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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@indianalawblog.com.)

Southern District of Indiana grieves the loss of Senior Judge Larry J. McKinney

The Southern District of Indiana has posted a tribute to Judge McKinney, 73, who died unexpectedly last week. A quote:

> "The entire court family is stricken by the news of Judge McKinney's passing," said Chief Judge Jane Magnus-Stinson. "He challenged us to remember that our work was about the litigants and not about us; he also set an example to value family above all else. Judge McKinney was an amazing combination of intellectual, every man, and rascal. We are heartsick for his family and for each other. Our loss is tremendous."

According to the statement, Judge McKinney's funeral service will be private; a memorial ceremony at the Birch Bayh Federal Building and United States Courthouse will be scheduled at a later date.

This loss follows upon the death August 2nd of Magistrate Judge Denise K. LaRue. A memorial ceremony for Judge LaRue was held on September 14.

Prior to Judge McKinney's death, the Court on September 20th issued this press release, which begins:

> In an effort to ease the ongoing Judicial Emergency in the Southern District of Indiana, beginning on or after October 1, 2017, two Magistrate Judges from

the Eastern District of Wisconsin will provide targeted assistance in the Indianapolis division. In addition, Chief Judge Michael J. Reagan of the Southern District of Illinois will be assisting the court by presiding over a trial.

The Southern District of Indiana is in a state of Judicial Emergency by virtue of an existing judicial vacancy and a weighted filing in excess of 800 cases per Judgeship. In the 12-month period ending June 30, 2017, the weightedfilings per Judgeship in the Southern District stood at 915, first in the Circuit and second in the nation. In addition, as a result of the untimely passing of Magistrate Judge Denise K. LaRue, the Magistrate Judges of the Southern District are experiencing a significant increase in their already considerable caseloads.

A list of the district judges and magistrates is available here.

"As Foxconn heads to Wisconsin, Indiana is a lucky loser"

That was the headline to a long, well-worth reading in full, opinion piece by business reporter James Briggs in the Aug. 4, 2017 Indianapolis Star. The article begins:

Sometimes it's good to be a loser.

Such is the case for Indiana as Foxconn Technology Group prepares to build a massive factory in southeast Wisconsin that will manufacture flat-panel displays used in television and computer screens.

Indiana was vying for the factory, according to The Wall Street Journal. If that's true — the Indiana Economic Development Corp. declined to say, citing confidentiality of all negotiations — then Indiana taxpayers should be thankful to live in a state that apparently is a little less aggressive than Wisconsin.

Wisconsin Gov. Scott Walker's administration closed the deal for Foxconn with a $3 billion, 15-year incentive package. That amounts to a tax credit giveaway of $519.per Wisconsin resident.

So what is going on now in Wisconsin? Last week Jason Stein of the Milwaukee Journal-Sentinel reported: *"Legislature's lawyers: Some provisions in Wisconsin's Foxconn law could be unconstitutional."* The story begins:

MADISON - GOP lawmakers and Gov. Scott Walker may have gone too far in dictating how courts should handle any potential litigation over a massive flat-screen factory planned for Racine County, the Legislature's nonpartisan attorneys have found.

> The memo from the Wisconsin Legislative Council didn't come to definite conclusions but found several provisions of the legislation for Foxconn Technology Group of Taiwan and its plant may be unconstitutional. The provisions could give opponents of the Foxconn deal more lines of attack in litigation — and potentially drive up the cost to taxpayers for defending the state in court.
>
> The law signed by Walker on Monday changes how environmental challenges and other potential legal cases over the factory would be handled, including automatically suspending any lower court orders until a higher court has weighed in.
>
> The eight-page analysis highlights this provision among the areas of concern, saying the decision on whether to suspend rulings could be seen as a core power of the court system.
>
> "A court could hold that the provision is unconstitutional if it finds that this provision violates the judiciary's independence in the fulfillment of its constitutional responsibilities," the memo reads.

Looming just off-stage is Amazon's just recently announced RFP for its Amazon HQ2.

> If you represent a city or regional economic development organization in North America and want to submit your proposal to host Amazon's second headquarters in North America, email our team at amazonhq2@amazon.com to get started. You can view the Request for Proposal (RFP) document here. We look forward to hearing from you.

The Amazon RFP, announced Sept. 7, 2017, is 8-pages long. Responses are due Oct. 19. The Star's Briggs opined in this Sunday's paper under the heading: *"Amazon's HQ2 is already costly. Cities and states shouldn't give up their dignity for it."*

Update to earlier story involving PPINK lawsuit

Indiana University opposes 2016 fetal tissue law in federal court was the heading to one of last week's ILB news items, pointing out that "Originally, Indiana University tried to intervene in a lawsuit brought in April, 2016 by Planned Parenthood (PPINK) and the Indiana ACLU in relation to HEA 1337-2016, [but] the motion was denied in May, 2016 on the grounds that the University's issues were different and Indiana University immediately filed its own lawsuit."

On Friday, Judge Tanya Walton Pratt issued a permanent injunction in the PPINK lawsuit, "prohibiting the State from enforcing the following provisions of HEA 1337: the anti-

discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16- 34-4-7, 16-34-4-8, the information dissemination provision, Indiana Code § 16- 34-2-1.1(a)(1)(K), and the fetal tissue disposition provisions."

The Indiana University challenge, to a different portion of HEA 1337, the new IC 35-46-5-1.5 added by SECTION 30, remains outstanding.

Petition for transfer argued that a litigant who receives a memorandum decision instead of published one does not enjoy the same "meaningful opportunity" for review by the Supreme Court

From a recent petition for transfer (filed 7-14-17) in the case of *Danny Burton v. State of Indiana* (49A02-1609-CR-02103) :

> **Appellate Rule 65(D) violates the Open Courts provision of the Indiana Constitution when the Court of Appeals has broad discretion to decide whether to publish opinions and non-citable memorandum decisions are virtually unassailable on transfer.**
>
> Although some Hoosiers come to court with stronger claims than others, their ability to have their cases heard by the state's highest court should not vary wildly based on the archaic distinction of published and memorandum decisions. Appellate Rule 57(H) understandably delineates issues of broad significance for granting discretionary review. Memorandum decisions may never be cited by an Indiana court[3] …
>
> [I]n the first six months of 2017, this Court granted transfer in 22% (28/127) of cases involving a published Court of Appeals' opinion but only 0.76% (2/263) of memorandum decisions.[5] Put another way, a litigant fortunate enough to receive a published opinion is *twenty-nine times* more likely to receive a grant of transfer than one who draws the short straw and receives a memorandum decision. * * *
>
> [A]s explained above, the odds of a transfer grant are nearly thirtyfold less from a memorandum decision than from a published opinion. Litigants who draw a judge or panel that seldom publishes opinions or, for whatever reason, gets a memorandum decision instead of published one, do not enjoy the same "meaningful opportunity" for review by this Court. Prohibiting future citation of memorandum decisions seemingly allows the resolution of cases in memorandum decisions with less regard to precedent — because the decisions

are not themselves precedential. This regime of resolving cases, with no possibility of their future citation, even though all types of out-of-state opinions may be cited, offends the most basic "lay concepts of justice" that Section 12 protects.

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[3] Appellate Rule 65(D) provides, in relevant part, "a memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case."

[5] These statistics were compiled by reviewing this Court's transfer disposition lists posted at http://www.in.gov/judiciary/cofc/Z338.htm.

In a 4-1 order filed 9-7-17, the Court denied the petition to transfer. ("All Justices concur except Slaughter, J., who votes to grant the petition to transfer.")

Indiana's Uniform Fiduciary Access to Digital Assets Act and the Indiana Code

Reviewing the enrolled act is often important to give context to a law. An example: Indiana's *Revised Uniform Fiduciary Access to Digital Assets Act*, SEA 253-2016, is codified at IC 32-39. Notice, however, that the new Uniform Act was added by SECTION 14* of SEA 253. SECTION 14 does not begin until page 11 of SEA 253. The first 13 SECTIONS of the bill made significant related changes to other parts of the Indiana Code.

(Reference to the underlying enrolled acts can be particularly important when considering criminal statutes. More about this later.)

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***SECTION vs. Sec**. As an aside, some unfamiliar with the legislative process may be unaware of the distinction between "SECTION" and "Sec." in Indiana bills and enrolled acts. A bill itself is divided into SECTIONS. Most SECTIONS of a bill will impact various sections of the Indiana Code (IC) by amendment, repeal, or adding new IC provisions. For example, here is the start of SECTION 1 of SEA 253-2016:

> SECTION 1. IC 29-1-8-1, AS AMENDED BY P.L.51-2014, SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2016]: Sec. 1. (a) Forty-five (45) days after the death of a decedent and upon being presented an affidavit that complies with subsection (b), a person:

Oral arguments before the Indiana Supreme Court this week of September 24, 2017

Thursday, Sept. 28th:

- 9:00 AM - ***Mathew W. McCallister v. State of Indiana*** (87S00-1609-LW-00497) (Warrick) Following a jury trial in the Warrick Superior Court, McCallister was convicted of murder and conspiracy to commit murder. He received a sentence of life imprisonment without parole for the murder and a concurrent term of 40 years in prison for conspiracy. In this **direct appeal**, McCallister challenges his convictions and life sentence.

- 9:45 AM - ***Jefferson Jean-Baptiste v. State of Indiana*** (49S02-1707-CR-00500) (Marion) After a bench trial, the Marion Superior Court convicted Jean-Baptiste of Class A misdemeanor resisting law enforcement. Jean-Baptiste appealed, arguing there was insufficient evidence to convict him. The Court of Appeals agreed, and reversed the conviction. The Court of Appeals further concluded the trial court improperly denied Jean-Baptiste a jury trial. *Jean-Baptiste v. State*, 71 N.E.3d 406 (Ind. Ct. App. 2017), *reh'g denied*, *vacated*. The Court has granted transfer and assumed jurisdiction over the appeal.

- 10:30 AM - ***Don H. Gunderson, et al. v. State of Indiana, et al.*** (46S03-1706-PL-00423) (LaPorte) The LaPorte Superior Court entered a judgment declaring that Gunderson, as an owner of property abutting Lake Michigan, and the State have sometimes overlapping property rights relating to land below the lake's ordinary high water mark and that Gunderson may not impair the right of the public to use the land for certain protected purposes. The Court of Appeals affirmed in part and reversed in part. *Gunderson v. State*, 67 N.E.3d 1050 (Ind. Ct. App. 2016), *vacated*. The Supreme Court has granted transfer and has assumed jurisdiction over the appeal. [**Note:** "Being duly advised, the Court GRANTS in part the Motion for Additional Oral Argument Time by Appellees-Cross Appellants Alliance For the Great Lakes and Save the Dunes and orders that oral argument will be sixty (60) minutes in length, equally divided between the appellants and the appellees."]

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

- ***Learning How to Learn.*** This is an outstanding MOOC and the most popular of all-time, worldwide. Teaches you how to move information from your short to long-term memory. Access it via Coursera (you can audit for at charge). Aug. 4, 2017 NY Times review, titled *"Learning to Learn: You, Too, Can Rewire Your Brain."*

- *Stay Tuned with Preet* - New podcast series by former U.S. Attorney (Manhattan) Preet Bharara. Preview from USA TOAY.
- *"Why Do Deleted Tweets Still Linger Online"* - from the Personal Tech column in the Sept. 19, 2017 NY Times.
- *How to Back Up All the Text Messages on Your iPhone* - Wired, 9-15-17.
