Rethinking Trial Rule 65(C) costs for dissolved preliminary injunctions and temporary restraining orders

By Colin E. Flora

In 1970, the Indiana Trial Rules supplanted the code-pleading practice that had controlled Indiana civil litigation for more than a century.[1] Most of the Trial Rules were modeled upon a corresponding Federal Rule.[2] Included among the litany of Federal Rules imported into Indiana procedure was Trial Rule 65. The first two subdivisions of the rule govern procedure for preliminary injunctions[3] and temporary restraining orders.[4] Because federal practice provided the template for Trial Rule 65, Indiana courts have often looked to federal authority for guidance.[5] But not all portions of T.R. 65 have been aided by federal procedure. On subdivision (C) Indiana procedure sharply contrasts with that of federal courts.

In both federal and state court proceedings, Rule 65(C) establishes the requirement that adequate security, usually a bond, be posted to protect from harm if a preliminary injunction was wrongfully issued.[6] But Indiana and federal courts interpret essentially identical language quite differently. Indiana applies a more expansive view of the availability and breadth of damages, allowing recovery of attorney fees and damages beyond the posted bond, while generally operating under a more rigid interpretation of the requirement for posting security, by more thoroughly restricting the circumstances in which security may be waived.

Practitioners accustomed to federal procedure may find themselves on dangerous ground should they overlook the distinctions. The purpose of this article is threefold: to advise of the differences between the two standards; to invite consideration of whether Indiana should continue to maintain the distinctions; and, in one instance, to call into question a line of appellate decisions that appear to have overlooked binding precedent to the contrary.

To understand how the differences arose, you must first understand the historical backdrop underlying federal and Hoosier injunction procedure.

Security for injunctions before Trial Rule 65(C)

Indiana's requirement to post security in order to obtain an injunction finds its origin in the chancery courts of the Indiana Territory.[7] That obligation continued after Indiana's admission to statehood.[8] In 1881, Section 3-2107 was adopted, which was the final pronunciation of injunction damages and security procedure prior to the adoption of T.R. 65(C).[9] Section 3-2107 provided:

> No injunction or restraining order shall be granted until the party asking it shall enter into a written undertaking, with surety to be approved by the court or judge, to the adverse party affected thereby, for the payment of all damages and costs which may accrue by reason of the injunction or restraining order.[10]

The purpose of Section 3-2107 "was to protect [enjoined parties] in the event they were wrongfully prohibited from doing what they had a right to do, and if they had been wrongfully restrained and temporarily enjoined, they had a remedy upon the bond or bonds."[11]

Contrary to the American Rule,[12] Indiana courts long interpreted Section 3-2107 and its predecessors to include attorney fees for resisting and obtaining dissolution of an injunction as "damages and costs."[13] Recoverable fees were, of course, limited to those directly attributable to the injunction,[14] and an enjoined party was obligated to act reasonably or risk forfeiting fees.[15] Notably, the recoverable damages were limited to the surety absent an independent tort, such as malicious prosecution.[16] Trial Rule 65(C) replaced Section 3-2107 and, as the Civil Code Study Commission noted, "is almost identical with [Section] 3-2107."[17] Consequently, the case law of Section 3-2107 was imported into Rule 65.

Creation of Trial Rule 65(C)

In 1938, creation of the Federal Rules of Civil Procedure accompanied a broad reformation of federal practice, which included the merger of law and equity into one court.[18] Because injunctions are tools of equity, the complexity of crafting a rule to add those tools to courts of law would appear daunting. But the resulting Federal Rule 65, surprisingly, did very little to change federal procedure. As a member of the rules advisory committee explained: "The subject of injunctions in federal courts (particularly in labor disputes) is so loaded with potential dynamite that the committee played quite safe and made very few changes in the existing practice under [Rule 65]."[19] As a result, Rule 65(c) was little more than a wholesale adoption of existing federal statutes.[20]

Rule 65(c) incorporated former 28 U.S.C. §382 with only one substantive change – addition of the final sentence, stating, "[n]o such security shall be required of the United States or of an officer or agency thereof."[21] That addition was a continuation of other statutes exempting the federal government from the bond requirement.[22] Due to the direct incorporation of prior statutes, early federal courts routinely consulted pre-1938 authority in applying Rule 65(c).[23]

When Indiana adopted Trial Rule 65(C), it did so by copying the first sentence of Federal Rule 65(c) verbatim, which had itself mimicked a federal

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statute, and modified the second sentence to exempt all governmental entities, not just the federal government.[24] That meant the language of Trial Rule 65(C) was based on language trying to preserve the pre-1938 federal practice. Indiana courts, however, have not viewed Trial Rule 65(C) as a direct incorporation of federal practice, but rather as a continuation of Indiana's pre-rule procedure.

Despite applying the same language, "there are two major differences between the federal rule and the Indiana rule[.]"[25] First, it is generally thought that Indiana allows recovery to go beyond the security, while the federal rule does not; but there is reason to doubt whether Indiana procedure actually differs.[26] Second, federal practice excludes recovery of attorney fees, while Indiana permits it.[27] There is a third noteworthy distinction as well: the scope of circumstances in which posting security may be waived.

When has a party been wrongfully enjoined or restrained?

In order to understand those differences, it is important to know when damages may be obtained under Rule 65(C). In both Indiana and federal courts, one who has "been wrongfully enjoined or restrained" may recover damages.[28] Thus, entitlement to damages depends on the meaning of "wrongfully." Most federal courts find "a party [] wrongfully enjoined when it had a right all along to do what it was enjoined from doing."[29] Indiana's interpretation is less simple – the meaning of "wrongfully" depends on whether the enjoining party is a governmental or private party.[30]

According to the Court of Appeals, for private parties, "[t]he determination of whether an injunction was wrongfully issued hinges on whether injunctive relief was warranted under the facts of the case rather than whether the injunction was ultimately dissolved."[31] Since likelihood of success on the merits is required to obtain a preliminary injunction, failure on the merits usually means enjoinment was wrongful.[32] Similarly, an injunction vacated as improvidently granted or for lack of subject matter jurisdiction will generally permit recovery.[33] Damages may even be allowed if a narrower final injunction is entered.[34]

An injunction by a private party is not, however, wrongful if the enjoined party stipulated to it or failed to sufficiently challenge its entry.[35] Similarly, although unilateral dismissal by a plaintiff may allow for damages, dismissal "*by both parties* through an 'amicable and voluntary' agreement" bars recovery.[36] Further, if the injunction is reversed on appeal due to a procedural error of the trial court, then damages may not be awarded because there could be no appellate adjudication on the merits of the injunction.[37] Damages are awarded only once the wrongfulness of "the injunction

[can] be said to be 'finally or ultimately determined[.]'"[38]

But as applied to governmental entities, in an attempt to harmonize the rule with the Indiana Tort Claims Act, "wrongfully" has a different meaning. In *Noble County v. Rogers*, the Indiana Supreme Court concluded that a governmental entity's "conduct is wrongful only to the extent that [it has] acted with such bad faith and malice that [its] actions undermine the authority of the court issuing the restraining order or injunction."[39] The Court specifically declined to address private parties, which left the broader standard applied by the Court of Appeals undisturbed.[40] That decision now places the meaning of "wrongfully" uncomfortably at odds with the presumption of consistent usage.[41]

Can recovery of costs and damages exceed the security?

The first prominent distinction is whether recovery may exceed the security. The purpose of the security is to be "available to the enjoined party in the event that he [i]s found to have been wrongfully enjoined. As such, the size of the bond is intended to approximate the damage the enjoined party will incur if it is found that he was enjoined wrongfully."[42] In federal practice and the majority of state courts, recovery may not exceed the bond, absent an independent action for malicious prosecution.[43] The bond may, however, be increased during the course of the injunction, though not after the injunction has been terminated.[44]

Indiana practice is less clear. It is generally thought that Indiana permits recovery beyond the bond.[45] In a dissenting opinion, Justice Boehm recognized that, since 1976, "Indiana has permitted recovery beyond the amount of the bond without any statutory basis other than Trial Rule 65(C). And in Indiana, a wrongfully enjoined party may recover actual damages even if no security was demanded."[46] The origin for this view – *i.e.,* the 1976-case referenced by Justice Boehm – is *Howard D. Johnson Co. v. Parkside Development Corp.* from the Court of Appeals.[47] There, Chief Judge Robertson looked to the purpose and language of T.R. 65(C) and determined that the speculative nature of fixing the amount of security necessitated allowing an enjoined party to recover excess damages from the party who sought the injunction.[48]

Although that is the prevailing view of Indiana law,[49] that does not mean it is correct. Prior to *Howard D. Johnson*, the pre-rule case law did not permit excess recovery.[50] In 1896, the appellate court held that an enjoined party's remedy, in the absence of malicious prosecution, is confined to the bond.[51] Chief Judge Robertson considered that decision but declined to follow it.[52]

The Civil Code Study Commission envisioned a different result: "Damages resulting from the injunction cannot exceed the amount of the bond unless the injured party proves an independent tort or wrong, such as malicious prosecution of civil litigation."[53] Even though "[t]he Commission's comments are not necessarily binding[,]" they are authoritative.[54] More importantly, the commission cited two cases in support. One was a federal district court decision,[55] which signals an expectation of continuity with federal practice, and the other was *Jones Drilling Corp. v. Rotman*.[56] Aside from periodic citation regarding the right to juries on equitable claims, *Jones Drilling* has largely been overlooked. Decided in 1964 – 12 years before *Howard D. Johnson* – the case also found that recovery was limited to the bond without sustaining a claim for malicious prosecution.[57] *Jones Drilling* matters because, unlike the case rejected by *Howard D. Johnson*, it is an Indiana Supreme Court decision. Although the Court of Appeals is free to decline to follow an appellate court decision, it may not deviate from Indiana

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Supreme Court authority.[58] To date, none of the Indiana appellate decisions since *Howard D. Johnson* has addressed Rule 65(C) in light of *Jones Drilling*, leaving open the question of whether Indiana law actually permits recovery to exceed the bond.

Whenever the Indiana Supreme Court revisits *Jones Drilling*, it will be confronted by competing views. One is that of *Howard D. Johnson*: limiting an enjoined party's recovery where it may suffer actual harm is unjust. That view has been lent some support by Judge Easterbrook, who has advised district courts to err in setting favor of a high bond instead of risking irreparable harm to an enjoined party.[59] He reasoned that "[a]n error in setting the bond too high [] is not serious[,]" because the cost of obtaining the "security is a very small fraction of the sum involved."[60]

Contrarily, a contractual theory of the bond requirement supports restricting damages.[61] As one leading source explains, by limiting liability to the security, the plaintiff can make an informed choice to forego injunctive relief if the risk – *i.e.,* cost – is too high or continue forward, knowing the full extent of liability.[62] In that manner, "[t]he bond can [] be seen as a contract in which the court and plaintiff 'agree' to the bond amount as the 'price' of a wrongful injunction"[63]

Regardless of how the Indiana Supreme Court ultimately resolves the incongruity between *Howard D. Johnson* and *Jones Drilling*, there remains uncertainty in Indiana law until the court weighs in.

Are attorney fees recoverable costs and damages?

The issue of whether attorney fees are available for dissolved injunctions has long found Indiana and federal courts at odds.[64] In accordance with pre-rule case law, Indiana has interpreted Trial Rule 65(C) as an exception to the American Rule.[65] Federal Rule 65(c), to the contrary, makes no allowance for fees.[66] Interestingly, some district courts have applied the *Erie* doctrine[67] to conclude that fees are allowable if jurisdiction is based upon diversity and the applicable state practice allows fees.[68] But the overwhelming majority of federal decisions, including from the Seventh Circuit, reject application of *Erie* in that manner,[69] even when the injunction was ordered prior to removal.[70]

Indiana's allowance of attorney fees stems from the 1873 decision *Raupman v. Evansville*.[71] Finding support in two New York chancery decisions,[72] the Court determined that "[t]he necessity of paying such counsel fees is an actual damage sustained by reason of the injunction."[73] The brevity of the opinion provides little analysis. An oft-cited *Harvard Law Review* adds insight, explaining that there is "a difference between attorneys' fees in normal litigation and those in litigation to oppose a wrongful injunction [because] … injunctions are 'extraordinary' remedies imposing costs beyond those attending normal litigation[.]"[74] The majority of states side with Indiana.[75]

The contrary federal view traces to the Supreme Court decision *Oelrichs v. Spain*, one year before *Raupman*.[76] Having considered various contexts beyond injunctions in which attorney fees are not compensable, the Court determined that prohibiting fees would preserve equal footing between the parties and avoid the complexity caused by varying rates of legal fees, which may require trial to assess.[77] Some have criticized "[t]he *Oelrichs* rule … as having 'little intelligible application today,'" and remaining only due "to the general disinclination of courts to award attorney[] fees even in defense of groundless claims in the absence of facts suggesting malicious prosecution."[78]

Just as the *Oelrichs* rule has its critics, so does Indiana's interpretation. Although ostensibly a contention that the dissolved injunction was not "wrongful," a dissent by Judge Darden is insightful.[79] In a case

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facing its second appeal, Judge Darden noted that the harm caused by the improper injunction was no more harmful to the defendant than had been the previously reversed grant of summary judgment against the plaintiff.[80] Yet, because one error came clothed in the posture of an injunction, the defendant was able to recover its fees while the similarly disadvantaged plaintiff was not.[81]

Judge Darden is certainly not alone in dissatisfaction. The author of the opinion upon which *Raupman* primarily relies voiced that he may not have awarded fees had it been left to his discretion.[82]

It merits mention that Indiana procedure is unclear as to when fees are warranted. Since 1877, Indiana case law has made reference to fees for "resisting" the injunction.[83] Often, the compensable amount is said to be fees "so far as [they] relate[] to services rendered in resisting the making of the injunction, *or* in procuring its dissolution."[84] In so doing, courts seem to have drawn a distinction between fees accrued before and after an injunction, with each recoverable.[85] No Indiana appellate decision appears to have addressed the recoverability of fees from a failed attempt to impose an injunction. A decision from Washington, which also permits fees as damages, found that they could be awarded even "[i]f the injunction is denied at a preliminary hearing[.]"[86] But only time will tell if Indiana will follow a similar path.

If Indiana still follows *Jones Drilling*, then recovery is limited to the posted security, making costs associated with successfully resisting the formation of an injunction unavailable because there can be no bond from which to make the award. Assuming that *Jones Drilling* still controls, then Judge Darden's critique is even more compelling. A trial court that errs in awarding a preliminary injunction will not only have exposed the plaintiff to repaying the defendant's fees for attempting to dissolve the injunction, including appellate fees,[87] but may also have made the costs spent for originally resisting the injunction compensable. Whereas a trial court that gets it right to begin with will have not only spared the plaintiff from the costs generated directly by the errant ruling, but also from the costs expended in resisting the motion in the first place. In that light, the impact of Trial Rule 65(C) appears abnormally punitive.

On this issue, the Indiana rule appears well settled. Nevertheless, with ample rationale on either side of the issue, an eventual challenge of this outlier to the American Rule may someday prove fruitful.

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Is issuance of security mandatory under Rule 65?

Finally, Indiana's interpretation of Rule 65(C) contrasts with several Circuits that have interpreted the federal version to grant district courts wide discretion in waiving security.[88] Indiana, like the Seventh Circuit and other courts that limit waiver of the bond to exceptional circumstances,[89] generally treats the bonds as mandatory.[90] Nevertheless, the Court of Appeals has thrice affirmed refusal to require a bond.[91]

Failure to require a bond outside those limited circumstances does not render the injunction void, but necessitates remand for the trial court to enter a bond.[92] Of course, as evident in the text of each rule, governmental entities are exempted from the bond requirement.[93] But, while governmental actors remain liable for damages in Indiana,[94] federal authority suggests a contrary result.[95]

Despite differing in many respects on the posting of security, the rules do agree that trial courts possess broad discretion in determining the amount of the security, even allowing posting of nominal amounts.[96]

Conclusion

For decades, the same words of Rule 65(C) have had different meanings depending on the courthouse in which they were spoken. Perhaps one day, the conflicting practices will come into harmony. Until then, Hoosier practitioners are wise to heed the distinctions. ⚖

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1. 22B Stephen E. Arthur, *Indiana Practice Series: Civil Trial Rule Handbook* §1:1 (2014 ed.); Charles M. Hepburn, *The Historical Development of Code Pleading in America and England*, 99-100 (1897).

2. *Noble Cnty. v. Rogers*, 745 N.E.2d 194, 201 (Ind. 2001) (Boehm, J., dissenting); *Leinenbach v. Dairymen, Inc.*, 166 Ind. Ct. App. 80, 82, 333 N.E.2d 910, 912 (1975); Robert J. Maley & John R. Maley, "More Than Arbiters of Cases and Controversies: The Growing Impact of the Judiciary on Indiana's Legal Culture" in *The History of Indiana Law* 278, 291 (David J. Bodenhamer & Randall T. Shepard, eds., 2006).

3. Ind. Trial Rule 65(A). Often overlooked, Ind. Code §34-26-1-1 *et seq.* provides further authority over preliminary injunctions. *See, e.g., J&J Wehner, Inc. v. H&L Plating & Grinding, Inc.*, No. 1:05-cv-0481-DFH-JMS, 2007 U.S. Dist. LEXIS 24366, at *12-13, 2007 WL 1021417 (S.D. Ind. Mar. 30, 2007).

4. T.R. 65(B) & (E). For simplicity, this article avoids the cumbersome reiteration that the rule applies to both injunctions and restraining orders, instead speaking almost exclusively of injunctions. The guidance herein is equally applicable to both.

5. *See, e.g., Roberts v. Cmty. Hosps. of Ind., Inc.*, 897 N.E.2d 458, 468 (Ind. 2008); *Bowyer v. Ind. Dep't of Nat. Res.*, 798 N.E.2d 912, 917 (Ind. Ct. App. 2003); *Leinenbach*, 166 Ind. Ct. App. at 82, 333 N.E.2d at 912.

6. *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 390 (7th Cir. 1983); Steven Baicker-McKee *et al., Fed. Civil Rules Handbook* at 1272 (2014 ed.); *Hampton v. Morgan*, 654 N.E.2d 8, 9 n.1 (Ind. Ct. App. 1995); Arthur, *supra* note 1, at §65:4.

7. *The Laws of the Northwest Territory, 1801-1809*, at 194, Laws of 1806 ch. XII §3d (Theodore Calvin Pease ed. 1930) (hereafter *The Laws, 1801-1809*) ("Nor shall any injunction be granted unless the complainant shall have previously executed a bond to the defendant, with sufficient surety … ").

8. *Id.* at 511-12, Laws of 1807 ch. LIX §21; *The Laws of the Indiana Territory, 1809-1816*, at 579-80, Laws of 1814 ch. XXI §26 (Louis B. Ewbank & Dorothy L. Riker, eds., 1934); *The Revised Laws of Indiana* ch. LXXIII, §21 (1824) ("Injunctions shall not be awarded … unless the complainant shall give bond … in a sum sufficient to secure the payment of the judgment so enjoined, with ten per centrum thereon, and all costs").

9. *Noble Cnty.*, 745 N.E.2d at 204 (Boehm, J., dissenting).

10. *Hooten v. Alt*, 244 Ind. 93, 104-05, 191 N.E.2d 13, 19 (1963) (quoting Burns §3-2107 (1946 Repl.), Acts 1881 (Spec. Sess.), ch. 38 §183, p. 240). Section 3-2107 retained its citation through numerous revisions of the Indiana statutes until its abrogation the same day T.R. 65(C) took effect. *See Noble Cnty.*, 745 N.E.2d at 204 (Boehm, J., dissenting); *Bd. of Trs. v. King*, 250 Ind. 389, 393, 236 N.E.2d 600, 603 (1968).

11. *Huntington v. N. Ind. Power Co.*, 211 Ind. 502, 508, 5 N.E.2d 889, 891 (1937).

12. *Nat'l Sanitary Supply Co. v. Wright*, 644 N.E.2d 903, 905 (Ind. Ct. App. 1994) ("[T]he American Rule … generally makes parties responsible for their own attorney fees." (citation omitted)), *trans. denied.*

13. *Raupman v. Evansville*, 44 Ind. 392, 392-93 (1873); *Swan v. Timmons*, 81 Ind. 243, 245 (1881);

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Elkhart v. Smith, 135 Ind. Ct. App. 108, 108, 191 N.E.2d 522, 523 (1963); *Clevenger v. Goltry*, 82 Ind. Ct. App. 110, 119, 145 N.E. 332, 335 (1924); *Hyatt v. Washington*, 20 Ind. Ct. App. 148, 149, 50 N.E. 402, 403 (1898).

14. *Robertson v. Smith*, 129 Ind. 422, 429, 28 N.E. 857, 860 (1891); *see also Clevenger*, 82 Ind. Ct. App. at 119, 145 N.E.2d at 335.

15. 2 J.G. Sutherland, *A Treatise on the Law of Damages: Embracing an Elementary Exposition of the Law & Also Its Application to Particular Subjects of Contract & Tort* §524 at 1721-22 (4th ed. 1916); *Hampton*, 654 N.E.2d at 10-11 (recognizing duty to mitigate damages from wrongful injunction).

16. *Jones Drilling Corp. v. Rotman*, 245 Ind. 10, 15-16, 195 N.E.2d 857, 860 (1964); *Harless v. Consumers' Gas Tr. Co.*, 14 Ind. Ct. App. 545, 548-49, 43 N.E. 456, 457 (1896); *Indiana Pleading and Practice* P 65.04 (LexisNexis Matthew Bender).

17. 1970 Civil Code Study Commission Comments, reprinted in *Indiana Pleading and Practice* P 65.04.

18. *Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 257 (1949); *Cavallo v. Allied Physicians of Michiana, LLC*, 42 N.E.3d 995, 1007 n.5 (Ind. Ct. App. 2015). Indiana merged law and equity almost nine decades earlier, in 1852. Hepburn, *supra* note 1, at 99.

19. Stephen B. Burbank, "The Bitter With the Sweet: Tradition, History, and Limitations on Federal Judicial Power – A Case Study," 75 *Notre Dame L. Rev.* 1291, 1319 n.158 (2000) (quoting Armistead M. Dobie, "The Federal Rules of Civil Procedure," 25 *Va. L. Rev.* 261, 301-02 (1939)) (quotation marks omitted; alteration in original).

20. *Id.* at 1319.

21. *Id.*; Notes of Advisory Committee to Rule 65(c); *Atomic Oil Co. v. Bardahl Oil Co.*, 419 F.2d 1097, 1100 (10th Cir. 1969), *cert. denied*. For the full text of 28 U.S.C. §382, *see Montgomery v. Am. Employers' Ins. Co.*, 22 F. Supp. 476, 477 (D. Del. 1938). Section 382 was a short-lived statute, having come into being in 1914 as part of the Clayton Act, but it was preceded by a similar statute in 1872. Note, "Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)," 99 *Harv. L. Rev.* 828, 829 n.6 (1986) [hereinafter "Recovery for Wrongful Interlocutory Injunctions"]; Erin Connors Morton, Note, "Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry," 46 *Hastings L.J.* 1863, 1872 (1995); *see also* 6 Benjamin Vaughan Abbott, *A Digest of the Reports of the United States Courts and of the Acts of Congress from May 1873 to November 1874*, 259-60 (2d Supp. 1874).

22. Notes of Advisory Committee to Rule 65(c).

23. *See, e.g.*, *Pabst v. Campbell*, 150 F. Supp. 71, 75 (S.D. Ind. 1957) (citing *Wingert v. First Nat'l Bank of Hagerstown*, 223 U.S. 670 (1912)); *Coyne-Delany*, 717 F.2d at 391-92 (citing *Houghton v. Cortelyou*, 208 U.S. 149 (1908); *Russell v. Farley*, 105 U.S. 433 (1882)); *Ctrs. v. Centennial Mortg., Inc.*, No. 3:04cv0153 AS, 2004 U.S. Dist. LEXIS 29775, at *2-3 (N.D. Ind. June 3, 2004), *aff'd in part and rev'd in part*, 398 F.3d 930 (7th Cir. 2005); *but c.f. Atomic Oil*, 419 F.2d at 1100.

24. *Compare* T.R. 65(C) (1970) *with* Fed. R. Civ. P. 65(c) (1970).

25. *Minn. Power & Light Co. v. Hockett*, 14 F. App'x 703, 706 (7th Cir. 2001).

26. *Id.*

27. *Id.*

28. T.R. 65(C); Fed. R. Civ. P. 65(c).

29. *Glob. NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 22 (1st Cir. 2007).

30. Federal courts do not appear to draw such a distinction. This is likely because it appears that federal courts exempt the government from liability altogether. *See infra* note 95.

31. *Drees Co. v. Thompson*, 868 N.E.2d 32, 45 (Ind. Ct. App. 2007), *trans. denied*.

32. *Id.*; *Palace Pharmacy, Inc. v. Gardner & Guidone, Inc.*, 164 Ind. Ct. App. 513, 515, 329 N.E.2d 642, 644 (1975).

33. *Bigley v. MSD of Wayne Twp. Schs.*, 881 N.E.2d 77, 81 (Ind. Ct. App. 2008); *Drees*, 868 N.E.2d at 45; *Minn. Power & Light Co. v. Hockett*, 105 F. Supp. 2d 939, 942 n.1 (S.D. Ind. 1999), *aff'd*, 14 F. App'x 703, 704 (7th Cir. 2001).

34. *Laux v. Chopin Land Assocs.*, 615 N.E.2d 902, 905-06 (Ind. Ct. App. 1993), *trans. denied*.

35. *Hay v. Baumgartner*, 903 N.E.2d 1044, 1049-50 (Ind. Ct. App. 2009); *GKC Ind. Theatres, Inc. v. Elk Retail Inv'rs, LLC*, 764 N.E.2d 647, 654-55 (Ind. Ct. App. 2002); *but cf. Strong v. Jackson*, 777 N.E.2d 1141, 1153 n.6 (Ind. Ct. App. 2002), *adhered to on reh'g*, 781 N.E.2d 770 (Ind. Ct. App. 2003), *trans. denied*.

36. *Good v. Crowel*, 416 N.E.2d 899, 901 (Ind. Ct. App. 1981) (emphasis in original).

37. *Nat'l Sanitary Supply*, 644 N.E.2d at 905-07.

38. *Pflederer v. Kesslerwood Lake Ass'n*, 878 N.E.2d 510, 513-15 (Ind. Ct. App. 2007); *Ace Bail Bonds v. Gov't Payment Serv.*, 892 N.E.2d 702, 705-07 (Ind. Ct. App. 2008), *trans. denied*; *see also Am. Bible Soc. v. Blount*, 446 F.2d 588, 595 n.12 (3d Cir. 1971).

39. 745 N.E.2d at 197; *see also* JoEllen Lind, "Recent Developments in Civil Procedure," 35 *Ind. L. Rev.* 1157, 1163-66 (2002).

40. *Noble Cnty.*, 745 N.E.2d at 197 n.4.

41. *See generally Dep't of Treasury v. Muessel*, 218 Ind. 250, 258, 32 N.E.2d 596, 599 (1941); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170-73 (2012).

42. *Laux*, 615 N.E.2d at 905; *see also Titus v. Rheitone, Inc.*, 758 N.E.2d 85, 95 (Ind. Ct. App. 2001), *trans. denied*; Baicker-McKee, *supra* note 6 at 1273 ("The maximum amount of security that may be required is the court's estimate of the potential

loss to a party proximately caused by erroneous issuance of the injunction or order.").

43. *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 770 n.14 (1983); *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 888 (7th Cir. 2000), *cert. denied*; *Noble Cnty.*, 745 N.E.2d at 201 (Boehm, J., dissenting); Jay M. Zitter, Annotation, "Recovery of Damages Resulting from Wrongful Issuance of Injunction as Limited to Amount of Bond," 30 *A.L.R.* 4th 273 §§ 3 & 5 (1984); "Recovery for Wrongful Interlocutory Injunctions," *supra* note 21, at 829-30; *but see In re UAL Corp.*, 412 F.3d 775, 779-80 (7th Cir. 2005) (recovery may exceed bond in instance of unjust enrichment).

44. Baicker-McKee, *supra* note 6, at 1274. Indiana practice also permits increasing the bond. *See Noble Cnty.*, 745 N.E.2d at 201 n.8 (Boehm, J., dissenting) (citing *Jones Drilling*, 245 Ind. at 13, 195 N.E.2d at 859).

45. *See, e.g.*, *Xantech Corp. v. Ramco Indus.*, 159 F.3d 1089, 1094 (7th Cir. 1998).

46. *Noble Cnty*, 745 N.E.2d at 201-02 (Boehm, J., dissenting). In a technical sense, the Indiana Trial Rules are statutory in nature. *Budden v. Bd. of Sch. Comm'rs*, 698 N.E.2d 1157, 1164 (Ind. 1998) (citing Ind. Code §34-8-2-2).

47. 169 Ind. Ct. App. 379, 387-89, 348 N.E.2d 656, 662-63 (1976).

48. *Id.*

49. *Peters v. Davidson, Inc.*, 172 Ind. Ct. App. 39, 46-47, 359 N.E.2d 556, 561-62 (1977), *trans. denied*; *Nat'l Sanitary Supply*, 644 N.E.2d at 905; *Noble Cnty.*, 745 N.E.2d at 201-02 (Boehm, J., dissenting); *Xantech Corp.*, 159 F.3d at 1094; Arthur, *supra* note 1, at §65:4; *Indiana Pleading and Practice* P 65.09 (LexisNexis Matthew Bender); 16 *Indiana Law Encyclopedia* Injunctions §99 (2007); 4 William F. Harvey, *Indiana Practice Series: Rules of Procedure Annotated* §65.6 at 534 (3d ed. 2003).

50. More accurately, not since the admission of Indiana to statehood had enjoined parties been permitted to recover directly against their opponents. That practice was permitted under the laws of the Indiana Territory. *The Laws, 1801-1809*, *supra* note 7, at 194, Laws of 1806 ch. XII §3d ("… on the dissolution of an injunction, judgment shall be given by the court against the securities as well as the plaintiff in the injunction bond").

51. *Harless*, 14 Ind. Ct. App. at 549, 43 N.E. at 457.

52. *Howard D. Johnson*, 169 Ind. Ct. App. at 388, 348 N.E.2d at 662. One commentator has called the change "a significant departure from earlier holdings[.]" *Indiana Pleading and Practice* P 65.09.

53. 1970 Civil Code Study Commission Comments, reprinted in *Indiana Pleading and Practice* P 65.09 (citing *Jones Drilling*, 245 Ind. 10, 195 N.E.2d 857; *Ne. Airlines, Inc. v. World Airways, Inc.*, 262 F. Supp. 316 (D. Mass. 1966)).

54. *L.D.H. v. K.A.H.*, 665 N.E.2d 43, 47 (Ind. Ct. App. 1996); *Figg & Muller Eng'rs, Inc. v. Petruska*, 477 N.E.2d 968, 971 (Ind. Ct. App. 1985), *trans. denied*.

55. *Ne. Airlines*, 262 F. Supp. at 319.

56. 245 Ind. 10, 195 N.E.2d 857.

57. *Id.* at 15, 195 N.E.2d at 860 (citing *inter alia Harless*, 14 Ind. Ct. App. 545, 43 N.E. 456).

58. *C.F. & A.F. the Ind. Dep't of Child Servs. v. C.F.*, 911 N.E.2d 657, 658 (Ind. Ct. App. 2009); *see generally* Bryan A. Garner *et al., The Law of Judicial Precedent* §§ 2 & 3 (2016).

59. *Mead Johnson*, 201 F.3d at 888.

60. *Id.*; *cf. Nat'l Sanitary Supply*, 644 N.E.2d at 905.

61. *Cf. Noble Cnty.*, 745 N.E.2d at 201 (Boehm, J., dissenting); "Recovery for Wrongful Interlocutory Injunctions," *supra* note 21, at 831-33.

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RETHINKING TRIAL RULE 65(C) COSTS

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62. "Recovery for Wrongful Interlocutory Injunctions," *supra* note 21, at 831-33.

63. *Id.*; *see also Coyne-Delany*, 717 F.2d at 394; Sutherland, *supra* note 15, at 1724.

64. *See Hockett*, 14 F. App'x at 708.

65. *Palace Pharmacy*, 164 Ind. Ct. App. at 514-15, 329 N.E.2d at 644; *Nat'l Sanitary Supply*, 644 N.E.2d at 905-07; *Hampton*, 654 N.E.2d at 10-11; *Grand Trunk W. R.R. v. Kapitan*, 698 N.E.2d 363, 367 (Ind. Ct. App. 1998), *trans. denied*; *Ind. High Sch. Athletic Ass'n v. Vasario*, 726 N.E.2d 325, 334-35 (Ind. Ct. App. 2000), *trans. denied*; *GKC*, 764 N.E.2d at 654-55; *Ace Bail Bonds*, 892 N.E.2d at 706; *Bigley*, 881 N.E.2d at 81-86; *Hay*, 903 N.E.2d at 1047-50; Arthur, *supra* note 1, at §65:4.

66. *See Hockett*, 14 F. App'x at 706; *Vision Ctr. Nw., Inc. v. Vision Value, LLC*, No. 3:07-CV-183 RM, 2008 U.S. Dist. LEXIS 45712, at *6-7 n.1, 2008 WL 2397686 (N.D. Ind. June 10, 2008). Nevertheless, fees may be recoverable if they are not "incurred in litigating the injunction[,]" but are "incurred in complying with the injunction[,]" such as those "incurred in collateral proceedings required by the terms of a wrongful injunction[.]" *Nokia Corp. v. Interdigital, Inc.*, 645 F.3d 553, 560 (2d Cir. 2011).

67. Justin D. Forlenza, Note, "CAFA and Erie: Unconstitutional Consequences?" 75 *Fordham L. Rev*. 1065, 1082 (2006) ("[T]he Erie doctrine requires federal courts sitting in diversity to apply state substantive law.").

68. "Recovery for Wrongful Interlocutory Injunctions," *supra* note 21, at 831 n.19; *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1464 (M.D.N.C. 1996); *Bulova Watch Co. v. Rogers-Kent, Inc.*, 181 F. Supp. 340, 344-45 (D.S.C. 1960).

69. *Hockett*, 105 F. Supp. 2d at 941-43; *Bass v. First Pac. Networks, Inc.*, 219 F.3d 1052, 1054-56 (9th Cir. 2000); *Fireman's Fund Ins. Co. v. S. E. K. Constr. Co.*, 436 F.2d 1345, 1351-52 (10th Cir. 1971); *Almoss, Ltd. v. Furman*, 2007 U.S. Dist. LEXIS 49162, at *2-4, 2007 WL 1975571 (S.D.N.Y. July 5, 2007); *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 104 F.2d 105, 107 (2d Cir. 1939), *cert. denied*.

70. *Riels v. Bank of Am., N.A.*, No. 2:14cv57-KS-MTP, 2014 U.S. Dist. LEXIS 140889, 2014 WL 4964185 (S.D. Miss. Oct. 3, 2014); *but see Fed. Beef Processors v. CBS Inc.*, 864 F. Supp. 127 (D.S.D. 1994); Sutherland, *supra* note 15, at 1725 ("It seems that the federal courts will recognize the rule of liability prevailing in the state courts where cases are removed from the latter to the former because liability for counsel fees having been assumed by the parties it should be enforced in every court in which an action on the bond is brought.").

71. 44 Ind. 392; *see also Beeson v. Beeson*, 59 Ind. 97, 99-100 (1877); *Swan*, 81 Ind. at 245-46; *Robertson*, 129 Ind. at 429-30, 28 N.E. at 860; *Hyatt*, 20 Ind. Ct. App. at 149-50, 50 N.E. at 402-03.

72. *Id.* at 392-93 (citing *Coates v. Coates,* 1 Duer Ch. 664 (N.Y. Sup. Ct. 1853); *Edwards v. Bodine,* 11 Paige Ch. 223 (N.Y. Ch. 1844)); *see also Corcoran v. Judson*, 24 N.Y. 106, 108-110 (1861); Isaac Grant Thompson, *The Law and Practice of Provisional Remedies* 342 (1867).

73. *Id.* at 392. The court, quoting *Edwards*, recognized that the purpose of the bond is "best effected by" allowing recovery of attorney fees. *Id.*

74. "Recovery for Wrongful Interlocutory Injunctions," *supra* note 21, at 831 n.19; *see also Nat'l Sanitary Supply*, 644 N.E.2d at 905.

75. 43A C.J.S. *Injunctions* §524 (2014); Sutherland, *supra* note 15, at 1723; *Register v. Griffin*, 6 N.C. App. 572, 575, 170 S.E.2d 520, 523 (1969); J.B. Glen, Annotation, "Attorneys' Fees as Element of Damages Allowable in Action on Injunction Bond," 164 *A.L.R.* 1088, 1089 (1946).

76. 82 U.S. (15 Wall.) 211, 230-31 (1872).

77. *Id.*; *see also Davison v. P.R. Firefighters Corps*, 479 F. Supp. 2d 243, 245 (D.P.R. 2007) (providing similar rationale for the American Rule in general).

78. *Network Int'l, L.C. v. Worldcom Techs., Inc.*, 133 F. Supp. 2d 713, 719-20 (D. Md. 2001) (quoting *Dobbs Law of Remedies* §2.11(3) at 272 (2d ed. 1993)).

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79. *Grand Trunk*, 698 N.E.2d at 368 (Darden, J., concurring in part and dissenting in part).

80. *Id.*

81. *Id.*

82. *Edwards*, 11 Paige Ch. at 227 ("If it was a mere matter of discretion, I might not be disposed to allow the counsel fees as damages in the present case, although the evidence before the master showed, without contradiction, that the amount paid was reasonable, and that the payment was necessary to obtain a dissolution of the injunction."); *see also Webb v. Beal*, 20 N.M. 218, 148 P. 487, 489 (1915) (Roberts, C.J., dissenting); *Stringfield v. Hirsch*, 94 Tenn. 425, 29 S.W. 609, 611-14 (1895).

83. *Beeson*, 59 Ind. at 99; *see also Swan*, 81 Ind. at 245-46.

84. *Robertson*, 129 Ind. at 429-30, 28 N.E. at 860 (emphasis added); *see also Clevenger*, 82 Ind. Ct. App. at 118-19, 145 N.E. at 335; *Palace Pharmacy*, 164 Ind. Ct. App. at 514-15, 329 N.E.2d at 644.

85. To the contrary, the oft-cited treatise High on Injunctions indicates that only damages suffered after the injunction has been awarded may be recovered. James L. High, *A Treatise on the Law of Injunctions: As Administered in the Courts of the United States and England* §965 (1st ed. 1873) ("In a suit upon the injunction bond, the recovery for costs and expenses incurred by reason of the injunction, is limited to such as accrued between the time of the issuing of the writ and the time of its dissolution[.]" *Id.* (citing *Wallis v. Dilley*, 7 Md. 237 (1854))); Sutherland, *supra* note 15, at 1724 ("Expenses incurred before the bond was given are not recoverable if its language does not include them." *Id.* (citing *Chicago, A. & N. Ry. Co. v. Whitney*, 143 Iowa 506, 516, 121 N.W. 1043, 1046 (1909))); *cf. Hay*, 903 N.E.2d at 1049-50 (allowing fees for period during enactment of injunction).

86. *Parsons Supply, Inc. v. Smith*, 22 Wn. App. 520, 525, 591 P.2d 821, 824 (1979) (citing Glen, *supra* note 75).

87. *Bigley*, 881 N.E.2d at 84-86; Bryan H. Babb & Kellie M. Barr, "Developments in Indiana Appellate Procedure: Rule Amendments, Notable Case Law, and Tips for Appellate Practitioners," 42 *Ind. L. Rev.* 813, 825-26 (2009).

88. Baicker-McKee, *supra* note 6, at 1272-73; Morton, *supra* note 21, at 1873-77 (1995); *Int'l Ass'n of Machinists & Aerospace Workers v. E. Airlines*, 925 F.2d 6, 9 (1st Cir. 1991); *Covidien LP v. Esch*, Civil Action No. 16-12410-NMG, 2017 U.S. Dist. LEXIS 4083, at *13 (D. Mass. Jan. 11, 2017); *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996), *cert. denied*; *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 431 (6th Cir. 2013); *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009); *AFC Enters. v. THG Rest. Grp., LLC*, 416 F. App'x 898, 898 (11th Cir. 2011); *Fed. Prescription Serv. v. Am. Pharm. Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980); *but see Sanchez v. Esso Std. Oil Co.*, 572 F.3d 1, 22 n.16 (1st Cir. 2009); *Front Range Equine Rescue v. Vilsack*, 844 F.3d 1230, 1233 (10th Cir. 2017) (quoting *Atomic Oil*, 419 F.2d 1100-01).

89. Baicker-McKee, *supra* note 6, at 1272-73; Morton, *supra* note 21, at 1873-77; *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999); *Reinders Bros., Inc. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 53 (7th Cir. 1980); *Chemlawn Servs. Corp. v. GNC Pumps, Inc.*, 823 F.2d 515, 515 (Fed. Cir. 1987); *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1338-39 (Fed. Cir. 2012) (O'Malley, J., dissenting in part); *but see Freedom from Religion Found. v. Concord Cmty. Schs.,* 148 F. Supp. 3d 727, 743 (N.D. Ind. 2015). The Eighth Circuit has not weighed in, resulting in contradictory positions among its district courts. *Compare First-Citizens Bank & Tr. Co. v. Outsource Servs. Mgmt.*, No. 12-1734 ADM/FLN, 2012 U.S. Dist. LEXIS 106912, at *6-8, 2012 WL 3136924 (D. Minn. Aug. 1, 2012), *and Am. Dairy Queen Corp. v. Wardlow*, No. 4:15-CV-04131-RAL, 2015 U.S. Dist. LEXIS 118301, at *15-16, 2015 WL 5178454 (D.S.D. Sept. 4, 2015), *with Sak v. City of Aurelia*, 832 F. Supp. 2d 1026, 1048 (N.D. Iowa 2011).

90. 4 Stephen E. Arthur, *Indiana Practice Series: Rules of Procedure Annotated* §65.6 at 99 (Supp. Oct. 2016); *see, e.g.*, *Barlow v. Sipes*, 744 N.E.2d 1, 10-11 (Ind. Ct. App. 2001), *trans. denied*; *Ridenour v. Furness*, 546 N.E.2d 322, 327 (Ind. Ct. App. 1989).

91. Harvey, *supra* note 49, at 533; *Crossmann Commtys., Inc. v. Dean,* 767 N.E.2d 1035, 1043 (Ind. Ct. App. 2002) (trial court did not abuse discretion because risk of injury – less than $20,000 – was an insignificant injury based upon the magnitude of Defendant's business); *Kennedy v. Kennedy*, 616 N.E.2d 39, 44 (Ind. Ct. App. 1993) (no bond required because enjoined party offered no evidence of harm), *trans. denied*; *Hacienda Mexican Rest. of Kalamazoo Corp. v. Hacienda Franchise Grp., Inc.*, 569 N.E.2d 661, 671 (Ind. Ct. App. 1991) (security requirement waived by contract), *trans. denied*; *see also Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164, 181-82 (Ind. Ct. App. 2008).

92. *Gleeson*, 883 N.E.2d at 181-82.

93. *Noble Cnty.*, 745 N.E.2d at 200 (Boehm, J., dissenting); *Union Twp. Sch. Corp. v. State ex rel. Joyce*, 706 N.E.2d 183, 187 (Ind. Ct. App. 1998), *trans. denied*; *Smith v. Ind. State Bd. of Health*, 159 Ind. Ct. App. 360, 367-68, 307 N.E.2d 294, 298 (1974); *see also Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453, 460 (7th Cir. 2010); Baicker-McKee, *supra* note 6, at 1274.

94. T.R. 65(C) ("[B]ut such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."); Arthur, *supra* note, 2 §65:4.

95. *Noble Cnty.*, 745 N.E.2d at 203 (Boehm, J., dissenting) (citing *SEC v. Unifund SAL*, 910 F.2d 1028, 1039-40 (2d Cir. 1990)).

96. Baicker-McKee, *supra* note 6, at 1273; Arthur, *supra* note 1, at §65:4; *see, e.g.*, *Muehlman v. Keilman*, 257 Ind. 100, 111-12, 272 N.E.2d 591, 598 (1971); *AGS Capital Corp. v. Prod. Action Int'l, LLC*, 884 N.E.2d 294, 317-18 (Ind. Ct. App. 2008) (affirming $2,000 bond where evidence of estimated losses were $980,000), *trans. denied*; *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 979-80 (N.D. Iowa 2006) (requiring $1).

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