many contractors and subcontractors know, despite high quality work, sometimes the property owner fails to pay for the work or materials. Contractors and sub-contractors may obtain a lien on the property where they provided labor or materials via a mechanic's lien . Indiana Code § 32-28-3 et seq. sets forth the procedure for obtaining payment from a recalcitrant client.

For the uninitiated, the mechanic's lien statute generally provides that when property is improved through the application of labor or services, then the party providing such labor or services may place a lien on the property to compel payment. (Ind. Code § 32-28-3-1).

Mechanic's liens may be obtained on real estate for the improvement of the property. For the alteration or repair of an owner-occupied single or double family dwelling, the putative lienholder must send written notice of the delivery of materials or work to home owner within 30 days of the first delivery or work performed. This pre-lien notice notifies the homeowner of work being done that could later result in a notice of intention to hold a lien. A mechanic's lien filed without providing the required pre-lien notice is not enforceable, and will be stricken.

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In the event a contractor does intend to file a lien, notice of the intent to file a lien must be filed with the recorder in the county where the property is located within 60 days of last performing work or delivering materials for residential property, and within 90 days of last performing work or delivering materials on non-residential property.

Once the notice is filed, the lienholder has one year to file suit to enforce the lien. If the lienholder does not file suit within a year, its lien rights expire and are not enforceable.

2. Recovery of costs incurred to obtain a mechanic's lien

Importantly, the mechanic's lien statute provides that the lienholder shall also recover attorney's fees and the cost of collection. *See Clark v. Hunter*, 861 N.E.2d 1202, 1209 (Ind. Ct. App. 2007) (award of reasonable attorney's fees is mandatory). The recovery of attorney's fees is important among other reasons because (1) construction disputes can be fact intensive and therefore expensive, and (2) the owner often has the "deep pockets" and can wear down the unpaid lienholder.

Often, a payment dispute arises between the general contractor and a sub-contractor, not the property owner and general contractor. An owner of property can avoid liability for attorney fees by paying the general contractor the full amount due under the contract. (Ind. Code § 32-28-3-14(b)).

Recently, the Indiana Supreme Court considered a case in which the owner paid its general contractor, the general did not pay its subcontractors, and the subcontractors filed contract claims against the general and a mechanic's lien foreclosure claim against the owner. The owner paid the full amount owed to its general, and the general filed a surety bond to remove the lien.

The general claimed that because the owner paid the contractual amount owed, and the surety bond removed the lien, that the subcontractor could not recover its attorney's fees.

The Indiana Supreme Court held "it would be an unfair and certainly unintended result if ... a general contractor could post a surety bond and avoid paying the attorney's fees that it would otherwise have to pay if a subcontractor foreclosed on a lien, thereby leaving the subcontractor in a worse position than if it had foreclosed—especially when the subcontractor cannot object to the posting of a surety bond." *Goodrich Quality Theaters, Inc. v. Fostcorp Heating and Cooling, Inc.,* 39 N.E.3d 660, 665 (Ind. 2015).

The Indiana Supreme Court went on to hold that "it is therefore only fair that the subcontractor lienholders be fully protected and allowed to recover attorney's fees ... upon [general contractor] Roncelli's filing of the undertaking and posting of the surety bond." *Id.*

In the end, the court decided that so long as the subcontractor was right (that it was entitled to be paid), then the subcontractor is also entitled to recover its attorney's fees. As a result, subcontractors retain this necessary tool in a dispute to collect its rights.

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3. Mechanic's liens on motor vehicles

In Indiana, there are two types of mechanic's liens related to motor vehicles, possessory (see IC § 9-22-6-1 through 3) and non-possessory (see IC § 32-33-10-1 through 10) (which includes motor vehicles as well as airplanes, construction machinery and equipment and farm machinery). The primary difference between a possessory lien and a non-possessory lien lies in perfection and foreclosure. *Hendrickson & Sons Motor Co. v. Osha*, 331 N.E.2d 743, 754 (Ind. 1975). A possessory mechanic's lien on a motor vehicle is perfected by retention or possession of the vehicle by the person asserting the lien. *Gangloff Indus., Inc. v. Generic Fin. & Leasing, Corp*, 907 N.E.2d 1059, 1066 (Ind. Ct. App. 2009). A possessory mechanic's lien is foreclosed "by sale without judicial process [and up]on notice to the owner." *Hendrickson*, 331 N.E.2d at 754.

a. Possessory Liens

A company that performs labor, furnishes storage or provides towing services at the request of the person that owns the vehicle, has a mechanic's lien on the vehicle if: (a) the charges incurred are not paid; and (b) the motor vehicle is not claimed. If both (a) and (b) do not occur within thirty (30) days after obtaining possession of the vehicle, then the company that performed the services has a lien and may advertise the vehicle for sale. The vehicle may not be advertised for sale until thirty days after the vehicle was left in or came into possession of the mechanic. The sale must then be advertised in a newspaper of general circulation in the city or town in which the mechanic's "place of business" is located and the advertisement/notice must at least 15 days before the sale. The vehicle may not be sold earlier than fifteen (15) days after the date the advertisement appears. If the lienholder is located outside the corporate limits of a city or a town, the advertisement must be placed in a newspaper of general circulation in the county in which the place of business of the lienholder is located. In addition to the advertisement, the company asserting a mechanic's lien must also notify the owner of the vehicle and any lienholder that the vehicle will be sold at a public auction to satisfy the mechanic's lien imposed by the statute. *See Sperro LLC v. Ford Motor Credit Co. LLC*, 64 N.E.3d 235, 247 (Ind. Ct. App. 2016).

b. Nonpossessory Liens (motor vehicles, airplanes, construction machinery and equipment and farm machinery)

Like possessory liens, nonpossessory liens may be acquired for towing, repair, service, or maintenance work. Nonpossessory liens are governed by Ind. Code § 32-33-10 et seq. A notice of intention to hold the lien must be filed in the county recorder's office of the county where the relevant service was performed. The notice must specifically state the amount claimed and give a substantial description of the item upon which the lien is asserted. The notice must be filed within 60 days after furnishing the relevant services or materials.

A complaint to foreclose the lien must be filed within one year of filing the notice of intention to hold the lien.

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4. Additional liens on personal property

Indiana also provides for additional liens on particularized personal property. The liens and relevant statutes are as follows:

Blacksmith Liens
Ind. Code § 32-33-1 *et seq.*

Boats and other Watercraft Liens
Ind. Code § 32-33-2 *et seq.*

Cleaning Lien for Services on and Storage of Clothing and Household Goods
Ind. Code § 32-33-3 *et seq.*

Hospital Liens
Ind. Code § 32-33-4 *et seq.*

Ambulance Liens
Ind. Code § 32-33-5 *et seq.*

Innkeeper's Liens
Ind. Code § 32-33-6 *et seq.*

Livestock Care and Feeding Liens
Ind. Code § 32-33-8 *et seq.*

Mechanics' and Tradesman's Liens
Ind. Code § 32-33-9 *et seq.*

Transfer, Moving, and Storage Liens
Ind. Code § 32-33-11 *et seq.*

Mechanized Agricultural Services Lien
Ind. Code § 32-33-12 *et seq.*

Watchmaker and Jeweler Liens
Ind. Code § 32-33-13 *et seq.*

Warehouseman's Lien
Ind. Code § 32-33-14 *et seq.*

Electronic Home Entertainment Equipment Lien
Ind. Code § 32-33-15 *et seq.*

Liens on Dies, Molds, Forms, and Patterns
Ind. Code § 32-33-16 *et seq.*

Corporate Employee's Liens
Ind. Code § 32-33-17 *et seq.*

Common Law Liens
Ind. Code § 32-33-18 *et seq.*

Special Tool Liens
Ind. Code § 32-33-20 *et seq.*

F. Indiana's adoption of Article 9 of the UCC relating to secured transactions

Indiana's version of Article 9 of the UCC is codified in Ind. Code 26-1-9.1 *et seq*. This chapter was adopted in 2000, following the 1998 adoption of the revised Article 9 of the UCC by the American Law Institute and the National Conference of Commissioners on Uniform State Laws and comports with the model UCC. *Id.*, see cmt. 2.

G. Construction projects and surety bonds

Indiana does not require payment bonds to be posted on private projects, although some municipalities require surety bonds to secure against code violations. Conversely, public bonds do require surety bonds. If a bond is posted the deadlines for filing a claim and filing suit will be

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outlined in the bond. It is also essential that regardless of the statutory deadlines, you should always read the bond. If the bond enlarges these time periods, the deadlines in the bond will control.

1. Public projects

There are four different types of public projects in Indiana. It's important to know which type of project you are working on so that you are aware of your statutory rights and obligations. The four types of projects are:

a. Title 4 State Projects – Indiana Code §4-13.6-1-1 *et seq.*

Title 4 projects are Indiana state public works projects solicited by the Indiana Department of Administration, the Public Works Division. Unless the bond provides for a greater period of time, a claimant must file a claim with the Public Works Division and the surety within 60 days from the last date labor was performed, material furnished or service rendered. If you have submitted your notice of claim and have not yet been paid, you must wait at least 30 days before filing suit against the surety to recover under the Bond. However, any suit must be brought against the surety within 1 year after final settlement of the contract with the contractor.

b. Title 5 State Projects – Indiana Code §5-16-1-1 *et seq.*

Any Indiana state public works project not covered under Title 4 or Title 8 are Title 5 projects. In order to make a claim against the bond on a Title 5 project, the claimant must file a verified claim with the state agency that commissioned the project within 60 days after completing labor or furnishing materials. The state agency will furnish a copy of the claim to the surety. The claimant must then wait at least 30 days. If payment has not been received a suit may be filed against the surety. Any suit against the surety must be brought within 60 days from the date of the final completion and acceptance of the project.

c. Title 8 Indiana Department of Transportation Projects – Indiana Code §8-23-9-1 *et. seq.*

Title 8 covers any project for the Indiana Department of Transportation. In order to make a claim on a bond posted for a Title 8 project, a claimant must within 1 year after acceptance of the labor, material, or services by the Commissioner furnish the surety a statement of the amount due. The claimant must wait at least 60 days after furnishing the statement to file suit against the surety. The claimant must bring any action within 18 months from the date of final acceptance of the project by the Commissioner.

d. Title 36 Local Government Projects – Indiana Code §36-1-12-1 *et. seq.*

Title 36 projects are projects for local governments, political subdivisions or their agencies. A claimant must within 60 days of last performing labor or furnishing material file with the local government board a signed statement of the amount due. The board will forward the

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statement to the surety. The claimant must then wait 30 days. If payment has not been received, a suit may be filed against the surety. Any suit against the surety must be brought within 60 days after the date of the final completion and acceptance of the project.

Project Type	Notice of Bond Claim Deadline	Grace period before filing suit	Suit Against the Surety Deadline
Title 4	60 days from the last date of labor performed, material furnished or services rendered	30 days after filing notice to file suit against the surety	1 year from final settlement with the contractor
Title 5	60 days after completion of labor or service or within 60 days after last item of material was furnished	30 days after filing notice to file suit against the surety	60 days from the date of final completion and acceptance of the project
Title 8	1 year after acceptance of the labor, material, or services by the Commissioner furnish the surety a statement of the amount due	60 days after furnishing the statement to file suit against the surety	18 months from the date of final acceptance of the project by the Commissioner
Title 36	60 days from the date of last performing labor or furnishing materials	30 days after filing the notice of claim	60 days after the date of final completion and acceptance of the project

2. The Payment and Performance Bonds

Payment and performance bonds are typically issued on American Institute of Architects ("AIA") Form A312, and modified as necessary. The A312 bond was modified in 2010. The modification was necessitated by the decision in *Bramble* case, *Nat'l Union Fire Ins. Co. of Pittsburgh v. David A. Bramble, Inc.*, 879 A.2d 101 (Md. 2005). As sureties are generally aware, *Bramble* held that a surety may waive its defenses for any portion of a payment bond claim if the surety does not strictly comply with Section 6 of the A312 payment bond which required that a surety state the amounts that are undisputed and the basis for challenging any amounts that are disputed within 45 days after receipt of the claim. A surety must also pay or arrange for payment of any undisputed amount. Following Bramble, the AIA modified the A312 bonds. A survey of the payment and performance bonds follows.

a. A312 – 2010 Payment Bond

The revised A312-2010 bond form Sections 7.1 and 7.2 increases the timeframe for a surety to respond and arrange for payment of undisputed amounts to a claimant from 45 days to 60 days. New Section 7.3 expressly provides that a surety's failure to discharge its obligations under Section 7.1 and 7.2 shall not be deemed to constitute a waiver of defenses the Surety or Contractor

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may have or acquire as to a Claim, except as to undisputed amounts for which the Surety and Claimant have reached agreement. However, if a Surety does fail in its obligations under Section 7.1 or 7.2 the Surety must indemnify the Claimant for reasonable attorney's fees incurred to recover any sums found to be due and owing to the Claimant.

Another significant revision of the A312 Payment Bond is the claim submission process. Section 5 requires claimants to submit "Claims" to the surety, not just "Notice" of a claim. Section 16.1 of the Bond defines "Claim" which requires a Claimant to submit a written statement and at a minimum the following:

1. The name of the Claimant;
2. The name of the person for whom the labor was done, or materials or equipment furnished;
3. A copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in the performance of the Construction Contract;
4. A brief description of the labor, materials or equipment furnished;
5. The date on which the Claimant last performed labor or last furnished materials or equipment for use in the performance of the Construction Contract;
6. The total amount earned by the Claimant for labor, materials, or equipment furnished as of the date of the Claim;
7. The total amount of previous payments received by the Claimant; and
8. The total amount due and unpaid to the Claimant for the labor, materials or equipment furnished as of the date of the Claim.

The changes to the claims process is intended to prevent claimants from submitting bare bones notice of claim in the hopes that a surety will be unable to timely respond.

b. A312 – 2010 Performance Bond

The most significant change in the Performance Bond form involves the process for an Owner to declare a Contractor in default and to make a claim under the Performance Bond. Under the old Bond form a Surety was not obligated to perform until the Owner notified the Contractor and its Surety of its intention to declare the Contractor in default and attempted to arrange a meeting with both parties. This meeting had to be held within 15 days after receipt of the claim notice. The Owner could not then declare a contractor in default or terminate the contractor until 20 days after the Contractor and Surety received notice of the default as described above.

Section 3 of the 2010 Performance Bond form no longer requires the Owner to jump through these hoops in order to declare the Contractor in default and assert a claim under the Bond.

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Instead, under revised Paragraph 3.1, the Owner may request a meeting in its notice to the Surety, but isn't required to do so. If the Owner does not make this request, the Surety may within 5 business days after receipt of the notice request the conference. If the Surety requests the conference, then the Owner must attend within 10 business days of the Surety's receipt of the notice. Additionally, the A312-2010 Performance Bond no longer requires a waiting period before the Owner can declare the Contractor in default or terminate the Contractor.

The most important aspect to the new claims process under the A312-2010 Performance Bond is new Section 4. This section states:

> Failure on the part of the Owner to comply with the notice requirement in Section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice.

Failure by an Owner to comply with the notice requirement is not a free pass, even under the new Bond form. Most jurisdictions already have case law protecting a Surety where an Owner fails to give proper notice. For example, in *Dragon Construction Company v. Parkway Bank & Trust*, 678 N.E.2d 55 (Ill. App. 3d 1997), where an Owner terminated a contractor and replaced the contractor without giving notice the Surety the Illinois Appeals Court held:

> since the (owner) replaced (contractor) with (replacement contractor) before informing (surety) that (contractor) was to be terminated and without consulting (surety) as to the successor, (surety) was stripped of its contractual right to minimize its liability under the performance bond by ensuring that the lowest responsible bidder was selected to complete the job. (surety) would be entitled to select, or at the very least participate in selecting, the lowest bidding contractor to complete the project in order to mitigate its damages under the performance bond. Surely, (surety) would not have issued the surety bonds if it did not have the authority to protect itself through the selection of the successor contractor.

Generally under this line of cases, a Surety does not have to show prejudice before being discharged under the Bond. Performance Bond A312-2010, however, requires a Surety to show that it has been prejudiced by the Owner's actions if proper notice was not given to the Surety under Paragraph 3.1. What constitutes actual prejudice is unclear. A Surety may be prejudiced if it was not given an opportunity to participate and mitigate its damages. This standard could then be read in conjunction with current case law. As the *Dragon* court states a Surety is entitled to mitigate its damages and it would not have issued the surety bonds if it did not have the authority to protect itself. Or it may be that a Surety must show quantifiable damages in order to demonstrate prejudice.

For further information, please contact Harley Means, Melissa De Groff, or Jennifer Watt.

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Ch. 6: Collection of Debts and Bankruptcy

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A. Collection of debts

1. Liability for the debts of others

a. Spouse's debts

You are generally not liable for your spouse's debts if you did not sign the contract or loan agreement. But in some situations the spouse entering the contract is found to be the agent of the other (acting on the other's behalf). Then the non-signing spouse could be held liable.

If the debt is for medical services or other necessities of a spouse, the other more financially stable spouse can be held liable but only after payment is sought and not obtained from the spouse who received the treatment. *Bartrom v. Adjustment Bureau, Inc.,* 618 N.E.2d 1, 8 (Ind. 1993). Claims for medical expenses for a deceased spouse must go through probate, not directly against the surviving spouse. *South Bend Clinic v. Estate of Ruffing*, 501 N.E.2d 1114 (Ind. Ct. App 1986). One spouse alone cannot mortgage or sell real estate owned by the couple as husband and wife without the other's consent. If only one spouse is sued, the creditor cannot execute upon that real estate to obtain payment of the judgment. Other property (not real estate) co-owned by husband and wife may be reached by creditors of either spouse to the extent of the debtor spouse's interest in the property.

b. Children's debts

Parents may be liable for their children's debts for necessary items, such as food, clothing, and medical care. They are not liable for debts for non-essential things. Parents are not liable for damage or injury caused by the child's negligence. But they are liable to a maximum of $5,000 for damage to person or property knowingly, intentionally or recklessly caused by their child, e.g. vandalism. An Indiana statute makes a parent responsible for actual damages up to $5,000 for vandalism caused by his or her child, if the parent has legal custody of the child and the child is living with the parent. IND. CODE § 34-31-4-1. A parent who encourages or benefits from a child's gang activity may be liable for actual damages for the child's gang activities if the parent has legal custody, the child is living with the parent or guardian and the parent failed to use reasonable efforts to prevent the child's involvement in gang activity. I.C. § 34-31-4-2. "Gang" is defined at I.C. 35-45-9-1.

c. Co-signed debts

Your liability is typically the same as that of the primary obligee. If he or she fails to make payments under the contract or agreement then the lender will likely seek payment from you. Co-signing for someone is an extremely serious matter and should never be done unless you are willing to pay the debt. Most loan contracts require payment of court costs, attorney fees, and interest if there is a loan default. If you are required to pay the primary obligee's loan you have the right to sue him or her for repayment or contribution, but if he or she could not pay the original loan there may be no money to pay you either.

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2. Garnishment and bank account holds

a. Collection agencies

Collection agencies take debts from businesses or professionals on contract. If they collect the unpaid balance, they usually receive a percentage of the amount collected. Collection agencies doing business in Indiana must be licensed by the Indiana Secretary of State.

An individual has no legal obligation to deal with or talk to a collection agency. Contact an attorney if you are harassed by collectors. If annoyed by constant calls, inform the agency that you may take legal action unless the calls stop. Unlawful collection practices are further limited for consumer debts by the Fair Debt Collection Practices Act.

It is a misdemeanor under Indiana law to use the telephone with the sole intent to annoy, abuse or threaten another person. It also is a misdemeanor to send fake court papers or a collection notice that looks like a court document through the mail. Call the county prosecutor or see an attorney if you get such papers.

b. Wage garnishment

A Court may order garnishment of wages of a person after an entry of judgment and a hearing. I.C. §§ 24-4.5-5-104 and 105. A final order of garnishment will be issued by the Court and transmitted to the judgment defendant's employee. Thereafter, part of each paycheck will be withheld by the employer and sent to the Court as payment on the judgment. Only wages, commissions or other earned income can be garnished. Social Security, welfare, veterans and other benefits cannot be garnished. You cannot by forced to pay a debt with these governmental benefits.

It is unlawful for an employer to fire a person because garnishment is ordered. I.C. § 24-4.5-5-106. See one or our labor and employment attorneys if you are fired because of a garnishment.

i. Garnishment formula

Courts utilize two formulas to calculate the amount garnished from a paycheck when the judgment and utilizes the formula yielding the lesser amount. The formulas are:

- 25% of your disposable earnings, or
- The amount by which your weekly disposable earnings exceed 30 times the federal hourly minimum wage. The current federal hourly minimum wage is $7.25 per hour.

Ind. Code § 34-55-8-7(a) provides that a court "may" order garnishment. Thus, the decision to order wage garnishment is within the trial court's discretion. *American Acceptance Co., LLC v. Melissa Willis*, 984 N.E.2d 653, 655 (Ind. Ct. App. 2013). Further, effective July 1, 2014, I.C. § 24-4.5-5-101 was amended to add that garnishment may not exceed 25% of disposable earnings, or "upon a

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showing of good cause by the individual why the amount should be reduced, an amount equal to: (i)less than twenty-five percent (25%); and (ii) at least ten percent (10%) of disposable earnings." *Id.*

ii. Examples of garnishment formula

Example 1: you earn $300 per week and your net wages (disposable earnings) are $250 after all required deductions. Thirty (30) times the current federal hourly minimum wage ($7.25) is $217.50. This means that your wages can be garnished up to $62.50 (25% of $250) or $32.50 ($250 minus $217.50) per week, whichever is less. As a result, your wages may only be garnished up to $32.50 per week because that is less than $62.50.

Example 2: utilizing the same income figures for Example 1, let's say you demonstrated good cause for reducing the garnishment to 10% of your wages. In this case, the most the creditor could garnish would be $30 (10% of $300).

iii. Child support garnishment

Indiana Statutes permits more money to be withheld for child support garnishment that permissible for payment of a general judgment. If the person owing support is supporting a spouse or dependents other than those named in the support order, up to 50% of weekly net earnings can be withheld. If no other spouse or dependents are being supported, 60% of weekly net earnings can be withheld. If the garnishment order is for support that has been unpaid for 12 weeks or longer, the deductions increase to 55% and 65%, respectively.

Where both a support withholding order and a non-support garnishment order are entered against the same person, the support order is paid first. The garnishment order will be honored only to the extent that there is money left, within the maximum limits of garnishable wages, after the support is deducted.

c. Bank account holds

The Indiana Depository Financial Institutions Adverse Claims Act is found at I.C. § 28-9-1-1 *et seq.*, and provides both pre-judgment and post judgment remedies. In addition to the post-judgment procedure discussed below, there are prejudgment remedies available in certain circumstances that provide more limited restrictions on the account. These restrictions are located at I.C. § 28-9-3-3.

A bank deposit account will be frozen if your bank receives notice from a court of a judgment against you. The bank must give you prompt notice of the freeze and of your right to request a prompt court hearing to prove that the money in the account came from exempt sources. Examples of exempt funds are Social Security, SSI and certain disability benefits. The burden has previously been upon judgment debtors to show they receive these benefits and the funds should therefore be exempted income, a federal regulation now puts the burden on the bank to ensure judgment debtors have not received electronically transferred income from veteran's benefits, certain disability pension benefits and social security funds in the two months preceding the garnishment order. 31 C.F.R. § 212.3

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(21011). The portion of the account which will be frozen will be equal to the amount of the judgment and allowable bank fees.

After a hearing and upon receipt of an order from the Court where the judgment was entered, the depository institution must deduct nonexempt amounts up to the amount of the judgment and fees and pay it to the judgment creditor.

The hold will remain in effect for 90 days unless an order has been issued by the Court to make withdrawals from the account to apply to the judgment. If additional deposits are made into the account while the hold is in effect, the bank is not required to hold those funds. Many banks do so, however.

If you receive a notice that your bank account is frozen and you have exempt funds in it, you may request a hearing by completing the detachable part of the notice and return it to the Court that issued the notice. If you have additional money deposited directly into your account it too could be subject to a bank hold at the additional request of the creditor.

3. Repossession of collateral

a. Collateral generally

Liens, mortgages, security interests are terms that are used to describe special property rights that sellers and lenders have to secure repayment of a debt. Also see the Property section above for a more detailed description of property rights. When a lending and borrowing relationship go well security interests can be beneficial to both the lender and the borrower. A lender can more freely extend credit and offer a lower interest rate when it has collateral on the loan. However, when a borrower is unable to pay, he or she can lose their home, cars and other property pledged as collateral on the loan.

The term "lien" is usually used in circumstances where a mechanic or worker claims an interest in property he or she improved. Mortgages relate to real property (land, homes, etc.). The majority of secured loans relate to goods – that is, movable property.

The property that is subject to a security interest is called "security" or more commonly, "collateral." Lenders only have rights in collateral if the borrower agrees. The contract provision giving the lender rights in collateral is called a "security agreement." The Truth in Lending Act, 15 U.S.C. § 1640, requires that creditors specifically list the collateral in the disclosure statement that accompanies the loan or credit sale made for non-commercial purposes.

Creditors can repossess their collateral on a loan when the buyer does not make timely payments. To repossess the collateral the creditor uses the acceleration clause in the contract. This clause allows the creditor to make the total amount of the loan due immediately when a payment is missed. To avoid repossession, the borrower must then pay the entire balance owed. However, many lenders will accept the missed payments in order to cancel a repossession order. Repossession also

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can occur when you fail to obtain required insurance or fail to do something else required by the contract.

b. Standard of commercial reasonableness

Indiana law allows creditors to repossess their collateral without getting a court order. The creditor is not required give notice that repossession will occur. However, the lender must follow some particular rules and the lender does have to act reasonably in all aspects of the repossession of property.

Moreover, this duty to act reasonably extends beyond the repossession to the sale of the collateral and the collection of any remaining balance (called a "deficiency"). If the lender does not act reasonably, the law provides for damages in favor of the debtor if the lender acts unreasonably or breaks other rules. Article 9 of the Uniform Commercial Code provides for damages against the lender amounting to the entire amount of the finance charge and 10 percent of the principal amount of the debt. In addition, if the lender commits a deceptive practice, the lender may be liable for the buyer's attorney fees under the Indiana Deceptive Consumer Sales Act. The lender's collection agents and attorneys (usually) must follow the Fair Debt Collection Practices Act for consumer debts.

c. Repossession must be peaceful

Courts have held it is lawful for the creditor to step peacefully on the consumer's driveway to repossess a car. It is not peaceful to break into a locked garage. A borrower is not required to hand over the car or even open the door to a recovery agent, unless it is a sheriff with a court order. You must comply with the terms of a court order or risk being found in contempt of court.

If a repossessed vehicle contains the debtor's property with a total value of more than $10, the recovery agent must send the debtor an itemized list of the property by certified mail. I.C. § 32-34-4-5. The notice must say that you have a right to claim the property within 30 days. If the items are not claimed within that time, they become the property of the creditor. Items valued at less than $10 become the creditor's property upon repossession.

d. Borrower's rights after repossession

After repossession the creditor must inform the borrower whether they intend to sell or keep the item. Recently, Indiana adopted Revised Article 9 of the Uniform Commercial Code. Revised Article 9-614 provides for more specific and detailed notice to debtors before collateral can be sold. The following notice must be provided:

- description of the debtor and the secured party;
- description of the collateral that is the subject of the intended disposition;
- the method of intended disposition;
- statement that the debtor is entitled to an accounting of the unpaid indebtedness and any charge for such an accounting;

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- the time and place of any public sale or the time after which any disposition is to be made;
- description of any liability for a deficiency of the person to whom the notice is sent;
- phone number from which the amount needed to redeem the collateral can be obtained; and
- number or mailing address from which additional information about the disposition and the obligation can be obtained. Indiana Code 26-1-9.1-613, 614.

A borrower should receive written notice if the creditor decides to keep the goods and not require any further payments. If you object to this in writing within 20 days, the creditor must sell the goods in a commercially reasonable way after giving you notice of the sale. The notice must be in writing, and give the time, date and place of the public sale, or the time after which the item will be sold at a private sale. I.C. § 26-1-9.1-620.

A secured party who seeks a deficiency judgment after failing to notify the debtor as required by the statute faces a rebuttable presumption that the reasonable value of the collateral at the time of the sale was equal to the amount of the debt. *Hall v. Owen County State Bank*, 370 N.E.2d 918, 928 (Ind. Ct. App. 1977). The secured party must prove the disposition of the collateral was commercially reasonable and the collateral's value was less than the debt to overcome the presumption. *McEntire v. Indiana National Bank*, 471 N.E.2d 1216, 1226 (Ind. Ct. App. 1985).

Following repossession and sale, the collateral often fails to sell for a price that pays the full amount owed, so the buyer still owes the balance to the creditor. Some buyers are then sued for the balance due (deficiency). Besides the deficiency, reasonable attorney's fees and the costs of repossession may be added if the buyer agreed to pay them in the contract.

Prior to any sale of collateral, the debtor in a consumer goods transaction has the absolute right to redeem the collateral. A redemption typically is not frequently used because it requires payment in full of the debt (not just the missed payment) plus expenses and attorney fees. I.C. § 26-1-9.1-623.

5. Foreclosure of liens[1]

B. Bankruptcy

1. Generally

Bankruptcy is a federal court proceeding offered to residents of the United States and certain territories thereof who are unable to meet their financial obligations as they become due. The Bankruptcy Code is that part of the federal law that sets out the rules and procedures for filing a bankruptcy proceeding. Bankruptcy is intended to give debtors a fresh financial start. *See generally* 11 U.S.C. §§ 101 et seq. The Bankruptcy Code is divided into different sections called chapters. While

[1] See Property Section above beginning on page 17.

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all of the chapters are still considered bankruptcy they each provide a different set of rules so as to possibly permanently relieve a debtor from his or her debt obligations. Individuals generally file for either Chapter 7 (liquidation) or Chapter 13 (reorganization), although individuals may also file Chapter 12 (family farmer) or Chapter 11 (reorganization) depending on the debtor's assets and liabilities. The proceedings are filed in a United States Bankruptcy Court in the federal district in which the debtor resides or where the debtor's principal assets are located. Indiana has two federal judicial districts, Northern and Southern. Within each district are several divisions.

As of October 17, 2005 as a prerequisite to filing a personal bankruptcy, a debtor must receive budget and credit counseling or submit a request for deferral due to exigent circumstances. *See* 11 U.S.C. § 109(h). A comprehensive list of Credit Counseling Agencies approved pursuant to 11 U.S.C. § 111 can be found at the following website: www.justice.gov/ust/list-credit-counseling-agencies-approved-pursuant-11-usc-111.

2. Overview

In each type of bankruptcy, a debtor is required to provide detailed financial information and must disclose all household income, living expenses and assets, including contingent interests in property, and must list all their creditors on a petition and schedule. Debtors must fully and accurately complete these documents because the bankruptcy court uses the petition and schedules to determine the scope of relief available to the debtor. Failure to fully or truthfully complete these documents may exempt certain debts from discharge or no discharge at all and/or may result in dismissal of the case or punishment for bankruptcy fraud.

When a bankruptcy petition is filed in federal district court, most collection activity must stop. *See* 11 U.S.C. § 362. The automatic stay immediately requires that most actions adverse to the debtor must cease. However, there are numerous exceptions to the automatic stay. As of October 17, 2005, there are now situations where the stay is not automatic. When a debtor has had a pending case dismissed within a year of filing, the automatic stay remains in effect for only the first 30 days unless an order continuing the stay is requested and approved by the Court. When a debtor has had two or more pending cases dismissed within a year of filing or if a creditor already obtained relief from the automatic stay in a previous case, the automatic stay may not go into effect. For more information, see 11 U.S.C. § 362.

After the petition is filed, the bankruptcy court schedules a meeting of creditors at which time a bankruptcy trustee examines the petition and schedules and questions the debtor under oath. This meeting is frequently referred to as a "341 meeting". Notice of the hearing is given to creditors listed on the debtor's schedules who may appear and ask limited questions the debtor. After the meeting of creditors, the trustee will make a report to the bankruptcy Judge assigned the case.
Depending on the debtor's resources and goals, a debtor either pays creditors according to a court approved plan in a Chapter 11, 12 or 13 case, or is permanently relieved from payment of dischargeable debts in a Chapter 7 case.

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3. Eligibility to file

To file bankruptcy in Indiana, you must have lived or owned property for at least six months in the area covered by the District Court where the case is to be filed.

There is no limit on the amount of debt you must have to file under Chapter 7. Once a debtor receives a Chapter 7 discharge, he or she cannot file again for eight years. There are debt limits that apply to both secured and unsecured debts for Chapter 13 cases. *See* 11 U.S.C. § 109(e). A debtor can file a Chapter 13 proceeding after receiving a Chapter 7 discharge; however, if less than four years have passed, the debtor will not be eligible for discharge. If the debtor receives a Chapter 13 discharge, the debtor will not be eligible for a discharge in another Chapter 13 case filed within two years.

Husbands and wives can file jointly, or only one spouse may file. The filing fee for a Chapter 7 bankruptcy petition is $335.00. The Chapter 13 filing fee is $310.00. The filing fees are the same whether a joint or individual petition is filed. The filing fee can be waived in very limited circumstances in Chapter 7, and it can also be paid in installments with the Court's approval.

Everyone who files for bankruptcy must attend all meetings or hearings scheduled. The debtor will be notified of the date, time, and place of these hearings and should attend if planning to continue with the case. Failure to attend a scheduled hearing could result in dismissal of a bankruptcy.

4. Automatic stay

Once a bankruptcy is filed, an automatic stay takes effect. 11 U.S.C. § 362. The automatic stay prohibits creditors from taking any form of legal or collection action against the debtor for claims arising before the bankruptcy case was filed in bankruptcy court. This means the creditors cannot repossess property, evict or foreclose a debtor's mortgage, shut off utilities, or garnish wages while the stay is in effect. It also freezes the debtor's property and requires anyone holding property of the debtor to turn it over to the bankruptcy trustee.

There are exceptions to the automatic stay and, as discussed previously, if there are previous bankruptcy filings, the automatic stay may be limited or not applicable. Secured creditors may seek court approval to have the stay lifted so they can proceed to repossess and sell their collateral.

5. Exemptions

Debtors may keep certain personal and real property that qualifies as "exempt." Indiana has enacted legislation "opting out" of the federal bankruptcy exemptions. This means that bankruptcy filers in Indiana are typically permitted to exempt property in accordance with Indiana exemption laws found at I.C. § 34-55-10-2. However, additional statutory exemptions are found throughout the Indiana Code as well as in certain Federal Statutes. Married couples filing a joint bankruptcy in Indiana may "double" the exemption amount. The effect of this rule is that each spouse may claim the full exemption amount for any property in which the spouse has ownership interest. In a Chapter 7 case,

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any property that is not exempt may be administered by the trustee for the benefit of unsecured creditors.

Below are some of the most common exemptions available under Indiana law:

- A debtor my exempt his or her interest in real or personal property used as a residence up to $19,300;
- Real estate owned as tenancies by the entirety may be exempt from debts owed by only one spouse.
- A debtor may exempt tangible property and/or other real estate up to $10,250.
- A debtor may exempt intangible property, such as interest in bank accounts, stock, etc., up to $400.
- Life insurance policies that name the insured spouse, children, dependent relatives, or any creditor as a beneficiary and proceeds of such policies are exempt from claims against the insured and the insured's spouse.
- A debtor may exempt 100.0% of any interest in a qualified retirement plan.

The exemption amounts listed in I.C. § 34-55-10-2 are tied to an index, with the current values being listed in 750 I.A.C. § 1-1-1.

6. Discharge of debts

Certain debts, such as child support, must continue to be paid throughout the bankruptcy. Most student loans must still be paid after bankruptcy, but do not have to be paid while the bankruptcy is pending. Other debt, such as debt owed to an ex-spouse pursuant to a divorce decree, is presumed to be non-dischargeable, but may be proved to be dischargeable. Still other types of debts may be determined to be non-dischargeable by following certain bankruptcy procedures. Complaints may be filed within the bankruptcy court to have the dischargeability of debts determined. In some instances, it may be advisable for the debtor to initiate a dischargeability proceeding to insure the debt is discharged.

Certain types of debts cannot be discharged in bankruptcy. These include most taxes, child support, most fines and penalties owed to governmental units, most student loans, and debts incurred because of criminal action.

7. Means Test

Under the 2005 Bankruptcy Act a debtor's income and expenses will be analyzed to determine if the debtor qualifies to file a Chapter 7 or if the debtor must file a Chapter 13. To apply the Means Test, the court will look at the debtor's average income for the 6 months prior to the filing and compare it to the median income for Indiana. If the income is below the median, then a debtor qualifies for a Chapter 7. However, the Means Test does not apply if the debtor's debts are not primarily consumer debts. See 11 U.S.C. § 707(b)(1).

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8. Types or "Chapters" of bankruptcy

a. Chapter 7 Bankruptcy

Chapter 7 bankruptcy is sometimes called a "liquidation" bankruptcy, but may provide for payment (usually partial) to creditors if the debtor has sufficient non-exempt assets from which the trustee may administer in order to make a distribution to creditors. A Chapter 7 trustee is appointed at the start of the case and is tasked with maximizing the value of the debtor's non-exempt assets for the benefit of creditors. All the debtor's non-exempt assets are sold and the proceeds distributed *pro rata* to those creditors who file proofs of claim after the payment of administrative expenses. If the trustee does not identify enough non-exempt assets to make a meaningful distribution to creditors, the trustee will recommend the case be processed as a "no asset" case, with no distribution to creditors.

There are certain debts that receive special treatment in a bankruptcy proceeding. For instance, most mortgages, liens and/or security interest survive the discharge in that the underlying personal liability is discharged, however the lien and/or security interest remain intact. If debtors are current in their payments to creditors who have secured debts, such as mortgages or car loans, the debtor may reaffirm the debt by signing an agreement to keep the secured property. A debtor may also "redeem" property in certain instances by paying a lump sum payment to the creditor representing the fair market value. See 11 U.S.C. § 722.

The bankruptcy code establishes limits and procedures for debtors and creditors to follow to determine their obligations to each other. All creditors are notified in writing of the pending bankruptcy and are given the opportunity to appear at a hearing (the meeting of creditors or 341 meeting) to question the debtor about the information in the petition and schedules.

b. Chapter 13 Bankruptcy

In recent years, amendments to the Bankruptcy Code have restricted the availability of Chapter 7 bankruptcy to some consumer debtors. Additionally, a goal of the debtor might be to preserve important assets (such as a home or car) while reducing their debt burden. In these instances and others, the debtor may consider Chapter 13 bankruptcy. Under Chapter 13, the debtor, in addition to filing a petition and schedules, proposes a payment plan (subject to court approval) for repaying all or part of the debts. As in a Chapter 7 case, the debtor receives a discharge (a court order that the debtor no longer owes those debts) at the end of the case, but only after the completion of a three (3) to five (5) year repayment plan. Chapter 13 bankruptcy permits a debtor to:

- Cure payment arrearages on mortgages or other loans;
- Reduce the purchase amount of some secured property;
- Reduce the interest rate on some secured personal property, but excluding real estate where the debtor resides;
- Receive a discharge of some debts which may not be dischargeable under Chapter 7;
- Repay tax liabilities;
- Reorder payment priorities into classes, which are paid according to an approved plan of repayment that is binding on the creditors and debtors; and

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- Provide some protection to co-debtors (such as co-signers) that is not available in Chapter 7. *See* 11 U.S.C. § 1301.

To be eligible for Chapter 13, a debtor must have a regular source of income (not necessarily from employment). In addition to filing petitions and schedules, a debtor must submit a payment plan to the Court setting out the order, manner and amount of payments to be made to creditors over a three (3) to five (5) year period. Within thirty days of filing for protection under Chapter 13, the debtor must begin making payments in accordance with the debtor's proposed repayment plan. As in a Chapter 7 case, a trustee is appointed by the Court to oversee the case. At the meeting of creditors, the trustee will review the repayment plan and, if it is acceptable, recommend the bankruptcy court approve it. After successful completion of the Chapter 13 plan, the debtor will receive a discharge, but not necessarily of all debts.

c. Chapter 11 Bankruptcy

Chapter 11 is a form of bankruptcy that involves a reorganization of a debtor's business affairs, debts and assets. For more information regarding Chapter 11 Bankruptcy, see "Should Our Business File Chapter 11?" by James A. Knauer. Chapter 11 is generally filed by corporations that require time to restructure their debts, and it give the debtor a fresh start, subject to the debtor's fulfillment of their obligations under the Bankruptcy Code. Chapter 11 cases are generally the most complex and expensive of all bankruptcy cases and should only be filed after careful analysis and exploration of all other alternatives.

Chapter 11 helps a business restructure its debts and obligations. It does not usually shutter the business. Many large U.S. companies have filed Chapter 11 and continued to operate. These companies include General Motors, United Airlines, K-Mart and thousands of others. While corporations, partnerships and limited liability companies usually file Chapter 11, individuals with significant debt who do not otherwise qualify for Chapter 7 or 13 may qualify of Chapter 11. It may take between a few months to many years to complete a Chapter 11 case.

In most cases, a business in the midst of a Chapter 11 will continue to operate. The debtor, called a debtor in possession, runs the business as usual subject to restrictions set forth in the Bankruptcy Code. However, in cases involving fraud, dishonesty or gross incompetence, a trustee may be appointed to run the business during the bankruptcy proceeding.

During a bankruptcy, certain business decisions can only be made after obtaining an order from the Court. These decisions include the sale of assets other than inventory, starting or terminating a rental agreement, and stopping or expanding business operations. The court also has control over decisions related to retaining and paying attorneys, and entering contracts with suppliers and unions. Further, the debtor is not able to obtain credit without court approval.

In a Chapter 11 bankruptcy, the individual or business has the first chance to propose a reorganization plan. These plans may include downsizing of business operations to reduce expenses, as well as renegotiating debts. In some cases, plans involve liquidating or selling all assets to repay creditors. If the plan is feasible, fair, and in the best interest of creditors, among other requirements,

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a court can approve it over objections of creditors. If the debtor does not suggest a plan, the creditors may propose one instead.

d. Chapter 12 Bankruptcy

Chapter 12 bankruptcy is a reorganization bankruptcy for family farmers and fisherman. Chapter 12 bankruptcy is a relatively new addition to the Bankruptcy Code. Chapter 12 was a "temporary" addition for many years and did not become permanent until 2005. This type of bankruptcy permits "family farmers" and "family fisherman" to restructure their finances and avoid liquidation or foreclosure. In many ways Chapter 12 bankruptcy is similar to Chapter 13 but it provides additional benefits to debtors.

Only a family farmer or fisherman with "regular annual income" may seek protection under Chapter 12. Debtors under Chapter 12 may be individuals, corporations, or partnerships. Individual Chapter 12 debtors must:

- Be engaged in a farming or commercial fishing operation
- Have total debts of not more than $4,153,150 if they are farmers or $1,924,550 if they are fishermen (as of April 2016)
- Owe 50% of their total debts on account of farming operations or 80% of their total debts on account of commercial fishing operations (in both cases excluding home mortgages), and
- Derive over 50% of their gross income from farming or commercial fishing operations.

Similar restrictions apply to farms and fishing operations owned through family partnerships and corporations. Partnerships and corporations cannot file bankruptcy under Chapter 12 unless a single family owns more than 50% of their stock or equity interests.

A Chapter 12 case begins when the debtor files a voluntary petition for relief. Most Chapter 12 debtors continue farming or fishing operations after they file bankruptcy. However, a bankruptcy trustee is appointed. The trustee's duties generally are limited to reviewing documents, monitoring the debtor's operations, advising the court, and collecting and disbursing plan payments.

Chapter 12 debtors must propose a repayment plan within 90 days of the date that they file bankruptcy. The plan process in Chapter 12 is similar to that in Chapter 13. Under Chapter 12, debtors propose a plan to pay creditors over three to five years. Three years is the minimum plan period in Chapter 12 but the plan period can be extended to five years with court approval. Chapter 12 plans have to meet the "best interests of creditors" test. Under the "best interests" test, creditors have to be paid at least as much under a Chapter 12 plan as they would receive in a hypothetical Chapter 7 bankruptcy liquidation. As long as the "best interests" test is met, unsecured creditors can be paid pennies on the dollar of what they are owed.

9. <u>Automatic stay</u>

Once a bankruptcy is filed, an automatic stay takes effect. 11 U.S.C. § 362. The automatic stay prohibits creditors from taking any form of legal or collection action against the debtor for claims

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arising before the bankruptcy case was filed in bankruptcy court. This means the creditors cannot repossess property, evict or foreclose a debtor's mortgage, shut off utilities, or garnish wages while the stay is in effect. It also freezes the debtor's property and requires anyone holding property of the debtor to turn it over to the bankruptcy trustee.

There are exceptions to the automatic stay and, as discussed previously, if there are previous bankruptcy filings, the automatic stay may be limited or not applicable. Secured creditors may seek court approval to have the stay lifted so they can proceed to repossess and sell their collateral.

10. Effect of a Bankruptcy filing on credit

Since a bankruptcy filing typically occurs after financial difficulties arise, in most cases an individual's credit report has already been damaged before a filing takes place. A Chapter 7 bankruptcy remains on your credit report for 10 years and a Chapter 13 bankruptcy remains for 7 years under the Fair Credit Reporting Act. Many creditors, including governmental units, employers, and utility companies, are prohibited by law from discriminating based upon bankruptcy. See 11 U.S.C. § 525. But potential creditors may refuse credit based on bankruptcy filing. Creditors who will extend credit often charge very high interest rates on the loans they make to individuals who have previously filed for bankruptcy relief. If you receive credit from a former creditor whose debt was discharged in your bankruptcy, do not agree to repay the discharged debt. Some creditors might try to get you to agree to repay debts even though the creditor is barred from attempting collection once a debt has been discharged. This practice violates the discharge injunctions contained in the bankruptcy code.

Should a discharged creditor contact you, you should immediately contact your bankruptcy attorney.

While the filing of a bankruptcy will not have a positive effect on your credit report, it is possible to rebuild your credit afterwards. Some practical suggestions to accomplish this are to hold a steady job, don't move from place to place, take out a loan and repay it early, timely pay your bills after the bankruptcy on an ongoing basis or save some money in a bank account to show you have the responsibility to put money aside.

For further information on this section, please contact Harley K. Means, or any of our other attorneys.

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Ch. 7: Dispute Resolution

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A. Indiana Court Structure

1. Trial Courts

a. General organization

Indiana's 92 counties make up 91 judicial circuits (the trial courts), while Ohio and Dearborn counties are in a "joint" circuit. Historically, each county had one Circuit Court , and as additional courts were required in a county to meet the caseload, Superior Courts were added. As an example, Hamilton County has one circuit court and six superior courts. The Superior Courts have original and concurrent jurisdiction with the Circuit Courts in all civil cases and in all criminal cases. They also have appellate jurisdiction over city and town courts.

Beginning in 1990, several counties successfully petitioned the General Assembly to remove the distinctions between circuit and superior courts. As a result, Monroe, Delaware, Henry, Madison, and Clark Counties, all refer to their trial courts as Circuit Courts (e.g. Henry Circuit Court Divisions 1, 2, and 3).

All Circuit Court judges are elected. All Superior Court judges are elected except in Lake and Joseph Counties, where local nominating commissions recommend appointments to the governor, and thereafter the judges are subject to retention votes. In most counties, but not all, the judicial elections are partisan.

Only Marion County has a distinct small claims court. Other counties typically have small claims dockets within the Circuit or Superior Court.

As of January 1, 2016, 65 cities and towns had a City Court or Town Court. City and Town courts have exclusive jurisdiction of all violations of city/town ordinances and jurisdiction of all misdemeanors and infractions.

b. Specialized trial courts

Certain counties have created specialized courts. Most notably, Indiana created the Commercial Courts Pilot Project in an effort to provide specialized knowledge in the judiciary for commercial disputes. The Commercial Courts provide early, comprehensive case management to avoid business interruption during pending litigation, close management of factually and/or legally complex commercial litigation, and consistency of decisions to enable business planning. Further, the Commercial Courts intend to ensure that legal disputes will be handled efficiently, competently, and predictably, and that businesses involved in litigation continue operations with minimal interruption. The Commercial Courts Handbook can be found at www.in.gov/judiciary/center/files/comm-ct-handbook.pdf

As of June 1, 2016, Commercial Courts were established in the following counties: Allen, Elkhart, Vanderburgh, Floyd, Superior, and Marion.

A number of counties have also established "Problem Solving Courts," including Veterans Court, Adult Drug Court, Adult Reentry Court, Juvenile Problem Solving Court, and Domestic

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Violence Court. A complete directory of the Problem Solving Courts can be found here: https://www.in.gov/judiciary/pscourts/files/pscourts-psc-directory.pdf

2. Indiana Court of Appeals

The Court of Appeals has jurisdiction in all appeals from final judgments of the Circuit, Superior, and Probate courts, except for those appeals for which the Indiana Supreme Court exercises original jurisdiction (see below).

The Court of Appeals divides Indiana into five districts and three judges are selected from each district, for a total of fifteen judges of the Court of Appeals. The judges select a chief judge, and the judges of each district select a presiding judge. Even though the judges are selected from each of the five districts, the assignment of cases is not governed by the residence of the judges (i.e. a trial court case that originated out of Porter County case will not necessarily be heard on appeal by a judge in the Court of Appeals from Porter County). Cases are adjudicated by panels of three judges.

The judges of the Court of Appeals are appointed by the Governor after nomination by a judicial nominating commission. After an initial two-year term, they run on a "Yes/No" retention ballot in the district that they serve, and, if successful, they then serve ten-year terms. All judges must retire at age 75.

3. Indiana Tax Court

The Tax Court has exclusive jurisdiction over (a) any case that arises under the Indiana tax laws; and (b) that is an initial appeal of a final determination made by the Indiana Department of State Revenue or the Indiana Board of Tax Review. In addition, the Tax Court has jurisdiction over certain appeals from the Department of Local Government Finance. The Tax Court also hears appeals of inheritance tax determinations from the courts of probate jurisdiction.

The Tax Court was established effective July 1, 1986, and is governed by Ind. Code § 33-26 *et seq*. The Tax Court currently has one judge.

4. Indiana Supreme Court

The Indiana Supreme Court exercises original exclusive jurisdiction on the following matters:

- The practice of law, including: admission to the practice of law; discipline and disbarment of those admitted; unauthorized practice of law; discipline, removal, and retirement of judges;
- Supervision of the exercise of jurisdiction by other courts;
- Issuance of writs necessary in aid of its jurisdiction;

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- Appeals from judgments imposing a sentence of death;
- Appeals from the denial of post-conviction relief in which the sentence was death;
- Appealable cases where a state or federal statute has been declared unconstitutional; and
- On petition, cases involving substantial questions of law, great public importance, or emergency.

Additionally, following an adverse decision from the Court of Appeals, a party may request transfer of the matter to the Indiana Supreme Court. If the Indiana Supreme Court grants transfer, the decision of the Court of Appeals is vacated except those parts of the decision which are expressly adopted or incorporated, or summarily affirmed. Similarly, a party adversely affected by a Tax Court decision may request review by the Indiana Supreme Court. If review is granted, the Tax Court retains jurisdiction for interim relief, which may be reviewed by the Indiana Supreme Court.

The Indiana Supreme Court consists of 4 Justices and 1 Chief Justice. All 5 members of the Supreme Court are appointed by the Governor after nomination by a judicial nominating commission. After an initial two-year term, they run on a "Yes/No" retention ballot, and, if successful, they then serve ten-year terms.

B. Considerations before filing suit

1. Bringing suit

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. Indiana Trial Rule 3.

Service of process is typically completed immediately after a complaint is filed. However, the rules don't specify a time limit within which process must be served.

2. Initiation of the case and assignment to the judge

A case may be filed in any county in Indiana. However, there are 10 categories of "preferred venue" (such as the residence of the defendant) and if the case is not filed in a county of preferred venue, any other party may move to have the case transferred to a county of preferred venue. T.R. 75.

Indiana does not have a uniform method of assignment of cases at the trial level. Some counties provide for random assignment of cases, while other counties (such as Hamilton and Boone) permit plaintiffs to select the trial judge when the case is filed. However, parties also have a right to a change of judge which must be filed within ten (10) days after the issues are closed on the merits. T.R. 76. Counties have their own method to select a new judge following a change of judge. Typically, a

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panel of three judges will be proposed and each party strikes one judge and the remaining judge receives the case. Some counties also provide the parties an opportunity to agree on a judge.

3. Length of time from commencement of an action to trial

There is no average length of time from commencement to trial. A party should not expect a court to schedule a matter for trial less than six months after filing. Depending on the scope of pre-trial issues encountered in discovery and motion practice, it is not unusual to have a commercial case take two to five years until judgment is entered.

4. Cost of litigation

There is no "expected" cost of litigation. The actual cost will depend on variables such as the amount of time spent in investigation and motion practice, the extent and type of discovery (including depositions and expert witnesses), and the preparation necessary for trial.

5. Personal jurisdiction – who can be sued in state courts?

The jurisdiction of Indiana courts extends as far as the limits of the Due Process Clause under the federal Constitution. *Attaway v. Omega*, 903 N.E.2d 73, 76 (Ind. Ct. App. 2009).

An Indiana court has personal jurisdiction over a non-resident defendant only if the defendant's contacts with Indiana are sufficient to establish that the defendant could reasonably anticipate being hailed into court there. Indiana courts consider whether the defendant had "certain minimum contacts" with Indiana such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Anthem Ins. Companies, Inc. v. Tenet Healthcare Corp.,* 730 N.E.2d 1227, 1233 (Ind. 2000); *Breneman v. Slusher,* 768 N.E.2d 451, 459 (Ind. 2002).

Indiana Trial Rule 4.4A sets out eight categories of actions that constitute sufficient minimum contacts:

> (1) doing any business in this state; (2) causing personal injury or property damage by an act or omission done within this state; (3) causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if [the nonresident] regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state; (4) having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state; (5) owning, using, or possessing any real property or an interest in real property within this state; (6) contracting to insure or act as surety for or on behalf of any person, property or risk located within this state at the time the contract was made; (7) living in the marital relationship within the state notwithstanding a subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues

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> to reside in the state; or (8) abusing, harassing, or disturbing the peace of, or violating a protective or restraining order for the protection of, any person within the state by an act or omission done in this state, or outside this state if the act or omission is part of a continuing course of conduct having an effect in this state.

T.R. 4.4(A).

Further, jurisdiction may be exercised "on any basis not inconsistent with the Constitutions of [Indiana] or the United States." *Id.*

6. The requirements to obtain a punitive damage award – and Indiana's unique statute that prevents a plaintiff from realizing the full benefit of a punitive damage award

Indiana permits the recovery of punitive damages subject to limitations. The proponent of the punitive damage award must show "by clear and convincing evidence, all of the facts that are relied upon by that person to support the recovery of punitive damages." Ind. Code § 34-51-3-2.

The factors considered in determine the amount of a punitive damage award are "the reprehensibility of conduct; the disparity between the harm suffered and the punitive damages awarded; and the difference between the punitive damages awarded and the civil and criminal penalties authorized or imposed in comparable cases." *Stroud v. Lints*, 790 N.E.2d 440, 446–47 (Ind. 2003). The court must also consider the defendant's financial status. *Id.* An award of punitive damages is reviewed *de novo* on appeal. *Id.* at 445.

Further, punitive damages are capped by statute at the greater of three (3) times the amount of compensatory damages awarded in the action; or fifty thousand dollars ($50,000). Ind. Code § 34-51-3-4. Only 25% of the punitive damages award goes to the plaintiff. The remaining 75% is paid to the State of Indiana to be placed in the violent crime victims compensation fund. Ind. Code § 34-51-3-6.

7. Statutes that permit increase of damage awards

The Indiana Code makes it a Class A misdemeanor for any person to engage "in any scheme, contract, or combination to restrain or restrict bidding for the letting of any contract for private or public work, or restricts free competition for the letting of any contract for private or public work." Ind. Code § 24-1-2-3. The action is also subject to civil action and the plaintiff may be awarded treble damages, costs of the suit as well reasonable attorneys' fees. Ind. Code § 24-1-2-7.

Indiana also has its Crime Victim's Relief Act ("CVRA") which permits victims of certain crimes to bring civil actions and collect treble damages, costs and attorneys' fees. Ind. Code § 34-24-3-1. The CVRA applies to individuals who suffered a pecuniary loss as a result of a violation of Indiana Code 35-43 (offenses against property), 35-42-3-3 (criminal confinement), 35-42-3-4 (interference with custody), or 35-45-9 (criminal organization/gang).

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8. Non-Indiana attorneys practicing in this state (pro hac admission)

Temporary admission to the Indiana Bar is governed by Rule 3.2 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys. Local counsel must appear and *must sign all papers* that are filed with the Court but local counsel does not need to be present at all court appearances. Rule 3.2(d). The applicant must provide a certificate of good standing from another jurisdiction as well as identifying information and historical data fully set out in the Rule.

The process requires the applicant to pay a fee to the Clerk of the Supreme Court and file a motion with the court where the matter is pending. Once the presiding judge grants the motion, the applicant must file the order with the Clerk of the Indiana Supreme Court along with a Notice of Temporary Admission. The applicant must pay the renewal fee each year by January 31st. Failure to file the Notice or any renewal fee can lead to automatic disqualification form the practice of law in Indiana.

9. What are the limitation periods for common causes of action, e.g., tort, intentional tort, contract?

Indiana's statutes of limitations can generally be found at Indiana Code §§ 34-11-1-1 *et seq.*, although it is expressly not an exhaustive listing. The limitations period for common types of actions are as follows:

1. Penalties or forfeitures under ordinance: two (2) years. Ind. Code § 34-11-2-4(a).

2. Injury to person or character: two (2) years. Ind. Code § 34-11-2-4(a).

3. Injury to personal property: two (2) years. Ind. Code § 34-11-2-4(a).

4. Injury to real property: six (6) years. Ind. Code § 34-11-2-7(3).

5. Employment-related actions (except when based upon a written contract): two (2) years. Ind. Code § 34-11-2-1.

6. Breach of oral contract: six (6) years. Ind. Code § 34-11-2-7(1).

7. Breach of written contract (except for payment of money): ten (10) years. Ind. Code § 34-11-2-11.

8. Breach of promissory notes or other written contract for payment of money: six (6) years. Ind. Code § 34-11-2-9.

9. Products liability suits based on negligence or strict liability must be commenced within two (2) years of accrual or within ten (10) years after the product is delivered to the first consumer. Ind. Code § 34-20-3-1.

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Under Indiana law, the statutory periods are tolled for fraud, mistake, or active concealment, *see* Ind. Code § 34-11-5-1, and Indiana has adopted the "discovery" rule. *See Wehling v. Citizens Nat. Bank*, 586 N.E.2d 840, 843 (Ind. 1992).

C. What to expect during suit

1. Rules of Court Procedure

Indiana has its own Rules of Trial Procedure which are promulgated by the Indiana Supreme Court. Ind. Code § 34-8-1-3. Each county also has its own local rules, and many counties have local rules for civil, criminal, and/or probate actions.

The Indiana Rule of Trial Procedure are modeled after the Federal Rules of Civil Procedure and even mirror the numbering system. For example F.R.C.P. 56 and Ind. T.R. 56 both pertain to motions for summary judgment.

Many of the Indiana Rules are based on the Federal Rules of Civil Procedure, and in those cases "it is appropriate to consider federal court interpretations when applying the Indiana rule." *Chicago Title Ins. Co. v. Gresh,* 888 N.E.2d 779, 782 (Ind. Ct. App. 2008).

2. What is the discovery process

Discovery in Indiana is governed by Section V of the Indiana Rules of Trial Procedure (Rules 16-37). The Indiana Rules closely parallel the Federal Rules of Civil Procedure: General provisions concerning discovery (Rule 26); Rules relating to depositions (Rules 27, 28, 30-32); Stipulations (Rule 29); Deposition by written questions (Rule 31); Interrogatories (Rule 33); Requests for production of documents (Rule 34); Physical and mental examinations (Rule 35); Requests for admission (Rule 36); and sanctions (Rule 37). Courts typically allow liberal discovery and expect the parties to make good faith efforts to resolve disputes. Motions to compel generally result in the award of attorney fees. Discovery is not filed with the court.

3. Pre-judgment rights and remedies

Indiana Rule of Trial Procedure 65 provides for temporary restraining orders and preliminary injunctions as remedies before final judgments. TROs may be issued without notice to the opposing party subject to strict limitations, and many Indiana courts are extremely reluctant to entertain a no-notice request. TROs are effective for ten days, and may be extended for good cause. Preliminary injunctions may be entered after a hearing. Both TROs and preliminary injunctions require the posting of a bond, the amount of which is set at the court's discretion.

A receiver may be appointed by the Court when the property, fund or rent, and profits in controversy are in danger of being lost, removed, or materially injured or when a mortgagee seeks to foreclose a mortgage. Ind. Code § 32-30-5-1. Appointment becomes mandatory in the case of a mortgagee if the property is not occupied by the owner as the owner's principal residence and: (A) the property is in danger of being lost, removed, or materially injured; (B) the property may not be

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sufficient to discharge the debt; (C) either the mortgagor or the owner of the property has agreed in the mortgage or in some other writing to the appointment of a receiver; (D) a person not personally liable for the debt secured by the mortgage has, or is entitled to, possession of all or a portion of the property; (E) the owner of the property is not personally liable for the debt secured by the mortgage; or (F) all or any portion of the property is being, or is intended to be, leased for any purpose. *Id.* The proponent of the mortgage must also show a reasonable probability of success in the main action and that there is no adequate legal remedy.

Indiana's replevin statute provides the method by which a claimant to property may recover it when in the possession of another. In determining whether a prejudgment order of possession should issue a trial court considers the showing made by the parties appearing and preliminarily determines which party, with reasonable probability, is entitled to possession, use and disposition of the property. Ind. Code § 32-35-2-14. For a plaintiff to recover in an action for replevin, it must prove: (a) that it has title or right to possession; (b) that the property is unlawfully detained, and (c) that the defendant wrongfully holds possession. *United Farm Family Mut. Ins. Co. v. Michalski*, 814 N.E.2d 1060, 1066 (Ind. Ct. App. 2004).

Indiana law provides for prejudgment garnishment "[i]n all personal actions arising upon contract, express or implied…." Ind. Code § 34-25-3-2(a). The Court clerk issues a summons to the garnishee defendant upon the filing of a written undertaking and an affidavit stating that "the plaintiff has good reason to believe, and does believe, that the person named in the affidavit…(2) is indebted to the defendant…." *Id.* at (a) and (b). When served with the summons, the garnishee defendant must respond within five (5) days by furnishing a certificate of the amount of debt owing to the defendant, or else appear and be examined under oath in open court concerning the information. Ind. Code § 34-25-3-4(b) and (c); 34-25-3-12(b). If the garnishee defendant is indebted to the defendant, the Court may order the garnishee defendant to pay the indebtedness into court. Ind. Code § 34-25-3-12(c).

4. Procedures to encourage pre-trial resolution

The Rules for Alternative Dispute Resolution govern, among other things, settlement negotiations, arbitration, mediation, conciliation, facilitation, mini-trials, summary jury trials, private judges. Mediation is mandatory in some areas of the state in family law matters and prior to taking a matter to trial. Parties should consult local rules. Parties may also agree or contract to use mediation or arbitration rather than the court system.

A defendant may make an offer of judgment to the plaintiff at any time greater than 10 days before trial. If the plaintiff declines the offer and receives a judgment less than the offer, then the plaintiff must pay costs accrued by the defendant after the offer. Trial Rule 68. Importantly, "costs" is a term of art that does not include attorney fees. *Ingram v. Key*, 600 N.E.2d 95, 95 (Ind. 1992).

Indiana also has a Qualified Settlement Offer Statute ("QSO" found at Ind. Code 34-50-1 *et seq.*) The QSO applies to claims brought under Title 33 or 34 of the Indiana Code. If the QSO is not accepted and the plaintiff receives less than the amount of the QSO, the offeror may recover costs and attorneys' fees, however attorneys' fees are capped at $100 per hour and the total award cannot exceed $1,000.

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Attorney's fees may also be awarded against a party who is deemed to have acted in a frivolous, groundless or meritless manner. Ind. Code § 34-52-1-1. A claim is frivolous (a) if it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law. *Kahn v. Cundiff*, 533 N.E.2d 164, 170-71 (Ind. Ct. App.), *aff'd*, 543 N.E.2d 627 (Ind. 1989). A claim or defense is unreasonable if, based on a totality of the circumstances, including the law and facts known at the time of the filing, no reasonable attorney would consider that the claim or defense was worthy of litigation or justified. *Id.* A claim or defense is groundless if no facts exist which support the legal claim relied on and presented by the losing party. *Id.*

D. Post judgment actions

1. Stays of judgments pending appeal

Judgments are not automatically stayed when an appeal is filed. Rather, the party who desires a stay must file a motion with the trial court to stay the execution on the judgment. The trial court has discretion to order a stay, and if a stay is granted, the amount of bond required. The decision to grant or deny the stay, as well as the amount of the bond, may be appealed to the Indiana Court of Appeals.

2. Bonds and other forms of surety required (a) for appeals or (b) in connection with other actions

A bond is not required to appeal a trial court decision. But an appeal alone does not stop the prevailing party from the trial to collect on the judgment. In order to prevent or stop collection efforts, the party appealing the judgment must seek a stay and post a bond in an amount determined by the trial court (and reviewable by the appellate court). Bonds or other security are also required upon issuance of a temporary restraining order or preliminary injunction, prejudgment possession, and for the appointment of a receiver.

For further information on this section, please contact Steve Runyan or Kevin Koons, or any of our other attorneys.

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Ch. 8: Environmental Law

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The Indiana Department of Environmental Management ("IDEM") is Indiana's agency for enforcing environmental statutes and regulations and regulating permits for various environmental activities. *See* Indiana Code §13-13-1 *et seq*. IDEM also works co-operatively with federal agencies in enforcing federal environmental laws in Indiana and is the designated department in Indiana for the enforcement of Federal water pollution, air pollution, solid and hazardous waste laws and the Midwest Interstate Compact. *See* www.in.gov/idem/. A sixteen-member Environmental Rules Board is authorized to make regulations to enforce environmental statutory law. *See* Indiana Code §13-13-8 *et seq*. The Office of Environmental Adjudication conducts hearings and appeals of IDEM enforcement actions and Environmental Rules Board rulemaking actions. *See* Indiana Code §4-21.5-7 *et seq*.

Under Indiana law, third party claims and claims by IDEM or US EPA for the investigation and remediation of environmental pollution may be covered by an insured's comprehensive general liability policies. Certain "pollution exclusions" to such coverage have been held to be vague and ambiguous, requiring insurers to respond with defense and indemnity coverage under such policies. *See American States Insurance Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Seymour Manufacturing Co. v. Commercial Union Insurance Co.*, 665 N.E.2d 891 (Ind. 1996); *Hartford Accident & Indemnity Co. v. Dana Corp.*, 690 N.E.2d 285 (Ind. Ct. App. 1997) ("Dana I"); *Travelers Indemnity Co. v. Summit Corp.* 715 N.E.2d 926 (Ind. App. 1999); *Allstate Insurance Co. v. Dana Corp.*; 759 N.E.2d 1049 (Ind. 2001) ("Dana II"); *Freidline v. Shelby Insurance Co.*, 774 N.E.2d 37 (Ind. 2002); *State Automobile Insurance Company v. Flexdar, Inc.*, 964 N.E.2d 845 (Ind. 2012).

For further information on this section, please contact Greg Cafouros or Brian Bosma.

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Ch. 9: Liability of Corporate Fiduciaries

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A. Personal exposure and liability of officers and managers of corporations and LLCs

Generally, officers and directors of a corporation and members and managers of a limited liability company are generally not liable for the debts or torts of the corporation or company. Ind. Code 23-18-3-3. Corporate officers and directors owe general fiduciary duties of due care and loyalty to the corporation. A limited liability company may increase, decrease, or even eliminate any fiduciary duties of its members or managers in the company's operating agreement. Ind. Code § 23-18-4-4(a)(1).

Indiana has adopted a strongly pro-management version of the business judgment rule that protects most decisions of corporate directors, including an expansive "other constituency" provision that allows directors to consider the interests of the company's suppliers, customers, or the surrounding community as a whole (as opposed to a narrow focus on shareholders or "profit maximization"). Ind. Code § 23-1-35-1(d); *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 991 (Ind. 2014).[2] There are several exceptions to the general rule of non-liability, although liability may not be imposed on a director in any situation unless the director engaged in willful misconduct or recklessness—negligence, even gross negligence, will not suffice (Ind. Code § 23-1-35-1(e) (corporations); § 23-18-4-2 (LLCs):

1. "Sham" Corporations—Piercing the Corporate Veil

Managers may be liable for corporate debts if the corporation is being used as a "sham." A plaintiff must prove that the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice. Indiana courts consider eight factors to determine whether the corporate form should be disregarded: (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form. *Aronson v. Price*, 644 N.E.2d 864 (Ind. 1994).

2. Unlawful Distributions

Directors who vote or assent to a shareholder distribution, such as a dividend, in excess of the amount permitted by statute (Ind. Code §§ 23-1-28-3, -4) are personally liable to the corporation for the excess amount. Ind. Code § 23-1-35-4. A dissenting director should be sure that his or her dissent is recorded in the meeting minutes or should deliver a written dissent to the presiding officer or secretary before the adjournment of the meeting or immediately thereafter.

3. Torts and Crimes

An officer, director, or manager may be individually liable for the torts he participates in, even if those torts occur while acting in his official capacity. *State, Civil Rights Comm'n v. Cty. Line Park, Inc.*,

[2] Indiana expressly did not codify the business judgment rule for non-director officers. See Ind. Code § 23-1-36-2 and Official Comments.

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738 N.E.2d 1044, 1050 (Ind. 2000); Ind. Code § 23-1-26-3 (no personal liability for shareholder except for his own acts or conduct); Ind. Code § 23-18-3-3 (LLCs) (members and managers liable for their own acts and omissions). An individual who participates in a criminal violation is criminally responsible even if acting in a corporate capacity. *Comm'r, Dep't of Envtl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556, 560 (Ind. 2001).

4. Special Statutes

Federal and special state statutes may impose higher duties on officers or directors. For example, the Indiana Tax Code imposes personal liability on a "responsible person" when the corporation collects sales and withholding taxes but fails to remit them to the state. Ind. Code §§ 6-2.5-9-3 and 6-3-4-8. Moreover,

Ind. Code. § 23-1-37 describes indemnification options that may be available to officers and directors. *See also* Ind. Code § 23-18-4-4 (2)(allowing indemnification provisions for members and managers in LLC's operating agreement.

B. Application of "deepening insolvency," and "piercing the corporate veil"

Indiana courts have expressly rejected the "deepening insolvency" or "trust fund" theories from other jurisdictions that have held corporate officers and directors liable to creditors when the corporation enters the "zone of insolvency." *Geiger & Peters, Inc. v. Berghoff*, 854 N.E.2d 842, 850 (Ind. Ct. App. 2006); *In re Eisaman*, 387 B.R. 219 (Bankr. N.D. Ind. 2008); *Abrams v. McGuireWoods LLP*, 518 B.R. 491, 502 (N.D. Ind. Bankr. 2014).

However, Indiana courts have established standards for holding one corporation liable for the obligations of an affiliated corporation, applying the above veil-piercing factors, as well as additional factors of 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. A court may also disregard the separateness of affiliated corporate entities when they are not operated separately, but rather are managed as one enterprise through their interrelationship, identified by characteristics such as the intermingling of business transactions, functions, property, employees, funds, records, and corporate names in dealing with the public. *Reed v. Reid*, 980 N.E.2d 277, 301–02 (Ind. 2012).

For further information on this section, please contact Kevin Koons or any of our other attorneys.

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Ch. 10: Intellectual Property

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A. The relationship between federal and state laws regarding intellectual property

Because intellectual property is governed at the federal level, state law regarding intellectual property can only govern where federal law does not preempt it. Indiana law serves to augment federal law in regard to the kinds of rights that owners can command over their intellectual property. For example, the Indiana Trademark Act is similar, and in some respects identical, to the Lanham Act. Although Indiana's body of trademark law is relatively undeveloped, the General Assembly has specified that the Indiana Trademark Act "is intended to provide a system of state trademark registration and protection that is consistent with the federal system of trademark registration and protection under the Trademark Act of 1946." Ind. Code § 24–2–1–0.5. Moreover, "[a] judicial or an administrative interpretation of a provision of the federal Trademark Act may be considered as persuasive authority in construing a provision of the Indiana Trademark Act." *Serenity Springs v. LaPorte Cty. Convention & Visitors Bureau*, 986 N.E.2d 314, 323 (Ind. Ct. App. 2013).

B. Trade secrets

Indiana has enacted a version of the Uniform Trade Secrets Act ("UTSA") at Ind. Code § 24-2-3-1, *et seq*. The UTSA provides a broad range of relief, including injunctive relief, for misappropriation of trade secrets. *See* Ind. Code § 24-2-3-3. The UTSA defines a "trade secret" as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ind. Code § 24-2-3-2. A protectable trade secret has four general characteristics: (1) information; (2) deriving independent economic value; (3) not generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and (4) the subject of efforts, reasonable under the circumstances, to maintain its secrecy. *Zemco Mfg., Inc. v. Navistar Int'l Transp. Corp.*, 759 N.E.2d 239, 245 (Ind. Ct. App. 2001).

The determination of whether information is a trade secret is a fact sensitive determination. *U.S. Land Servs., Inc. v. U.S. Surveyor, Inc.*, 826 N.E.2d 49, 63 (Ind. Ct. App. 2005). The burden of proof is on the party asserting the trade secret to show that it is included in the categories of protectable trade secret information listed in the trade secrets statute. *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 920 (Ind. 1993). The actual or threatened misappropriation of trade secrets may be enjoined. In addition, a complainant is entitled to recover for actual loss caused by the misappropriation and for the unjust enrichment resulting from the misappropriation. Ind. Code § 24-2-3-4.

C. Trade names

A trade name is "a word, name, symbol, device, or other designation, or a combination of such designations, that is distinctive of a person's business or other enterprise and that is used in a manner that identifies that business or enterprise and distinguishes it from the businesses or enterprises of

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others." *Keaton & Keaton v. Keaton*, 842 N.E.2d 816, 820 (Ind. 2006) (quoting *Restatement (Third) of Unfair Competition* § 12). Although Ind. Code § 24-2-1-2 also defines a "trade name" as "a name used by a person to identify a business or vocation of the person," the use of a trade name is not regulated by statute. Rather, trade names "are acquired by adoption and user. They belong to the one who first uses them and gives them a value." *Johnson v. Glassley*, 83 N.E.2d 488, 490 (Ind. 1949). The mere adoption of a particular name as a trade name, without actual use thereof in the market, confers no right thereto, even though such adoption is publicly declared. *Id.*

At common law, trade name infringement exists when a defendant's use of a name is likely to cause confusion as to the source of goods or products, irrespective of whether the defendant has a subjective intent to deceive or confuse. *Keaton*, 842 N.E.2d at 820. In order to state a cognizable claim for trade name infringement, a plaintiff must make a threshold showing of a protectable trade name. *Id.* A trade name, including a personal name, is protectable if it is distinctive. Personal names, including surnames, are not "inherently distinctive" and are only protectable as trademarks or trade names upon proof of secondary meaning. *Id.*

Although not generally regulated, the use of certain trade names are prohibited under Indiana law. For example, it is unlawful for an individual or entity to use "any word or expression which may lead the public to believe that the seller or the place is owned, operated or managed by the United States government or its military or naval forces or any agency of the United States government." Ind. Code § 24-2-2-1.

D. Trademarks

The Indiana Trademark Act (the "ITA") provides for the registration of any word, name, symbol, or device or any combination of them used by a person to identify his or her goods or services and distinguish them from the goods or services of others. Ind. Code § 24-2-1-2. The ITA "is intended to provide a system of state trademark registration and protection." Ind. Code § 24–2–1–0.5. A "trademark" is:

> Any word, name, symbol, or device or any combination of a word, name, symbol, or device that is used by a person to:
>
> > (A) identify and distinguish goods, including a unique product, of a person and distinguish the person's goods from goods manufactured or sold by another person; and
> >
> > (B) indicate the source of the goods, even if the source is unknown.

Ind. Code § 24-2-1-2.

The Secretary of State examines all applications for trademarks. Ind. Code § 23-2-1-4.5. The Secretary may require the applicant to provide additional information, and the application may be amended by the applicant or by the secretary, with the applicant's authorization, or the secretary may require the applicant to amend the application. *Id.* The protection of registration only extends to the

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class of goods for which the registrant uses the mark and to markets in which the parties compete. *Id.*

Registration of a trademark or service mark with the Secretary provides a registrant with a remedy in the event of infringement. Ind. Code § 24–2–1–14(a); *Serenity Springs v. LaPorte Cty. Convention & Visitors Bureau*, 986 N.E.2d 314, 323 (Ind. Ct. App. 2013). A cause of action for infringement in the owner of the trademark may be brought against any person who:

> (1) uses, without the consent of the registrant, a reproduction, counterfeit, copy, or colorable imitation of a mark registered under this chapter in connection with the sale, offering for sale, distribution, or advertising of goods or services; or on or in connection with which the use is likely to cause confusion or mistake; or result in deception regarding the source of origin of the goods or services; or
>
> (2) reproduces, counterfeits, or copies a mark or colorably imitates a mark and applies the reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used in connection with the sale or other distribution of the goods or services in Indiana; or on the goods or services.

Ind. Code § 24-2-1-13.

Despite the statutory procedure for infringement, the Act does not adversely affect common-law trademark rights, and an injured party may bring an action under the "broader law of unfair competition that has its sources in English common law." See *Keaton*, 842 N.E.2d at 820; Ind. Code § 24–2–1–15.

For further information on this section, please contact Ted Nolting, or any of our other attorneys.

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Ch. 11: Tax Matters

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Statutes pertaining to business and personal taxes:

1. **Corporate Income Tax:**

   Utility Receipts Tax. Ind. Code § 6-2.3 *et seq.*

2. **Personal Income Tax:**

   Ind. Code § 6-3-2 *et seq.*

3. **Stock or Franchise Tax (Applicable Only to Financial Institutions):**

   Computation of franchise tax: Ind. Code § 6-5.5-2-1.

4. **Sales and Use Tax:**

   Retail tax: Ind. Code § 6-2.5 *et seq.*

   Use tax: Ind. Code § 6-2.5-3 and -3.5 (gasoline) *et seq.*

   Hotel, parks, or marinas: Ind. Code § 6-2.3-4-5.

   Automobile rental tax: Ind. Code § 6-6-9 *et seq.*

   Gasoline tax: Ind. Code § 6-6-1.1 *et seq.*

   Special fuel tax: Ind. Code § 6-6-2.5 *et seq.*

   Motor carrier fuel tax: Ind. Code § 6-6-4.1 *et seq.*

   Petroleum severance tax: Ind. Code § 6-8-1 *et seq.*

   Alcoholic beverage taxes. Ind. Code § 7.1-4 *et seq.*

   Cigarette and tobacco taxes: Ind. Code § 6-7 *et seq.*

5. **Property Taxes, real and personal:**
   Indiana Code 6-1.1 *et seq.*

6. **Estate, Probate, Inheritance Taxes:**

   Indiana does not have an inheritances tax for individuals dying after December 31, 2012.

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7. County and local taxes

Locally Imposed Hotel and Motel Tax: Ind. Code § 6-9 *et seq*.

County adjusted gross income tax: Ind. Code § 6-3.5-1.1 et seq.

County option income tax: Ind. Code § 6-3.5-6 et seq.

County economic development income tax: Ind. Code § 6-3.5-7 et seq.

For further information on this section, please contact Ted Nolting or one of our other attorneys.

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