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Indiana Law Blog Newsletter

Thank you for subscribing to the ILB Newsletter. Invite your friends and colleagues to sign up to receive this free weekly newsletter, emailed every Monday morning. The issues are intended to bridge the gap between the former **Indiana Law Blog** and its anticipated replacement (more about which will be coming later). Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate. (BTW, feedback and suggestions are encouraged - send to ilb.newsletter at indianalawblog.com.)

Holiday Schedule: The **ILB Newsletter** was published *only twice* in November, and will publish *only twice* in December. The December publication dates were Dec. 4th and today, Dec. 18th. We plan to resume our normal schedule in January.

Application forms available, deadline set for submissions, and dates set for interviews for Marion County judges seeking retention

In the last issue of this *ILB Newsletter*, Prof. Joel Schumm reported on the Nov. 28th meeting of the newly-created Marion County Judicial Selection Committee, where the format of applications and the procedures to be followed in interviewing new and retention candidates were discussed and finalized.

This week the Indiana Supreme Court announced that the application forms are available:

> for incumbent trial court judges seeking retention in Marion County. The 14-member Marion County Judicial Selection Committee, chaired by Indiana Supreme Court Justice Mark Massa, developed the application.
>
> Judges interested in seeking retention should review the statutes regarding the deadlines and details of required paperwork which must be submitted to the Indiana Secretary of State and the Marion County Clerk's Office. The separate application (which must be submitted to the Committee) along with instructions and other information about judicial vacancies can be found online at courts.in.gov/5245.htm.

The completed retention applications and other materials should be emailed to the Committee by **February 9, 2018**.

As previously reported in the *ILB Newsletter*, the public interviews of incumbents seeking retention are scheduled to take place on **March 12 and 13, 2018**. The *ILB* plans to provide coverage of these interviews as it has the past judicial vacancies at the appellate level.

Who is eligible to apply for retention in 2018? Here are the Marion County Superior Court judges elected on Nov. 6, 2012. The only change is that Robert Altice was replaced by Alicia Gooden after he applied successfully for the Court of Appeals.

JUDGE OF THE SUPERIOR COURT
Vote For Not More Than 20
(WITH 600 OF 600 PRECINCTS COUNTED)

LINDA E. BROWN (DEM)	198,654	6.55
TOM CARROLL (DEM)	184,561	6.09
JOHN CHAVIS (DEM)	183,473	6.05
STEVEN R. EICHHOLTZ (DEM)	183,069	6.04
JOHN F. HANLEY (DEM)	183,510	6.05
GRANT W. HAWKINS (DEM)	183,423	6.05
BECKY PIERSON-TREACY (DEM)	188,488	6.22
JOSE SALINAS (DEM)	183,393	6.05
MARK D. STONER (DEM)	185,820	6.13
HEATHER WELCH (DEM)	189,259	6.24
ROBERT R. (BOB) ALTICE, JR. (REP)	118,347	3.90
LISA F. BORGES (REP)	119,900	3.95
SHEILA A. CARLISLE (REP)	121,741	4.01
CLAYTON GRAHAM (REP)	112,973	3.73
AMY JONES (REP)	121,722	4.01
JAMES A. JOVEN (REP)	111,661	3.68
MICHAEL D. KEELE (REP)	115,175	3.80
HELEN MARCHAL (REP)	117,018	3.86
WILLIAM (BILL) J. NELSON (REP)	114,616	3.78
CLARK ROGERS (REP)	115,458	3.81

More change in Southern District of Indiana judgeships

The Nov. 6, 2017 *ILB Newsletter* included an article headed *"Some movement in filling the vacancies on 7th Circuit and Indiana federal district courts,"* summarizing the current status of the 7th Circuit and of both the Indiana Northern and Southern Districts. Some quotes from the section about the SD Ind:

- The four current judges are: Chief Judge Jane Magnus-Stinson, Judges Richard Young, William Lawrence, and Tanya Walton Pratt.
- Larry J. McKinney, who took senior status in 2009, was replaced by Magnus-Stinson in 2010. Senior Judge McKinney died earlier this year.
- Sara Evans Barker took senior status in 2014. In 2016 President Obama nominated Winfield Ong of Indianapolis to fill the seat; the nomination was endorsed and sent to the floor by the Senate Judiciary Committee, but died with the election of President Trump. On Nov. 1st, President Trump announced his nomination of James R. Sweeney II of Indianapolis to fill the vacancy.

Current status of the 5-member court: One vacancy (with a nominee pending); 4 active judges. One judge with senior status.

Because of its high caseload/judge, the court has been under a judicial

> emergency for some time. Most recently, it was announced that a senior judge from the Northern District of Indiana, Robert Miller, Jr., will sit by designation on the Southern District, at least through December 31, 2018.

But a Dec. 13, 2017 press release from the Clerk of the Court announced that "More changes are coming ... as District Judge William T. Lawrence has notified President Donald J. Trump of his intention to take senior status effective July 1, 2018." The announcement does note that Judge Lawrence intends "to render substantial judicial service as a senior judge."

The Southern District also has been down a magistrate judge since the death of Magistrate Judge Denise K. LaRue, who passed away on August 2, 2017. A news release dated Nov. 17, 2017 announced the selection of attorney Doris L. Pryor to fill the vacancy. It began:

> The Honorable Jane E. Magnus-Stinson, Chief Judge of the United States District Court for the Southern District of Indiana, is pleased to announce the selection of attorney Doris L. Pryor as United States Magistrate Judge. Ms. Pryor's appointment will be made upon completion of a Federal Bureau of Investigation background check, a process that can take several months.

Justice Christopher M. Goff issues his first Supreme Court opinion

From the *ILB's* April 18, 2017 coverage of the Judicial Nominating Commission's interview with then-Judge Christopher M. Goff, Wabash Superior Court:

> Chief Justice Rush asked which of the three cases on the docket for next week Judge Goff would want to write if he was on the [Supreme] Court, and he said tax is the area in which he has the least experience, and he would want to jump in and do that one.

So as it turns out, the first opinion Justice Goff has authored as a member of the Indiana Supreme Court *is* about a tax case, albeit one argued after he joined the Court. In *Merchandise Warehouse Company v. IDOR*, a Dec. 13, 2017, 12-page, 5-0 opinion, Goff writes:

> Petitioner submitted refund claims to the Department of State Revenue for sales tax paid on blast freezing equipment and the electricity used in operating said equipment. The Department partially denied the refunds and the Tax Court affirmed, holding that the Petitioner did not engage in "direct production" and, therefore, could not qualify for exemptions under the relevant statutes . We grant review and reverse. * * *
>
> We associate blast freezing food with ripening fruit with ethylene gas. Just as exposing bananas to ethylene gas proves essential and integral to producing ripe bananas, placing food in a separate freezer area and forcing cold air

around it to blast freeze it proves essential and integral to producing blast - frozen food. Like Indianapolis Fruit [Indianapolis Fruit v. Ind. Dep't. of State Revenue, 691 N.E.2d 1379, 1383 (Ind. Tax Ct. 1998)], MWC receives an unfinished product and actively transforms it into a finished product. Put differently, MWC receives an unmarketable product and transforms it into a marketable one . * * *

Today we reaffirm the longstanding principle that direct production involves a process that includes those steps essential and integral to transforming tangible personal property into a distinct marketable good, i.e., the good actually marketed to consumers. In so doing, we hold that MWC's blast freezing process constitutes direct production because it represents the crucial final step in creating a distinct marketable good — blast frozen food. Furthermore, the relevant statutes and regulations impose no requirement that MWC's blast - freezing procedure be its own, separate production process. Consequently, we grant review and reverse the Tax Court, enter summary judgment for MWC on the direct production issue, and remand for further proceedings consistent with this opinion.

Rush, C.J., and David, Massa, and Slaughter, JJ., concur.

Bloomington annexation plan effectively killed by non-related language inserted at the last minute into the 2017 budget bill; now in court and bears watching ...

The *ILB* first wrote about this in an April 25, 2017 post, quoting from a $$ *Bloomington Herald-Times* story:

> Bloomington's annexation plan effectively was killed early Saturday when the Indiana House approved a biennial budget bill that included language targeting the controversial proposal to absorb approximately 9,500 acres and nearly 15,000 people into the city.
>
> The budget bill, approved by the House before adjourning for the year just prior to 1 a.m. Saturday, contained a section inserted during conference committee proceedings that terminates annexation ordinances under consideration by the Bloomington City Council and prohibits any further effort to annex that property until after June 20, 2022.
>
> In remarks Saturday morning on the House floor, state Rep. Matt Pierce, D-Bloomington, said he was more concerned about the way the provision got into the bill — at the last minute — than the provision itself.
>
> "The mayor and city council were working through the system laid down in

> the law. They were following the rules," Pierce said. "It's all done now. So much for democracy.

A month later, the City of Bloomington sued. From the May 24th *Indianapolis Star*:

> The city of Bloomington filed a lawsuit in Monroe County Court challenging the constitutionality of state legislation it says will stall the city's annexation efforts until 2022.
>
> The legislation, passed by the Indiana General Assembly and signed into law by Gov. Eric Holcomb last month, "was dropped into the state budget bill just hours before the end of the legislative session," states a news release from the city. The lawsuit was filed Wednesday.
>
> "The language was designed to affect only Bloomington and the state-sanctioned annexation effort underway here," the news release said. * * *
>
> The lawsuit names Holcomb and claims the legislation is unconstitutional because it targets Bloomington and only Bloomington.
>
> Indiana's Constitution prohibits "special legislation" that singles out individual communities for regulation.
>
> Additionally, the suit claims the provision was improperly inserted into the state's budget bill because it has nothing to do with spending and the state constitution requires that legislation cover a single subject, the news release states.
>
> "This gross overreach by state government we believe violates our state constitution and undermines the concept of home rule enshrined in our statutes," said Hamilton.
>
> "We believe the state's action is illegal and sets a dangerous precedent. Without the court's ruling in our favor, every local government in Indiana could have legal processes capriciously terminated by state level officials."
>
> Bloomington, represented by city attorneys, is seeking a declaratory judgment on the constitutionality of the legislation and an injunction against enforcement.

[The provision at issue is properly identified as "SECTION 161" of HEA 1001-2017, found at p.185 of the 2017 budget law.]

A few weeks after suit was filed, *Star* columnist Matt Tully wrote from a public policy perspective:

> "This gross overreach by state government we believe violates our state constitution and undermines the concept of home rule enshrined in our

> statutes," Bloomington Mayor John Hamilton said in a statement announcing the legal challenge. "This lawsuit deals with annexation, but it is fundamentally a broader challenge to the constitutionality of the state's efforts to terminate a specific community's legal process."
>
> Good for Bloomington. Let's hope this lawsuit will chip away at a hierarchy that has left cities, towns and counties at the mercy of state lawmakers. It's a bad situation, as a disproportionate share of the most innovative and effective politicians in the state, Democrats and Republicans, occupy roles in local governments. The legislature should let them do their jobs. * * *
>
> The last time I wrote about this issue was in January, when the Republican-controlled legislature was seeking to block an ordinance in Carmel governing short-term home rentals. Carmel is a Republican city in the heart of Republican Hamilton County, but it had trouble fighting off a bad bill because of a fierce lobbying effort from short-term rental business interests. * * *
>
> So here's where we find ourselves: Liberal Bloomington is arguing for a smaller, more local-government mentality at the Statehouse, while our conservative state legislature is once again taking part in the type of government overreach its members routinely bemoan.
>
> Bloomington's annexation efforts should be subject to all sorts of legal challenges. The residents who oppose the move deserve to make their case in local meetings and in the courts. But the state legislature should stay out of this and other local issues. Since it refuses to do so, here's hoping Bloomington's lawsuit helps to reshape our state's balance of political power.

The lawsuit is *City of Bloomington v. Eric Holcomb* (53C06-1705-PL-001138). On Oct. 3, 2017, Monroe Special Judge Frank Nardi denied defendant's motion to dismiss in a 2-page order.

On Dec. 4, 2017 the State of Indiana filed an 8-page motion for interlocutory appeal in *Eric Holcomb v. City of Bloomington* (53A01-1712-PL-02764). Of particular interest:

> 8. Litigation efforts that target and burden the Governor are particularly suspect. The Indiana Supreme Court has, in the past, used an interlocutory appeal under rule 14(B) to consider the extent to which the Governor may be dragged into a lawsuit. In *State v. International Business Machines Corp.*, the trial court issued an order compelling the governor to be deposed. 964 N.E.2d 206, 209 (2012). The State moved for interlocutory certification, which the trial court granted, and the Indiana Supreme Court subsequently granted emergency transfer. Id. The court held that executive privilege protected the Governor from being deposed. Id. at 212. This privilege broadly "encompass[es] protection from all manner of interference with [the Governor]'s official duties—ranging from interferences with [his] time to interferences with the deliberative process." Id. at 211.

> 9. Cases from federal courts have also recognized the unique position of the Governor with regard to litigation. "The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979); see also *Ist Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 113 (3d Cir. 1993) ("General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law."). To hold otherwise "would quickly approach the nadir of the slippery slope; each state's high policy officials would be subject to defend every suit challenging the constitutionality of any state statute, no matter how attenuated his or her connection to it." *Ist Westco Corp.*, 6 F.3d at 116. Courts have warned that "[s]uch a result is undesirable, a drain on resources of time and money[.]" Id. 10. Because this appeal implicates a concern of interference with the Governor's official duties, this Court should grant jurisdiction to protect the independence of the executive branch. Just as unlawfully compelling the Governor to sit for a deposition interferes with his official duties, so too does subjecting him to suit (and the discovery that comes with it) where he has no actual ability to provide the plaintiff with relief. It is important for this Court to grant jurisdiction over this appeal to ensure the Governor is not inappropriately burdened with having to defend against abstract constitutional claims. * * *
>
> 13. Appellate review is necessary to answer the question that *Stoffel* left unanswered, namely whether, given the Indiana Constitution's diffusion of executive (or "administrative") authority among multiple constitutional (and statutory) officers, see, e.g., Ind. Const. art. 6, § 1 (creating the separately elected offices of Secretary, Auditor and Treasurer of State), the Governor's constitutional executive authority makes him specially subject to constitutional challenges even where he has no actual enforcement authority.

Re the interesting statement by the State concerning the "Indiana Constitution's diffusion of executive (or 'administrative') authority among multiple constitutional (and statutory) officers", the *ILB* recalls the landmark 1941 Indiana Supreme Court decision in *Tucker v. State*, 218 Ind. 614, which dealt at length with these very issues...

Oral arguments scheduled before the Indiana Supreme Court the remainder of December, 2017

Tuesday, Dec. 19th:

- 9:00 AM - ***Commitment of A.A. v. Eskenazi Health Midtown CMHC*** (49A02-1610-MH-02286; 49S02-1711-MH-00688) (Marion) While A.A. was being involuntarily detained under an emergency order, the Marion Superior Court held a commitment hearing, which A.A. did not attend. The court found A.A. had waived his right to be present and entered an order for A.A.'s involuntary commitment. The Court of Appeals held a respondent to an involuntary commitment proceeding cannot voluntarily waive his right to be present at a commitment hearing, but nevertheless affirmed the commitment order. *A.A. v. Eskenazi Health/Midtown Clinic*, 81 N.E.3d 629 (Ind. Ct. App. 2017), *vacated*. The Supreme Court has granted petitions to transfer and assumed jurisdiction over the appeal.

- 9:45 AM - ***Adrian Durden v. State of Indiana*** (49A02-1701-CR-00188) (Marion) After a trial in the Marion Superior Court, the jury found Durden guilty of murder and eight drug-related counts. The Court of Appeals reversed and remanded for a new trial, concluding the removal of a juror after deliberations had begun requires reversal. *Durden v. State*, 83 N.E.3d 1232 (Ind. Ct. App. 2017). The State has petitioned the Supreme Court to accept jurisdiction over this appeal.

- 10:30 AM - ***State of Indiana v. John B. Larkin*** (46A04-1607-CR-01522; 46S04-1711-CR-00701) (LaPorte) The State charged Larkin with voluntary manslaughter. The LaPorte Circuit Court granted Larkin's motion for discharge under Criminal Rule 4 and motion to dismiss the charge based on misconduct by the State. The Court of Appeals affirmed. *State v. Larkin*, 77 N.E.3d 237 (Ind. Ct. App. 2017), *vacated*. The Supreme Court has granted the State's petition to transfer and assumed jurisdiction over this appeal.

The briefs and lower court opinions may be accessed via the links above. Webcasts of the Supreme Court's oral arguments are available here.

Recommended this week

- *Use These Search Tricks to Take Control of Your Gmail Inbox* - **Lifehacker**.
- *Ten Long-Press Tips for Safari (including how to get back an accidentally closed tab)* **- 9 to 5 Mac.**
- *10 Minute Mail - Temporary E-Mail* - a click on this link immediately provides you with, for the next 10-minutes, a temporary disposable e-mail address service to beat future spam.
- *iPhone X vs. iPhone 8: Which One Should I Get?* ***- NY Magazine.***