



301 Massachusetts Avenue  
Indianapolis, Indiana 46204  
T: 317-633-8787  
[rwaicukauski@price-law.com](mailto:rwaicukauski@price-law.com)  
[bcatlin@price-law.com](mailto:bcatlin@price-law.com)

IN THE NEWS: Washington Post, Editorial--Supreme Court justices aren't political hacks in robes

1. A statute's definition of "person" to include corporations does not mean that the term "personal" also reaches corporations; *FCC v. AT&T Inc.* - 131 S.Ct. 1177 (S.Ct. 3/1/11)(Roberts)
2. The National Childhood Vaccine Injury Act preempts all vaccine defective design claims; *Bruesewitz v. Wyeth LLC* - 131 S.Ct. 1068 (S.Ct. 2/22/11)(Scalia)
3. Jury verdict reinstated because trial court did not provide specific reasons for setting verdict aside; *Walker v. Pullen* - 2011 WL 892391 (Ind.S.Ct. 3/15/11)(Shepard)
4. No horizontal *stare decisis* for Court of Appeals' decisions; *Lakes v. Grange Mut. Cas. Co.* - 2011 WL 682343 (Ind.Ct.App. 2/28/11)(Riley)
5. Default judgment set aside because of insufficient process; *Cotton v. Cotton* - 942 N.E.2d 161 (Ind.Ct.App. 2/24/11)(Najam)
6. Juror bias warrants new trial; *Thompson v. Gerowitz* - 2011 WL 535101 (Ind.Ct.App. 2/16/11)(Barnes)
7. No duty to defend against claim for negligent control of controlled substance; *Forman v. Penn* - 2011 WL 861903 (Ind.Ct. App. 3/14/11)(Baker)
8. A realtor may not purchase a property if she has acted as an agent to purchase that property if the client still expresses an interest; *Demming v. Underwood* - 2011 WL 589726 (Ind.Ct.App. 2/21/11)(Mathias)
9. Leased Employee is a joint employee of both the lessor and lessee, regardless of their agreement; *Taylor v. Ford Motor Co.* - 2011 WL 700525 (Ind.Ct.App. 3/1/11)(Mathias)
10. Defendant is proximate cause of damages if the injury is an expected consequence of defendant's conduct; *BCS Services, Inc. v. Heartwoods 88, LLC* - \_\_F.3d\_\_ (C.A.7 3/24/11)(Posner)
11. Email exchange between attorneys sufficient to bind clients to settlement; *Sands v. Helen HCI, LLC* - 2011 WL 664233 (Ind.Ct.App. 2/23/11)(Bailey)
12. The Seventh Circuit warns lawyers not to misrepresent their word count; *Abner v. Scott Memorial* - 2011 WL 799778 (C.A.7 3/9/11)(Posner)
13. 7<sup>th</sup> Circuit reprimands and fines appellants' counsel for unprofessional behavior on appeal; *Lee v. Cook County, Illinois* - 2011 WL 982383 (C.A.7 3/22/11)(Easterbrook)
14. Attorney suspended for ex parte communication with judge; *In re: Jane G. Cotton* - 939 N.E.2D 619 (Ind.S.Ct. 12/27/10)(per curiam)

ADVOCACY TIP OF THE MONTH: Don't skimp on the facts in your appellate brief.

## **IN THE NEWS: Supreme Court justices aren't political hacks in robes**

Washington Post, Editorial, March 28, 2011

Technically, the litigants in the case scheduled for argument before the Supreme Court on Tuesday are Wal-Mart Stores and some 1 million current and former female employees who allege in a class action that they have been discriminated against. But all eyes will be on the justices themselves.

Will the “conservatives” on the court reflexively side with big corporate interests, as some liberal activists fear? Or, as some conservatives worry, will the “liberals” on the court get their way and craft a decision that gives the “little guy” a boost against the corporate behemoth? It's easy in cases such as this one to try to caricature justices as political players in search of a desired result. Easy, but wrong, as a recent spate of decisions shows.

Within the past few weeks, the Supreme Court, with conservative justices in agreement, rendered decisions that caused corporate America to groan. In one case, the justices sided with an employee who claimed his employer retaliated against him after he made a complaint. [*Kasten v. Saint-Gobain Performance Plastics Corp.*, 3-22-11]. In another, they unanimously gave a green light to investors who sued a drugmaker accused of withholding information about serious side effects linked to one of its products. [*Matrixx Initiatives, Inc. v. Siracusano*, 3-22-11]. And the court, in a decision written by Chief Justice John G. Roberts Jr., an appointee of George W. Bush, rebuffed AT&T's argument that it was entitled to “personal privacy” in order to shield certain information from public view. [*FCC v. AT&T Inc.*, 3-1-11].

Justices are not devoid of points of view, and their “judicial philosophies” help steer them to certain results. There will be cases in which the justices appear to split along ideological lines, and the Wal-Mart case may very well be one of them. Debate and disagreement over the merits of a decision are understandable; not so painting justices as mere political hacks camouflaged in judicial robes.

P.S. Seventh Circuit Judge Ann Claire Williams was nominated to the U.S. District Court for the Northern District of Illinois by President Reagan (Republican) in 1985 and nominated to the Seventh Circuit by President Clinton (Democrat) in 1999. When asked by the Chicago Tribune about her political affiliation in December 1999, Judge Williams declined to identify herself as either a Republican or Democrat, instead calling herself “politically independent.”

### **1. A statute's definition of “person” to include corporations does not mean that the term “personal” also reaches corporations; *FCC v. AT&T Inc.* - 131 S.Ct. 1177 (S.Ct. 3/1/11)(Roberts)**

The FCC investigated AT&T after AT&T had voluntarily reported to the FCC that it might have overcharged the Government for services it provided. At the conclusion of that investigation, the FCC and AT&T entered into a consent agreement. Several months later, a trade association representing some of AT&T's competitors filed a FOIA request for “[a]ll pleadings and correspondence” on the AT&T investigation. Exemption 7(C) within FOIA exempts the disclosure of “records or information compiled for law enforcement purposes”

that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The FCC concluded that this exemption could not apply to AT&T, but the Third Circuit reversed, holding that Exemption 7(C) extends to the "personal privacy" of corporations, since "the root from which the statutory word [personal] . . . is derived" is the defined term "person."

The United States Supreme Court disagreed with the Third Circuit.

Adjectives typically reflect the meaning of corresponding nouns, but not always. Sometimes they acquire distinct meanings of their own. The noun "crab" refers variously to a crustacean and a type of apple, while the related adjective "crabbed" can refer to handwriting that is "difficult to read," Webster's Third New International Dictionary 527 (2002); "corny" can mean "using familiar and stereotyped formulas believed to appeal to the unsophisticated," *id.*, at 509, which has little to do with "corn," *id.*, at 507 ("the seeds of any of the cereal grasses used for food"); and while "crank" is "a part of an axis bent at right angles," "cranky" can mean "given to fretful fussiness," *id.*, at 530.

Because the term "personal" is not ordinarily used to describe the "correspondence, influence, or tragedies of" corporations, courts should be wary of applying that term to corporations. The Court then looked to the use of the term "personal" in the context of the surrounding language and the statute as a whole and found no support for the idea that the term "personal" should be applied to corporations.

We reject the argument that because "person" is defined for purposes of FOIA to include a corporation, the phrase "personal privacy" in Exemption 7(C) reaches corporations as well. The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.

**Lesson:** Although a corporation may be a "person" under a statute, this does not mean that the term "personal" applies to the corporation.

## **2. The National Childhood Vaccine Injury Act preempts all vaccine defective design claims; *Bruesewitz v. Wyeth LLC* - 131 S.Ct. 1068 (S.Ct. 2/22/11)(Scalia)**

The National Childhood Vaccine Injury Act established a no-fault compensation program for people injured by childhood vaccines. Congress included a section that preempted certain state law claims as part of that Act. 42 U.S.C. § 300aa-22(b)(1) states as follows:

No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.

The majority and dissent disagreed over how this statute should be interpreted. The majority concluded that the statute clearly excluded defective design claims.

The "even though" clause clarifies the word that precedes it. It delineates the preventative measures that a vaccine manufacturer must have taken for a side-effect to be considered "unavoidable" under the statute. Provided that there was proper manufacture and warning, any remaining side effects, including those resulting from design defects, are deemed to have been unavoidable. State-law design-defect claims are therefore preempted.

The dissent argued that the majority's interpretation made the phrase "if the injury or death resulted from side effects that were unavoidable" superfluous. It, therefore, tried to give that phrase some meaning.

Given that the "even though" clause requires the absence of manufacturing and labeling defects, the "if" clause's reference to "side effects that were unavoidable" must refer to side effects caused by something other than manufacturing and labeling defects. The only remaining kind of product defect recognized under traditional products liability law is a design defect. Thus, "side effects that were unavoidable" must refer to side effects caused by a vaccine's design that were "unavoidable."

[W]hen Congress intends to pre-empt design defect claims categorically, it does so using categorical (e.g., "all") and/or declarative language (e.g., "shall"), rather than a conditional term ("if").

The plain text and structure of the Vaccine Act thus compel the conclusion that §22(b)(1) pre-empts some — but not all — design defect claims. Contrary to the majority's and respondent's categorical reading, petitioners correctly contend that, where a plaintiff has proved that she has suffered an injury resulting from a side effect caused by a vaccine's design, a vaccine manufacturer may invoke § 22(b)(1)'s liability exemption only if it demonstrates that the side effect stemming from the particular vaccine's design is "unavoidable," and that the vaccine is otherwise free from manufacturing and labeling defects.

The majority acknowledged that its interpretation of the statute rendered the "if" clause superfluous, but held that this didn't matter.

Petitioners and the dissent contend that the interpretation we propose would render part of § 300aa-22(b)(1) superfluous: Congress could have more tersely and more clearly preempted design-defect claims by barring liability "if . . . the vaccine was properly prepared and was accompanied by proper directions and warnings." The intervening passage ("the injury or death resulted from side effects that were unavoidable even though") is unnecessary. True enough. But the rule against giving a portion of text an interpretation which renders it

superfluous does not prescribe that a passage which could have been more terse does not mean what it says. The rule applies only if verbosity and prolixity can be eliminated by giving the offending passage, or the remainder of the text, a competing interpretation. That is not the case here.

**Lesson:** The rule against interpreting a portion of a statute as superfluous does not apply if eliminating the superfluous language does not give the remainder of the text a competing interpretation.

**3. Jury verdict reinstated because trial court did not provide specific reasons for setting verdict aside; *Walker v. Pullen* – 2011 WL 892391 (Ind.S.Ct. 3/15/11)(Shepard)**

This case involved a motor vehicle collision. There was some dispute with regard to how much of the plaintiff's treatment was caused by the accident. The total medical bills were \$12,500, with a portion of those attributable to an MRI. After a trial, the jury entered a verdict for \$10,070. After the dollar amount, the jury wrote "for P.T. & initial [sic] medical assessment." According to the Supreme Court's calculations, the actual amount attributable to the plaintiff's physical therapy and initial medical assessment was \$10,064. The plaintiff moved to correct error and asked for a new trial pursuant to Trial Rule 59(J), saying that the award was less than his total medical bills. The trial court granted that motion. The full text of the trial court's ruling was as follows:

1. The undisputed medical testimony in this case established that Plaintiff's medical bills from Porter Memorial Hospital, Dr. Lakhani, and Radiologic Associates of Northwest Indiana were for appropriate treatment of injuries suffered by Plaintiff as a result of the negligence of Defendant.
2. Those medical bills totaled \$12,520.00. The jury's verdict was less than those medical bills.
3. There was also undisputed medical testimony that Plaintiff endured pain and suffering for a minimum of five months. The jury's verdict obviously contained no award for that, however minimal.

The Court of Appeals affirmed in an unpublished opinion and the Supreme Court granted transfer. The Court emphasized that trial courts must strictly comply with Rule 59(J) when granting a new trial on the ground that the verdict does not accord with the evidence. It then found that the trial court's findings in this case were not sufficiently specific.

In this case, the trial court granted a new trial because it believed the verdict did not accord with the evidence. It did not state whether the verdict was against the weight of the evidence or clearly erroneous. The court made only general findings and not the special findings required by Rule 59(J).

This case provides a prime example of why special findings are required when the judge acts as the thirteenth juror. Pullen claimed a total of \$25,019.50 in damages for medical bills - \$12,520 for treatment in 2004 and \$12,499.50 for

treatment in 2007 and 2008. The jury apparently did not agree that Walker's negligence required all of those treatments and awarded Pullen \$10,070 "for P.T. & initial [sic] medical assessment." By our count, Pullen's expenses for physical therapy, appointments with his regular physician, and the initial x-rays following his first appointment were \$10,064. After hearing all the testimony, the jury may apparently have believed these damages were the result of Walker's negligence, and believed Walker's medical expert that the remainder of the expenses were either unnecessary or unrelated.

The court's statement that the evidence was "undisputed" is not a sufficient special finding to justify supplanting the jury's verdict. The trial court's findings do not suggest that this was an unjust result.

The Court clearly stated that it wanted this case to serve as an example of the types of findings that are insufficient under Rule 59(J). Thus, if you file a motion to correct error, your proposed order should contain the specifics required by the Rule. If it does not, then the remedy on appeal is reinstatement of the jury verdict.

**Lessons:**

1. If a trial court grants a new trial because the verdict does not accord with the evidence, it must make specific findings supporting that decision.
2. The appellate remedy for a trial court's failure to comply with Trial Rule 59(J) is to reinstate the jury verdict.

**4. No horizontal *stare decisis* for Court of Appeals' decisions; *Lakes v. Grange Mut. Cas. Co.* – 2011 WL 682343 (Ind.Ct.App. 2/28/11)(Riley)**

In this case, the Indiana Court of Appeals held that a trial court erred when finding that it should use a tortfeasor's per accident policy limits, rather than the per person policy limits, when determining whether the tortfeasor was underinsured. The Court also concluded that I.C. § 27-7-5-2(a) mandates UIM coverage of \$50,000 per person.

The latter conclusion is directly contrary to a 2008 decision by another panel of the Court of Appeals. In refusing to follow the recent precedent of *Progressive Halcyon Inc. Co. v. Petty*, 883 N.E.2d 854 (Ind. Ct. App. 2008), the panel states:

We respectfully note that *Petty* is not binding on this court. Indiana does not recognize horizontal *stare decisis* and therefore, each panel of this court has coequal authority on an issue and considers any previous decision by other panels but ultimately is not bound by those decisions.

Although *Petty* relied on three considerations in concluding that the per person UIM coverage under the statute is a mandatory limit of \$25,000, conspicuously absent from its analysis is a reference to the statute's legislative history. A fundamental rule of statutory construction is that an amendment changing a prior statute indicates a legislative intention that the meaning of the statute has

changed. Such an amendment raises the presumption that the Legislature intended to change the law unless it clearly appears that the amendment was passed in order to express the original intent more clearly.

The statutory history was one of expanding the availability of uninsured and underinsured motorist coverage and convinced the Court of "an intent by our Legislature to give insureds the opportunity for full compensation for injuries inflicted by financially irresponsible motorists." Thus, the Court disagreed with *Petty* and held that the mandatory per person limits for underinsured coverage is \$50,000.

**Lessons:**

1. The Indiana Court of Appeals does not recognize horizontal *stare decisis*.
2. Courts will assume that a statute has been amended for a reason.
3. There is currently a split in the Court of Appeals concerning whether I.C. § 27-7-5-2(a) mandates UIM per person policy limits of \$50,000.

**5. Default judgment set aside because of insufficient process; *Cotton v. Cotton* – 942 N.E.2d 161 (Ind.Ct.App. 2/24/11)(Najam)**

In this dissolution case, the wife was served with a summons that was not on a form provided by the Clerk, but was typewritten and prepared by the husband's counsel. The wife did not respond to the summons, did not receive notice of the final dissolution hearing, and did not appear at that hearing. After the hearing, the trial court defaulted the wife and entered the final dissolution decree, which awarded the parties joint legal and physical custody of their son and divided the marital estate. After the wife learned that the dissolution decree had been entered, she moved to set aside the judgment, but the trial court denied that motion.

On appeal, the wife argued that the summons was defective because it did not warn her of the possibility of default. The Court noted that the wife's claim was for the insufficiency of process, not the insufficiency of service of process.

A claim of insufficiency of process "challenges the content of a summons; [insufficiency of service of process] challenges the manner or method of service." *Heise v. Olympus Optical Co.*, 111 F.R.D. 1, 5 (N.D. Ind. 1986).

The content of the summons was found to be insufficient.

The summons informed Wife that she or her attorney may appear and that she may respond, but nothing in the summons required Wife to do anything in response to the petition having been filed, other than to appear before the court "if directed to do so." ... We hold that due process requires that, at a minimum, a respondent in a dissolution proceeding be notified of the risk of default for failure to appear or otherwise respond.

Without a statement of the consequences, namely, that judgment could be entered without further notice should Wife fail to appear or otherwise respond, the summons did not

satisfy due process or comply with the intent of Trial Rule 4(C)(5). Accordingly, the dissolution court did not obtain personal jurisdiction over Wife, and the dissolution decree is void as a matter of law.

The husband's failure to include this information was not excusable under Trial Rule 4.15(F) because the failure to inform the wife of the consequences of failing to appear was not a "minor, technical defect" in the summons.

**Lessons:**

1. A default judgment arising from an insufficient summons is void as a matter of law.
2. A summons is insufficient if it does not notify the defendant of the risk of default for failure to appear or otherwise respond.

NOTE: T.R. 4.15 states: "No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond."

**6. Juror Bias Warrants New Trial; *Thompson v. Gerowitz* - 2011 WL 535101 (Ind.Ct.App. 2/16/11)(Barnes)**

In the trial of this medical malpractice case, defense counsel asked a panel of prospective jurors if they had negative experiences with physicians or had sued a physician. One juror did not answer and this juror was seated in the jury. After being informed that she was in the jury, the juror said that she was a widow, had sued a doctor for negligence and indicated that she would have a problem with being fair. The trial court concluded that there was nothing to be done and that the jury was a good one for both parties. After the trial, the jury entered an award for the plaintiff for \$420,000.

On appeal, the Court found that the defendant was entitled to a new trial because of the potential juror bias.

We believe that Juror Odam's silence when taken with her subsequent statement to the trial court was specific, substantial evidence showing a juror was possibly biased. Dr. Thompson brought this issue to the trial court's attention in a timely manner. At that point, it was incumbent upon the trial court to conduct a hearing, out of the presence of the remainder of the jury, to determine: (1) whether Juror Odam's silence indicated bias or lack of disinterest; and (2) whether the hearing itself has created a bias in the juror. The court should then have allowed Dr. Thompson to challenge Juror Odam for cause, and should have excused her and declared a mistrial if bias was found to be present.

The trial court did not follow this protocol; instead, it denied Dr. Thompson's motions to strike, for a hearing, and for a mistrial based on its previous, albeit extensive, experience conducting jury trials. Although the trial court's rulings on these motions was a matter of discretion, the trial court was not permitted to

disregard the established procedure or the distinct possibility of juror bias based on Juror Odam's own belated statement. The trial court erred by not conducting a hearing to address Juror Odam's alleged bias.

Trial attorneys should take note that a trial court's duty to conduct a hearing into a juror's bias or lack of disinterest is triggered if the trial court is presented with "specific, substantial evidence showing a juror was possibly biased." That standard was met in this case. A trial court's failure to follow this protocol may, as in this case, result in a reversal and remand for a new trial.

**Lesson:** A trial court must conduct a hearing into a juror's bias or lack of disinterest if it is presented with specific, substantial evidence showing a juror was possibly biased.

**7. No duty to defend against claim for negligent control of controlled substance; *Forman v. Penn* - 2011 WL 861903 (Ind.Ct.App. 3/14/11)(Baker)**

Last month, we told you how the Indiana Court of Appeals *sua sponte* raised the issue of whether the grant of a partial motion for summary judgment was an appealable order in *Forman v. Penn*, Case No. 33A01-1007-CT-343. After the trial court certified its ruling for a discretionary interlocutory appeal, the Court dealt with the merits of the case.

Forman, a teen, was staying at a friend's home for the night. The boys were playing video games when the adults retired for the night. The next morning, after the adults had left for some errands before the boys were awake, the friend called them to report that Forman could not be wakened. Ultimately, Forman was hospitalized and contends that he has permanent injuries from ingestion of methadone that had been supplied by his friend from the friend's mother's prescription.

Forman sued his friend and the adults, alleging negligent supervision and control over the methadone and negligence in caring for him after it was discovered that he could not be wakened. Western Reserve, with whom the home was insured, intervened, seeking a declaratory judgment that it had no duty to provide a defense to Forman's complaint. The relevant insurance policy included the following exclusion:

[a]rising out of the use, sale, manufacture, delivery, transfer, or possession by any person of a Controlled Substance(s) as defined by the Federal Food and Drug Law at 21 U.S.C.A. Sections 811 and 812. Controlled Substances include but are not limited to cocaine, LSD, marijuana and all narcotic drugs. However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the orders of a licensed physician.

Western Reserve moved for summary judgment and the trial court granted that motion.

On appeal, the Court found this policy language unambiguous. Here, it is undisputed that Lisa Orr had a valid prescription for methadone, which is a controlled substance included

within the meaning of the above clause. It is also undisputed that Forman's use of the methadone was not a legitimate use pursuant to the orders of a licensed physician.

The Appellants argue, however, that because Lisa's possession and use of the methadone was legitimate, the exclusion does not apply. But Forman's bodily injury arose out of Forman's use of the methadone, which was not a legitimate use of the drug pursuant to the orders of a licensed physician.

We sympathize with the Appellants' argument that they are entirely innocent of any connection between Forman and his decision to steal and consume Lisa's methadone. We acknowledge that the Appellants justifiably believe that Western Reserve should defend them under these circumstances. Unfortunately for the Appellants, the language of the policy is clear and unambiguous that Forman's injury, which arose out of his illicit use of a controlled substance, is excluded from liability coverage. Consequently, the trial court properly entered summary judgment in Western Reserve's favor on the issue of its duty to defend the Appellants.

The lesson here is that people who legally have controlled substances at their homes need to take reasonable steps to prevent other people from accessing those controlled substances. They will be paying the costs of their own defense, if they do not.

**Lesson:** Homeowners' policy excludes coverage for claim of negligent control over a controlled substance.

**8. A realtor may not purchase a property if she has acted as an agent to purchase that property if the client still expresses an interest; *Demming v. Underwood* – 2011 WL 589726 (Ind.Ct.App. 2/21/11)(Mathias)**

Demming was interested in purchasing two properties in Bloomington, Indiana, as part of her investment strategy. She asked Underwood, a realtor, to find out whether they were for sale. After being told that the properties weren't for sale, Demming and Underwood "strategized" together on how Demming could acquire the properties, and Underwood offered to inquire about the properties' availability every few months. Over the next few years, Underwood inquired about the properties' availability "every four or five months." Additionally, on three occasions in 2006, Underwood inquired into the availability of the properties after Demming specifically instructed her to do so. While Underwood was not compensated for these services, it was discussed and understood that Underwood would be paid a real estate commission, at closing. Unbeknownst to Demming, Underwood became interested in purchasing the properties for herself after she acquired a neighboring property in May 2006.

In February 2007, Demming again instructed Underwood to inquire into the availability of the properties for purchase. The seller's agent responded that she would contact the properties' owner, but she expressed doubt as to whether the owner would be willing to sell. The next day, Underwood told Demming that the Properties were not for sale. Demming

instructed Underwood to "stay on it" because she believed that the owner would be willing to sell in the near future.

A few days later, Underwood was informed that the owner was willing to entertain an offer. Underwood did not relay this information to Demming. Instead, Underwood and a partner tendered their own written offer and purchased the properties.

Demming sued Underwood for breach of fiduciary duty and constructive fraud and asked the court to impose a constructive trust compelling Underwood and her partner to convey title of the properties to Demming. Underwood moved for summary judgment and the trial court granted that motion, finding that no agency relationship existed between Demming and Underwood as a matter of law. Demming appealed.

On appeal, the Court first addressed whether Underwood was Demming's agent under the common law. It held that the facts supported an inference that Underwood agreed to act as Demming's agent, which created a genuine issue of material fact precluding entry of summary judgment. It held that a principal "need not exercise complete control over every aspect of the agent's activities within the scope of the agency" and that "it was enough that Demming instructed Underwood to make contact with Costley." The Court then turned to the question of whether Underwood had breached the duties she owed Demming. It concluded that Underwood could be Demming's agent "not only for the purposes of making a few, isolated contacts with [the seller's agent] regarding the Properties, but for the broader purpose of actually acquiring the Properties. ... This is not to suggest that the agency relationship between Demming and Underwood would continue indefinitely until Demming acquired the Properties." But that relationship lasted at least as long as the time within Underwood purchased the properties. "Underwood clearly would have breached the fiduciary duties arising out of that relationship by purchasing the Properties for herself without informing Demming that Mrs. Morris was entertaining offers." Therefore, the trial court erred in granting summary judgment to Underwood.

The Court next addressed Underwood's statutory duties to Demming. It noted the relative paucity of cases interpreting I.C. Chapter 25-34.1-10, which governs real estate agency relationships, noted ambiguities in that Chapter, and concluded that Underwood could have been an agent under those statutes. The Court then held "that Indiana Code section 25-34.1-10-11(e) does not allow a licensee representing a buyer to purchase properties during the course of the agency with respect to which he or she has acted as the buyer's agent and in which the client has expressed interest."

Finally, Underwood argued that she could not be found liable for constructive fraud because the fifth element of a claim for constructive fraud is "the gaining of an advantage by the party to be charged at the expense of the complaining party" and no real estate transaction took place between Demming and Underwood. The Court again disagreed.

Keeping in mind the equitable principles underlying the doctrine of constructive fraud, we reject the Defendants' contention that an action for constructive fraud cannot be maintained in the absence of a transaction between the parties to a

confidential or fiduciary relationship. Rather, we hold that where an agent has acquired an advantage from a third party at the principal's expense as a result of actions taken in furtherance of the underlying agency between the principal and agent, the principal has satisfied his or her burden with respect to a constructive fraud claim as set forth in *Strong*.

**Lessons:**

1. An agency relationship exists between a realtor and a client if the client orders the realtor to inquire into the availability of a property for purchase.
2. An agency relationship will last for a reasonable period of time if the duration is not specified.
3. A person can be a realtor's client under I.C. Chapter 25-34.1-10 even if there is no agreement regarding compensation and the particular property being investigated is not currently listed for sale.
4. A realtor cannot purchase a property that her client is expressing interest in purchasing.
5. A principal can prove constructive fraud if an agent has acquired an advantage from a third party at the principal's expense as a result of actions taken in furtherance of the underlying agency between the principal and agent.

**9. Leased Employee is a joint employee of both the lessor and lessee, regardless of their agreement; *Taylor v. Ford Motor Co.* – 2011 WL 700525 (Ind.Ct.App. 3/1/11)(Mathias)**

Taylor was employed by Visteon and leased to ACH, a subsidiary of Ford. The lease agreement between Visteon and ACH provided that Visteon would retain responsibility for Taylor's worker's compensation benefits and that Taylor would not be ACH's employee. Taylor was seriously injured at the ACH plant when Adams, a Ford employee, struck him with a forklift. Taylor received worker's compensation benefits. Taylor then filed suit against Adams, ACH, and Ford, alleging that their negligence caused his injuries. The defendants moved to dismiss for lack of subject matter jurisdiction and the trial court granted that motion.

The Worker's Compensation Act (WCA) provides the exclusive remedy for recovery of personal injuries against an employer arising out of and in the course of employment in Indiana. Taylor argued that his claims against Adams, ACH, and Ford are claims against third-parties that are not precluded by the WCA and should be allowed to proceed. He focused his argument on the language of the lease agreement. However, the Court of Appeals found that the relevant statute (I.C. § 22-3-6-1(a)) was clear and unambiguous and that it, not the contract between Visteon and ACH, controlled.

[E]ven though James may have been considered an employee of Visteon only for purposes of the Employee Lease Agreement, by operation of the mandatory provision of Subsection 1(a), both Visteon and ACH are considered James's joint employers for purposes of the exclusivity portion of the Act.

Taylor argued that the *Seyring* court did not rely solely on Subsection 1(a), but also looked to the contract between the lessor and lessee of the temporary employee in determining who to consider as employers. The Court disagreed.

The fact that joint employers may distribute the cost of the unemployment compensation by contract does not mean that they can contractually exclude themselves from the mandatory language of Subsection 1(a), which defines both lessors and lessees of leased employees as joint employers for purposes of the Act. The *Seyring* court did not hold otherwise. Instead, the court assumed *arguendo* that even if an employer could waive the exclusivity provisions of the Act, the lease agreement in that case did not contain such a waiver. The same is true here. Although the Employee Lease Agreement does provide that any leased employee such as James was to be considered an employee of Visteon only and not ACH, there is nothing in the Agreement mentioning the exclusivity provision of the Act or indicating that ACH was intentionally waiving this provision.

Thus, Visteon and ACH were joint employers of Taylor for the purposes of the WCA. Likewise, Ford was a joint employer of Taylor, because ACH was its subsidiary. Therefore, the WCA's exclusivity provisions were applicable against all of the defendants.

**Lessons:**

1. The lessor and lessee of a leased employee are both joint employers of the employee for the purposes of the Worker's Compensation Act.
2. A parent and subsidiary corporation are joint employers of an employee of the subsidiary for the purposes of the Worker's Compensation Act.

**10. Defendant is proximate cause of damages if the injury is an expected consequence of defendant's conduct; *BCS Services, Inc. v. Heartwoods 88, LLC*, \_\_ F.3d\_\_ (C.A. 7 3/24/11)(Posner)**

The plaintiffs brought a RICO claim against a group of defendants related to the purchase of tax liens at auction in Cook County, Illinois. When an owner of property in Cook County fails to pay his property tax on time, the amount of tax that is due (which is to say past due) becomes a lien on the property. The county sells its tax liens at auctions. The bids at the auctions are stated as percentages of the taxes past due. If the taxpayer fails to redeem by paying what he owes, the purchaser of the lien can obtain a tax deed to the property and thus become the property's owner. For reasons that don't need to be explained in detail here, the best bid is a zero-percent bid.

The auctions are conducted in rapid-fire fashion in a room in which the bidders bid by raising a card with their bidder ID number and shouting out their penalty percentage (usually "zero!"). Almost 85 percent of the winning bids are at the zero-percent penalty level, which implies that most bids are identical bids (identical zero-percent bids). The auctioneer tries to award the lien to the bidder who raised his hand first. But if many bidders raised their hands as soon as the bidding began, the auctioneer would use some other method to allocate awards fairly. The County's rules permit only one agent of a potential buyer, or of a group of cooperating buyers ("related entities"), to bid. Otherwise a potential buyer could increase the

likelihood of winning by packing the room. If a buyer did pack the room, then it would have engaged in a pattern of mail fraud in violation of RICO.

The plaintiffs accused the defendants of engaging in a RICO conspiracy to pack the room. The district court dismissed the case on the ground that the plaintiffs can't prove that the fraud was a "proximate cause" of their alleged losses. On appeal, the Court engaged in an extensive discussion of actual and proximate causation.

You cannot obtain damages for fraud or any other tort, whether you are litigating under common law or the RICO statute, without proving that the fraud caused a loss to you, such as a financial loss, for which damages can be awarded. The problem is that there may be multiple causes of your loss, obscuring the effect of the defendant's wrongful act. *Sometimes the causes are joint.* For example, a passerby drops a match in a puddle of oil created by a leak from a tanker truck, and the oil explodes. Without both match and leak — hazards created by separate persons — there would be no explosion and so no harm. Who should be liable?

*Sometimes causes are alternative:* a person is stabbed by two knife-wielding assailants, and either stab wound would have been fatal. Should both be excused from liability because neither was necessary for the injury to occur? And likewise when each of two wrongdoers could have caused the plaintiff's injury and it is unclear which did and each points at the other and says let me off because the other guy may have done it.

*Or sometimes* — and here is where the doctrine of proximate cause does its work — too many unexpected things had to happen between the defendant's wrongdoing and the plaintiff's injury, in order for the injury to occur — so many unexpected things that the *defendant couldn't have foreseen the effect of his wrongdoing* and therefore couldn't have been influenced, in deciding how much care to employ in the activity that produced the wrongful act, by the prospect of inflicting such an injury as occurred.

The doctrine of proximate cause ... protects the ability of primary victims of wrongful conduct to obtain compensation; simplifies litigation; recognizes the limitations of deterrence (unforeseeable consequences of a person's acts will not influence his decision on how scrupulously to comply with the law); and eliminates some actual or possible but probably minor causes as grounds of legal liability. All this is true in RICO cases just as in other tort cases whether common law or statutory.

In this case, the Court found that the defendants proximately caused the plaintiffs harm because it was foreseeable that packing the room would cause the defendants to win a larger number of awards (the evidence in the case showed that the defendants received a significant percentage of the awards).

The defendants stole a business opportunity from the plaintiffs by flooding the auction room with raised hands that shouldn't have been there. The only intermediate cause and effect pair was the raising of hands (cause) and the auctioneer's determination of the winning bid (effect), and this pair doesn't weaken the inference that by having more hands in the air the defendants stole tax liens from the other bidders.

The defendants argued that the plaintiffs were required to prove the absence of alternative causes. The Court disagreed.

The plaintiff doesn't have to prove a series of negatives; he doesn't have to "offer evidence which positively exclude[s] every other possible cause of the accident." In technical legal terms the burden of proving an "intervening cause" — something which snaps the "causal chain" (that is, operates as a "superseding cause," wiping out the defendant's liability) that connects the wrongful act to the defendant's injury — is on the defendant.

The defendants [arguments concerning the negatives that the plaintiffs had failed to prove] were throwing sand in the district judge's eyes. The object of their conspiracies was to obtain liens that would otherwise go to one-armed bidders — there could be no other reason for wanting to pack the room in violation of the County's rule. The plaintiffs were major bidders. They bid for many thousands of liens. How likely is it that they lost no bids to bidders who had 13 arms in the room but should have had only three?

Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation.

The Court then described that the burden of proof on damages is more relaxed than the burden of proof on causation.

In this case, for example, the plaintiffs do not have good records of which tax liens they bid for unsuccessfully. The only reason they would have needed such records was to prove damages in a lawsuit. Since they didn't know they were victims of fraud, they had no reason to think they needed good records of their unsuccessful bids — for of what use would such records have been had there been no fraud? The judge missed this point because he confused proof of causation with proof of amount of damages and so denied the plaintiffs the benefit of the easier burden of proving damages than of causation.

The statistical evidence in this case would be enough, when combined with evidence also presented by the plaintiffs of the average profit they made on the zero-percent liens that they won, to carry their burden of proving an amount of damages with sufficient (which is not to say with great) precision to justify an award of that amount.

**Lessons:**

1. A plaintiff can prove causation if he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct.
2. The defendant has the burden of proving an intervening cause.
3. The burden of proof on damages is more relaxed than the burden of proof on causation.

**11. Email exchange between attorneys sufficient to bind clients to settlement;  
*Sands v. Helen HCI, LLC* - 2011 WL 664233 (Ind.Ct.App. 2/23/11)(Bailey)**

This case involved a dispute between parties that spanned litigation in Wisconsin and Indiana. In email communications, counsel for one party proposed a mutual dismissal of the various claims in the various courts by all the parties. After a series of e-mails, one party's attorney denied that a settlement had been reached and rejected the proposed written agreement. The other party then instituted proceedings to enforce the settlement agreement. The trial court denied the motion to enforce the settlement agreement.

On appeal, the Court noted that there was no factual dispute concerning counsels' authority to bind their clients when exchanging the email. The Court noted that all of the parties agreed, via email to the essential terms, i.e. that the parties would mutually release their claims with prejudice. The fact that the parties contemplated that the motions to dismiss and releases would be executed later did not affect the existence of an agreement to settle.

Helen HCI maintains that no binding settlement agreement was reached because the parties yet anticipated the execution of settlement documents. The releases were to be effective upon the "Effective Date," defined as "the first business day after this Agreement has been executed by all parties." Thus, the releases were to be effected on a future date, as were the dismissals. Nonetheless, as to the contract here at issue, executing the motions to dismiss and the releases would constitute the full performance of the contract, not its formation.

Thus, the settlement agreement was binding. The lesson here is clear - if you engage with settlement discussions with opposing counsel via email, then your client can be bound by those discussions, even if the parties do not actually execute a settlement agreement and release. Make sure that you actually communicate your client's wishes in these types of communications.

**Lesson:** Settlement discussions via email can bind your client, if you agree to all the essential terms of the settlement, even if the parties do not execute a settlement agreement and mutual release.

**12. The Seventh Circuit warns lawyers not to misrepresent their word count;  
*Abner v. Scott Memorial* - 2011 WL 799778 (C.A.7 3/9/11)(Posner)**

*Abner* involved an appeal from the grant of summary judgment to the defendant in a suit under the False Claims Act. Fed. R. App. P. 32(a)(7)(B) describes the word count limitation for appellate briefs and Fed. R. App. P. 32(a)(7)(C) requires that a party certify compliance with that word count. The appellants certified that their brief contained 13,877 words, which was less than the 14,000 word limit. In a footnote, the appellee noted that appellants' brief exceeded the 14,000-word limit — that it contained 18,000 words excluding the portions of the brief that Rule 32(a)(7)(B)(iii) exempts from the word limit. The appellant did not file a reply brief or otherwise respond.

The Court issued an order to show cause "why their brief should not be stricken and/or sanctions imposed for failing to comply with Rule 32 and making a false representation to the court." Counsel for the appellants responded that he had "inadvertently considered only the words included in the argument section of the brief as part of the Rule 32(a)(7)(B)(iii) requirement (the word count also did not factor in citations made within parentheses)." The Court found there was no ambiguity in the Rule. Then, the Court started to seriously criticize the appellants' counsel.

Had appellants filed an 18,000-word brief with a truthful certificate, the brief would have been rejected; there would have been no occasion for sanctions, just as there is no occasion for sanctions when a brief is rejected for omitting a statement of the standard of review or the date on which the judgment was entered, which is essential to determining the timeliness of the appeal. We reject many briefs for these and similar reasons. The problem here, by contrast, is a misrepresentation that was initially successful in averting rejection of the brief. The misrepresentation would have gone unnoticed had the appellee not called it to our attention.

The response to the order to show cause, and the belated "Motion for Leave to Exceed Word Count" filed with it, advance no persuasive grounds for allowing an oversized brief to be filed, and so the brief is stricken. We could go further. As the Supreme Court pointed out in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991), a court has the authority "to fashion an appropriate sanction for conduct which abuses the judicial process," including the "particularly severe sanction" of dismissal.

The flagrancy of the violation in this case might well justify the dismissal of the appeal: let this be a warning. But in addition it is plain from the briefs that the appeal has no merit. To allow time for the appellants to file a compliant brief and the appellees to file a revised brief in response, and to reschedule oral argument, would merely delay the inevitable.

**Lessons:**

1. If you misrepresent the word count in your appellate brief to the Seventh Circuit, then you and your clients could be sanctioned.
2. The Seventh Circuit does not always verify that the certified word counts in appellate briefs are accurate.

3. Always check to see if the opposing party's word count certification is accurate.

**13. 7<sup>th</sup> Circuit reprimands and fines appellants' counsel for unprofessional behavior on appeal; *Lee v. Cook County, Illinois* – 2011 WL 982383 (C.A.7 3/22/11)(Easterbrook)**

The plaintiffs in *Lee* were three employees of the Cook County prison system. The EEOC issued right-to-sue letters to these employees in March 2008, and recipients had 90 days to commence litigation. The three employees and nine of their co-workers, brought a discrimination case against Cook County. The district court thought that the 12 plaintiffs' contentions were too disparate to justify joint litigation. In September 2008, the court dismissed the complaint without prejudice and told the plaintiffs that they had 40 days to file individual suits. Their individual cases were not refiled until May 2009 and the relevant district courts dismissed them as barred by the statute of limitations.

On appeal, the Court stated that the original district court erred when it dismissed the 12-person complaint.

There was nothing wrong with the original complaint. Multiple plaintiffs are free to join their claims in a single suit when "*any* question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1)(B) (emphasis added). The common question need not predominate; that's a requirement for class actions, not for permissive joinder. Whether the Cook County prison system discriminates against black employees when making promotions is a question common to all plaintiffs' claims.

While an order dismissing a case without prejudice is usually not appealable, it was in this instance. It was now too late to address that original error.

When a federal civil action is dismissed without prejudice, the statute of limitations runs continuously. ... Thus on the very date that Judge Castillo dismissed the original suit, nominally without prejudice, it was *already* too late for plaintiffs to file individual suits.

They should have appealed immediately. Although a dismissal without prejudice nominally is not final, and thus can't be appealed, when the decision effectively precludes re-filing — as it did here — it is treated as final and appealable. An appeal would have produced a remand with instructions to reinstate the suit in compliance with Rules 20(b) and 21. But [plaintiffs' counsel] did not appeal, the time to do so has long passed, and the fact that an un-appealed order dismissing a suit may have been erroneous does not extend the time to file a replacement suit.

The plaintiffs argued that the district court's order dismissing the case extended the statute of limitations by granting extra time to file replacement actions. The Court stated that district courts do not have that authority and rejected other, similar arguments. It then began seriously criticizing the plaintiffs' counsel.

Greco's calamitous handling of this litigation in the district court has been followed by a sloppy performance in this court. As we've mentioned, Greco has never related why he did not appeal in September 2008 or file new suits by the end of October 2008. And his performance has been marked by procedural gaffes, three of which led to orders to show cause why the appeal should not be dismissed — and one of which led to his clients' brief being struck.

Greco's response to this last show-cause order, the fourth in a single appeal, is consistent with his performance throughout the litigation. ... Greco labels his deficient compliance an "oversight" but does not explain why the error was made. We do not penalize lawyers who rely on plausible misreadings of ambiguous rules, but Greco does not contend that Rule 31(e) is ambiguous or offer any explanation for his failure to do what it commands.

The events recounted in this opinion show that Greco is a menace to his clients and a scofflaw with respect to appellate procedure. The district court may wish to consider whether he should remain a member of its bar. Would-be clients should consider how Greco has treated Lee, Washington, and Moore. Greco has not asked for a hearing on the disciplinary order to show cause, and we now conclude that he has comported himself unprofessionally. We reprimand Greco for this unprofessional behavior and fine him \$5,000, payable to the Clerk within 14 days. Greco must send Lee, Washington, and Moore copies of this opinion so that they may consider whether to file malpractice suits against him.

The two biggest takeaway from this case are (1) to remember that dismissals without prejudice are still immediately appealable if the dismissal effectively prevents refile, and (2) judges cannot extend statutes of limitations. However, this case should also remind practitioners to read and follow the local rules of any court in which you are practicing, particularly when you don't normally practice in that court. The Court may not be willing to cut you much slack, if you can attribute your failure to follow its rules to nothing more than an "oversight".

**Lessons:**

1. Dismissals without prejudice are still immediately appealable if the dismissal effectively prevents refile.
2. Judges cannot extend statutes of limitations.
3. Whether common questions "predominate" is irrelevant for purposes of Rule 20.

**14. Attorney suspended for ex parte communication with judge; *In re: Jane G. Cotton*- 939 N.E.2D 619 (Ind.S.Ct. 12/27/10) (per curiam)**

On December 14, 2007, attorney Jane Cotton agreed to serve as replacement counsel for the wife in a divorce case then pending in Madison County. The wife asked Cotton to stop her husband from removing his personal property from the parties' South Central Way Property. The wife gave Cotton an "Order for Protection" that had been previously signed by Judge

Newman which ordered the husband to stay away from the wife's residence but did not identify the address.

Cotton and the wife went to the courthouse on December 14 to talk with Magistrate Clase about the matter but only Judge Clem was available. Judge Clem had not been involved in the case. Cotton told Judge Clem that the husband wanted to remove personal property from the South Central Way Property and that the address for the property had inadvertently been left out of the Order for Protection and asked Judge Clem to add that address to the order, which he did.

On December 19, pursuant to a motion which the husband had filed, the divorce court signed an order allowing the husband to remove his personal property from the South Central Way Property. The wife received the motion and order but apparently did not share them with Cotton.

On December 29, the husband attempted to load his personal property onto a truck but the wife called police, showed them the modified Order for Protection and asked them to arrest the husband. The police declined to make any arrest but refused to let the husband remove his personal property. The husband went back to court, got a second order allowing him to remove his personal property and when he did so later in January, discovered that some of his property was missing.

In this disciplinary action, the Indiana Supreme Court found that Cotton violated Rule 3.5 of the Rules of Professional Conduct by engaging in an ex parte communication with a judge and Rule 8.4(d) by engaging in conduct prejudicial to the administration of justice.

Rule 35 states: "A lawyer shall not ... communicate ex parte with [any judge] during the proceeding unless authorized to do so by law or court order." The Court also concluded that Cotton had misrepresented a material fact to Judge Clem by telling him that the address had been "inadvertently left out of the original order" which was not true. The Court expressed additional concern with Cotton's failure to notify the husband's counsel of the ex parte contact and the alteration of the Order for Protection.

For this misconduct, the Court suspended Cotton for 30 days. The Court also ordered the release of \$1,275 that Cotton had tendered to the Commission as restitution for the husband's attorney's fees (to obtain the second order to allow removal of his personal property). These sanctions were ordered notwithstanding the facts that Cotton "was motivated by genuine concern for her client at a time of apparent crisis" and "the mental illness" of Cotton's client "may have contributed to a communication of inaccurate or incomplete facts" to Cotton.

**Lessons:**

1. Ex parte communication with a judge in a pending case is not just bad form, it's a serious violation of the Rules of Professional Conduct.
2. When dealing with new clients, keep in mind the Russian proverb: "Trust, but verify."

**ADVOCACY TIP OF THE MONTH:** Don't skimp on the facts in your appellate briefs.

From Larry A. Klein, *The Evolved Appellate Brief*, *Litigation Magazine*, Fall 2011, p. 39  
[Klein served as a judge on Florida's Fourth District Court of Appeal from 1993 to 2009 and now practices with Holland & Knight, LLP in West Palm Beach, Florida]

"Remember that the facts are almost always as important as the law, and often more important than the law. Do not skimp on the facts, and, if I have to think about including a fact that is arguably irrelevant, err on the side of inclusion. Facts that add human interest, but are of no legal significance, can make a case more interesting. In addition, not all judges agree on the relevancy of certain facts to an issue. The more experience I gained as an appellate lawyer and judge, the more I recognized that what might seem to be chaff to me was wheat to a colleague I respected, or vice versa."

## **Accessing The Indiana Law Update Electronically**

For your convenience, a podcast of today's presentation and a PDF version of this document will be available online at [www.indianalawupdate.com](http://www.indianalawupdate.com).

- PDF: Simply click on the dated item of interest, and with the proper Adobe Acrobat software installed on your computer you will be able to view, save or print.
- PODCAST: To listen to an audio recording of the March 31, 2011 Indianapolis Law Club simply click on the podcast link. Upon following the link, you will be asked if you want to save or open the file.
- To listen to the podcast, select the "open" button.
  - To download through iTunes, select the "save" button.
  - To download via your iPod, select the "save button". After signing in, select the "import" button found under the file menu. Import the saved file from your computer. Select the "Sync iPod/mp3" button and enjoy.

## **IndianaLawUpdate – the Blog**

To keep up with developments in Indiana law between Law Club meetings, check out <http://www.indianalawupdate.com/>

This blog is written by Brad Catlin and Ron Waicukauski of Price Waicukauski & Riley, LLC and focuses on recent decisions of the Indiana appellate courts and the Seventh Circuit as well as statutory and rule changes.

The IndianaLawUpdate blog is available as an RSS newsfeed. To subscribe, go to the website at <http://www.indianalawupdate.com/>.

**Ronald J. Waicukauski**  
**PRICE WAICUKAUSKI & RILEY, LLC**  
301 Massachusetts Avenue  
Indianapolis, IN 46204  
317/633-8787 Phone  
E-mail: [rwaicukauski@price-law.com](mailto:rwaicukauski@price-law.com)



Ron Waicukauski is a trial lawyer whose practice focuses on plaintiffs' complex litigation including matters involving business disputes, property rights, professional malpractice, and class actions. He has tried more than sixty jury cases to verdict as lead counsel in both state and federal courts. Ron has been recognized in Best Lawyers in America (2006-2011) and Indiana Super Lawyers (2004-2011) and with an AV Rating from Martindale-Hubbell.

Ron received his bachelor degree with Distinction from Northwestern University, his J.D. degree from Harvard University where he was named Best Oralist in the Ames Moot Court Competition, and an LL.M. degree, with Highest Honors, from George Washington University. Ron has taught trial and appellate advocacy at the Indiana University Schools of Law in Bloomington and Indianapolis, and has served on the faculties of the National Institute of Trial Advocacy and the Defense Counsel Trial Academy.

Ron has also served as President of the Indianapolis American Inn of Court, as Chair of the Continuing Legal Education Board of the International Association of Defense Counsel, and as Co-chair of the Training the Advocate Committee, Litigation Section, American Bar Association. He formerly was a JAG and Captain in the U.S. Marine Corps and served as the elected Prosecuting Attorney in Monroe County, Indiana.

Ron co-authored *The Twelve Secrets of Persuasive Argument* (2009 ABA), *The Winning Argument* (2001 ABA), *Classical Rhetoric and the Modern Trial Lawyer*, Litigation (Winter 2010); and *Ethos and the Art of Argument*, Litigation (Fall 1999). Ron also wrote *Learning the Craft*, Litigation (Spring 1998) and was the editor and a contributing author of *Law and Amateur Sports* (Ind. Univ. Press 1982).

**Brad A. Catlin**

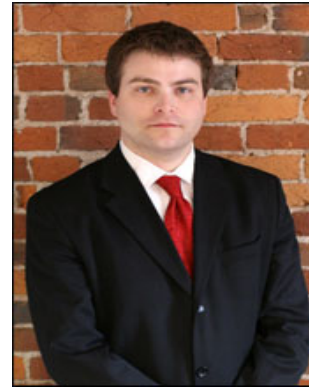
**PRICE WAICUKAUSKI & RILEY, LLC**

301 Massachusetts Avenue

Indianapolis, IN 46204

317/633-8787 Phone

E-mail: [bcatlin@price-law.com](mailto:bcatlin@price-law.com)



Brad is an associate and active trial lawyer at the Indianapolis based plaintiffs' litigation firm, Price Waicukauski & Riley, LLC. His practice focuses on complex and class litigation, including legal malpractice, product liability, commercial litigation, and consumer fraud. Brad is admitted to practice in the States of Indiana and Ohio.

Brad is a native of Westfield, Indiana and attended Wabash College as an Honor Scholar. He graduated from Wabash *cum laude* with an A.B. in Political Science and obtained his law degree from the University of Notre Dame School of Law. While in law school, Brad worked for Jones Obenchain, LLP, in South Bend, Indiana.

Before joining Price Waicukauski & Riley, LLC, Brad served as a law clerk to Hon. Mary DeGenaro of Ohio's Seventh District Court of Appeals, where, in addition to his regular clerkship responsibilities, he helped prepare material for the Ohio exam governing certification as a specialist in Appellate Law.

Brad is a co-editor of The Indiana Law Update ([www.indianalawupdate.com](http://www.indianalawupdate.com)), a legal blog focused on important developments in the law that will be of general interest to Indiana litigators.