SURVEY OF RECENT DEVELOPMENTS IN PRODUCT LIABILITY LAW

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INTRODUCTION

The 2003 survey period[1] once again produced an interesting array of published product liability decisions. Those decisions demonstrate that Indiana judges and product liability practitioners are still refining the scope and meaning of the Indiana Product Liability Act ("IPLA").[2] They also demonstrate that the Indiana General Assembly may need to clarify some of its policy intentions in several areas.

This survey does not attempt to address in detail all cases applying Indiana product liability law decided during the survey period.[3] Rather, it examines selected cases that are representative of the important product liability issues. This survey also provides some background information, context, and commentary where appropriate.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978. It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended it to apply only to strict liability actions.[4] In 1995, the General Assembly amended the IPLA to once again encompass tort theories of recovery based upon both strict liability and negligence theories.[5]

In 1998, the General Assembly repealed the entire IPLA and recodified it,

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1. The survey period is October 1, 2002 to September 30, 2003.

2. IND. CODE § 34-20-1-1 to -9-1 (1999). This survey Article follows the lead of the Indiana General Assembly and employs the term "product liability" (not "products liability") when referring to actions governed by the IPLA.

3. Judge Barker's decision in *In re Bridgestone/Firestone, Inc. (Estate of Zachary)*, 2002 U.S. Dist. LEXIS 24954 (S.D. Ind. 2002), is one example of a product liability decision that practitioners may find useful even though much of the opinion interprets Georgia law. The decision contains a discussion about exclusion of expert testimony in federal court that practitioners may find particularly useful.

4. 1983 Ind. Acts 1815.

5. 1995 Ind. Acts 4051; *see* Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 487 n.2 (Ind. 2001).

effective July 1, 1998.[6] The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of the statutes governing civil practice.

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by a user or consumer against a manufacturer or seller for physical harm caused by a product, regardless of the theory of liability.[7] When Indiana Code sections 34-20-1-1 and -1-2 are read together, there are five unmistakable threshold requirements (regardless of theory) for liability under the IPLA: (1) a claimant whom is a user or consumer and is also in the class of persons that the seller should reasonably foresee as being subject to the harm caused; (2) a defendant that is a manufacturer or a seller engaged in the business of selling a product; (3) physical harm caused by a product; (4) a product that is in a defective condition unreasonably dangerous to a user or consumer or to his property; and (5) a product that reached the user or consumer without substantial alteration in its condition.[8]

In connection with the foregoing threshold issues, it is important to recognize that Indiana Code section 34-20-1-1 clearly states that the IPLA governs and controls all claims brought by users or consumers against manufacturers or sellers for physical harm arising out of the use of a defective and unreasonably dangerous product. Such is true "regardless of the theory of liability."[9]

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6. The current version of the IPLA is found at Indiana Code sections 34-20-1-1 to -9-1.

7. IND. CODE § 34-20-1-1.

8. *Id.* §§ 34-20-1-1 to -1-2. Indiana Code section 34-20-2-1 imposes liability only when

> a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property . . . if: (1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition; (2) the seller is engaged in the business of selling the product; and (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.

Id. § 34-20-2-1.

9. In the wake of the 1995 amendments to the IPLA, practitioners and sometimes judges have seemed to struggle with what the IPLA covers and what it does not. Indiana Code section 34-20-1-1 provides that the IPLA governs and controls all actions brought by users and consumers against manufacturers or sellers (under the right circumstances) for physical harm caused by a product *regardless of the theory of liability*. Accordingly, theories of liability based upon breach of warranty, breach of contract, and common law negligence against entities that are outside of the IPLA's statutory definitions are not governed by the IPLA. *E.g.,* N.H. Ins. Co. v. Farmer Boy AG, Inc., 2000 U.S. Dist. LEXIS 19502, at *9 (S.D. Ind. 2000) (alleging breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superceded by the theory of strict liability; plaintiff could proceed on a warranty theory so long as it was limited to a contract theory). At the same time, however, Indiana Code section 34-20-1-2 provides that the "[IPLA] shall not be construed to limit any other action from being brought against a seller of a product." IND. CODE

A. User or Consumer

The language the General Assembly employs in the IPLA is very important when it comes to who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by "users" and "consumers." For purposes of application of the IPLA, "consumer" means:

> (1) a purchaser; (2) any individual who uses or consumes the product; (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.[10]

"User" has the same meaning as "consumer."[11]

A literal reading of the IPLA seems to demonstrate that even if a claimant falls within one of those statutorily-defined groups, he or she also must satisfy

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§ 34-20-1-2. That language, when compared with the "regardless of the legal theory upon which the action is brought" language found in Indiana Code section 34-20-1-1 raises an interesting question: whether alternative claims against product sellers or suppliers that fall outside the reach of the IPLA are still viable when the "physical harm" suffered is the very type of harm the IPLA otherwise would cover. *See* Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Product Liability Law*, 36 IND. LAW REV. 1165, 1177-78 (2003); *see also* text accompanying *infra* notes 96-97.

In three recent cases, *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), *Kennedy v. Guess, Inc.*, 765 N.E.2d 213 (Ind. Ct. App. 2002), and *Goines v. Federal Express Corp.*, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. 2002) (applying Indiana law), courts subjected "sellers" to potential liability based on common law negligence theories for the very same "physical harm" covered by the IPLA. In doing so, those and other courts seem to assume that common law "negligence" claims based upon design and warning theories still exist separate and apart from the IPLA, citing to cases that were decided before the 1995 amendments to the IPLA and at a time when Indiana still recognized dual-track strict liability and negligence claims. The 1995 amendments impose negligence standards for design and warning claims and retain strict liability only for manufacturing claims.

Whether courts have the power to impose common law negligence liability against "sellers" when the harm allegedly suffered is the same "physical harm" covered by the IPLA is an open question. If a "seller" cannot be held liable for "physical harm" that is clearly within the purview of IPLA (*e.g.*, a manufacturing defect theory when the seller has no actual knowledge of the defect and cannot otherwise be deemed a manufacturer pursuant to Indiana Code section 34-20-2-4 or Indiana Code section 34-6-2-77), how can the same entity be liable for the same "physical harm" outside the purview of the IPLA? That idea seems to run contrary to the Indiana General Assembly's policy determination that the IPLA covers all actions for "physical harm" "regardless of the theory of liability." The Indiana General Assembly may need to address whether and to what extent a common law negligence claim for the same "physical harm" covered by the IPLA is an "other action" that the IPLA does not limit.

10. IND. CODE § 34-6-2-29.

11. *Id.* § 34-6-2-147.

another statutorily-defined threshold before proceeding with a claim under the IPLA. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the "user" or "consumer" also be "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."[12] The IPLA does not appear to provide a remedy to any claimant whom a seller should reasonably foresee as being subject to the harm caused by a product's defective condition. Rather, it would appear as though the claimant first has to fit within the IPLA's definition of "user" or "consumer." If the claimant falls outside of the IPLA's definition of "user/consumer," whether that claimant was "reasonably foreseeable" as being subject to harm caused by a product's defect may be irrelevant.

Indiana courts have issued several published decisions in recent years that construe the statutory definition of "user" and "consumer."[13] The latest, *Vaughn v. Daniels Co.*,[14] is a case in which Solar Sources, Inc. ("Solar") contracted Daniels Company ("Daniels") to design, procure and construct a coal preparation plant. Daniels contracted Trimble Engineers and Constructors, Inc. ("Trimble") to construct the plant, including the assembly of three coal sumps according to Daniels' blueprints and specifications. Trimble employed Vaughn, who was injured while installing one of the coal sumps into the coal preparation plant. In an effort to assist his coworkers, Vaughn climbed onto the sump without securing his safety belt while a pipe was maneuvered through the wall of the plant by a forklift and raised to the level of the sump. Once the pipe was raised, Trimble employees wrapped a chain around the pipe to support it as the forklift pulled away. The chain gave way, the pipe slipped, and Vaughn fell fifteen feet, suffering significant injuries. Vaughn sued Solar and Daniels. His theories of liability against Daniels included product liability, negligence and nuisance.[15] His theories of liability against Solar were negligence and nuisance.[16]

The trial court granted Daniels' motion for summary judgment, concluding as a matter of law that Vaughn was not a foreseeable "user or consumer" as contemplated by the IPLA.[17] Vaughn appealed. Daniels argued that because the

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12. *Id.* § 34-20-2-1; *see also supra* note 8.

13. *See* Butler v. City of Peru, 733 N.E.2d 912 (Ind. 2000) (holding maintenance worker could be considered a "user or consumer" of electrical transmission system because his employer was the ultimate user and he was an employee of the "consuming entity"); Estate of Shebel v. Yaskawa Elec. Am., Inc., 713 N.E.2d 275 (Ind. 1999) (holding "user or consumer" includes a distributor who uses the product extensively for demonstration purposes).

14. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on rehearing*, 782 N.E.2d 1062 (2003). In his dissenting opinion, Chief Judge Brook concluded that Vaughn could not maintain an action against Solar or Daniels under the IPLA. Vaughn, however, did not make a claim against Solar under the IPLA. Accordingly, the clarification on rehearing recognized: "Given that Vaughn did not maintain an action against Solar under the [IPLA], any mention in Chief Judge Brook's dissent of Solar's liability under the act should be disregarded." *Vaughn*, 782 N.E.2d at 1062-63.

15. *Vaughn*, 777 N.E.2d at 1110.

16. *Id.*

17. *Id.*

sump was not designed to be a "construction scaffold," Vaughn was not a foreseeable user or consumer of it. Daniels also argued that Vaughn could not maintain a claim under the IPLA because the sump had not been injected into the stream of commerce and that Vaughn was not a member of the consuming public.

In a 2-1 decision, a majority of the court of appeals held that Vaughn was a "user" of the construction scaffold as that term is statutorily defined.[18] The fact the sump was not being used for its primary intended purpose was irrelevant to the majority because "the installation would be encompassed under the umbrella of reasonably expected uses."[19]

In reaching its decision, the *Vaughn* majority first distinguished two cases upon which the trial court relied, *Thiele v. Faygo Beverage, Inc.*[20] and *Lukowski v. Vecta Educational Corp.*[21] The majority first refused to apply *Thiele*, which held that a stock clerk who was injured by an exploding soda bottle was not a "user" or a "consumer." The *Vaughn* majority distinguished *Thiele* on its facts because Thiele worked for a passing intermediary whereas Vaughn worked for the initial consuming entity.[22] The *Vaughn* majority also believed it important that the sump was at its final destination being installed for use and, therefore, not a "transient product" such as a case of soft drinks.[23]

The second case, *Lukowski v. Vecta Educational Corp.*,[24] involved a plaintiff who fell from the top of the balcony bleachers in a high school gymnasium. The school had elected to use the bleachers in a partially finished condition before the railings had been delivered. The *Vaughn* majority summarized the *Lukowski* court's holding by recognizing that an unfinished product does not meet the "delivery" prerequisite for the imposition of liability under the IPLA.[25] The

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18. *Id.* at 1128.

19. *Id.* at 1127-28.

20. 489 N.E.2d 562 (Ind. Ct. App. 1986).

21. 401 N.E.2d 781 (Ind. Ct. App. 1980). The *Vaughn* majority also discussed two other cases, *Crist v. K-mart*, 653 N.E.2d 140 (Ind. Ct. App. 1995) and *Wingett v. Teledyne Industries*, 479 N.E.2d 51 (Ind. 1985). The majority opinion includes a discussion about *Crist* ostensibly as a way to point out what the majority termed a "logical inconsistency" in *Thiele* and to note that Daniels, unlike the defendant in *Crist*, could be liable because it was not an "'occasional seller who is not engaged in that activity as part of [its] business.'" *Vaughn*, 777 N.E.2d at 1125 (quoting *Crist*, 653 N.E.2d at 143). *Wingett* is another case the trial court cited. The *Vaughn* majority's discussion about *Wingett* is limited, merely pointing out that the Indiana Supreme Court, while holding that a manufacturer's potential liability for products placed in the stream of commerce does not extend to the demolition of the product, reasoned that it was "necessary to look at the intended use of a product in analyzing the issue of foreseesable use in determining whether a plaintiff is a user or consumer." *Id.* at 1125-26 (citing *Wingett*, 479 N.E.2d at 56).

22. 777 N.E.2d at 1124. Thiele was a "middle man" employee who merely handled Faygo's product as it flowed in the stream of commerce toward a retail purchaser. *Thiele*, 489 N.E.2d at 585-88.

23. 777 N.E.2d at 1124-25.

24. 401 N.E.2d at 781.

25. 777 N.E.2d at 1124-25 (citing *Lukowski*, 401 N.E.2d at 786).

Vaughn majority then determined that the two cases are different because the school in *Lukowski* opted to use the bleachers before the railing had been shipped and installed, whereas the sump was not designed with a railing.[26] The *Vaughn* majority buttressed its conclusion that the cases are legally distinguishable by pointing out that the injury in *Lukowski* was not foreseeable to the manufacturer because it was "not expected that the school would use the bleachers for members of the public in a partially completed state."[27] According to the *Vaughn* majority, however, Vaughn's injury during installation was "foreseeable and expected" by Daniels[28] and Vaughn "was not injured as a result of someone using the sump in an incomplete state in an unforeseeable manner."[29]

After distinguishing *Thiele* and *Lukowski*, the *Vaughn* majority found instructive the case of *Stegemoller v. ACandS, Inc.*,[30] using its rationale as the foundation for the opinion. *Stegemoller* and its two companion matters, *Martin v. ACandS, Inc.*[31] and *Camplin v. ACandS, Inc.*,[32] are cases in which the Indiana Supreme Court held that the wives of insulators who were exposed to asbestos fiber by washing their husbands' work clothes qualified as "users" of the asbestos-containing products at issue because of their status as "bystanders" pursuant to what is now Indiana Code section 34-6-2-29(4).[33] That section provides the final of four alternative definitions for the term "user/consumer" for purposes of the IPLA, defining "user/consumer" to include "any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use."[34] The *Stegemoller* court determined that the reasonably expected use of asbestos-containing products included customary clean-up activities such as cleaning asbestos residue from one's person and clothing at the end of the workday.[35] According to the *Vaughn*

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26. *Id.* at 1125.

27. *Id.*

28. *Id.* The *Vaughn* majority concluded that the injury was foreseeable and expected by Daniels because Daniels hired Trimble to install the sump according to its plans in order for the machine to become operational. *Id.*

29. *Id.*

30. 767 N.E.2d 974 (Ind. 2002).

31. 768 N.E.2d 426 (Ind. 2002).

32. 768 N.E.2d 428 (Ind. 2002).

33. In *Stegemoller*, *Martin*, and *Camplin*, the wives claimed that asbestos dust remained on their husbands' work clothes, and that they inhaled the dust brought home from the various workplaces while laundering those work clothes. The wives claimed various illnesses, all allegedly caused by inhalation of asbestos fibers. The trial court dismissed the wives' claims, finding that they were not "users" or "consumers" as defined by the IPLA because they were not in the vicinity of the product during its reasonably expected use (as industrial insulation) and, accordingly, could not be considered "bystanders." *Id.* Thus, the trial court held that the wives could not sustain causes of action under the IPLA or at common law. *Id.* The Indiana Court of Appeals affirmed. *Id.* The Indiana Supreme Court reversed. *Id.*

34. IND. CODE § 34-6-2-29(4) (1999).

35. 767 N.E.2d at 976. The *Stegemoller* court was influenced heavily by what it viewed as

majority:

> [I]t is self-evident that if, for example, maintenance is a reasonably expected "use" of a product, the person performing the maintenance is a "user" of the product. Thus, the supreme court's analysis as to who falls within the definition of "user and consumer," even as a bystander, is instructive to our analysis today.[36]

The *Vaughn* majority further wrote:

> By approving maintenance and 'customary clean-up activities' as reasonably expected uses for purposes of determining who is a user or consumer, including bystander, the [*Stegemoller*] court expanded the application of the [IPLA] to activities beyond the exact intended purpose of the product. The [*Stegemoller*] court included not only the intended use of the product, but also those activities related to furthering the use of the product.[37]

Accordingly, the *Vaughn* majority concluded that it is a "logical extension of the [*Stegemoller*] analysis to include in the definition of user or consumer a person who is injured while installing a product. The installation of a product is the preparation of a product for safe operation, just as maintenance is in many cases."[38]

That the sump was not yet being used for its primary intended purpose (processing slurry) was, according to the *Vaughn* majority, not fatal to the claim because the installation "would be encompassed under the umbrella of

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a point implicit in *Butler v. City of Peru*, 733 N.E.2d 912 (Ind. 2000). The *Butler* court held that a maintenance worker who was electrocuted while trying to restore power to an electrical outlet was a user or consumer under the IPLA. The *Stegemoller* court wrote: "Implicit in th[e *Butler*] holding was the assumption that maintenance may be part of a product's reasonably expected use." 767 N.E.2d at 976. The *Stegemoller* court further reasoned that the "normal, expected use of asbestos products entails contact with its migrating and potentially harmful residue" and concluded that "divorcing the underlying product from fibers or other residue it may discharge is not consistent with the [IPLA]." *Id.*

The opinions in *Stegemoller*, *Camplin*, and *Martin* either broaden the term "vicinity" or they broaden the term "reasonably expectable use," or perhaps they do both. On the one hand, it is hard to argue that the wives in these three cases were anywhere close to the "vicinity" of the products in their intended use as industrial insulation at the commercial jobsites where their husbands worked. On the other hand, it is admittedly difficult to argue with the court's logic that the "reasonably expectable" use of asbestos insulation necessarily entails contact with migrating fibers and that it does not make sense to divorce those fibers from the insulation end product. In light of *Stegemoller*, *Camplin*, and *Martin* it is difficult to ascertain with any certainty just how broadly courts will (or should) view the "vicinity" of the "reasonably expectable use."

36. 777 N.E.2d at 1127.

37. *Id.*

38. *Id.*

reasonably expected uses."[39] Indeed, the *Vaughn* majority wrote that it was foreseeable to Daniels that installation would be required and that the sump could not become operational for its intended purpose without being installed. In that sense, the court reasoned, it is a "different kind of product than many other consumer products affected by the [IPLA]."[40] The majority's final reasoning is as follows:

> The installation process was not only foreseeable but expected and routine, just as the cleaning process in *Stegemoller* and the maintenance was in *Butler*. If Vaughn was, in fact, injured by Daniels' defective product, it seems illogical that he would be precluded from pursuing a suit against Daniels simply because the sump was not completely installed when he was injured while trying to install it, particularly when the alleged defect affected his ability to install it safely.[41]

The *Vaughn* majority's "logical extension" of *Stegemoller* is noteworthy for at least a couple of reasons. First, the majority utilized a "reasonably foreseeable" analysis from a case that interpreted "bystanders" under Indiana Code section 34-6-2-29(4) and applied it in the context of the "user/consumer" definition found in Indiana Code section 34-6-2-29(2). Second, the majority's "reasonably foreseeable" analysis applied in arriving at the "user/consumer" determination may be at odds with a literal reading of the IPLA.

With respect to the first point, the *Vaughn* majority unmistakably utilized the *Stegemoller* analysis, having initially recognized that Vaughn could not be a "user" or "consumer" under the "bystander" definition found in Indiana Code section 34-6-2-29(4)).[42] Because Vaughn was neither a "purchaser" (Indiana Code section 34-6-2-29(1)) nor a "person who, while acting for or on behalf of the injured party, was in possession and control of the product in question" (Indiana Code section 34-6-2-29(3)), the claim could not proceed under the IPLA unless the Vaughn was a person, who "used" or "consumed" the product pursuant to Indiana Code § 34-6-2-29(2). Applying the *Stegemoller* rationale, the *Vaughn* majority concluded that installers such as Vaughn should fall within the statutory definition of "user/consumer."[43]

In its initial introduction of the *Stegemoller* case, the *Vaughn* majority characterizes *Stegemoller* as a case that considered the "notion of reasonably foreseeable use."[44] Whether the issue of legal foreseeability was truly before the *Stegemoller* court is open to interpretation because the standard by which bystanders are determined to be "users/consumers" is one that examines whether the claimant is a person "who would reasonably be expected to be in the vicinity

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39. *Id.*
40. *Id.*
41. *Id.* at 1127-28.
42. *Id.*
43. *Id.*
44. *Id.* at 1126.

of the product during its reasonably expected use."[45] It is not unfair to say that whether a use is factually or legally "foreseeable" by a manufacturer is not necessarily synonymous with the use the manufacturer expects or intends. Regardless, there are two fundamental precepts upon which the *Vaughn* majority rests that are largely driven by public policy: (1) that the General Assembly intended the term "reasonably expected use" to, as *Stegemoller* determined, include maintenance and clean-up activities so as to confer "user/consumer" status on bystanders; and (2) that the General Assembly intended that the installation of a product itself, without more, should confer "user/consumer" status upon the individual performing the installation.

The first precept, embraced by the Indiana Supreme Court, holds that the General Assembly intended the IPLA to allow recovery by bystander "users" for injuries sustained during maintenance or "clean-up" attendant to a product's "reasonably expected use" pursuant to Indiana Code section 34-6-2-29(4). Although many industrial and commercial products require some amount of maintenance attendant to their reasonably expectable use, the IPLA contains no clear policy statement about whether it was intended to cover injuries sustained during "maintenance" or "clean-up" attendant to reasonably expected use for purposes of Indiana Code section 34-6-2-29(4).

The *Vaughn* majority's second precept holds that the General Assembly intended the IPLA to provide recovery for injuries sustained during all activities, including installation, that relate in any way to furthering the product's use. Chief Judge Brook took issue with that in his dissent:

> While I agree that current precedent supports the conclusion that maintenance of a product may be part of that product's "reasonably expected use" under certain limited circumstances, it simply does not follow that *installation* of the product itself, without more, confers "user" status on the individual performing the installation.
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> The verb "use" may be defined as "[t]o employ or make use of (an article, etc.) esp[ecially] for a profitable end or purpose[.]" The verb "install" may be defined as "[t]o place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use[.]" Quite simply, installation of a product occurs *before use of the product has even begun* and therefore cannot be part of a product's use. Consequently, one who installs a product cannot be a user under the [IPLA].[46]

It is also interesting that the *Vaughn* majority relied so heavily upon a foreseeability analysis in supporting its legal determination that installation of a product, which is admittedly not part of its "primary intended purpose," is nevertheless "encompassed under the umbrella of reasonably expected uses."[47]

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45. IND. CODE § 34-6-2-29(4) (1999).

46. 777 N.E.2d at 1140 (Brook, C.J., dissenting) (footnote and citations omitted).

47. *Id.* at 1127. The *Vaughn* majority reached its conclusion despite the fact that the sump, by the majority's own admission, was not being used at the time the injury was sustained for its

Reliance upon such an analysis in arriving at the "user/consumer" determination may be at odds with a literal reading of the IPLA. As briefly discussed above, the IPLA seems to separate the "reasonably foreseeable plaintiff" analysis from the analysis required to determine who qualifies as a "user/consumer." Indiana Code section 34-20-2-1(1) states that "users" and/or "consumers" must also be "in the class of persons that the seller should reasonably foresee as being subject to harm caused by the defective condition."[48] Thus, the plain language of the statute seems to assume that a person or entity is already defined as a "user" or a "consumer" *before* the separate "foreseeability" analysis is to be undertaken. In that regard, the IPLA may not automatically provide a remedy to any claimant whom a seller should reasonably foresee as being subject to the harm caused by a product's defective condition.

With that statutory framework in mind, recall that the *Stegemoller* opinion was limited to a determination about whether a claimant qualified as a "user/consumer" by virtue of "bystander" status conferred by Indiana Code section 34-6-2-29(4). Recall also that a bystander "user" is one "who is in the vicinity of the product during its reasonably expected use." The General Assembly's inclusion of the term "reasonably expected" when modifying the word "use" for purposes of who qualifies as bystander "users" certainly seems to entail something akin to a foreseeability analysis. Thus, the *Stegemoller* court's use of a foreseeability analysis similar to what was performed earlier in cases such as *Lukowski* or *Wingett* does not seem inconsistent with the IPLA in the limited context of interpreting the scope of bystander "users" pursuant Indiana Code section 34-6-2-29(4). The definition of "user" for purposes of Indiana Code section 34-6-2-29(2), however, contains no such "reasonably expected" component or requirement. It states merely that a "user" is "any individual who uses or consumes the product." Nothing modifies the term "uses." If the IPLA does indeed contemplate a foreseeability analysis only after the statutory definition of "user/consumer" has been satisfied, then any such analysis in arriving at the "user/consumer" definition for purposes of Indiana Code section 34-6-2-29(2) may be at odds with the intended post-1995 statutory framework.[49]

The statutory interpretations offered by the Indiana Supreme Court in *Stegemoller* and the Indiana Court of Appeals in *Vaughn* involve fundamental

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intended purpose (processing slurry). *Id.*

48. Indiana Code section 34-20-2-1 imposes liability only when

> a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition. . . .

IND. CODE § 34-20-2-1 (1999).

49. In this regard, it is important to note that all of the cases distinguished or rejected by the *Vaughn* majority were decided several years before the General Assembly revised and enacted the current IPLA in 1995.

choices about the intended breadth of the IPLA. This is an area with respect to which the General Assembly may choose to offer additional guidance.

B. Manufacturer or Seller

For purposes of application of the IPLA, "manufacturer" means "a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer."[50] For purposes of application of the IPLA, "seller" means "a person engaged in the business of selling or leasing a product for resale, use, or consumption."[51] Indiana Code section 34-20-2-1(2) of the IPLA employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless the "seller" is "engaged in the business of selling the product."[52]

Sellers also can be manufacturers. The definition of "manufacturer" expressly includes a seller who

> (1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process; (3) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the actual manufacturer.[53]

A seller also may be held liable to the same extent as a manufacturer in one other limited circumstance, namely if the court is "unable to hold jurisdiction over a particular manufacturer" and if the seller is the manufacturer's principal distributor or seller.[54]

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50. IND. CODE § 34-6-2-77.

51. *Id.* § 34-6-2-136.

52. *Id.* § 34-20-2-1(2); *see, e.g.*, Williams v. REP Corp., 302 F.3d 660 (7th Cir. 2002) (recognizing that Indiana Code section 34-20-2-1 imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a "manufacturer" or "seller"); Del Signore v. Asphalt Drum Mixers, 182 F. Supp. 2d 730 (N.D. Ind. 2002) (reasoning that although it provided some technical guidance or advice relative to ponds at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem defendant a "manufacturer" of the plant).

53. IND. CODE § 34-6-2-77(a).

54. *Id.* § 34-20-2-4; *see, e.g.*, Goines v. Fed. Express Corp., 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. 2002) (applying Indiana law). The court examined the "unable to hold jurisdiction over" requirement of Indiana Code section 34-20-2-4. The plaintiff assumed that "jurisdiction" refers to the power of the court to hear a particular case. The defendant argued that the phrase equates to

There is one other important provision about which practitioners must be aware when it comes to liability of "sellers" under the IPLA. When the theory of liability is based on "strict liability in tort,"[55] Indiana Code section 34-20-2-3 provides that an entity that is merely a "seller" and cannot be deemed a "manufacturer" is not liable and is not a proper IPLA defendant.[56]

There are no published decisions during the 2003 survey period that address in detail manufacturers or sellers under the IPLA.

"personal jurisdiction." The court refused to resolve the issue, deciding instead simply to deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Id.* Kennedy v. Guess, Inc., 765 N.E.2d 213, 217-18 (Ind. Ct. App. 2002) (defendants failed to designate sufficient evidence demonstrating foreign manufacturer and distributor were not the "principal distributor or seller" of an allegedly defective umbrella, and absent evidence to show definitive identity of principal distributor, court refused to apply Indiana Code section 34-20-2-4 to bar liability).

55. The phrase "strict liability in tort," to the extent that the phrase is intended to mean "liability without regard to reasonable care," appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard, not a "strict liability" standard. IND. CODE § 34-20-2-2.

56. In *Ritchie v. Glidden Co.*, 242 F.3d 713, 725 (7th Cir. 2001), the court cites what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels) and because Glidden did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* There is an omission in the *Ritchie* court's citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: "[A] product liability action *based on the doctrine of strict liability in tort* may not be commenced or maintained. . . ." *Id.* (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. Indiana Code section 34-20-2-2 provides that "strict liability in tort" applies now only to IPLA cases in which the theory supporting why the product was defective and unreasonably dangerous is a manufacturing defect. Indiana Code section 34-20-2-2 unequivocally provides that liability regardless of the exercise of reasonable care simply does not apply to warning or design claims, which are controlled by a negligence standard. Thus, if indeed the phrase "strict liability" means "liability without regard to the exercise of reasonable care," then the only theory to which such a standard applies is a manufacturing defect theory. *E.g.,* Burt v. Makita USA, Inc., 212 F. Supp. 2d 893 (N.D. Ind. 2002). Accordingly, the *Ritchie* court, in a negligent failure to warn case, seems to be applying a provision of the IPLA that was only intended, as written, to be applied to sellers in manufacturing defect cases. Courts appear to have done the same thing in *Kennedy*, 765 N.E.2d at 217-18, *Goines*, 2002 U.S. Dist. LEXIS 5070 (applying Indiana law), and *Williams*, 302 F.3d at 660.

C. Physical Harm Caused by a Product

For purposes of application of the IPLA, "physical harm" means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property."[57] It does not include "gradually evolving damage to property or economic losses from such damage."[58]

For purposes of application of the IPLA, "product" means "any item or good that is personalty at the time it is conveyed by the seller to another party."[59] "The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product."[60]

There are no published decisions during the 2003 survey period that address either the "physical harm" or "product" requirements.

D. Defective and Unreasonably Dangerous

Succinctly stated and as noted above, the IPLA imposes liability in favor of statutorily-delineated users and consumers against statutorily-delineated

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57. IND. CODE § 34-6-2-105.

58. *Id.*; *see, e.g.*, Miceli v. Ansell, Inc., 23 F. Supp. 2d 929 (N.D. Ind. 1998) (in a case brought by a couple against a condom manufacturer, court denied a motion to dismiss, determining that Indiana recognizes that pregnancy may be considered a "harm" in certain circumstances); Fleetwood Enter., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492 (Ind. 2001) (holding personal injury and property damage to other property from a defective product are actionable under the IPLA, but their presence does not create a claim for damage to the product itself); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484 (Ind. 2001) (holding no recovery under IPLA where claim is based on damage to the defective product itself); *see also* Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc., 2002 U.S. Dist. LEXIS 7830 (S.D. Ind. 2002) (no recovery under IPLA in case involving motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

59. IND. CODE § 34-6-2-114.

60. *Id.*; *e.g.*, N.H. Ins. Co. v. Farmer Boy AG, Inc., 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. 2000) (J. Tinder) (installation of a custom-fit electrical system into a hog barn involved wholly or predominately the sale of a service rather than a product); R.R. Donnelley & Sons Co. v. N. Tex. Steel Co., 752 N.E.2d 112 (Ind. Ct. App. 2001) (manufacturer of component parts of a steel rack system sold a product and did not merely provide services because it modified raw steel to produce the component parts and, in doing so, transformed the raw steel into a new product that was substantially different from the raw material used); Marsh v. Dixon, 707 N.E.2d 998 (Ind. Ct. App. 1999) (an amusement ride involved the provision of a service and not the sale of a product); Lenhardt Tool & Die Co. v. Lumpke, 703 N.E.2d 1079 (Ind. Ct. App. 1999) (defendant provided products and not merely services because it transformed metal block into "new" products and because it repaired damaged products, both of which created "new," substantially different work product); *see also Great N. Ins. Co*., 2002 U.S. Dist. LEXIS at 7830 (involving a fire that destroyed a motor home, plaintiff insurance carrier attempted to state a claim for negligent inspection against defendant separate and apart from IPLA and court rejected the negligence claim, determining that no reasonable juror could determine that the allegedly negligent inspection occurred as part of a transaction for "services" separate and apart from the purchase of the motor home).

manufacturers and sellers of defective and unreasonably dangerous products that are expected to and do, in fact, reach users or consumers without substantial alteration in their condition.[61] The "rule of liability" in Indiana Code section 34-20-2-1 provides that such is true even though: "(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller."[62] What Indiana Code section 34-20-2-1 bestows, however, in terms of liability despite the exercise of "all reasonable care," (i.e., fault) Indiana Code section 34-20-2-2 largely removes. Chapter 2-2 first eliminates the privity requirement between buyer and seller for imposition of liability, but it also confirms that a manufacturer's or seller's exercise of reasonable care eliminates liability in cases in which the theory of liability is design defect or warning defect:

> [I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.[63]

Indiana courts and commentators routinely have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the "exercise of all reasonable care") for manufacturing defect cases.[64] Thus, just as in any other negligence case, a claimant in a design or warnings case must prove: (a) duty; (b) breach of duty; and (c) injury caused by the breach.[65] Even though Indiana is years removed from the 1995 amendments to the IPLA, some courts and practitioners continue to use language that implies that "strict liability" and/or "liability without regard to reasonable care" still applies to cases in which the theory of liability is based upon inadequate warnings or improper design.[66]

In Chapter 4 of the IPLA, the focus returns to the IPLA's threshold requirement that only products that are in a "defective condition" are products

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61. IND. CODE § 34-20-2-1.

62. *Id.* § 34-20-2-2.

63. *Id.*

64. *See* Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979, 999 (1996) ("The effect of [Indiana Code section 34-20-2-3 and Indiana Code § 34-20-2-4] is to prevent the user or consumer injured by a product with a manufacturing defect from suing the local retail seller of the product on a strict liability theory unless, for some reason, the court cannot get jurisdiction over the manufacturer.").

65. *See* Kennedy v. Guess, Inc., 765 N.E.2d 213, 220 (Ind. Ct. App. 2002).

66. *See* Smock Materials Handling Co. v. Kerr, 719 N.E.2d 396 (Ind. Ct. App. 1999) (court found no error in the trial court's use of the term "strict liability" in its instructions to the jury in a case that was not limited to manufacturing defects).

for which liability may attach pursuant to the IPLA. For purposes of the IPLA,

> a product is in a defective condition if at the time it is conveyed by the seller to another party, it is in a condition: (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling and consumption.[67]

As noted above, claimants in Indiana prove that a product is in a "defective condition" by asserting one or a combination of three theories: (1) the product has a defect that is the result of a malfunction or impurity in the manufacturing process; (2) the product has a defect in its design; or (3) the product lacks adequate or appropriate warnings.

There is a specific statutory provision covering the warning defect theory; it states that,

> [a] product is defective . . . if the seller fails to: (1) properly package or label the product to give reasonable warnings of danger about the product; or (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.[68]

The IPLA also provides two specific provisions concerning when a product is not defective. Indiana Code section 34-20-4-3 provides that "[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA]."[69] Indiana Code section 34-20-4-4 provides that "[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly."[70] Those two statutes are consistent with the two requirements for liability set forth in Indiana Code section 34-20-4-1.

The statutes that comprise Chapter 4 confirm that the IPLA requires that the product at issue be both in a condition not contemplated by expected users or consumers and unreasonably dangers to the expected user or consumer when used in reasonably expectable ways. Indiana Code sections 34-20-4-3 and 34-20-4-4 solidify that, as do recent cases.[71] A product is "unreasonably dangerous" if

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67. IND. CODE § 34-20-4-1.

68. *Id.* § 34-20-4-2.

69. *Id.* § 34-20-4-3.

70. *Id.* § 34-20-4-4.

71. *See* Moss v. Crosman Corp., 136 F.3d 1169, 1174 (7th Cir. 1998) (stating that a product may be "dangerous" in the colloquial sense, but not "unreasonably dangerous" for purposes of IPLA liability); *In re* Inlow, Accident Litigation, 2002 U.S. Dist. LEXIS 8318, at *66; CCH Prod. Liab. Rep. P16,346 (S.D. Ind. 2002) ("Although closely related to the question of whether a

its use exposes the user or consumer to a risk of physical harm beyond that contemplated by the ordinary user or consumer who purchases it with ordinary knowledge about the product common to consumers in the community.[72] A product is not unreasonably dangerous if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.[73]

1. Warning Defect Theory.—The duty to warn in Indiana consists of two duties: (1) to provide adequate instructions for safe use, and (2) to provide a warning about dangers inherent in improper use.[74] Indiana courts have been active in recent years in resolving cases involving warning defect theories.[75]

In *Birch v. Midwest Garage Door Systems*,[76] a young girl "sustained serious injuries when the door of the garage closed down on her while she was lying in its path."[77] The Birches purchased the home from J. Robinson Homes ("Robinson"), a general contractor that builds and sells homes.[78] On April 3, 1993, at Robinson's request, Midwest Garage Door Systems ("Midwest") installed an automatic garage door opener system in the home that Robinson was constructing for the Birches.[79]

Most garage door systems have two types of safety mechanisms: (1) an "impact/rebound" type that prevents injury by triggering the door to stop closing when the lower edge of the door makes contact with any object; and (2) an

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product is defective because a failure to warn, a plaintiff must show that the product was unreasonably dangerous as a separate element of a product liability claim.").

72. *See* IND. CODE § 34-6-2-146.

73. *See In re Inlow*, 2002 U.S. Dist. LEXIS 8318, at *66 (citing Anderson v. P.A. Radocy & Sons, Inc., 865 F. Supp. 522, 531 (N.D. Ind. 1994)).

74. *See* Natural Gas Odorizing, Inc. v. Downs, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997).

75. *See* Burt v. Makita USA, Inc., 212 F. Supp. 2d 893 (N.D. Ind. 2002) (rejecting the argument that a saw should have had warning labels making it more difficult for the saw guard to be left in a position where it appeared to be installed when in fact it was not; the scope of the duty to warn is determined by the foreseeable users of the product and there was no evidence that the circumstances of plaintiff's injuries were foreseeable such that defendants had a duty to warn against those circumstances); *In re Inlow*, U.S. Dist. LEXIS 8318 (holding manufacturer and distributor did not have a duty to warn helicopter operators or passengers exiting or boarding helicopter about known, open and obvious dangers that were posed by moving and decelerating rotor blades); McClain v. Chem-Lube Corp., 759 N.E.2d 1096 (Ind. Ct. App. 2001) (reasoning because designated evidence showed that both defendants knew that the product at issue was to be used in conjunction with high temperatures that occurred as a result of the hot welding process, trial court should have addressed whether the risks associated with use of product were unknown or unforeseeable and whether or not the defendants had a duty to warn of the dangers inherent in the use of the product); *see also* Morgen v. Ford Motor Co., 762 N.E.2d 137 (Ind. Ct. App. 2002) (accrual before 1995 amendments to IPLA).

76. 790 N.E.2d 504 (Ind. Ct. App. 2003).

77. *Id.* at 508.

78. *Id.* at 507.

79. *Id.*

"optical sensor" type that prevents injury by not allowing the door to close if an electric beam, located across the bottom of the door opening, is interrupted by any object.[80]

On January 1, 1993, before Midwest installed an "impact/rebound" system at the Birch residence, the Consumer Product Safety Commission issued a Federal Residential Garage Door Safety Requirement ("Federal Safety Requirement") that required garage door opener manufacturers to incorporate "optical sensors" as a standard safety feature.[81] Although the Federal Safety Requirement was effective January 1, 1993, manufacturers were permitted to continue selling door closing systems without optical sensors if they were built before January 1, 1993 so long as those systems complied with an applicable federal safety entrapment standard.[82] Although Midwest advised Robinson about the Federal Safety Requirement and the practical considerations related to selecting the garage door system, the Birches had no part in selecting the "impact/rebound" system used.[83] The Birches received a manual with the impact/rebound system, which strongly recommended an optical sensor system for families with small children.[84] Although the Birches became aware of the availability of optical sensors as an alternative to impact/rebound safety systems, they never installed an optical sensor system.[85]

The Birches sued Robinson, Midwest, Chamberlin Group (manufacturer of the garage door opener) and Windsor Door (manufacturer of a spring on the garage door).[86] Robinson and Midwest were the only active parties to the appeal, and Midwest was the only party alleged to be liable under the IPLA.[87] The Birches' theory against Midwest alleged it was liable as a manufacturer because it was aware of the defective condition of the door.[88] The Birches argued that their garage door system was defective because of its design and because Midwest failed to warn them about the new Federal Safety Requirement.[89] Midwest filed a motion for summary judgment in the trial court, arguing that the garage door was not defective and that, in any event, it was not the manufacturer.[90] The trial court granted summary judgment for Midwest and the Birches appealed.[91]

Plaintiffs argued that Midwest was liable under Indiana Code section 34-20-

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 507-08.
84. *Id* at 508.
85. *Id.*
86. *Id.* at 508 n.2.
87. *Id.* at 508-16.
88. *Id.* at 508-09.
89. *Id.* at 517.
90. *Id.* at 516.
91. *Id.*

2-1 as a seller of a product in a defective condition.[92] The Birches argued that their garage door system without optical sensors was in a defective condition unreasonably dangerous to the Birches within the confines of the IPLA.[93] The Birches alleged that their system was in a dangerous condition because it lacked an optical sensor and because the impact/rebound system may not work as intended if it is not properly maintained.[94] Indeed, the operating manual for the impact/rebound system at issue warned that maintenance needed to be performed monthly, and the record disclosed that the Birches only tested the system once during a four year period.[95]

Plaintiffs also contended that the impact/rebound system at issue was defective because the federal government "banned" systems without optical sensors.[96] Plaintiffs argued that because Midwest knew of the Federal Safety Requirement regarding optical sensors, Midwest should bear liability as a manufacturer because that term included "a seller who 'has actual knowledge of a defect in a product.'"[97] The court concluded that the garage door system at issue was not defective and that a change in a safety regulation, in and of itself, did not make a product defective.[98] Furthermore, the court found it important that the Federal Safety Requirement permitted the continued sale of systems without optical sensors.[99]

Next, the court turned its attention to the Birches' failure to warn theory that the "garage door opener was defective because Midwest failed to warn them 'that their garage door opener was no longer legal to manufacture for safety reasons.'"[100] Focusing on the designated evidence that illustrated the Birches' knowledge of the alleged defect, the court concluded that Midwest had no duty to warn plaintiffs about changes in federal safety regulations because the system manual they received included numerous warnings regarding impact/rebound systems and that "there was no information about garage door openers that could have been provided by Midwest that would have added to the Birches' understanding of the characteristics of the product."[101]

The Seventh Circuit also issued a published opinion in an allegedly inadequate warnings case. In *Ziliak v. AstraZeneca*,[102] plaintiff's physician prescribed an inhaled corticosteroid called Pulmicort Turbuhaler ("Pulmicort") to treat the plaintiff's asthma. Pulmicort, manufactured by defendant AstraZeneca, contained package inserts warning that "rare instances of glaucoma,

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92. *Id.* at 516-17.
93. *Id.* at 517-18.
94. *Id.* at 518.
95. *Id.*
96. *Id.*
97. *Id.* at 517 n.7 (quoting IND. CODE § 34-6-2-77(a) (1999)).
98. *Id.* at 518.
99. *Id.*
100. *Id.* (quoting Appellant Br.).
101. *Id.* at 518-19.
102. 324 F.3d 518 (7th Cir. 2003).

increased intraocular pressure, and cataracts have been reported following the inhaled administration of corticosteroids."[103] Approximately ten months after plaintiff began taking Pulmicort, she developed severe glaucoma, cataracts, and high intraocular pressure.[104] Plaintiff sued AstraZeneca, claiming that "lack of adequate warnings rendered Pulmicort a defective or unreasonably dangerous product."[105] The district court granted summary judgment to AstraZeneca, finding that it could not be held liable for plaintiff's injuries under Indiana's "learned intermediary" doctrine and because the warning accompanying Pulmicort was adequate as a matter of law.[106] Plaintiff appealed.

Because it agreed that the warning was adequate as a matter of law, the Seventh Circuit did not address the learned intermediary basis for the district court's decision.[107] The *Ziliak* court recognized that in Indiana, "some products such as pharmaceuticals are unavoidably unsafe in that they are incapable of being made completely safe for their intended or ordinary use."[108] The court also pointed out that "'[s]uch a product, properly prepared, and accompanied by proper directions and warnings, is not defective, nor is it unreasonably dangerous.'"[109] Indeed, according to the *Ziliak* court:

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103. *Id.* at 519. Plaintiff's physician was aware of the warnings and of the risks of using Pulmicort to treat asthma. He prescribed Pulmicort because, in his view, the benefits of using the drug outweighed the risks. *Id.*

104. *Id.*

105. *Id.* Plaintiff originally filed her action in state court. AstraZeneca removed the case to federal district court based upon diversity of citizenship. *Id.*

106. *Id.* In response to AstraZeneca's motion for summary judgment, plaintiff tendered an affidavit from her purported medical expert. Plaintiff's expert opined that case reports and two small studies convinced him that the risk of glaucoma and cataracts, though small, should not have been characterized in the warning as "rare." *Id.* He also concluded that the information given to the physician about the side effects of glaucoma and cataracts was insufficient to warn him adequately of the risk of those side effects. *Id.* at 520. He further concluded that

> the information provided to the prescribing physician needs to state that there is a causal relationship between the use of Pulmicort and development of cataracts and glaucoma, that monitoring is necessary for development of these problems, and that cessation of inhaled steroid use needs to be considered, as part of any therapeutic regimen.

Id. (quoting Dr. Donald Marks, medical expert witness). The district court found that the expert's testimony "was inadequate because he had not sufficiently established his expertise." *Id.* Rather than rejecting the testimony outright, however, the district court gave plaintiff thirty days to submit additional affidavits establishing his qualifications. *Id.* The affidavits were not timely submitted. *Id.* Without the expert's testimony, plaintiff had failed to identify any evidence suggesting that the warnings were inadequate. *Id.* Even if the affidavit had been timely filed, the district court held that the warning accompanying Pulmicort was consistent with what the warning should have said. *Id.*

107. *Id.* at 520-21.

108. *Id.* at 521 (citing Moss v. Crosman Corp., 136 F.2d 1169, 1171 (7th Cir. 1998)).

109. *Id.* (quoting Ortho Pharm. Corp. v. Chapman, 388 N.E.2d 541, 545-46 (Ind. Ct. App. 1979)).

> The duty to provide adequate warnings arises only when the manufacturer knows or should know of a risk posed by the product, and, in cases involving drugs available only by prescription, extends only to the medical profession, not the consumer. . . . A warning is adequate if it is reasonable under the circumstances.[110]

With respect to the particular Pulmicort warning at issue, the court failed to discern any inconsistency between how plaintiff contended AstraZeneca's package insert should have read and how it actually read:

> If a pharmaceutical manufacturer warns doctors that specific adverse side effects are associated with the use of a drug . . . and development of potential side effects is implicit in the warning, as is the doctor's need to monitor the patient and to consider alternative therapies. Here Ziliak does not dispute that [her physician] was aware of AstraZeneca's warnings, and that he took the risks that Ziliak would develop adverse side effects into account when prescribing Pulmicort. Ziliak therefore has not identified any evidence demonstrating the existence of a triable question of fact whether the warnings accompanying Pulmicort were inadequate.[111]

Practitioners should be aware that the *Ziliak* opinion includes an assumption about the applicability of strict liability that, although not ultimately relevant to the court's decision, is contrary to the IPLA. In its review of Indiana law, the court writes that, "manufacturers are *strictly liable* to consumers for injuries caused by defective or unreasonably dangerous products placed in the stream of commerce."[112] A few sentences later, the court again incorporates strict liability into its analysis: "AstraZeneca is absolved of *strict liability* so long as it has imparted adequate warnings to treating physicians."[113] In support of its assumption about strict liability, the *Ziliak* court cites Indiana Code section 34-20-2-1.[114]

Because Ziliak's cause of action accrued in November 1998, there is no question that the case is governed by the current version of the IPLA, which was enacted in 1995. Although, as the *Ziliak* court recognized, it is true that the "rule of liability" established by Indiana Code section 34-20-2-1 applies even though a seller has exercised all reasonable care in the manufacture and preparation of the product (the rule of strict liability), Indiana Code section 34-20-2-2 eliminates the rule of liability without regard to reasonable care in all cases in which the theory of liability is inadequate warnings or improper design stating:

> [I]n an action based on an alleged design defect in the product or based

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110. *Id.*

111. *Id.*

112. *Id.* (emphasis added).

113. *Id.* (emphasis added).

114. *Id.* (citing IND. CODE § 34-20-2-1 (1999)).

> on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.[115]

Many courts have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the "exercise of all reasonable care") for manufacturing defect cases.[116] *Ziliak*, however, does not stand alone among the recent opinions that rely upon outdated authority to support the proposition that strict liability still applies in cases in which the theory espoused to prove that a product is "unreasonably dangerous" or "defective" is based upon improper design or inadequate warnings.[117]

2. Design Defect Theory.—Indiana courts have required plaintiffs in design cases to prove what practitioners and judges often refer to as a "feasible alternative" design. Plaintiffs must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.[118] Judge Easterbrook has described that a design claim in Indiana is a "negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of the accident."[119]

In *Miller ex rel. Miller v. Honeywell International, Inc.*,[120] plaintiffs were victims of a helicopter crash involving an Army UH-1 "Huey" helicopter near Camp Atterbury in 1997.[121] They alleged that defective planetary gear within the helicopter's engine fractured, causing the crash.[122] They further argued that

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115. IND. CODE § 34-20-2-2.

116. *See, e.g.,* Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); Kennedy v. Guess, Inc., 765 N.E.2d 213, 220 (Ind. Ct. App. 2002).

117. *See* Smock Materials Handling Co. v. Kerr, 719 N.E.2d 396 (Ind. Ct. App. 1999) (finding no error in the trial court's use of the term "strict liability" in its instructions to the jury in a case that was not limited to manufacturing defects).

118. *Burt*, 212 F. Supp. 2d at 893; Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995). In addition to the failure to warn theory in *Burt*, the *Whitted* case also involved a design defect theory. The plaintiff in *Burt* was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be the installed position. With respect to his design claims, plaintiff's expert suggested that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. *Burt*, 212 F. Supp. 2d at 900. The court rejected the claim, holding that the "plaintiff has wholly failed to show a feasible alternative design that would have reduced the risk of injury." *Id.*

119. McMahon v. Bun-O-Matic Corp., 150 F.3d 651, 657 (7th Cir. 1998).

120. 2002 U.S. Dist. LEXIS 20478 (S.D. Ind. 2002).

121. *Id.* at *4-5.

122. *Id.* at *53.

defendant Honeywell International, Inc. ("Honeywell") was responsible for the negligent design specifications for a "carrier assembly" that contained the gears and that Honeywell owed them a post-sale duty to warn about an alleged unreasonably dangerous alignment "defect" within the "carrier assembly."[123]

Although Honeywell did not manufacture the planetary gears, plaintiffs nevertheless argued that Honeywell was subject to liability as a manufacturer because the actual manufacturer of the planetary gears, Precision Gear ("Precision"), manufactured the planetary gears in accordance with Honeywell's drawings, design specifications and quality standards ("design specifications").[124] Because Precision manufactured the planetary gears sometime before 1977,[125] the court previously held that "any action for defects in the helicopter engine or the carrier assembly that existed at the time of sale was barred" by the statute of repose.[126] Claims based upon the defective planetary gears, however, survived the statute of repose because the carrier assembly at issue was overhauled in 1996, and the overhaul included new planetary gears.[127]

Honeywell conveyed the design specifications to the Army in 1989. Accordingly, the critical date that plaintiffs needed to use to establish Honeywell's liability was 1989, the date when the design specifications were placed "into the stream of commerce."[128] The court concluded that Honeywell was indeed a "manufacturer" under the IPLA because it defines "the term 'manufacturer,' in relevant part, as an 'entity who designs, assembles, fabricates . . . or otherwise prepares a product or a component of the product before the sale of the product to a user or consumer.'"[129]

The court properly identified the standard for liability in design defect cases as a negligence standard.[130] At a minimum, the court required that plaintiffs establish that Honeywell's design specifications were flawed and unreasonably dangerous in 1989.[131] The crux of plaintiffs' design defect claim charged that Honeywell's design specifications were defective and unreasonably dangerous because they allowed an inadequate carburization process.[132] More specifically, plaintiffs argued that Honeywell's heat treatment specifications did not conform to the state-of-the-art in 1989 because another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.[133] The court concluded that plaintiffs' offensive use of a state-of-the-art argument failed because: (1)

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123. *Id.* at *2-3.
124. *Id.* at *7-8.
125. *Id.* at *6.
126. *Id.* at *11-13.
127. *Id.* at *7, *13-16.
128. *Id.* at *62-63.
129. *Id.* at *36 (quoting IND. CODE § 34-6-2-77 (2002)).
130. *Id.* at *38.
131. *Id.* at *65.
132. *Id.*
133. *Id.* at *66.

plaintiffs' own expert testified that Honeywell's heat treatment specifications were not unreasonably dangerous; and (2) although plaintiffs' expert repeatedly testified about superior specifications that should have been used by Honeywell, the record revealed that those specifications we not created until 1991.[134] Thus, the court held that "[Honeywell's] design specifications were not 'defective,' in the sense required by [the IPLA] at the time those specifications were introduced into the stream of commerce."[135]

Vaughn v. Daniels Co.,[136] discussed above in connection with the "user/consumer" issue, is a case in which defendant Daniels Company ("Daniels") designed a coal preparation plant. A contractor constructed the plant, including the assembly of three coal sumps according to Daniels' blueprints and specifications.[137] Plaintiff Vaughn, an employee of the contractor, was injured while installing one of the coal sumps into the coal preparation plant.[138] Vaughn climbed onto the sump without fastening his safety belt because he was rushing to assist coworkers who were maneuvering a pipe through the wall of the plant by a forklift and raising it to the level of the sump.[139] Once the pipe was raised, workers wrapped a chain around the pipe to support it as the forklift pulled away.[140] The chain gave way, the pipe slipped, and Vaughn fell.[141]

One of Daniels' arguments was that the sump was not "unreasonably dangerous" or "defective" because it was not meant to serve as a construction platform nor was Vaughn using the product for its intended purpose (to process slurry).[142] Two professional engineers submitted affidavits in favor of Daniels, both opining that the sump from which Vaughn fell was not unreasonably dangerous when used for its intended purpose.[143] Both engineers opined that the sump was typical of sump designs in coal preparation plants being constructed throughout the country at the time of Vaughn's fall.[144] Vaughn's expert affidavit responded that design flaws rendered the sump unreasonably dangerous because it did not have a handrail around the top and because it did not have some sort of

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134. *Id.* at *64-65.

135. *Id.* at *71. Plaintiffs' also asserted a related failure to warn claim, contending that Honeywell failed to warn the Army when it discovered that its heat treatment specifications, which were a subpart of the design specifications, were inadequate. *Id.* The court relied upon its previous analysis regarding plaintiffs' design defect claim, ultimately concluding that no duty to warn existed because the plaintiffs failed to first establish that the design specifications were defective in 1989, when they were sold to the Army. *Id.* at *74.

136. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on rehearing* 782 N.E.2d 1062 (2003).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1128-29.

143. *Id.*

144. *Id.* at 1129.

apparatus above from which the pipe could easily be safely hoisted.[145]

After agreeing that the legal conclusions in Vaughn's expert's affidavit should be stricken, the *Vaughn* court reviewed remaining designated evidence and held as follows:

> [I]t is clear that we have two experts maintaining one position, namely that the product was not being used for its intended purpose and is not dangerous when used for the proper purpose. We also have one expert taking the opposite stance, namely that there were design flaws in the sump that rendered it out of compliance with accepted safety standards. This contradiction is the classic question-of-fact scenario contemplated by Trial Rule 56, which necessarily precludes summary judgment on this issue.[146]

The *Vaughn* court reserved the "reasonably expected use" question for the jury with respect to whether the sump was "defective" and "unreasonably dangerous," yet none of the judges on the panel seemed to have any qualms about making a nearly identical inquiry into "reasonably expected use" in the context of deciding as a matter of law whether Vaughn was a "user" of the sump.[147] The apparent justification for the difference in treatment is the presence of dueling opinion affidavits.[148]

It is interesting, however, to point out that at least one recent court

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145. *Id.*

146. *Id.*

147. *Id.* at 1127-29.

148. *Id.* at 1128-29. In addition, Daniels argued that Vaughn misused the sump because he was using it at a construction platform and that it was not being used, nor could it have been used at the time at the time of the accident, for its intended purpose. *Id.* at 1129. The court of appeals concluded that the issue of unforeseeable misuse was one to be left the jury. *Id.* at 1130.

Practitioners should note the relationship between the "misuse" defense set forth in Indiana Code section 34-20-6-4 and the language found in two other places within the IPLA, Indiana Code § 34-20-4-1(1) and Indiana Code § 34-20-4-3.

> It is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.

IND. CODE § 34-20-6-4 (1999). Indeed, the facts necessary to prove the defense of "misuse" at times may be similar or identical to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers, *id.* § 34-20-4-1(1), or that the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable, *id.* § 34-20-4-3, or both. Thus, in Indiana, there are at least three separate statutory standards that might bar liability when injury results from a set of circumstances related to uses that are beyond reasonable contemplation or expectation. *See, e.g.,* Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899-903 (N.D. Ind. 2002) (holding defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law; that being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met and the defense of "misuse" in Indiana Code section 34-20-6-4 had been established).

interpreting Indiana law decided the "defective" and "unreasonably dangerous" issue as a matter of law in a design defect context even in the presence of divergent expert testimony. In *Burt v. Makita USA, Inc.*,[149] the plaintiff was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be in the installed position. With respect to his design claims, plaintiff's expert opined that the saw was "defective" and "unreasonably dangerous" by its design, suggesting that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw.[150] The court rejected the claim, holding that the plaintiff and his expert had "wholly failed to show a feasible alternative design that would have reduced the risk of injury."[151]

In *Hughes v. Battenfeld Glouchester Engineering Co.*[152] plaintiff Hughes injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station ("nip station"), which defendant Battenfeld Glouchester Engineering Co., Inc. ("Battenfeld") designed and manufactured.[153] Hughes admitted that he knew about the dangers associated with using the nip station because he observed co-workers who were injured performing similar tasks.[154] The task performed by Hughes at the time of incident required him to manually route the plastic film into the machine between two driven roller bars.[155] Hughes testified that he was aware of the alleged defect that caused his accident, and on two previous occasions he had filed written suggestions with his employer requesting that it reduce the risk of injury involved.[156]

Hughes filed suit against Battenfeld, alleging negligent design and manufacture. Battenfeld moved for summary judgment. Judge Tinder first recognized that to prevail on a claim under the IPLA, Hughes had to prove that the product was in a defective condition that rendered it unreasonably dangerous.[157] "To be unreasonably dangerous, a defective condition must be hidden or concealed . . . [and] evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff's prima facie case that the defect was hidden."[158] Battenfeld argued that the dangerous condition of the nip station was open and obvious.[159] Judge Tinder agreed and entered summary judgment for Battenfeld, finding that the dangers of running the inside treatment orders in the nip station were open and obvious as a matter of law.[160]

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149. 212 F. Supp. 2d at 893.
150. *Id.* at 900.
151. *Id.*
152. 2003 U.S. Dist. LEXIS 17177, at *1 (S.D. Ind. 2003).
153. *Id*. at *2-5.
154. *Id.* at *4.
155. *Id.* at *2-3.
156. *Id.* at *3-4.
157. *Id.* at *7.
158. *Id.* at *7-8.
159. *Id.* at *7.
160. *Id.* at *17.

Although decided a couple of months after the 2003 survey period expired, the Indiana Supreme Court's decision in *City of Gary v. Smith & Wesson Corp.*,[161] is noteworthy and is briefly summarized here. The City of Gary and its mayor sued several handgun manufacturers, distributors, and retailers, alleging, among other claims, negligent design, manufacture, distribution, and sale of guns with inadequate, incomplete, or nonexistent warnings regarding the risks of harm. The city alleged a separate design defect claim against the manufacturers for failure to include adequate safety devices. The court of appeals rejected all such bases of liability, holding that no duty of care existed between the parties because the attenuated relationship between the city and the defendants rendered the connection between the harm alleged by the city and the conduct of the defendants tenuous and remote.[162] The court concluded that the city simply was not a reasonably foreseeable plaintiff injured in a reasonably foreseeable manner.[163]

The Indiana Supreme Court reversed, first concluding that the City's allegations were sufficient to give rise to public nuisance and general negligence claims.[164] The *City of Gary* court also reversed with respect to the City's negligent design claim against the manufacturers.[165] The City contended that the manufacturers

> were negligent in designing the handguns in a manner such that the defendants foresaw or should have foreseen that the products would pose unreasonable risks of harm to the citizens of Gary who were unaware of the dangers of a firearm or untrained in the use of handguns, or who are minors or mentally impaired persons.[166]

The City further alleged that the handguns were defective because they lacked

> adequate safety devices including, but not limited to, devices that prevent handguns from being fired by unauthorized users, devices increasing the amount of pressure necessary to activate the trigger, devices alerting the users that a round was in the chamber, devices that prevent the firearm from firing when the magazine is removed, and devices to inhibit unlawful use by prohibited or unauthorized users.[167]

Although *City of Gary* recognized that the City is not a purchaser and has no direct claim under "statutory or common law theories," the court nonetheless concluded as follows:

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161. 801 N.E.2d 1222 (Ind. 2003).

162. City of Gary v. Smith & Wesson Corp., 776 N.E.2d 368 (Ind. Ct. App. 2002), *rev'd*, 801 N.E.2d. 1222 (Ind. 2003).

163. *City of Gary*, 776 N.E.2d at 388.

164. *City of Gary*, 801 N.E.2d at 1229-47.

165. *Id.* at 1248-49.

166. *Id.* at 1247.

167. *Id.* The City also alleged that the manufacturers "knowingly and intentionally colluded with each other to adhere to unsafe industry customs regarding the design of handguns." *Id.*

> [T]o the extent these actions constitute an unreasonable interference with a public right, the City has alleged a claim for a public nuisance. Whether these alleged design defects are unreasonable and the extent to which they contribute to the harm alleged are matters for trial. Similarly, the availability of relief appropriate to any unreasonable interference, given that the defendant's products are lawful and the public has a right to acquire them may present substantial obstacles to the City's claim.[168]

The court, therefore, held that "at th[e] pleading stage . . . the City has stated a claim for relief."[169]

II. LIMITATIONS AND REPOSE ISSUES

A. Statute of Limitations

The IPLA provides, in relevant part, that "a product liability action must be commenced within two (2) years after the cause of action accrues, or within ten (10) years after the delivery of the product to the initial user or consumer."[170] Practitioners and judges alike generally refer to the first clause of that statute as the statute of limitations and to the latter as the statute of repose.

The IPLA does not define the meaning of "accrues" for purposes of fixing the two-year statute of limitations generally applicable to all product liability actions in Indiana. Indiana courts nevertheless have adopted a discovery rule for the accrual of tort-based damage claims caused by an allegedly defective product. In *Degussa Corp. v. Mullens*,[171] the Indiana Supreme Court held that the date upon which a product liability claim accrues depends upon a subjective analysis of a patient's communications with his or her doctor about when a causal link between a disease and the defendant's product is established.[172] "Once a plaintiff's doctor expressly informs the plaintiff that there is a 'reasonable possibility, if not a probability' that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law."[173]

> When a doctor so informs a potential plaintiff, the plaintiff is deemed to have sufficient information such that he or she should promptly seek 'additional medical or legal advice needed to resolve any remaining uncertainty or confusion' regarding the cause of his or her injuries, and therefore be able to file a claim within two years of being informed of a reasonably possible or likely cause.[174]

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168. *Id.* at 1248.

169. *Id.*

170. IND. CODE § 34-20-3-1(b) (1999).

171. 744 N.E.2d 407, 410-11 (Ind. 2001).

172. *Id.* at 410-11.

173. *Id.* at 411 (quoting Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999)).

174. *Id.* (quoting *Van Dusen*, 712 N.E.2d at 499). In addition,

In *Dorman v. Osmose, Inc.*,[175] plaintiff Dorman injured his shin on a piece of freshly-cut treated lumber on June 23, 1996. Dorman did not know at that time that the wood had been treated with cromated copper arsenate ("CCA"). A week after the accident, the injured area had become red, swollen, and infected. On June 29, 1996, Dorman's treating physician diagnosed him with cellulitis and advised him that treated wood had "some nasty stuff" in it.[176] The physician stopped short, however, of overtly linking the injury to any particular chemical in the wood. At that time, Dorman believed that the wood had been treated with salt.

More than a year later, in August 1997, Dorman's leg was reportedly swollen, red, and painful.[177] Another physician diagnosed Dorman with "cellulitis with ascending lymphadenitis." The second physician did not connect Dorman's condition to the treated wood. In December 1999, Dorman approached an attorney regarding his injury and claimed that he learned for the first time that treated wood contained CCA.[178] On May 5, 2000, Dorman consulted a third physician, who issued a medical report concluding that the CCA in the treated wood caused his injury. Dorman filed suit shortly thereafter on June 30, 2000.

Dorman filed suit based upon negligence and product liability theories. The

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> [a]n unexplained failure to seek additional information should not excuse a plaintiff's failure to file a claim within the statutorily defined time period. Although "events short of a doctor's diagnosis can provide a plaintiff with evidence of a reasonable possibility that another's" product caused his or her injuries, a plaintiff's mere suspicion or speculation that another's product caused the injuries is insufficient to trigger the statute.

Id. (citations omitted); *see* Barnes v. A.H. Robins Co., 476 N.E.2d 84, 87-88 (Ind. 1985) (stating that a cause of action accrues when the claimant knew or should have discovered that he or she "suffered an injury or impingement, and that it was caused by the product or act of another"); *see also* Nelson A. Nettles, *When Does a Product Liability Claim 'Accrue'? When Is It 'Filed'?*, IND. LAW., May 9, 2001, at 23.

In *Nelson v. Sandoz Pharmaceuticals Corp.*, 288 F.3d 954 (7th Cir. 2002), a case decided during last year's survey period, the Seventh Circuit followed *Degussa*. In that case, the trial court granted summary judgment to a pharmaceutical manufacturer based on the IPLA statute of limitations. *Id.* at 958. After concluding that Indiana law applied, the Seventh Circuit reversed. *Id.* at 965. The court first cited *Degussa* for the proposition that the statue of limitations runs from the date that plaintiff knew or should have discovered that she suffered an injury or impingement and that it was caused by the product or act of another. *Id.* at 966. According to the Seventh Circuit, the plaintiff's suspicion, standing alone, was insufficient to trigger the limitations period. *Id.* at 966-67. The court held that the period begins to run if a physician suggests reasonable possibility, if not a probability, of a causal connection between the illness alleged and the product involved. *Id.*

175. 782 N.E.2d 463 (Ind. Ct. App.), *trans. denied*, 792 N.E.2d 46 (Ind. 2003).

176. *Id.* at 464-65.

177. *Id.* at 465.

178. *Id.*

trial court granted summary judgment in favor of the defendants based upon the IPLA's statute of limitations.[179] Dorman appealed, and the court of appeals reversed. In doing so, the *Dorman* court relied upon *DeGussa*, writing that "[o]nce a plaintiff's doctor expressly informs the plaintiff that there is a 'reasonable possibility, if not a probability' that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law."[180] Noting that "*a plaintiff's mere suspicion or speculation that another's product caused the injuries is insufficient to trigger the statute*[,]"[181] the *Dorman* court concluded that Dorman's speculation about the connection between his leg problem and the treated lumber was not enough to trigger the limitations period as a matter of law.[182]

In *Detrex Chemical Industries, Inc. v. Skelton*,[183] the plaintiff began having nosebleeds, chest congestion and breathing problems in December 1995. In 1996, plaintiff was diagnosed with chronic obstructive pulmonary disease ("COPD"), which was aggravated by his inhalation of fumes in the workplace. The treating physician believed that plaintiff's disease was caused by asthma.[184] In spite of his doctor's diagnosis, plaintiff suspected that his health problem was related to his workplace, and he began gathering information about the chemicals he worked near. Also, in February 1996, plaintiff filed a *pro se* workers compensation action based upon exposure to chemical fumes at work. Plaintiff consulted with another physician in October 1996, and the second physician tested for allergies and the presence of chemicals, and diagnosed plaintiff with allergies, asthma and a poorly functioning immune system. In August 1997, the second physician linked plaintiff's COPD with his chemical exposure. In November 1998, plaintiff visited another doctor who did not find a link between plaintiff's health problems and his occupational chemical exposure. Finally, in April 1999, plaintiff consulted another physician who concluded that plaintiff's occupational chemical exposure "was most certainly responsible for [plaintiff's] condition."[185]

In May of 1999, plaintiff filed his complaint. Thereafter, defendants filed motions for summary judgment based upon the statute of limitations. The trial court denied the defendants' motions, defendants appealed, and the appellate panel affirmed.[186] Just as was the case in *Dorman*, the court began its substantive discussion with *Degussa:* "[W]hile events short of a doctor's diagnosis can provide a plaintiff with evidence of a reasonable possibility that a product caused his or her injuries, a plaintiff's mere suspicion or speculation that the product

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179. *Id.* at 464.

180. *Id.* at 467 (quoting DeGussa Corp. v. Mullens, 744 N.E.2d 407, 410-11 (Ind. 2001)).

181. *Id.* (emphasis in original).

182. *Id.* 469-70.

183. 789 N.E.2d 75 (Ind. Ct. App. 2003).

184. *Id.*

185. *Id.* at 77.

186. *Id.* at 77, 80.

caused the injuries is insufficient to trigger the statute."[187] Defendants argued that, as early as April 3, 1997, plaintiff should have known that there was a reasonable possibility, if not probability that his health problems had been caused by chemicals.[188] However, the court noted that during that same period of time, plaintiff heard from other doctors that his condition was not from occupational chemical exposure, and plaintiff also was advised that he had various allergies.[189] Despite the evidence that plaintiff had begun taking precautions to protect himself from chemical exposure at work in 1995 and 1996, the *Detrex* panel held that the limitations period did not begin to run at that time.[190] The conflicting evidence related to plaintiff's health condition caused the court to hold that "whether the statute of limitations had run on [plaintiff's] claim is a question of fact for resolution at trial."[191]

Although the Indiana Supreme Court in *Degussa* advises that factors short of a physician's diagnostic causal link between the defendant and the injury may trigger the IPLA's limitations period,[192] Indiana appellate courts during this survey period have been noticeably reluctant to find anything short of just such a diagnostic connection sufficient to trigger it.

B. Statute of Repose

Indiana Code section 34-20-3-1 provides, in relevant part, that "a product liability action must be commenced within . . . ten (10) years after the delivery of the product to the initial user or consumer."[193] The statute of repose gets a little more complicated in the last two years of the 10-year period mentioned above. Indiana Code section 34-20-3-1(b) provides that "if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues."[194] Practitioners should be wary here in light of some very specific statutory language. Note that subsection (b) grants the full two-year limitations period after accrual if the cause of action accrues at least eight years but less than ten years after initial delivery. If accrual occurs ten years to the day after the initial delivery, it would appear as though suit must be filed that day because the additional two-year period only applies if accrual occurs at any time less than ten years after initial delivery.

Recent case law confirms that there are at least two situations in which a manufacturer can be liable even beyond ten years after delivery to the initial user or consumer: (1) when the manufacturer supplies replacement parts for the

187. *Id.* at 78.
188. *Id.* at 79.
189. *Id.*
190. *Id.* at 79-80.
191. *Id.* at 80.
192. DeGussa Corp. v. Mullens, 744 N.E.2d 407, 411 (Ind. 2001).
193. IND. CODE § 34-20-3-1(b) (1998).
194. *Id.*

product and the replacement parts are the cause of the plaintiffs' injury; and (2) when the manufacturer rebuilds the product, such that the rebuild significantly extends the life of the product and thereby renders it in like-new condition.

The Indiana Supreme Court has recognized the utility and underlying policy justifications for the existence of a statute of repose, and has reaffirmed that the wisdom of the policy underlying a product liability statute of repose is a question for the legislature.[195] Moreover, the Indiana Supreme Court in *McIntosh v. Melroe Co.*,[196] has held that application of the statute of repose does not violate article I, sections 12 or 23 of the Indiana Constitution.[197]

Product liability cases involving asbestos products are unique in several ways, including the manner by which the Indiana General Assembly chose to handle the repose period that applies to them. Indiana Code section 34-20-3-2(a)[198] provides that "[a] product liability action that is based on: (1) property damage resulting from asbestos; or (2) personal injury, disability, disease, or death resulting from exposure to asbestos: must be commenced within two (2) years after the cause of action accrues."[199] That exception applies, however, "only to product liability actions against persons who mined and sold commercial asbestos; and (2) to funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims."[200]

The phrase "persons who mined and sold commercial asbestos"[201] had been a source of controversy for several years. Plaintiffs argued that the "and" should be read as an "or." Many defendants, on the other hand, have contended that Indiana Code section 34-20-3-2 creates an exception to the limitations and repose periods only for claims against those entities that *both* mined *and* sold commercial asbestos, and that the term "commercial" has a very specific meaning. Until March 25, 2003, when the Indiana Supreme Court issued a much-

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195. Shebel v. Yaskawa Elec. Am., Inc., 713 N.E.2d 275, 278 (Ind. 1999).

196. 729 N.E.2d 972 (Ind. 2000).

197. During last year's survey period, the U.S. Court of Appeals for the Seventh Circuit recognized and applied *McIntosh* in *Land v. Yamaha Motor Corp.*, 272 F.3d 514 (7th Cir. 2001), a case in which the court concluded that the statute of repose cannot be circumvented by claiming that the manufacturer continued its negligence after the initial sale by failing to warn customers of known dangers and that post-sale failure-to-warn claims merge with the underlying product liability claims that are barred, in their entirety, by the statute of repose. *Id.* at 518. In response to an argument that the statute of repose was unconstitutional, the Seventh Circuit also noted that *McIntosh* already had conclusively addressed that issue. *Id.*

198. IND. CODE § 34-20-3-2(a) (1998) (amending *id.* § 33-1-1.5-5.5).

199. *Id.* The statute further provides that an action accrues "on the date when the injured person knows that the person has an asbestos related disease or injury," *id.* § 34-20-3-2(b), and that the "subsequent development of an additional asbestos related disease or injury is a separate cause of action." *Id.* § 34-20-3-2(a).

200. *Id*. § 34-20-3-2(d).

201. *Id.*

anticipated decision in *AlliedSignal Inc. v. Ott*,[202] various Indiana appellate courts answered those questions in divergent ways, most in favor of plaintiffs.

The string of appellate decisions preceding *Ott* began in 1989, shortly after the General Assembly approved what is now Indiana Code section 34-20-3-2. In *Covalt v. Carey Canada, Inc.*,[203] the majority held that the statutory language now appearing in Indiana Code section 34-20-3-1 did not apply "to cases involving protracted exposure to an inherently dangerous foreign substance [that] is visited into the body."[204] While the *Covalt* court was deliberating its decision, the General Assembly approved the language for what is now Indiana Code section 34-20-3-2.[205]

In 2001 and early 2002, majorities of six separate panels of the Indiana Court of Appeals in *Black v. ACandS, Inc.*,[206] *Poirier v. A.P. Green Services, Inc.*,[207] *Fulk v. AlliedSignal, Inc.*,[208] *Parks v. A.P. Green Industries, Inc.*,[209] *AlliedSignal, Inc. v. Herring*,[210] and *Harris v. ACandS, Inc.*,[211] held that Indiana Code section 34-20-3-2's exception to the IPLA repose period applies to entities that mined commercial asbestos, even if they did not sell it, and to entities that sold commercial asbestos, even if they did not mine it. Each of those cases involved workers or their estates who claimed injury or death as the result of working with

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202. 785 N.E.2d 1068 (Ind. 2003).

203. 543 N.E.2d 382 (Ind. 1989).

204. *Id.* at 385.

205. *Id.* at 383 n.1. Nine years after *Covalt*, the repose issue in asbestos cases returned to the fore. Roberts v. ACandS, Inc, 1998 U.S. Dist. LEXIS 22635, at *12-13 (S.D. Ind. 1998). Judge Larry McKinney of the United States District Court for the Southern District of Indiana held that section 1 barred claims made against a manufacturer of an asbestos-containing product that accrued more than ten years after the delivery of the product to its initial user and consumer. In doing so, Judge McKinney determined that what is now chapter 3, section 2 applied only to entities that both mined and sold commercial asbestos. *Id.* Less than a year later, the Indiana Court of Appeals in *Sears Roebuck and Co. v. Noppert*, 705 N.E.2d 1065, 1068 (Ind. Ct. App. 1999), reached the same conclusion as part of a larger discussion about the timeliness of a post-judgment motion filed pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure: "[W]hile courts in Indiana have on occasion construed an 'and' in a statute to be an 'or,' we find that there is no ambiguity in this statute requiring such an interpretation." *Id.* In *Novicki v. Rapid-American Corp.*, 707 N.E.2d 322 (Ind. Ct. App. 1999), another panel of the court of appeals, citing *Noppert*, recognized that chapter 3, section 2's exception to the statute of repose applied only to entities that both mined and sold commercial asbestos. *Id.*

206. 752 N.E.2d 148, 162 (Ind. Ct. App. 2001), *vacated and remanded by* Black v. ACandS, Inc., 785 N.E.2d 1084 (Ind. 2003).

207. 754 N.E.2d 1007, 1012 (Ind. Ct. App. 2001).

208. 755 N.E.2d 1198, 1206 (Ind. Ct. App. 2001).

209. 754 N.E.2d 1052, 1061 (Ind. Ct. App. 2001).

210. 757 N.E.2d 1030, 1037 (Ind. Ct. App. 2001), *vacated and remanded by* AlliedSignal, Inc. v. Herring, 785 N.E.2d 1090 (Ind. 2003).

211. 766 N.E.2d 383 (Ind. Ct. App. 2002), *vacated and remanded by* Harris v. ACandS, Inc., 785 N.E.2d 1087 (Ind. 2003).

or around asbestos-containing products. The claimants sued sellers of asbestos-containing products, alleging damages caused by inhalation of asbestos dust. The following language from the majority opinion in *Black* provides the underpinning for the rulings:

> Clearly, the intent of the legislature in enacting [Indiana Code section 34-20-3-2] was at least in part to acknowledge the long latency period of asbestos-related injuries. Without the [Indiana Code section 34-20-3-2] exception, the statute of limitations and statute of repose would be meaningless for the vast majority of people harmed by exposure to asbestos. Asbestos-related injuries would truly be a wrong without a remedy. Equally clear is that the legislature thus could not have intended by enacting [Indiana Code section 34-20-3-2] to so severely limit the means of recovery.[212]

Judge Mathias wrote a lengthy dissenting opinion in *Black*, concluding that the statute of repose on its face is unambiguous and clearly applies only to those companies who both mined and sold commercial asbestos, not all sellers of asbestos-containing products.[213]

In *Jurich v. Garlock, Inc.*,[214] yet another panel of the court of appeals weighed in. Although the *Jurich* court recognized the *Black* majority's conclusion as "reasonable," it disagreed that the defendants sold "commercial asbestos."[215] The *Jurich* court determined that the defendants sold asbestos-containing products, not "commercial asbestos," which referred to either raw or processed asbestos that is incorporated into other products.[216] The *Jurich* court went on, however, to conclude that the application of Indiana Code section 34-20-3-1 to the plaintiff under the facts presented in the case violated article I, section 12 of the Indiana Constitution.[217]

The *Ott* case involved a direct appeal from the Allen County Superior Court. The trial court issued an order denying motions for summary judgment based on the statute of repose. The defendants that filed those motions argued that they had not mined and sold commercial asbestos.[218] The trial court, citing *Noppert*, first concluded that Indiana Code section 34-20-3-2's exception did not apply to the moving defendants. The trial court, however, went on to conclude that Indiana Code section 34-20-3-1, as applied to Mrs. Ott, violated article I, section 12 and article I, section 23 of the Indiana Constitution. The trial judge certified his orders for interlocutory appeal.[219] Because of the conflicting opinions of the court of appeals, the moving defendants petitioned the Indiana Supreme Court

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212. Black v. ACandS, Inc., 752 N.E.2d 148, 152 (Ind. Ct. App. 2001).
213. *Id.* at 158 (Mathias, J., dissenting).
214. 759 N.E.2d 1066 (Ind. Ct. App. 2001).
215. *Id.* at 1069-70.
216. *Id.*
217. *Id.* at 1077.
218. AlliedSignal, Inc. v. Ott, 785 N.E.2d 1068 (Ind. 2003).
219. *Id.*

for emergency transfer to resolve the conflict.[220]

The 3-2 majority in *Ott* held that Indiana Code section 34-20-3-1 bars claims against manufacturers that did not sell bulk asbestos fiber for asbestos-related injuries accruing more than ten years after the initial delivery.[221] In doing so, the court concluded that the asbestos-specific "discovery rule" exception to the ten-year repose period[222] does not apply to manufacturers that did not sell bulk asbestos fiber.[223] The *Ott* court also held that application of the ten-year statute of repose does not violate "due process" guarantees provided by article I, section 23 of the Indiana Constitution.[224] The court, however, left open pending further factual findings whether, as applied, the statute of repose violates article I, section 12 of the Indiana Constitution.[225]

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220. On November 16, 2001, the Indiana Supreme Court accepted the petition and held oral argument on May 16, 2002.

221. *Ott*, 785 N.E.2d at 1073.

222. IND. CODE § 34-20-3-2 (1998) (formerly *id.* § 33-1-1.5-5.5).

223. *Ott*, 785 N.E.2d at 1073.

224. *Id.* at 1075-77. Article I, section 23 of the Indiana Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall no equally belong to all citizens." IND. CONST. art. I, § 23. Before it could apply the *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), analysis, the *Ott* majority concluded that it first had to determine what legislative classification was at issue. *Ott*, 785 N.E.2d at 1077. It defined the classification at issue as "asbestos victims in Indiana are bound by the statute of repose governing product liability actions when suing particular categories of defendants but are not so constrained when suing others. Thus, the statute creates a distinction between asbestos victims and other victims under the product liability act." *Id.* The *Ott* majority concluded that because the distinction worked in favor of asbestos plaintiffs, the distinction is constitutionally permissible. *Id.* (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347-48 (1936)) ("The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation."). In a footnote, the *Ott* majority addressed an issue raised by *amicus* regarding whether or not Indiana Code section 34-20-3-2 was unconstitutional as applied to miners stating that because "such a claim does not impact any party in the present case, we will not address [Indiana Code section 34-20-3-2]'s constitutionality as applied to miners at this time." *Id.* The court's footnote raises other additional questions. Is Indiana Code section 34-20-3-2 facially unconstitutional? If deemed unconstitutional, how would that affect asbestos plaintiffs given the language in Indiana Code section 34-20-3-2(e) that indicates that if any portion of it is deemed unconstitutional, all of it would be stricken?

225. *Ott*, 785 N.E.2d at 1077. Article I, section 12 of the Indiana Constitution provides: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, Shall have remedy by due course of law." IND. CONST. art. I, § 12. The *Ott* majority began its constitutional analysis with a lengthy quote from *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999), a case holding that article I, section 12 precludes the application of a two-year medical malpractice statute of limitations when a plaintiff has no meaningful opportunity to file an otherwise valid tort claim within the specified statutory period, because, given the nature of the asserted malpractice and the resulting injury or medical condition, he is unable to discover that he has a cause of action. The *Ott* majority determined that when evaluating Indiana Code section 34-20-3-1 under article I,

Justice Dickson, in a dissenting opinion joined by Justice Rucker, challenged each of the conclusions reached by the majority.[226] Justice Dickson relied heavily on *Black* for his reasoning challenging the interpretation of Indiana Code section 34-20-3-2.[227]

The *Ott* decision, in practical effect, reversed the *Ott* trial court and overruled *Black*, *Poirier*, *Fulk*, *Parks*, *Herring*, and *Harris* to the extent that those decisions interpreted Indiana Code section 34-20-3-2 to apply to manufacturers of all products that contained asbestos. It also overruled *Jurich* with respect to the article I, section 23 issue, and rejected much of the *Jurich* analysis with respect to the article I, section 12 issue. In addition, the *Ott* majority overruled *Covalt* to the extent any inconsistencies existed between the two decisions.

> We stated in *Covalt* that the applicability of the holding in that case was limited to "the precise factual pattern presented," which involved exposure to raw asbestos fibers. . . . Thus *Covalt* can be read as consistent with the effect of [Indiana Code section 34-20-3-2] in that it relieved asbestos plaintiffs from the statue of repose in a lawsuit against

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section 12, the key question is when the injury occurred. *Ott*, 785 N.E.2d at 1074.

The Indiana Supreme Court considered several factual scenarios in evaluating the application of Indiana Code section 34-20-3-1. First, it considered a scenario where a plaintiff had been exposed to asbestos fibers from a product more than ten years after the product had been delivered to its initial user or consumer and concluded that *McIntosh* would apply to bar the claim. *Id.* The majority next addressed a scenario where a plaintiff "is injured by a product within ten years of its initial delivery, but who has neither knowledge of nor any ability to know of that injury until more than ten years have passed," concluding that such a scenario implicated *Richey*. *Id.* The *Ott* majority determined that a cause of action "accrues" when "the disease has actually manifested itself." *Id.* at 1075. In reaching this definition, the *Ott* majority acknowledged that "it is difficult to reconcile science and law," noting that injury "does not occur upon mere exposure to (or inhalation of) asbestos fibers" but that "injury may well occur before the time that it is discovered." *Id.* The *Ott* majority then concluded that Indiana Code section 34-20-3-1 "*might* be unconstitutional as applied to the plaintiff if a reasonably experienced physician could have diagnosed Jerome Ott with an asbestos-related illness or disease within the ten-year statute of repose, yet Ott had no reason to know of the diagnosable condition until the ten-year period had expired." *Id.* (emphasis added). Because the record had not been developed to address that issue, the case was remanded to the trial court for further proceedings. *Id.*

226. *Id.* at 1078-84 (Dickson, J., dissenting) (challenging the definition of "commercial asbestos," the failure to substitute "or" for "and" in Indiana Code section 34-20-3-2, the article I, section 12 analysis, and the article I, section 23 analysis).

227. *Id.* at 1080-81 (Dickson, J., dissenting). Indeed, Justice Dickson cites *Black* for the proposition that

> [b]ecause the statute of repose is concerned not with the introduction of the asbestos into the marketplace but with exposure to the hazardous foreign substance that causes disease, an interpretation of the statute that permits or denies recovery based solely on the nature of the entity that introduced the asbestos into the marketplace cannot stand.

Id. (citing Black v. ACandS, 752 N.E.2d 148, 154 (Ind. Ct. App. 2001)).

a supplier of commercial asbestos.[228]

III. DEFENSES

A. Use with Knowledge of Danger (Incurred Risk)

Indiana Code section 34-20-6-3 provides that "[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured."[229] Incurred risk is a defense that "involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk."[230] At least one Indiana court has held in the summary judgment context that application of the incurred risk defense requires evidence without conflict from which the sole inference "to be drawn is that the plaintiff had actual knowledge of the specific risk and understood and appreciated that risk."[231]

In *Vaughn v. Daniels Co.*,[232] discussed above in connection with the "user/consumer" and the "unreasonably dangerous" issues, defendant Daniels Company ("Daniels") designed a coal preparation plant. A contractor constructed the plant, including the assembly of three coal sumps according to Daniels' blueprints and specifications. Plaintiff Vaughn, an employee of the contractor, was injured while installing one of the coal sumps into the coal preparation plant.[233] In an effort to aid his co-workers in installation, Vaughn climbed onto the sump without his safety belt while a pipe was maneuvered through the wall of the plant by a forklift and raised to the level of the sump.

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228. *Id.* at 1077.

229. IND. CODE § 34-20-6-3 (1998).

230. Cole v. Lantis Corp., 714 N.E.2d 194, 200 (Ind. Ct. App. 1999).

231. *Id.* Indiana courts have decided some important incurred risk cases in the last few years. *E.g.*, Smock Materials Handling Co. v. Kerr, 719 N.E.2d 396 (Ind. Ct. App. 1999) (finding no basis for the incurred risk defense under the facts of that case; plaintiff had no knowledge of the fact that the manufacturer had changed the design of the lift so as to eliminate pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform); Hopper v. Carey, 716 N.E.2d 566 (Ind. Ct. App. 1999) (because the plaintiffs did not adequately specify the basis of their claim, the court was unclear whether the defect in the fire truck was open and obvious or whether warnings were placed on the truck informing the passengers of the specific risk from which the Hoppers' injuries resulted, and the court was unable to determine the applicability of the incurred risk defense); Cole v. Lantis Corp., 714 N.E.2d 194 (Ind. Ct. App. 1999) (because plaintiff's job necessarily entailed moving containers across gap between aircraft and aircraft loading equipment and his apparent belief that he had to somehow find a way to work around the known danger posed by the gap, the majority concluded that whether plaintiff voluntarily incurred the risk of falling through the gap was a fact question for the jury's resolution).

232. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on rehearing* 782 N.E.2d 1062.

233. *Id.* at 1116.

After raising the pipe, workers wrapped a chain around the pipe to support it as the forklift pulled away. The chain gave way, the pipe slipped, and Vaughn fell.[234]

One of Daniels' arguments was that Vaughn knew and appreciated the risk of falling and failed to take proper precautions despite his knowledge. It was undisputed that Vaughn understood and appreciated the risks of working at heights and the need to wear a safety belt. He was, in fact, wearing his belt until moments before the accident, but he did not put it back on before rushing to the sump to assist his co-worker.[235] The trial court agreed, finding that Vaughn "knew and appreciated the risk of falling that came with not being properly [fastened] while working at heights and despite his knowledge and appreciation of this risk, failed to take proper safety precautions."[236]

Vaughn countered that his failure to wear his safety belt was not voluntary under the circumstances because he was rushing to help his co-workers who needed assistance. Thus, Vaughn argued that "although he knew of the general risks of working at heights without wearing a safety belt, his failure to do so in this case was reasonable because of the need to help his co-workers."[237] In addition, Vaughn pointed to his deposition testimony in which he stated that he had no place to fasten his safety belt while working on the sump at issue and that there had been a handrail around another sump he had previously installed onto which he could fasten the belt.

Focusing on the phrase "actual knowledge of the specific risk" and taking its cue from *Ferguson v. Modern Farm Systems, Inc.*,[238] the court reasoned as follows:

> It is true that the undisputed designated evidence is that Vaughn understood the danger of working at heights over six feet without a safety belt and yet climbed to the top of the sump to install the pipe without wearing it or tying off. . . . That being said, however, there remains a question concerning the voluntariness of the failure to wear the belt given the urgent need of the coworkers for help. There is also the risk of working on the sump without a handrail as a result of the allegedly defective design. There remain questions as to whether Vaughn was fully aware that the sump had no handrail before he went up the ladder and that he fully understood the risk of being on the sump without a handrail such that he really could have voluntarily undertaken the task of installing the pipe even in spite of the danger.[239]

Accordingly, the *Vaughn* court held that questions of fact existed "relating to whether Vaughn incurred the risk, and, therefore, summary judgment is not

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234. *Id.*
235. *Id.* at 1132.
236. *Id.* at 1131.
237. *Id.* at 1132.
238. 555 N.E.2d 1379 (Ind. Ct. App. 1990).
239. *Vaughn*, 777 N.E.2d at 1132.

appropriate.[240]

It is important to note here that, in discussing the incurred risk defense, the *Vaughn* court wrote that Indiana Code section 34-20-6-3 "provides a *complete defense* where a plaintiff incurs the risks associated with the use of a product."[241] The use of the term "complete" is not insignificant. A "complete" defense in this context is one that, if the requirements to establish it are met, relieves a defendant of liability and automatically eliminates any need for fault allocation. Incurred risk, misuse, and alteration/modification were "complete" defenses to IPLA claims before the 1995 amendments.[242]

As the *Vaughn* court seems to have recognized, incurred risk should remain a complete defense. When the General Assembly amended in 1995 what is now Indiana Code section 34-20-6-3(3), it eliminated the word "unreasonably" from the phrase that previously read "nevertheless proceeded 'unreasonably' to make use of the product." The language choice tends to support the proposition that incurred risk is not subject to fault apportionment. In addition, and perhaps even more compelling, is the fact that the definition of "fault" for cases governed by the Comparative Fault Act includes a plaintiff's assumed or incurred risk, whereas the definition of "fault" for purposes of the IPLA does not.[243] It follows, therefore, that an IPLA plaintiff's incurred risk, because it is not "fault" under the IPLA, should not be subject to fault apportionment.

In addition to *Vaughn*, the opinion by the court of appeals in *Hopper v. Carey* provides support for the proposition that incurred risk remains a complete defense in Indiana.[244]

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240. *Id.*

241. *Id.* at 1130 (emphasis added).

242. *E.g.*, Estrada v. Schmutz Mfg. Co., 734 F.2d 1218 (7th Cir. 1984) (misuse); Foley v. Case Corp., 884 F. Supp. 313 (S.D. Ind. 1994) (modification/alteration); Perdue Farms, Inc. v. Pryor, 646 N.E.2d 715 (Ind. Ct. App. 1995) (incurred risk).

243. Indiana Code section 34-6-2-45(b) defines "fault" for cases governed by the Comparative Fault Act and includes within that definition the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." IND. CODE § 6-2-45(b) (1999). Indiana Code section 34-6-2-45(a) defines "fault" for cases governed by the IPLA, and, although it tracks the definition in section (b) closely, conspicuously eliminates any reference to assumption of risk and incurred risk. "Fault" for purposes of the IPLA means:

> [A]n act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes . . . [u]nreasonable failure to avoid an injury or to mitigate damages and [a] finding under IC 34-20-2 . . . that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.

Id. § 34-6-2-45(a).

244. 716 N.E.2d 566, 576 (Ind. Ct. App. 1999) (quoting Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 441 (Ind. 1990)) ("'[E]ven if a product is sold in a defective condition unreasonably dangerous, recovery *will be denied* an injured plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily accepted the risk.'") (emphasis added).

B. Misuse

Indiana Code section 34-20-6-4 provides that "[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party."[245] Knowledge of a product's defect is not an essential element of establishing the misuse defense.

As noted above, the facts necessary to prove the defense of "misuse" many times will be similar or identical to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers[246] or the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable,[247] or both. Thus, in Indiana there are at least three separate statutory standards that might bar liability when injury results from a set of circumstances related to uses that are not reasonably expectable or foreseeable.[248]

Misuse also was an issue in the *Vaughn* case discussed at length earlier in this survey.[249] The trial court found that even if the coal sump could be considered a product, Vaughn's injuries "were caused by his misuse of the sump, because he knew of and appreciated the risk of falling when working at heights, but failed to use the sump in a foreseeable manner."[250] The trial court also found that Vaughn misused the sump to the extent that it was not foreseeable for Daniels to expect that Vaughn would "'fail to [properly secure himself] when working at heights and for a bolt to 'foul' in the steel of the pipe [Vaughn] was attempting to maneuver into place.'"[251] Daniels pointed to evidence in the record

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245. IND. CODE § 34-20-6-4 (1999).

246. *See id.* § 34-20-4-1(1).

247. *See id.* § 34-20-4-3.

248. *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002), illustrates how a set of facts can be analyzed to deny recovery using Indiana Code section 34-20-4-1(1), Indiana Code section 34-20-4-3, or Indiana Code section 34-20-6-4. Recall that the *Burt* case is the one in which the plaintiff was injured by a circular saw's blade guard. The district court held that there was

> no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly attached. To the contrary, the evidence suggest[ed] that the accident was unforeseeable, caused by a very unusual set of factual circumstances.

Burt, 212 F. Supp. 2d at 898. Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law. *Id.* That being the case, the statutory definition in Indiana Code § 34-20-4-1(1) had not been met and the defense of "misuse" in Indiana Code § 34-20-6-4 had been established. *Id.*

249. 777 N.E.2d 1110 (Ind. Ct. App. 2002).

250. *Id.* at 1129.

251. *Id.* at 1130 (quoting Appellant Br.).

confirming that the coal sump at issue was typical of sump designs being utilized in Indiana and across the country, that the purpose of such a sump was to provide a feed to the heavy media cyclone pump, that Vaughn was not using the sump for its intended use at the time he was injured, and that the sump was not capable of being operated for its intended purpose during installation at the time when Vaughn was injured.[252]

Vaughn countered by arguing that "the mere fact the blueprints show that a ladder allowed access into the sump means that he was using the sump in a foreseeable manner."[253] Vaughn also pointed to his own deposition to the effect that other sites utilizing sumps had steel overhead from which hangers could be used to hold the pipe during installation. Vaughn's expert added that "'The design of the facility to house the heavy media sump did not include a beam to suspend a chain hoist to afford safe assembly and maintenance disassembly of heavy and long pipe components' . . . ."[254]

The court of appeals reversed the trial court's misuse decision on these facts, concluding that an issue of fact existed with respect to misuse:

> Although we are of the opinion that it was foreseeable that workers would be on the sump based on the presence of the ladder, there is conflicting evidence as to the manner in which the pipe was being installed while Vaughn and the other workers were on the top of the sump and whether such use constituted misuse.[255]

Another misuse case is *Barnard v. Saturn Corp.*,[256] a wrongful death action against the manufacturers of an automobile and its lift jack.[257] Plaintiff's decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. The jack gave way, trapping the decedent underneath the car.[258] Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow.[259] For example, the decedent failed to block the tires while he used the jack, he used the jack when the vehicle was not on a flat surface, and he got underneath his vehicle while it was raised on the jack—all of these actions were contrary to the warnings provided by the manufacturers.[260] The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed.

The *Barnard* court first concluded that product misuse is not a complete bar to recovery in an action brought pursuant to the IPLA: "[W]e believe that the defense of misuse should be compared with all other fault in a case and does not

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252. *Id.* at 1129-30.
253. *Id.*
254. *Id.*
255. *Id.*
256. 790 N.E.2d 1023 (Ind. Ct. App. 2003).
257. *Id.* at 1026-27.
258. *Id.*
259. *Id.* 1026.
260. *Id.* at 1030.

act as a complete bar to recovery in a products liability action."[261] The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed.[262] "By specifically directing the jury to compare all 'fault' in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme."[263] Notwithstanding that conclusion, the *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that "no reasonable trier of fact could find that [the Decedent] was less than fifty percent at fault for his injuries."[264]

Barnard adds yet another case to the conflict among published decisions with respect to whether product misuse is a "complete" defense that relieves a defendant of liability, automatically eliminating any need for fault allocation.[265] Two cases, *Indianapolis Athletic Club v. Alco Standard Corp.*[266] and *Morgen v. Ford Motor Co.*,[267] have held that a misuse is a "complete" defense under the IPLA. Indiana courts view the "misuse" defense as "complete" because the existence of facts giving rise to the defense amounts to an unforeseeable intervening cause that relieves the manufacturer of liability as a matter of law.[268] *Barnard* joins a Seventh Circuit decision, *Chapman v. Maytag Corp.*,[269] in determining that "misuse" of a product falls within the scope of the IPLA's definition of "fault."[270] The *Chapman* court concluded that because a jury is directed to compare all "fault" in a case, the district court did not abuse its discretion in determining that the IPLA requires "misuse" be part of the comparative fault analysis and not a complete defense.[271]

The debate is interesting. The 1995 amendments to the IPLA changed Indiana law with respect to fault allocation and distribution in product liability cases. Indeed, the Indiana General Assembly provided that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to Indiana Code section 34-20-8-1, nor can a defendant "be held jointly liable for damages attributable to the fault of another defendant."[272] In addition, the IPLA now requires the trier of fact to compare the "fault" (as the term is defined by statute) "of the person suffering the physical harm, as well as the 'fault' of all others who caused or contributed to cause the

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261. *Id.* at 1029.

262. *Id.* at 1030.

263. *Id.*

264. *Id.* at 1031.

265. Before the 1995 amendments to the IPLA, misuse was a "complete" defense. *E.g.*, Estrada v. Schmutz Mfg. Co., 734 F.2d 1218 (7th Cir. 1984).

266. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

267. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002).

268. *Id.*

269. 297 F.3d 682 (7th Cir. 2002).

270. *Id.* at 689.

271. *Id.*

272. IND. CODE § 34-20-7-1 (1998).

harm. . . ."[273] The IPLA mandates that

> [i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.[274]

The statutory definition of "misuse" seems to consider only the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser's conduct. That would tend to explicitly demonstrate that "misuse" is not "fault." The district judge in *Chapman* recognized as much. The judge also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement and a plaintiff's misuse arguably falls within Indiana Code section 34-6-2-45(a)'s definition of "fault."

That the General Assembly may not have overtly indicated that it intended to exempt misuse from the scope of the comparative fault requirement does not necessarily mean that it is exempted. After all, it would seem equally likely that the legislature's silence on the matter indicates an implicit recognition that the "complete" nature of the pre-1995 product liability defenses was to remain that way notwithstanding the introduction of some comparative fault principles *vis-a-vis* defendants and non-parties.

The split in authority will be difficult to resolve without some policy input from the Indiana General Assembly. In the interim, however, it is clear that courts are filling in the blank as best they can absent clear legislative direction.

C. Modification and Alteration

Indiana Code section 34-20-6-5 provides that

> [i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the modification or alteration is the proximate case of the physical harm where the modification or alteration is not reasonably expectable to the seller.[275]

Although this survey Article does not address in detail any modification or alteration cases, practitioners should recognize that the alteration defense examines the change in condition of a product *after* delivery to the initial user or consumer. In this context, it is important to recognize that Indiana Code section 34-20-2-1(3) also incorporates the idea of "substantial alteration." Chapter 2-1(3) establishes a threshold element of proof an IPLA claimant must affirmatively satisfy in order to state a *prima facie* IPLA claim—specifically, that

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273. *Id.* § 34-20-8-1(a).

274. *Id.* § 34-20-8-1(b).

275. *Id.* § 34-20-6-5.

the product is expected to and does reach the user or consumer without substantial alteration in its condition after it is sold by the manufacturer or seller. It certainly appears as though, in the context of chapter 2-1(3), the General Assembly intended the phrase "user or consumer" to mean "initial" user or consumer. If that is, indeed, a correct assumption, then chapter 2-1(3) and chapter 6-5 are intended to apply to two different factual scenarios (chapter 2-1(3) to alterations that occur between time of sale and delivery to the initial user or consumer and chapter 6-5 to alterations that occur between delivery to the initial user or consumer and injury).

CONCLUSION

The 2003 survey period joins the 2002 survey period in illustrating that there are some important policy decisions that the IPLA has not resolved. Courts are doing their part to make those decisions absent more clear legislative directive. The coming years promise to remain interesting for product liability practitioners.