SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2008 survey period[1] produced some thought-provoking opinions for practitioners and judges who handle product liability litigation in Indiana. Indeed, the decisions rendered during this survey period raise nearly as many questions as they resolve, particularly when it comes to the intended scope of the Indiana Product Liability Act (IPLA).[2] This Survey does not attempt to address in detail all of the cases decided during the survey period.[3] Rather, it examines

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1. The survey period is October 1, 2007, to September 30, 2008.

2. This 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. Courts issued several important opinions in cases in which the theory of recovery was related to or in some way based upon "product liability" principles, but the appellate issue did not involve a question implicating substantive Indiana product liability law. Those decisions are not addressed in detail here because of space constraints, even though they may be interesting to Indiana product liability practitioners. *See generally* Ebea v. Black & Decker, Inc., No. 1:07-cv-1146-DFH-TAB, 2008 U.S. Dist. LEXIS 35833 (S.D. Ind. May 1, 2008) (denying a motion to dismiss based on Indiana's Worker's Compensation Act where defendant argued that the statute provided the employee with exclusive remedy for work related injuries); Kazmer v. Bayer Healthcare Pharm., Inc., No. 2:07-CV-112-TS, 2007 U.S. Dist. LEXIS 85789 (N.D. Ind. Nov. 19, 2007) (involving claims of relation back of amended complaint to correct names of defendants and to add new defendants.); McDaniel v. Synthes, Inc., No. 2:07-CV-245RM, 2007 U.S. Dist. LEXIS 80520 (N.D. Ind. Oct. 20, 2007) (dealing with a removal based on fraudulent joinder of non-diverse in-state defendants and granting a remand); Nature's Link, Inc. v. Przybyla, 885 N.E.2d 709 (Ind. Ct. App. 2008) (granting a new trial for failure of other party to disclose expert witness pursuant to IND. TRIAL RULE 26(E)); Allianz Ins. Co. v. Guidant Corp., 884 N.E.2d 405 (Ind. Ct. App. 2008) (involving an insurance coverage dispute associated with the recall of a medical device used to repair abdominal aortic aneurysms), *trans. denied*, (Ind. Jan. 8, 2009); Fitz v. Rust-Oleum Corp., 883 N.E.2d 1177 (Ind. Ct. App.) (indemnity claim by marketer of spray paint against can

selected cases that discuss important, substantive product liability issues. This Survey also provides some background information, context, and commentary when appropriate.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978.[4] 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.[5] In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.[6]

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.[7] 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 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 users or consumers against manufacturers or sellers for physical harm caused by a product, "regardless of the substantive legal theory or theories upon which the action is brought."[8] When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant who 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";[9] (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";[10] (3) "physical harm caused by a product";[11] (4) a product that is "in a defective condition unreasonably

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manufacturer as a result of an injury caused by a can of spray paint), *trans. denied*, 898 N.E.2d 1228 (Ind. 2008).

4. Act of Mar. 10, 1978, No. 141, § 28, 1978 Ind. Acts 1308, 1308-10.

5. Act of Apr. 21, 1983, No. 297, 1983 Ind. Acts 1814.

6. Act of Apr. 26, 1995, No. 278, §§ 1-7, 1995 Ind. Acts 4051, 4051-56; *see* Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 487 n.2 (Ind. 2001).

7. Act of Mar. 6, 1998, 1998 Ind. Acts 1. The current version of the IPLA is found in Indiana Code sections 34-20-1-1 to -9-1.

8. IND. CODE § 34-20-1-1 (2008).

9. Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." Indiana Code section 34-20-2-1(1) requires that IPLA claimants be in the "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."

10. Indiana Code section 34-20-1-1(2) identifies proper IPLA defendants as "manufacturers" or "sellers." Indiana Code section 34-20-2-1(2) provides the additional requirement that such a manufacturer or seller also be "engaged in the business of selling the product," effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability.

11. IND. CODE § 34-20-1-1(3) (2008).

dangerous to [a] user or consumer" or to his property;[12] and (5) a product that "reach[ed] the user or consumer without substantial alteration in [its] condition."[13] Indiana Code section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements, "regardless of the substantive legal theory or theories upon which the action is brought."[14]

A. "User" or "Consumer"

The language the General Assembly employs in the IPLA is very important when determining who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by "users" and "consumers."[15] For purposes 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.[16]

"User" has the same meaning as "consumer."[17] Several published decisions in

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12. *Id.* § 34-20-2-1.

13. *Id.* § 34-20-2-1(3). Indiana Pattern Jury Instruction 7.03 sets out a plaintiff's burden of proof in a product liability action. It requires a plaintiff to "prove each of the following propositions by a preponderance of the evidence":

> 1. The defendant was a manufacturer of the product [or the part of the product] alleged to be defective and was in the business of selling the product;
> 2. The defendant sold, leased, or otherwise put the product into the stream of commerce;
> 3. The plaintiff was a user or consumer of the product;
> 4. The product was in a defective condition unreasonably dangerous to users or consumers (or to user's or consumer's property);
> 5. The plaintiff was in a class of persons the defendant should reasonably have foreseen as being subject to the harm caused by the defective condition;
> 6. The product was expected to and did reach the plaintiff without substantial alteration of the condition in which the defendant sold the product;
> 7. The plaintiff or the plaintiff's property was physically harmed; and
> 8. The product was a proximate cause of the physical harm to the plaintiff or the plaintiff's property.

IND. PATTERN JURY INSTRUCTIONS—CIVIL § 7.03 (2005).

14. IND. CODE § 34-20-1-1 (2008).

15. *Id.*

16. *Id.* § 34-6-2-29.

17. *Id.* § 34-6-2-147.

recent years construe the statutory definitions of "user" and "consumer."[18]

A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined "user" or "consumer," he or she also must satisfy 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."[19] Thus, the plain language of the statute assumes that a person or entity must already qualify as a "user" or a "consumer" *before* a separate "reasonable foreseeability" analysis is undertaken. In that regard, the IPLA does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product's defective condition if that claimant falls outside of the IPLA's definition of "user" or "consumer."

There were no significant published decisions during the survey period that interpreted the terms "user" or "consumer."[20]

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18. *See* Butler v. City of Peru, 733 N.E.2d 912, 919 (Ind. 2000) (mentioning that a maintenance worker could be considered a "user or consumer" of an 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, 279 (Ind. 1999) (holding that a "user or consumer" includes a distributor who uses the product extensively for demonstration purposes). For a more detailed analysis of *Butler*, see Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001). For a more detailed analysis of *Estate of Shebel*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-36 (2000).

19. Indiana Code section 34-20-2-1 imposes liability 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.

20. During the 2006 survey period, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (West Virginia), Inc.*, 841 N.E.2d 1133 (Ind. 2006). That case helped to further define who qualifies as a "user" or "consumer" for purposes of bringing an action under the IPLA. In that case, Daniels Company (Daniels) designed and built a coal preparation plant at a facility owned by Solar Sources, Inc. (Solar). *Id.* at 1136. Part of the design involved the installation of a heavy media coal sump. *Id.* An out-of-state steel company manufactured the sump that Daniels designed and sent it, unassembled, to the facility. *Id.* Stephen Vaughn worked for the construction company that Daniels hired to install the sump. *Id.* During the installation process, Vaughn climbed onto the top of the sump to help connect a pipe. *Id.* The chain he was using to secure the pipe in place gave way, causing Vaughn to fall and sustain injuries. *Id.* Vaughn did not wear his safety belt when he climbed onto the sump. *Id.* The Indiana Supreme Court held that Daniels could not be liable under the IPLA because Vaughn was not a "user" or "consumer." *Id.* at 1141-43. Because the "product" was not assembled and installed at the time of Vaughn's accident, "neither Vaughn nor anyone else was a user of the product at the time it was still in the process of assembly and installation." *Id.* at

B. "Manufacturer" or "Seller"

For purposes of the IPLA, "'[m]anufacturer' . . . 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."[21] "'Seller' . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption."[22] Indiana Code section 34-20-2-1(2) 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."[23]

Sellers can be held liable as manufacturers in two ways. First, a seller can be held liable as a manufacturer if the seller fits within the definition of "manufacturer" found in Indiana Code section 34-6-2-77(a), which 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 manufacturer.[24]

Second, a seller can be deemed a statutory "manufacturer" and, therefore, be held liable to the same extent as a manufacturer in one other limited circumstance. Indiana Code section 34-20-2-4 provides that a seller may be deemed a "manufacturer" "if the court is unable to hold jurisdiction over a

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1139.

21. IND. CODE § 34-6-2-77 (2008).

22. *Id.* § 34-6-2-136.

23. *Id.* § 34-20-2-1(2); *see, e.g.*, Williams v. REP Corp., 302 F.3d 660, 662-64 (7th Cir. 2002) (recognizing that Indiana Code section 33-1-1.5-2(3), the predecessor to 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, 745-46 (N.D. Ind. 2002) (holding that although the defendant 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 it a "manufacturer" of the plant); *see also* Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1170-72 (2003).

24. IND. CODE § 34-6-2-77(a) (2008).

particular manufacturer" and if the seller is the "manufacturer's principal distributor or seller."[25]

Practitioners also must be aware that when the theory of liability is based upon "strict liability in tort,"[26] Indiana Code section 34-20-2-3 provides that an entity that is merely a "seller" and cannot otherwise be deemed a "manufacturer" is not liable and is not a proper IPLA defendant.[27]

A few recent Indiana decisions have addressed the statutory definitions of "seller" and "manufacturer."[28] The 2008 survey period produced a couple of

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25. *Id.* § 34-20-2-4. *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressing the circumstances under which entities may be considered "manufacturers" or "sellers" under the IPLA. *See also* Goines v. Fed. Express Corp., No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070, at *14-15 (S.D. Ill. Jan. 8, 2002). The court, applying Indiana law, examined the "unable to hold jurisdiction over" requirement of Indiana Code section 34-20-2-4. *Id.* at *9. The plaintiff assumed that "jurisdiction" refers to the power of the court to hear a particular case. *Id.* at *9-10. The defendant argued that the phrase equates to "personal jurisdiction." *Id.* at *12. The court refused to resolve the issue, deciding instead to simply 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.* at *14-15.

26. 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.

27. IND. CODE § 34-20-2-3 (2008). In *Ritchie v. Glidden Co.*, 242 F.3d 713, 725-26 (7th Cir. 2001), the court cited 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.* at 725 (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. *Id.* Indiana Code section 34-20-2-2 makes it clear that "liability without regard to the exercise of reasonable care" (strict liability) applies now only to product liability claims alleging a manufacturing defect theory. Claims alleging design or warning defect theories are controlled by a negligence standard. *See, e.g.*, Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002); *see also* Alberts & Boyers, *supra* note 23, at 1173-75.

28. There have been some important recent decisions in this area. *See* Fellner v. Philadelphia Toboggan Coasters, Inc., No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006) (involving a girl who was killed when she was ejected from a wooden roller coaster operated as an attraction at Holiday World amusement park); Thornburg v. Stryker Corp., No. 1:05-cv-1378-RLY-

federal decisions that are relevant in this area. In the first case, *Mesman v. Crane Pro Services*,[29] John Mesman suffered serious leg injuries when a load of steel sheets fell on him while he was unloading them from a railcar.[30] The plant used a crane to do the unloading.[31] Before the accident, Mesman's employer hired defendant Konecranes, Inc. to rebuild the crane.[32] Konecranes evaluated the design and operation of the crane and made several design changes, including supplementing the controls in the operator's cab with a hand-held remote-control device that the operator could use to control the crane from the ground.[33] On the day of the accident, one of Mesman's co-workers was operating the crane using the remote while Mesman worked in one of the railcars.[34] The co-worker failed to press an emergency stop button on the remote to avert a collision between two parts of the crane.[35] That collision caused the load to fall, resulting in Mesman's injuries.[36]

The trial judge permitted Konecranes to argue that it could not be responsible under the IPLA for liability arising out of the design of the crane because the company had merely "repaired" the crane and, therefore, did not manufacture it.[37] Reviewing that issue on appeal, the Seventh Circuit determined that the trial judge should not have permitted Konecranes to argue that it could not be liable under the IPLA because it did not manufacture the crane.[38] Although it is true that the IPLA does not countenance design defect liability for those persons or entities who merely repair a product, it does recognize design defect liability for those persons or entities who "rebuild" or otherwise engage in efforts to "re-design" a product.[39] The Seventh Circuit believed that the evidence demonstrated unequivocally that "Konecranes rebuilt the crane, [specifically] altering its design to enable it to be operated from ground level rather than just from the overhead cab."[40] As such, Konecranes should not have been allowed to argue that it could avoid IPLA liability under the circumstances.[41]

TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006) (involving a plaintiff who filed product liability and medical malpractice claims after hip replacement surgery).

29. 512 F.3d 352 (7th Cir. 2008).

30. *Id.* at 353.

31. *Id.*

32. *Id.*

33. *Id.* The precise changes that Konecranes made are discussed in detail *infra* Part I.D.2.

34. *Id.* at 354.

35. *Id.*

36. *Id.*

37. *Id.* at 356.

38. *Id.*

39. *Id.* (citing Richardson v. Gallo Equip. Co., 990 F.2d 330 (7th Cir. 1993); Lenhardt Tool & Die Co. v. Lumpe, 703 N.E.2d 1079, 1085 (Ind. Ct. App. 1998)).

40. *Id.*

41. *Id.* Interestingly, the court found that the trial court's error in permitting Konecranes to argue it was not liable because it merely "repaired" the crane was "inconsequential" because the plaintiffs were also allowed to pursue a "common law negligence" claim. *Id.* We discuss that

Another federal case, *LaBonte v. Daimler-Chrysler* (*LaBonte II*),[42] provides some additional guidance for practitioners in this area.[43] Kelly LaBonte was killed in an automobile accident on May 29, 2005, while driving a 1996 Jeep Grand Cherokee.[44] Plaintiff claimed that during the accident the seatbelt retractor unlocked, permitting the seatbelt to spool out.[45] A label on the seatbelt webbing read that the restraint was manufactured by AlliedSignal on April 4, 1996.[46]

Plaintiff sued Daimler-Chrysler and Key Safety Systems alleging, among other things, that Key was the manufacturer of the seatbelt.[47] Key, however, did not even begin manufacturing seat belts until more than a year after the seat belt at issue was manufactured.[48] It was at that time that Key's predecessor, Breed Technologies, Inc.,[49] purchased certain assets from AlliedSignal.[50] As part of the purchase of AlliedSignal's assets, Key agreed to assume some of AlliedSignal's potential liabilities.[51] Roughly two years after it purchased the assets from AlliedSignal, Key filed for bankruptcy reorganization under Chapter XI. In the proceeding, Key discharged any claim that arose from any agreement entered before its bankruptcy confirmation order.[52] In its reorganization plan, Key did not affirm any of the potential liabilities assumed or contemplated in the AlliedSignal asset purchase agreement.[53] Key moved for summary judgment

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portion of the court's analysis *infra* Part I.E.

42. No. 3:07-CV-232-TS, 2008 WL 513319 (N.D. Ind. Feb. 22, 2008).

43. To fully understand *LaBonte*, there are two decisions that must be reviewed and considered. The first, *LaBonte v. Daimler-Chrysler* (*LaBonte I*), No. 3:07-CV-232-TS, 2008 U.S. Dist. LEXIS 11384 (N.D. Ind. Feb. 14, 2008) (*LaBonte I*), was decided on February 14, 2008. The second, *LaBonte v. Daimler-Chrysler* (*LaBonte II*), No. 3:07-CV-232-TS, 2008 WL 513319 (N.D. Ind. Feb. 22, 2008), was decided on February 22, 2008. In *LaBonte I*, the court denied Key Safety Systems summary judgment motion without prejudice because, even though unopposed, the court was not satisfied that Key could not be liable as a successor manufacturer to AlliedSignal. *LaBonte I*, 2008 U.S. Dist. LEXIS 11384, at *7-13. On rehearing in *LaBonte II*, however, the court granted Key's motion. *LaBonte II*, 2008 WL 513319, at *1-2.

44. *LaBonte II*, 2008 WL 513319, at *1.

45. *LaBonte I,* 2008 U.S. Dist. LEXIS 11384, at *5.

46. *Id.*

47. *Id.* at *2.

48. *Id.* at *5-6.

49. In 2003, Breed Technologies, Inc., changed its name to Key Safety Systems, Inc. *Id.* at *6. Even though some of the events pertinent to the court's decision occurred prior to Breed Technologies changing its name to Key Safety Systems, for the sake of consistency and easier comprehension, the authors have used Key throughout the discussion. The name change was not significant to the court's analysis or decision.

50. *Id.* at *5.

51. *Id.*

52. *Id.* at *5-6.

53. *Id.*

asserting that it was not the manufacturer of the seat belt.[54] The court quoted the definition of manufacturer from the IPLA[55] and easily determined that Key was not the manufacturer of the seat belt because it was manufactured over eighteen months before Key entered the occupant restraint manufacturing business.[56] Nonetheless, the court analyzed whether Key could be liable as a successor to the original manufacturer, AlliedSignal.

Initially, the court noted that when one corporation purchases the assets of another, the purchaser does not assume the debts and liabilities of the seller unless one of four exceptions recognized under Indiana law creating successor liability exists.[57] The four exceptions to Indiana's general rule of non-liability are: (1) an implied or express agreement to assume the obligation; (2) a fraudulent sale to escape liability; (3) a de facto consolidation or merger; and, (4) where the purchase was a mere continuation of the seller.[58] The court noted that the first exception applied because Key agreed to accept liability in its purchase agreement with AlliedSignal; however, because of Key's bankruptcy, the bankruptcy court had discharged any liability Key agreed to bear in the purchase agreement years earlier.[59] The discharge, however, had no impact on the three remaining exceptions.[60] Key's summary judgment filings did not discuss, and no evidence was designated to address, the remaining three exceptions.[61] Thus the court could not conclude on the record it had before it that none of the other exceptions applied.[62] Therefore, the court denied Key's motion, but allowed it to refile a second motion addressing the other exceptions to the general rule of successor non-liability.[63]

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54. *Id.* at *1.

55. Indiana Code section 34-6-2-77 defines a manufacturer as "a person or 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."

56. *LaBonte I*, 2008 U.S. Dist. LEXIS 11384, at *7.

57. *Id.* at *7-8 (citing Guerrero v. Allison Engine Co., 725 N.E.2d 479, 482 (Ind. Ct. App. 2000)).

58. *Id.* at *8 (citing *Guerrero*, 725 N.E.2d at 482).

59. *Id.*

60. The three exceptions not addressed were: (1) a fraudulent sale to escape liability; (2) a de facto consolidation or merger; and, (3) where the purchase was a mere continuation of the seller.

61. *Id.* at *8-9.

62. *Id.* at *9. Key also argued that the bankruptcy discharge prevented it from being sued as AlliedSignal's successor. *Id.* The court did not agree. *Id.* at *9-10. It concluded that Key's argument was inconsistent with *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000), because ordinary tort victims have no claim, for bankruptcy purposes, until an injury occurs. *Id.* at *10-12. And, the court reasoned, the case before it was not a mass tort situation where, even though the claim may not have been ripe when the bankruptcy was filed, the bankruptcy proceeding nevertheless discharged the claim. *Id.* at *11-12. Instead, the plaintiff did not have a claim when Key filed for bankruptcy so the estate's claim was not discharged. *Id.* at *12.

63. *Id.* at *12-13.

Five days later, Key filed a motion to reconsider.[64] This time Key designated evidence that AlliedSignal, the corporation from whom Key purchased assets to enter the occupant restraint business and who made the seat belt years prior to Ms. LaBonte's death, was a solvent Delaware corporation.[65] The court noted that the exceptions to the general rule of non-liability of a successor corporation require that the predecessor corporation cease to exist.[66] The court first noted that it had earlier determined that Key was not the manufacturer and that any obligation to assume liability through the asset purchase agreement was discharged in the bankruptcy proceeding.[67] It then reasoned that because AlliedSignal continued to exist, Key could not be liable as its successor corporation.[68] Because Key was neither the manufacturer of the seat belt nor liable as a successor corporation to the manufacturer, it was entitled to judgment as a matter of law and the court entered final judgment in its favor.[69]

C. Physical Harm Caused by a Product

For purposes of the IPLA, "'[p]hysical harm' . . . means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property."[70] It "does not include gradually evolving damage to property or economic losses from such damage."[71]

For purposes of the IPLA, "'[p]roduct . . . means any item or good that is personalty at the time it is conveyed by the seller to another party."[72] "The term does not apply to a transaction that, by its nature, involves wholly or

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64. LaBonte v. Daimler-Chrysler (*LaBonte II*), No. 3:07-CV-232-TS, 2008 WL 513319, at *1 (N.D. Ind. Feb. 22, 2008).

65. *Id.* at *1-2.

66. *Id.* at *1 (quoting Guerrero v. Allison Engine Co., 725 N.E.2d 479, 482 (Ind. Ct. App. 2000)).

67. *Id.*

68. *Id.* at *2.

69. *Id.*

70. IND. CODE § 34-6-2-105(a) (2008).

71. *Id.* § 34-6-2-105(b); *see, e.g.*, Miceli v. Ansell, Inc., 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (denying a motion to dismiss a case determining that Indiana recognizes that pregnancy may be considered a "harm" in certain circumstances); Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492, 493 (Ind. 2001) (holding that "personal injury and damage to other property from a defective product are actionable under the [IPLA], but their presence does not create a claim under the Act for damage to the product itself"); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 486 (Ind. 2001) (holding that there is no recovery under the IPLA where a claim is based on damage to the defective product itself); *see also* Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc., No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830, at *2 (S.D. Ind. Apr. 29, 2002) (holding that there was no recovery under the IPLA in a case involving a motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

72. IND. CODE § 34-6-2-114(a) (2008).

predominantly the sale of a service rather than a product."[73]

D. Defective and Unreasonably Dangerous

Only products that are in a "defective condition" are subject to IPLA liability.[74] 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 or consumption.[75]

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.[76]

Claimants in Indiana may prove that a product is in a "defective condition" by asserting one or a combination of three theories: (1) the product has a defect in its design (a "design defect"); (2) the product lacks adequate or appropriate warnings (a "warning defect"); or (3) the product has a defect that is the result of a malfunction or impurity in the manufacturing process (a "manufacturing defect").[77]

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73. *Id.* § 34-6-2-114(b). Although it is a "not for publication" memorandum decision, *Fincher v. Solar Sources, Inc.*, No. 42A01-0701-CV-25, 2007 WL 1953473 (Ind. Ct. App.) (mem.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007), is an opinion that was rendered during the 2007 survey period to which practitioners may look for additional guidance about what is and what is not a "product" for purposes of the IPLA. In *Fincher*, the plaintiff was a truck driver who was injured in an accident while hauling coal sludge. *Id.* at *1. Coal sludge has a wet consistency and is comprised of the fine particulate matter that remains after raw coal is mined and put through a washing process. *Id.* A panel of the Indiana Court of Appeals unanimously agreed that coal sludge was not a product under the IPLA. *Id.* at *6. According to the *Fincher* court,

> The coal sludge in question is a waste by-product of a coal mining operation. It is trash. The coal sludge was not marketable or ever in a marketed state. It was not sold or being transported to a consumer. It was being transported to a disposal site. It was also never intended for consumption or for any use by any consumer.

Id.

74. IND. CODE § 34-20-2-1(1) (2008); *see also* Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc., No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006).

75. IND. CODE § 34-20-4-1 (2008).

76. *See* Baker v. Heye-Am., 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003) ("[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous." (citing Cole v. Lantis Corp., 714 N.E.2d 194, 198 (Ind. Ct. App. 1999))).

77. *See* First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 689 (7th Cir. 2004); *Westchester Fire Ins. Co.*, 2006 WL 3147710, at *5; *Baker*, 799 N.E.2d at 1140; Natural Gas Odorizing, Inc. v. Downs, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997). Additional authority is found in *Troutner v. Great Dane Ltd. Partnership*, No. 2:05-CV-040-PRC,

Although claimants are free to assert any of those three theories for proving that a product is in a "defective condition," the IPLA provides explicit statutory guidelines identifying when products are not defective as a matter of law. 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]."[78] In addition, 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."[79]

In addition to the two specific statutory pronouncements identifying when a product is not "defective" as a matter of law, Indiana law also defines when a product may be considered "unreasonably dangerous" for purposes of the IPLA. A product is "unreasonably dangerous" only if its use "exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary consumer who purchases [it] with the ordinary knowledge about the product's characteristics common to the community of consumers."[80] A product is not

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2006 WL 2873430 (N.D. Ind. Oct. 5, 2006), which confirms that a plaintiff's product liability claim will fail as a matter of law if he or she does not articulate a legitimate manufacturing, design, or warning defect. In that case, the plaintiff was a semi-truck driver who fell and suffered head injury when a grab bar mounted on his trailer gave way. *Id.* at *1. The plaintiff sued the companies that manufactured and sold the trailer and the grab bar, alleging that they placed a trailer with a grab bar into the stream of commerce in a defective and unreasonably dangerous condition. *Id.* The case was removed to federal court, and both manufacturing defendants moved for summary judgment, pointing out that "plaintiff's own expert . . . testified that the most likely cause of the failure of the grab bar was inadequate and negligent maintenance." *Id.* at *3. The plaintiff did not file a response to either motion. *Id.* at *1. Because, under such circumstances, no reasonable jury could find for plaintiff on the product liability claims, the court granted summary judgment. *Id.* at *3.

78. IND. CODE § 34-20-4-3 (2008). One recent case discussing "reasonably expectable use" is *Hunt v. Unknown Chemical Manufacturer No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at *28-32 (S.D. Ind. Nov. 5, 2003). In *Hunt*, a homeowner tore down and burned a deck that was made from lumber treated with chromium copper arsenate. *Id.* at *3-4. He spread the ashes as fertilizer in the family garden. *Id.* at *4. Later tests of the soil in the garden revealed elevated levels of arsenic. *Id.* Judge Larry McKinney held that the homeowner could not pursue product liability claim because his use of the lumber was not, legally speaking, foreseeable, intended, or expected.. *Id.* at *27-37.

79. IND. CODE § 34-20-4-4 (2008).

80. *Id.* § 34-6-2-146; *see also Baker*, 799 N.E.2d at 1140; Cole v. Lantis Corp., 714 N.E.2d 194, 199 (Ind. Ct. App. 1999). In *Baker*, a panel of the Indiana Court of Appeals wrote that "[t]he question whether a product is unreasonably dangerous is *usually* a question of fact that must be resolved by the jury." 799 N.E.2d at 1140 (emphasis added) (citing Vaughn v. Daniels Co. (W. Va.), Inc., 777 N.E.2d 1110, 1128 (Ind. Ct. App. 2002), *vacated*, 841 N.E.2d 1133 (2006)). Those panels also seem to favor jury resolution in determining reasonably expected use. Indeed, the *Baker* opinion states that

> reasonably expectable use, like reasonable care, involves questions concerning the

unreasonably dangerous as a matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.[81]

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a "defective condition," recent decisions have quite clearly recognized that the substantive defect analysis (i.e., whether a design was inappropriate or whether a warning was inadequate) should *follow* a threshold analysis that first examines whether, in fact, the product at issue is "unreasonably

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> ordinary prudent person, or in the case of products liability, the ordinary prudent consumer. The manner of use required to establish "reasonably expectable use" under the circumstances of each case is a matter peculiarly within the province of the jury.

Id. (citing *Vaughn*, 777 N.E.2d at 1128).

It would seem incorrect, however, to conclude from those pronouncements that there exists something akin to a presumption that juries always *should* resolve whether a product is unreasonably dangerous or whether a use is reasonably expectable. Indeed, recent cases have resolved 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*., 212 F. Supp. 2d 893 (N.D. Ind. 2002), 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." *Id.* at 895. With respect to the defective 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. *Id.* at 900. 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." *Id.*; *see also* Miller v. Honeywell Int'l, Inc., No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *1-4 (S.D. Ind. Oct. 15, 2002) (holding that Honeywell's design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time the specifications were introduced into the stream of commerce).

81. *See Baker*, 799 N.E.2d at 1140; *see also* Moss v. Crosman Corp., 136 F.3d 1169, 1174 (7th Cir. 1998) (writing that a product may be "dangerous" in the colloquial sense, but not "unreasonably dangerous" for purposes of IPLA liability). An open and obvious danger negates liability. "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." *Hughes v. Battenfeld Glouchester Eng'g Co.*, No. TH 01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at *7-8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 199). In *Hughes*, the plaintiff injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station. *Id.* at *2-3. Plaintiff admitted that he knew about the dangers associated with using the nip station because he was aware of reports by co-workers who were injured performing similar tasks. *Id.* at *4. Plaintiff 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. *Id.* at *4. Judge Tinder held that the dangerous condition of the nip station was open and obvious as a matter of law and entered summary judgment. *Id.* at *17.

dangerous."[82]

The IPLA provides that liability attaches for placing a product in a "defective condition"[83] in the stream of commerce 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."[84] What the IPLA bestows, however, in terms of liability despite the exercise of "all reasonable care [i.e., fault]," it then removes for design and warning defect cases, replacing it with a negligence standard:

> [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.[85]

The statutory language therefore imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the "exercise of all reasonable care") only for those claims relying upon a manufacturing defect theory.[86] Thus,

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82. Indeed, in *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1 (S.D. Ind. July 20, 2005), *aff'd*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect) and *Conley v. Lift-All Co*., No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *1 (S.D. Ind. July 25, 2005) (involving an alleged warnings defect), Judge Hamilton followed that precise approach.

83. IND. CODE § 34-20-2-1(1) (2008).

84. *Id.* § 34-20-2-2.

85. *Id.*

86. *See* Mesman v. Crane Pro Servs., 409 F.3d 846, 849 (7th Cir. 2005) ("Under Indiana's products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design."); First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 690 n.4 (7th Cir. 2004) ("Both Indiana's 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles."); *Conley*, 2005 U.S. Dist. LEXIS 15468, at *12-13 ("The IPLA effectively supplants [the plaintiff's] common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff's common law claims will therefore be treated as merged into the IPLA claims."); *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 ("[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence."), *aff'd*, 452 F.3d 632 (7th Cir. 2006); *see also* Miller v. Honeywell Int'l Inc., No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002), *aff'd*, 2004 U.S. Dist. LEXIS 15261 (7th Cir. July 26, 2004); Burt v. Makita, USA, Inc., 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); Birch v. Midwest Garage Door Sys., 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

just as in any other negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements—duty, breach, injury, and causation.[87]

Despite the IPLA's unambiguous language and several years worth of authority recognizing that "strict liability" applies only in cases involving alleged manufacturing defects, some courts unfortunately continue to employ the term "strict liability" when referring to IPLA claims, even when those claims allege warning and design defects and clearly accrued after the 1995 IPLA amendments took effect.[88] That disturbing trend continued in the 2008 survey period, as demonstrated by the case of *Kovach v. Alpharma, Inc.*,[89] in which the parents of a child who died from an overdose of codeine following surgery sued the manufacturers and sellers of the cup used to dispense the codeine.[90] The Indiana Supreme Court granted transfer in *Kovach* on February 27, 2009. We nevertheless analyze the decision in this Survey because the issues involved may be important to Indiana judges and practitioners as they await a decision from the Indiana Supreme Court.

In *Kovach*, the child's parents asserted, among other claims, an IPLA-based "strict liability in tort" claim and an IPLA-based "negligence" claim against the cup manufacturer and seller.[91] The trial court granted summary judgment to the cup manufacturer and seller as to each of the claims, presumably because it found insufficient evidence to sustain a verdict that the cup was defective and/or unreasonably dangerous.[92]

Although the *Kovach* majority opinion indicates that the plaintiffs chose "to

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87. *E.g.*, *Conley*, 2005 U.S. Dist. LEXIS 15468, at *13-14 ("To withstand summary judgment, [the plaintiff] must come forward with evidence tending to show: (1) [the defendant] had a duty to warn the ultimate users of its sling that dull or rounded load edges could cut an unprotected sling; (2) the hazard was hidden and thus the sling was unreasonably dangerous; (3) [the defendant] failed to exercise reasonable care under the circumstances in providing warnings; and (4) [the defendant's] alleged failure to provide adequate warnings was the proximate cause of his injuries.").

88. *See, e.g.*, Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt*, 212 F. Supp. 2d at 900; *see also* Fellner v. Phila. Toboggan Coasters, Inc., No. 3:05-CV-218-SEB-WGH, 2006 WL 2224068, at *1, *4 (S.D. Ind. Aug. 2, 2006); Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc., No. 4:05 CV 49, 2006 WL 299064, at *2-3 (N.D. Ind. Feb. 7, 2006); Vaughn v. Daniels Co. (W. Va.), Inc., 841 N.E.2d 1133, 1138 (Ind. 2006).

89. 890 N.E.2d 55 (Ind. Ct. App. 2008), *trans. granted*, (Ind. Feb. 27, 2009).

90. *Id.* at 61.

91. *Id.*

92. *Id.* We presume from the surrounding context that the trial court so found. Because the court of appeals described the trial court as having "summarily" granted summary judgment without any findings of fact or conclusions of law, *id.* at 65, the opinion is devoid of specific reasoning for the trial court's decision to grant summary judgment. We also note here that the cup manufacturers and sellers cross-appealed, arguing that the trial court erred by denying a motion to exclude the opinion testimony of plaintiffs' expert witness. *Id.* at 61. The court's discussion of that issue is addressed *infra* Part I.D.1.

proceed under both the theory of strict liability in tort and negligence,"[93] there is no indication in the opinion that the operative theory for proving product defect was anything other than failure to warn. The opinion addresses only claims alleging failure to warn.[94] If, indeed, it is true that plaintiffs were not pursuing a manufacturing defect theory in the trial court, then there is simply no operative theory in the case to which strict liability would have applied because, as noted above, Indiana Code sections 34-20-2-1 and 34-20-2-2 make it clear that only manufacturing defect theories are subject to strict liability.[95]

This Survey addresses in detail a handful of cases in which plaintiffs attempted to demonstrate products were defective and unreasonably dangerous by utilizing warning, design, and manufacturing defect theories.

1. Warning Defect Theory.—The IPLA contains a specific statutory provision covering the warning defect theory, which reads as follows:

> 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.[96]

In failure to warn cases, the "unreasonably dangerous" inquiry is essentially the same as the requirement that the defect be latent or hidden.[97]

Indiana courts have been active in recent years in deciding cases espousing warning defect theories. Some of those cases include: *Ford Motor Co. v.*

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93. *Kovach*, 890 N.E.2d at 66.

94. *Id.* at 66-67.

95. Although this point is made in more detail below, *see infra* Part I.D.1, it also bears pointing out here that the majority's opinion ultimately concludes that the cup "was defective in its design by failing to include a warning." *Kovach*, 890 N.E.2d at 67. That statement is confusing and unfortunate. As described above, failure to warn and improper design are two different theories, each of which can be used independently to establish that a product was in a defective condition for purposes of the IPLA. Under the IPLA, a product that is judged not to contain an appropriate warning is not, by virtue of that fact alone, a defectively designed product. As also described below, the elements required in Indiana to prove a design defect theory under the IPLA are different from those required to prove a failure to warn theory.

96. IND. CODE § 34-20-4-2 (2008); *see also* Deaton v. Robison, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008); Coffman v. PSI Energy, Inc., 815 N.E.2d 522, 527 (Ind. Ct. App. 2004) (both noting the standard for proving a warning defect case).

97. *See* First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 690 n.5 (7th Cir. 2004). For a more detailed analysis of *Inlow II*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1221-27 (2005).

Rushford;[98] *Tober v. Graco Children's Products, Inc.*;[99] *Williams v. Genie Industries, Inc.*;[100] *Conley v. Lift-All Co.*;[101] *First National Bank & Trust Corp. v. American Eurocopter Corp.* (*Inlow II*);[102] and *Birch v. Midwest Garage Door Systems*.[103]

The 2008 survey period revealed that federal and state courts in Indiana are as busy as ever when it comes to addressing issues in cases involving allegedly defective warnings and instructions. Indeed, three cases are noteworthy here.

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98. 868 N.E.2d 806 (Ind. 2007). For more detailed discussion and commentary about *Rushford*, see Joseph R. Alberts, James Petersen & Robert B. Thornburg, *Survey of Recent Developments in Indiana Product Liability Law*, 41 IND. L. REV. 1165, 1184-87 (2008).

99. 431 F.3d 572 (7th Cir. 2005). For more detailed discussion and commentary about *Tober*, see Joseph R. Alberts & James Petersen, *Survey of Recent Developments in Indiana Product Liability Law*, 40 IND. L. REV. 1007, 1028-30 (2007).

100. No. 3:04-CV-217 CAN, 2006 WL 1408412 (N.D. Ind. May 19, 2006). For more detailed discussion and commentary about *Williams*, see Alberts & Petersen, *supra* note 99, at 1032-33.

101. No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005).

102. *Inlow II*, 378 F.3d 682, *aff'g In re* Inlow Accident Litig. (*Inlow I*), No. IP 99-0830-C H/K, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002). In the *Inlow* cases, a helicopter rotor blade struck and killed the Conseco general counsel, Lawrence Inlow, as he passed in front of the helicopter after disembarking. *Id.* at 685. Because of the helicopter's high-set rotor blades, the court determined as a matter of law that the deceleration-enhanced blade flap was a hidden danger of the helicopter and that the manufacturer had a duty to warn its customers of that danger. *Id.* at 691. The court ultimately held, however, that the manufacturer satisfied its duty to warn Conseco and Inlow as a matter of law in light of the sophisticated intermediary doctrine. *Id.* at 692-93.

103. 790 N.E.2d 504 (Ind. Ct. App. 2003). In *Birch*, a young girl sustained serious injuries when the garage door closed on her. *Id.* at 508. The court concluded that the garage door system at issue was not defective and that a change in an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 518. Additionally, the court concluded that there was no duty to warn plaintiffs about changes in federal safety regulations because the system manual the plaintiffs received included numerous warnings regarding the type of system installed and that no additional information about garage door openers would have added to the plaintiffs' understanding of the characteristics of the product. *Id.* at 518-19. For a more detailed analysis of *Birch*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Indiana Product Liability Law*, 37 IND. L. REV. 1247, 1262-64 (2004); *see also* Burt v. Makita USA, Inc., 212 F. Supp. 2d 893 (N.D. Ind. 2002) (rejecting plaintiff's 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 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); McClain v. Chem-Lube, 759 N.E.2d 1096 (Ind. Ct. App. 2001) (holding that the trial court should have addressed whether the risks associated with use of a product were unknown or unforeseeable and whether the defendants had a duty to warn of the dangers inherent in the use of the product, 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). For a more detailed analysis of *Burt* and *McClain*, see Alberts & Boyers, *supra* note 23, at 1183-85.

In the first case, *Deaton v. Robison*,[104] a panel of the Indiana Court of Appeals affirmed a trial court's judgment in favor of the manufacturer of a black powder rifle that the plaintiff alleged to be defective and unreasonably dangerous.[105] Plaintiff James Deaton and his friend, Justin Robison, were in Robison's garage on December 1, 2002, preparing to go deer hunting.[106] Robison owned a black powder rifle manufactured by defendant Knight Rifles, Inc.[107] Robison realized that his rifle was still loaded from the previous day's hunt.[108] Robison acknowledged the danger that would be posed by transporting a loaded rifle, telling Deaton, "I've got to unload this before I kill somebody."[109] As Robison tried to unload the rifle, the bolt slipped and it accidentally fired.[110] The discharged round struck Deaton in the leg.[111] Although the rifle was equipped with two safeties, only one of them—a trigger safety—was engaged at the time of the shooting.[112] According to the court, "[t]he rifle would not have fired at all had both safeties been engaged."[113]

Deaton and his wife sued both Robison and Knight, "alleging that Robison was negligent in shooting Deaton and that Knight was negligent in failing to adequately warn of the dangers associated with the [rifle]."[114] At trial, the court granted Knight's motion for judgment on the evidence, concluding that there was insufficient evidence to sustain a verdict that Knight's warnings were inadequate.[115] Specifically, Knight argued that a product must be found to be unreasonably dangerous even if there is arguably sufficient evidence to establish it was in a defective condition.[116] The Deatons presented two theories at trial to show that the rifle's operator's manual was inadequate. First, the Deatons contended that the manual failed to warn the user not to let the firing pin rest against a live primer.[117] Second, the Deatons asserted that the manual did not instruct about how to unload the rifle.[118]

In making its case for judgment on the evidence to the trial court, Knight argued that both of plaintiff's theories were subsumed and extinguished because the risk of injury from accidental discharging was manifestly apparent to both

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104. 878 N.E.2d 499 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

105. *Id.* at 500.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 501.

115. *Id.* The trial court also "sustained Knight's objection to the admission into evidence of a manual and instructional video associated with Robison's rifle." *Id.*

116. *Id.* at 502.

117. *Id.* at 503-04.

118. *Id.*

Robison and Deaton under the circumstances.[119] Moreover, there was ample evidence to demonstrate that Robison knew how to unload the rifle because he had used it for years and, in fact, when asked if he was "of course aware that if [the firing pin] slipped when you were pulling it back without the safety, there was a risk of it firing," Robison responded, "Yeah, I . . . I . . . there's always a risk."[120] The evidence at trial demonstrated that if the secondary safety had been engaged, "everything would have been fine."[121] Indeed, Robison agreed both in his deposition and in his testimony at trial that the manner in which the rifle was stored in his garage—keeping the primer on with the rifle loaded, the projectile cap in place, the jacket on with the hammer resting on it—just before Deaton was shot was "dangerous."[122] Robison likewise admitted at trial that trying to remove the primer cap without the secondary safety engaged "is a very dangerous thing to do," particularly when the rifle was "pointed at someone."[123]

Given that evidence, the trial court agreed with Knight's argument that "there is no need to warn someone if they already know about [the hazard]. A warning would be superfluous or meaningless."[124] At the conclusion of trial, the jury found Robison entirely at fault in causing Deaton's injuries and awarded the Deatons damages.[125]

On appeal the Deatons argued that the trial court erred when it entered judgment in favor of Knight on the issue of inadequate warnings.[126] The court, in answering the issue, first acknowledged that the case fell "within the provisions of the [IPLA]."[127] The court also pointed out that the IPLA requires a plaintiff to prove, among other things, both that a product is defective and unreasonably dangerous.[128] Citing the definition provided by Indiana Code section 34-6-2-146, the court recognized that "unreasonably dangerous" refers to "any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge about the

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119. *Id.* at 502-04.

120. *Id.* at 503.

121. *Id.* at 502-03.

122. *Id.* at 503.

123. *Id.*

124. *Id.* at 502.

125. *Id.* at 501.

126. *Id.*

127. *Id.* Although making it clear initially that the case "falls within the provisions of the [IPLA]," the *Deaton* opinion also indicates that Indiana has "adopted" section 388 of the Restatement (Second) of Torts, which seeks to impose common law liability upon possessors of defective and unreasonably dangerous chattel. *See Deaton*, 878 N.E.2d at 501. Whether and to what extent section 388 should provide a separate avenue of recovery for the same physical harm suffered by the Deatons is addressed *infra* Part I.E.

128. *Deaton*, 878 N.E.2d at 501 (citing Coffman v. PSI Energy, Inc., 815 N.E.2d 522, 527 (Ind. Ct. App. 2004)).

product's characteristics common to the community of consumers."[129]

As they did in the trial court, the Deatons contended on appeal that the dangerous and defective condition the rifle presented was its ability to fire even with one of the safeties engaged.[130] They also argued that there was "no evidence that Robison appreciated the specific danger that the gun could fire with the trigger safety engaged."[131] The court of appeals disagreed, pointing to evidence showing that Robison, indeed, "fully appreciated the danger of unloading the gun in the presence of others and that he knew engaging the secondary safety would have prevented the shooting."[132] The court continued:

> It is undisputed that Robison appreciated the danger inherent in handling a loaded rifle and in unloading a rifle while pointing it at someone . . . . If Robison thought the rifle was in a safe condition, loaded, but with the single safety engaged, he would not have been so concerned about unloading it before leaving for the hunting trip. Immediately before the shooting, Robison stated his concern that he might kill someone if he did not unload the rifle before the trip. And Robison testified that having a loaded firearm "in the condition that [he] had it in when [he] took it out of [his] case seconds before Mr. Deaton was shot [namely, with only the trigger safety engaged,]" was a "dangerous thing to do." . . . That evidence shows that Knight reasonably believed that Robison would realize the danger of unloading the rifle while pointing it at someone, regardless of whether one or both safeties were engaged.[133]

The court of appeals, therefore, concluded that Knight could not be liable for its alleged failure to warn or to provide additional instructions.[134] Simply stated,

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129. *Id.* (citing IND. CODE § 34-6-2-146 (2008)).

130. *Id.* at 503.

131. *Id.*

132. *Id.*

133. *Id.* at 503-04 (citation omitted). The evidence also showed that Robison would not have heeded the specific warning the Deatons contend Knight should have provided. According to the court, "Robison testified that he did not read the manual, and he testified that he probably watched the video, but only to learn how to clean the rifle. And, as previously noted, Robison already knew it was dangerous to point a loaded weapon at someone and did it anyway." *Id.* at 504 n.1.

134. *Id.* at 504. In the unpublished case of *Lind v. Menard, Inc.*, No. 45A04-0707-CV-408, 2008 WL 324018 (Ind. Ct. App. Feb. 7, 2008), another panel of the court of appeals arrived at a different conclusion under a different set of facts. In *Lind*, the customer purchased a drain clearing product from Menards. *Id.* at *1. The customer read the instructions and warnings on the bottle, including the instruction to wear gloves, goggles, and other suitable protective clothing. *Id.* He poured approximately two cups of the drain-clearing product into the drain and waited one hour as the label advised. *Id.* Although the instructions provided that users should allow the product to work overnight for best results and to flush the drain with hot water, Lind used warm water from the bathroom faucet to try to flush the drain. *Id.* When the drain did not open, he went to his basement to remove the cap from the drum trap. *Id.* As he did, the cap exploded and Lind suffered severe eye injuries, burns, and scarring. *Id.* The court reversed the trial court's summary judgment

the rifle did not present an unreasonable or concealed hazard for purposes of the IPLA, but rather a manifest and obvious risk that Robison well-contemplated.[135] As such, the court of appeals affirmed the trial court's entry of judgment on the evidence.[136]

The *Deaton* decision tracks almost perfectly the principles espoused in a 2006 Seventh Circuit design defect case, *Bourne v. Marty Gilman, Inc.*,[137] In that case, the court held that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law.[138] Judge David Hamilton granted summary judgment for the goal post manufacturer, determining as a matter of law that the goal post was not unreasonably dangerous because it was obvious to an objective, reasonable person that a goal post collapsing under the weight of celebrating fans poses a risk of serious injury.[139] Indeed, the manufacturer's evidence established that the aluminum posts are about forty-feet tall and weigh 470 pounds.[140]

The Bournes appealed to the Seventh Circuit, arguing that the "open and obvious" rule cannot bar a claim for defective design under the IPLA, even if a risk is obvious, if they could prove that the goal post manufacturer should have adopted a safer and feasible alternative design.[141] The Seventh Circuit ultimately agreed that Judge Hamilton's ruling was sound, although it found it more accurate to state that the goal post was not unreasonably dangerous as a matter of law, rather than declaring that the danger posed by it was "obvious as a matter of law."[142] In doing so, the Seventh Circuit made it clear that the case examined whether the product was defective and unreasonably dangerous as a matter of law, not whether the "incurred risk" defense applied as a matter of law.[143] This is an important distinction because the extent to which a product's risk is "open" or "obvious" is a critical element in determining both the reasonableness of the danger it presents, and the degree to which a user actually knew of the product's danger.[144] The former, and not the latter, determination was at issue in *Bourne*.[145]

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for the defendant even though the label warned about the danger of severe burns. *Id.* at *6. The court reached its decision largely because Lind wore glasses, waited one hour for the product to work before taking action, and did something that the label did not specifically warn him against. *Id.* Under those circumstances, the panel concluded that a jury was entitled the determine the adequacy of the warnings and instructions. *Id.*

135. *Deaton*, 878 N.E.2d at 504.

136. *Id.*

137. 452 F.3d 632 (7th Cir. 2006). For a complete discussion of *Bourne*, see Alberts & Peterson, *supra* note 99, at 1022-26.

138. *Bourne*, 452 F.3d at 633, 638-39.

139. *Id.* at 634-35.

140. *Id.* at 633.

141. *Id.* at 635.

142. *Id.* at 637.

143. *Id.*

144. *Id.*

145. *Id.*

Practitioners and judges in Indiana, therefore, should be mindful that application of the "open and obvious" concept can be used in at least two different ways: (1) in determining whether a product is "unreasonably dangerous" because unreasonable danger depends upon the reasonable expectations of expected users and the obviousness of the risk will eliminate the need for any further protective measures;[146] and (2) in determining whether the "incurred risk" defense[147] applies. Practitioners and judges in Indiana should also recognize that *Deaton* and *Bourne* analyzed the openness and obviousness of a product's condition and ultimately concluded, as a matter of law, that the products at issue did not present an unreasonable, concealed hazard. Whether the same decision would have been reached as a matter of law in the context of the "incurred risk" statutory defense is a more difficult question because the defense requires a defendant to establish that the user actually knew about the product's danger.[148] No such requirement exists when the "open and obvious" concept is used to support the argument that a product is not unreasonably dangerous because of the open and obvious nature of the danger it presents. The latter is based upon a "reasonable user expectation" standard, not an actual knowledge standard.

The second of the three significant 2008 cases involving allegedly defective warnings and instructions is the federal district court decision in *Clark v. Oshkosh Truck Corp*.[149] *Clark* involved a plaintiff, Jimmy Clark, who worked as a repossession agent. Clark suffered injuries while trying to repossess a vehicle.[150] The injuries occurred on December 12, 2005, at a time when there was freezing rain and ice on the ground.[151] Clark slipped while walking on the raised rollback bed of the truck he used to repossess vehicles, caught his foot in an open-sided rail, and tumbled over the side of the truck.[152] The truck had been exposed to the elements, but Clark said that he did not need to shovel or remove snow, ice, or water from the truck bed.[153]

Clark had worked as a repossession agent for four-and-a-half years and had experience using rollback trucks similar to the one he used on the day of the injury.[154] The truck at issue had slick beds and open-sided rails because those were the specifications that Clark's employer requested when it purchased the vehicle.[155] Before December 12, 2005, Clark had slipped and fallen on the

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146. *Id.*

147. IND. CODE § 34-20-6-3 (2008).

148. *Id.* §§ 34-20-6-3(1)-(2).

149. No. 1:07-cv-0131-LJM-JMS, 2008 WL 2705558, Prod. Liab. Rep. (CCH) ¶ 18,046 (S.D. Ind. July 10, 2008).

150. *Id.* at *1.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

truck's bed on two other occasions, but had not suffered any injuries.[156]

The operator's manual and safety video included with the truck at issue instructed users not to drive a vehicle onto the inclined bed.[157] Those materials did not provide any warning against walking on the truck bed, nor did they specify how to unload small vehicles.[158] Regardless, Clark never read the operator's manuals, nor did he observe any of the instructional materials for any of the vehicles he used.[159] He did, however, receive on-the-job training about the operation of rollback bed trucks from co-workers, who told Clark "to tie down all four corners of a vehicle being towed and to set the parking brake before transporting the vehicle."[160] Clark's regular practice was to drive the vehicle to be towed up the inclined ramp.[161] Clark's training also advised that both the front "tie downs" and the parking brake had to be released before unloading a vehicle.[162] According to Clark, "there was no way to release the front tie downs or the parking brake when unloading the vehicle without walking on the inclined bed, particularly if the towed vehicle was a small vehicle."[163]

Clark and his wife filed suit against the manufacturer of the rollback truck, collectively referred to in the court's decision as "Jerr-Dan."[164] Plaintiffs presented two theories under the IPLA. First, plaintiffs asserted that Jerr-Dan "failed to warn of the dangers associated with walking on the rollback bed"[165] and, second, they contended that Jerr-Dan "failed to provide adequate instructions [about] how to operate the rollback bed, especially when the operator is of average size and the vehicle is a mid-size or small."[166]

Jerr-Dan moved for summary judgment, arguing that the rollback truck was not unreasonably dangerous because the danger posed to Clark was open and obvious.[167] Citing to IPLA sections 34-20-2-1, 2-3, 4-1, and 4-2, the court initially recognized that the IPLA governed plaintiffs' substantive claims regardless of their legal theories and reiterated that the operative theory alleged that the truck was defective because it did not provide adequate warnings or use instructions.[168] The court also recognized that the IPLA requires a plaintiff to prove that: "(1) the product was defective and unreasonably dangerous; (2) the defective condition existed at the time the product left the defendant's control; and (3) the defective condition was the proximate cause of the plaintiff's

156. *Id.*
157. *Id.* at *2.
158. *Id.*
159. *Id.* at *1.
160. *Id.*
161. *Id.*
162. *Id.* at *2.
163. *Id.*
164. *Id.* at *1.
165. *Id.* at *4.
166. *Id.*
167. *Id.*
168. *Id.* at *3.

injuries."[169] As noted above and as Judge McKinney pointed out, the "'reasonable consumer expectation'" analysis posits that "'a product may be defective under the [IPLA] where the manufacturer fails in its duty to warn of a danger or instruct on the proper use of the product as to which the average consumer would not be aware.'"[170] For purposes of the application of the IPLA, a product is unreasonably dangerous when it "'exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge about the product's characteristics common to the community of consumers.'"[171]

The court granted Jerr-Dan's motion with regard to the failure to warn theory, concluding that Jerr-Dan "had no duty to warn of any dangers associated with the rollback bed's open and obvious conditions."[172] Clark's prior knowledge about and experience with the type of rollback bed at issue were key to the court's decision. Indeed, the court noted that Clark was personally aware of the "slick nature" of the rollback bed, having compared the bed to glass and having twice complained about its slippery surface.[173] Clark argued that "the open and obvious defense [did not] apply because although he knew the bed was slick, he did not expect to fall after he slipped and got his foot stuck under the rail."[174] The court rejected that argument, determining that "the specific mechanics" of Clark's fall were "irrelevant because of the plainly visible characteristics of the rollback bed, which [Clark] recognized."[175]

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169. *Id.* (citing Deaton v. Robison, 878 N.E.2d 499, 501 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008)). The court also aptly noted that the "defective condition" analysis "'focuses on the product itself'" while the "unreasonably dangerous" analysis "'focuses on the reasonable expectations of the consumer.'" *Id.* (quoting Welch v. Scripto-Tokai Corp., 651 N.E.2d 810, 814 (Ind. Ct. App. 1995)).

170. *Id.* at *4 (quoting Ford Motor Co. v. Rushford, 868 N.E.2d 806, 810 (Ind. 2007)). Citing IPLA section 2-2), the *Clark* court also pointed out that actions alleging design defect or failure to warn as the operative theory to prove defectiveness "'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.'" *Id.* (quoting IND. CODE § 34-20-2-2 (2008)).

171. *Id.* (quoting IND. CODE § 34-6-2-146 (2008)).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* It is worth mentioning that Judge McKinney chose to write that the "open and obvious danger rule applies in products liability claims based on common law negligence." *Id.* at (citing Welch v. Scripto-Tokai Corp., 651 N.E.2d 810, 815 (Ind. Ct. App. 1995)). That is a correct statement of Indiana law from an historical standpoint. Indeed, the case to which the *Clark* court cites (*Welch*) was decided at a time when Indiana common law provided a separate avenue for pursuing failure-to-warn claims alleging physical harm caused by a product. It is important to point out here that the "open and obvious" danger doctrine is technically no longer a "defense" and practitioners should take care not to apply it in the same manner as it had been applied before the 1995 amendments to the IPLA merged all failure-to-warn claims into the IPLA, thereby extinguishing all separate common law failure-to-warn theories for physical harm caused by a

According to the court, that analysis did not end the inquiry because the plaintiffs also contended that Jerr-Dan failed to provide adequate instructions about the proper and safe use of the rollback bed.[176] With regard to that theory, the court denied Jerr-Dan's summary judgment motion, concluding that plaintiffs had, indeed, designated enough evidence to present their inadequate use instruction theory to the jury.[177] The court pointed to several things that Jerr-Dan's safety video did not address, including: (1) how the winch should be "unwound from its original position"; (2) "how the parking brake [should be] set on a vehicle after it is loaded on the bed"; (3) "how the front tie downs are affixed"; and (4) how each of those procedures should be accomplished when unloading a vehicle from the truck.[178] According to the court, Jerr-Dan did not offer any additional arguments specific to the failure-to-instruct theory, but rather argued that all of plaintiffs' claims fail because any dangers associated with the use of the rollback bed and truck were open and obvious.[179] In rejecting such an argument, the court concluded as follows:

> [E]ven if the Court concludes that no features of the rollback bed or truck were concealed, a reasonable jury could still find that an average consumer would not be aware of how to safely perform certain required tasks absent adequate instructions, particularly when a person of average stature attempts to load or unload a mid-size or small vehicle. As such, a reasonable jury could find that Jerr-Dan's inadequate instructions rendered the rollback bed and truck defective and unreasonably dangerous to an average consumer . . . . After reviewing both the safety video and operations manual, the Court concludes that the Plaintiffs have presented sufficient evidence to suggest that Jerr-Dan's rollback bed and truck were defective under Indiana Code [section] 34-20-4-2.[180]

Clark may prove troublesome to those trying to interpret and apply it because the decision allowed the plaintiffs to proceed to trial on a failure-to-instruct theory despite having made an initial determination that the slippery truck bed and the risk of falling on it was obvious and did not present an unreasonably dangerous condition. As noted above, in cases alleging improper design or inadequate warnings as the theory for proving that a product is in a "defective condition," recent decisions have adopted an approach in which that the substantive defect analysis—whether a design was inappropriate or whether a warning was inadequate—*follows* a threshold analysis that first examines whether, in fact, the product at issue is "unreasonably dangerous."[181]

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product.

176. *Id.* at *5.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* (citations omitted).

181. Indeed, in *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467 (S.D. Ind. July 20, 2005), *aff'd*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged

In *Clark*, there is little doubt that the slick surface of the rollback truck's bed was the defective condition from which the truck at issue suffered. There seems likewise little doubt that such a condition would have existed under the circumstances even had Jerr-Dan provided a set of instructions about the proper use of the rollback bed and truck. Either they would have instructed users not to walk on the bed (which would have rendered Clark's actions a "misuse") or they presumably would have provided that the user must walk carefully on the bed so as to make the proper adjustments to the vehicle being repossessed. Regardless, the condition of which Clark complained—the slippery bed—would have been unavoidable absent a different set of weather conditions.

The IPLA and recent case law interpreting it seem to suggest that the better approach for courts to take is to first determine whether the defective condition from which the product allegedly suffers would, as a matter of law and under all relevant circumstances, thereby also render it unreasonably dangerous.[182] If not, the inquiry should be at an end even if it is possible that a plaintiff could present sufficient evidence to defeat a summary judgment concerning whether the product could be said to be in a "defective condition."[183] In that context, the *Clark* decision is peculiar because it reaches the conclusion that the defective condition (the slippery rollback bed) does not render the truck unreasonably dangerous as a matter of law (in light of Clark's prior knowledge and experience with it and the open and obvious nature of the risk presented), yet the court nevertheless resurrected plaintiffs' claim merely because there was arguably sufficient evidence to demonstrate that Jerr-Dan's use instructions could have been better.[184] Following the letter of the IPLA, the jury could find that the truck was in a defective condition, but the court's previous ruling as a matter of law that Clark's knowledge of the open and obvious danger renders the truck not unreasonably dangerous, which, in turn, means that plaintiffs cannot recover.

The *Clark* court determined that "the specific mechanics" of Clark's fall were "irrelevant because of the plainly visible characteristics of the rollback bed, which [Clark] recognized."[185] Under the circumstances and following the precise letter of the IPLA, the specific theory employed by Clark to prove that the truck was in a defective condition should likewise be irrelevant if that condition and the risk it presented already have been determined as a matter of law not to present an unreasonably dangerous condition.

The third significant warnings defect case decided during the 2008 survey period is *Kovach v. Alpharma, Inc.*[186] We briefly mentioned *Kovach* earlier in

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design defect) and *Conley v. Lift-All Co*., No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005) (involving an alleged warnings defect), Judge Hamilton followed such an approach.

182. *E.g.*, Bourne v. Marty Gilman, Inc., 452 F.3d 632 (7th Cir. 2006).

183. *Id.*

184. *Clark*, 2008 WL 2705558, at *4-5.

185. *Id.* at *4.

186. 890 N.E.2d 55 (Ind. Ct. App. 2008), *trans. granted*, (Ind. Feb. 27, 2009).

this Article[187] because the majority opinion appears to embrace the idea that strict liability attaches to failure to warn theories despite unambiguous language to the contrary in the IPLA.[188] Putting aside that issue for the sake of this discussion, the majority's substantive treatment of the failure to warn claim deserves separate and detailed attention. As noted above, we recognize that the Indiana Supreme Court granted transfer on *Kovach* on February 27, 2009. As of the date of publication of this Survey, the Indiana Supreme Court has not issued a decision.

In *Kovach*, a nine-year-old boy was admitted to an ambulatory surgery center for a scheduled adenoidectomy.[189] After the procedure, while recovering in the Post-Anesthesia Care Unit, a nurse gave the boy Capital of Codeine, an opiate.[190] Later in the day, after being discharged from the surgery center, the boy went into respiratory arrest and was transported to a hospital where he tragically died from asphyxia attributed to an opiate overdose.[191]

The nurse administering the Capital of Codeine used a graduated, translucent, but not entirely clear, medicine cup.[192] The cup possessed measurement marks on its inside representing milliliters (ml), drams, ounces, teaspoons, tablespoons and cubic centimeters.[193] These interior measurement marks possessed similar translucency to that of the measuring cup.[194] The young boy was prescribed 15 ml of Capital of Codeine, which was one half of the cup.[195] The administering nurse claimed that she gave the boy 15 ml of the drug as prescribed, but the child's father testified that the 30 ml cup used to dispense the opiate was full when the nurse entered the room and the boy drank its entire contents.[196] An autopsy revealed that the young child's blood contained more than twice the recommended therapeutic level of the prescribed drug.[197]

The child's parents sued the manufacturers and sellers of the medicine cup (the Cup Defendants) under theories of breach of implied warranty of merchantability and the implied warranty of fitness for a particular purpose under the Uniform Commercial Code and strict liability in tort and negligence under the IPLA.[198] The Cup Defendants moved for summary judgment.[199] When the plaintiffs responded, they relied in part on an affidavit from a pharmacist.[200] The

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187. *See supra* Part I.D.
188. *Kovach*, 890 N.E.2d at 66.
189. *Id.* at 60.
190. *Id.* at 60-61.
191. *Id.* at 61.
192. *Id.* at 60-61.
193. *Id.* at 61.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*

defendants moved to exclude the plaintiffs' pharmacist's opinions.[201] The trial court denied the Cup Defendants' motions to exclude the plaintiffs' expert's opinion testimony but summarily granted the Cup Defendants' motions for summary judgment.[202]

On appeal the plaintiffs challenged the summary judgment ruling against them.[203] The Cup Defendants defended the ruling and cross appealed the denial of their motions to exclude the opinion testimony of plaintiffs' expert.[204] Before turning to the summary judgment ruling, the reviewing court first addressed whether the trial court properly denied the Cup Defendants' motion to exclude the opinion testimony of plaintiffs' expert.[205] Although in depth analysis of the reviewing court's treatment of the exclusion of the expert's testimony is unnecessary and beyond the scope of this Article, some comment is needed because the court returns to the expert's opinions throughout the opinion to support its decision on the substantive legal claims.

Plaintiffs' expert was seemingly well-credentialed.[206] Relying on his years of training and experience, he opined that children are more sensitive to overdose than adults.[207] As a result, when administering medications, and when dispensing opiates in particular, precise medicinal doses are necessary.[208] He then posited that the cup at issue was acceptable for use in determining the volume of medications that did not require precise measurement, but "defective and unreasonably dangerous" for precise volume measurements.[209] He concluded that the cup's graduated measurement markings lacked clear contrast and insufficient visibility, making the cup lack fitness and possess a defective condition that caused the boy's overdose and subsequent death.[210]

The defendants challenged the admission of plaintiffs' expert's opinion as "lacking any scientific foundation, unreliable and irrelevant."[211] The court agreed that no scientific principles formed the basis of the expert's testimony.[212]

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 61-64.

206. *See id.* at 63. Plaintiff's expert was a registered pharmacist with over thirty-five years of experience. *Id.* Among other things, he had developed a pharmacy in a pediatric hospital, created a pediatric pharmacy where he assessed and developed a medication system for all aged patients, and developed a drug dispensing system. *Id.* He was also a professor of pharmacy and had taught various medical care providers about safe methods of administering medications in addition to being hired by hospitals and others to evaluate cases of medication errors and how to prevent them. *Id.* at 63-64.

207. *Id.* at 64.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

It reasoned, however, that the opinions were nevertheless admissible because they were reliably based on the expert's observations and the application of his specialized knowledge to such observations.[213] The court concluded that the lower court did not err when it denied the Cup Defendants' motion to strike the opinion testimony.[214]

After finding that the lower court had properly denied the Cup Defendants' motion to exclude plaintiffs' expert's opinion testimony, the court of appeals turned to the summary ruling granting the defendants' motions for summary judgment. The plaintiffs argued that the trial court erred and asserted two claims under the Uniform Commercial Code and two claims under the IPLA.[215] All four theories or claims were based on claims of inadequate warning.[216]

The court first addressed the IPLA claims.[217] Initially the court noted that the IPLA governs all product liability actions "regardless of the substantive legal theory or theories upon which the action is brought."[218] Quoting from *Stegemoller v. ACandS, Inc.*[219] the court next acknowledged that after the 1995 amendments to the IPLA, the IPLA governed product liability claims based on either theories of strict liability or negligence.[220] As mentioned earlier, plaintiffs' claim was that the medicine cup "was defective and unreasonably dangerous [because] it failed to include a warning of the dangers in the Cup's use."[221] The court at least tacitly accepted the imprecise framing of the initial IPLA issues when it wrote that the plaintiff had presented both strict liability and negligence claims under the IPLA.[222] As noted above, the IPLA applies a negligence standard to design defect, inadequate warning, and inadequate instruction claims; strict liability only applies to manufacturing defect claims.[223] Paradoxically, however, in the first section addressing plaintiff's self-styled "strict liability failure to warn claim," the court quotes from Indiana Code section 34-20-2-2,

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213. *Id.*

214. *Id.*

215. *Id.* at 64-65.

216. *Id.* Due to the structure of this Survey, the authors acknowledge that the *Kovach* decision and their discussion of it does not fit conveniently or neatly into any single section of this Article. The plaintiffs advanced failure to warn of the risk of imprecise measuring as the factual predicate for each of their four legal theories, the two IPLA based claims, and the two UCC based claims. Thus, the entire decision could be addressed here. However, remaining mindful of the mandate in Indiana Code section 34-20-1-1 that the IPLA applies to all actions regardless of substantive legal theory or theories, the authors have chosen to address the UCC-based theories *infra* Part I.E. Indeed, because of the far-reaching nature of the decision, it is one of the most significant decisions of the 2008 survey period.

217. *Id.* at 65-67.

218. *Id.* (citing IND. CODE § 34-20-1-1 (2008)).

219. 767 N.E.2d 974 (Ind. 2002).

220. *Kovach*, 890 N.E.2d at 66 (citing *Stegemoller*, 767 N.E.2d at 975).

221. *Id.*

222. *Id.*

223. *See supra* Part I.D; *see also* IND. CODE §§ 34-20-2-1, 2 (2008).

which provides, in pertinent part, that actions for inadequate warnings or instructions require the party making the claim to "establish that the manufacturer or seller failed to exercise reasonable care under the circumstances."[224] Relying on testimony from plaintiffs' expert, the court concluded that it "would have been reasonable to include a warning with the [c]up stating that it should be used with caution when dispensing precise doses of medications."[225] In other words, the Cup Defendants should have included a warning of the dangers of imprecise dosing, this concluding that "the Kovachs established that the [c]up was defective in its design by failing to include a warning."[226]

The court then turned briefly to the plaintiffs' failure to warn claim based on negligence.[227] Because it had included its negligence analysis in the "strict liability" section of the decision, the court quickly penned that the negligent failure to warn claim survived for the same reasons it concluded genuine issues of fact remained to prevent the entry of summary judgment on the strict liability failure to warn claim.[228]

After addressing the UCC claims[229] the court addressed the issue of causation.[230] The court recognized that the plaintiffs had to prove a causal link between the cup's defective condition and the child's death.[231] To establish causation, plaintiffs relied on Indiana's heeding presumption.[232] They argued that because the boy was supposed to receive 15ml, one-half of the cup, and instead received 30ml, a full cup, an appropriate warning not to use the cup to dispense precise measurements of medications to children would have been read and heeded.[233] The absence of the warning, they argued, created a presumption of causation.[234] The court discussed several Indiana cases,[235] all of which involved the manufacturer not warning or providing inadequate warnings of the specific risk that caused the injury to the plaintiff.[236] The court analogized each to the Cup Defendants' failure to warn not to use the cup to dispense precise

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224. *Kovach*, 890 N.E.2d at 66 (quoting IND. CODE § 34-20-2-2 (2008)).

225. *Id.* at 67.

226. *Id.* That sentence is problematic and confusing because, as discussed above, failure to warn and defective design are two separate and distinct legal theories under the IPLA.

227. *Id.*

228. *Id.*

229. For a complete discussion and analysis of the UCC claims, see *infra* Part I.E.

230. *Kovach*, 890 N.E.2d at 70-71.

231. *Id.* at 67, 70.

232. *Id.* at 71.

233. *Id.*

234. *Id.*

235. Summit Bank v. Panos, 570 N.E.2d 960, 968 (Ind. Ct. App. 1991), *abrogated on other grounds by* Vergara v. Doan, 593 N.E.2d 185 (Ind. 1992); Jarrell v. Monsanto Co., 528 N.E.2d 1158, 1168 (Ind. Ct. App. 1988); Ortho Pharm. Corp. v. Chapman, 388 N.E.2d 541, 555 (Ind. App. 1979).

236. *Kovach*, 890 N.E.2d at 71.

medicinal doses to children (the risk of overdose), which caused the boy's death.[237]

Chief Judge Baker dissented from the majority's opinion with respect to causation.[238] He concluded that the plaintiffs failed to establish that the nurse who administered the overdose did so as a result of imprecise measuring.[239] Since the boy's death was caused by the nurse administering at least a double dosage of the drug, he wrote that no reasonable fact finder could conclude that the nurse's actions were the result of a measuring error.[240] Because the failure to warn of imprecise measurements was not the cause of the child's death, Judge Baker concluded that the entry of summary judgment for the Cup Defendants should have been affirmed.[241]

There is much about the *Kovach* decision that is worthy of discussion. The two most significant parts of the decision are the majority's treatment of the failure-to-warn claim as one involving strict liability and its treatment of the UCC-based claims involving personal injury. The UCC claim is addressed separately below.[242] With regard to the failure-to-warn claim, and despite noting that a plaintiff in a failure-to-warn case has the burden of establishing that a manufacturer failed to exercise reasonable care under the circumstances when providing warnings or instructions to a consumer (a negligence standard), *Kovach* can be read as creating a new theory of strict liability for failure-to-warn. As discussed above, the unambiguous language contained in Indiana Code section 34-20-2-2 mandates the application of a negligence standard.[243] Thus, since 1995, a negligence standard should be applied to all claims of inadequate warning or instruction.[244] If the court of appeals intended to create a new strict liability-based failure to warn claim, Indiana Code section 34-20-2-2 has been dramatically changed, if not completely eviscerated. If a strict liability-based failure to warn claim is allowed to exist, the reasonableness of the warning given or that the decision not to give a warning will no longer be an issue. Instead, all that remains to be proven is that no warning was given or the warning was inadequate. Once these predicates are established, the manufacturer or seller would then be subject to strict liability. Simply stated, it is virtually impossible to reconcile the *Kovach* decision with Indiana Code section 34-20-2-2.

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237. *Id.*

238. *Id.* at 72-73 (Baker, C.J., dissenting).

239. *Id.* at 72.

240. *Id.*

241. *Id.* at 73.

242. *See infra* Part I.E.

243. *See supra* Part I.D.; *see also* IND. CODE § 34-20-2-2 (2008).

244. Indeed, a negligence standard was applied to warning claims even prior to tort reform. *See, e.g.*, Natural Gas Odorizing, Inc. v. Downs, 685 N.E.2d 155, 163 n.11 (Ind. Ct. App. 1997) (noting "no doctrinal distinction between negligence and strict liability failure-to-warn actions under the Restatement"); Jarrell v. Monsanto Co., 528 N.E.2d 1158, 1166 (Ind. Ct. App. 1988) ("In Indiana, the issue of the adequacy of warnings in a strict liability case is governed by the same concepts as in negligence.").

2. Design Defect Theory.—Decisions that address substantive design defect allegations in Indiana require plaintiffs to prove the existence of what practitioners and judges often refer to as a "safer, feasible alternative" design.[245] 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.[246] One panel of the Seventh Circuit (Judge Easterbrook writing) has described that "a design-defect 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 accidents."[247] Stated in a slightly different way, "[t]he [p]laintiff bears the burden of proving a design to be unreasonable, and must do so by showing there are other safer alternatives, and that the costs and benefits of the safer design make it unreasonable to use the less safe design."[248]

Indiana's requirement of proof of a safer, feasible alternative design is similar to what a number of other states require in the design defect context. Indeed, that requirement is reflected in Section 2(B) of the Restatement (Third) of Torts and the related comments.[249]

In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard.[250] As such, a claimant can hardly find a manufacturer negligent for adopting a particular design unless he or she can prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. The claimant must prove that the safer, feasible alternative design was in fact available and that the manufacturer unreasonably failed to adopt it.[251]

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245. In cases alleging improper design to prove that a product is in a "defective condition," the substantive defect analysis may need to follow a threshold "unreasonably dangerous" analysis if one is appropriate. *See, e.g.*, Bourne v. Marty Gilman, Inc., No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *10-20 (S.D. Ind. July 20, 2005), *aff'd*, 452 F.3d 632 (7th Cir. 2006).

246. *See* Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995); Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

247. McMahon v. Bunn-o-matic Corp., 150 F.3d 651, 657 (7th Cir. 1998).

248. Westchester Fire Ins. v. Am. Wood Fibers, Inc., No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006) (citing *Bourne*, 452 F.3d at 638). Another recent Seventh Circuit case postulates that a design defect claim under the IPLA requires applying the classic formulation of negligence: B [burden of avoiding the accident] < P [probability of the accident that the precaution would have prevented] L [loss that the accident if it occurred would cause]. *See Bourne*, 452 F.3d at 637; *see also* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (referencing Judge Learned Hand's articulation of the "B<PL" negligence formula).

249. RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

250. IND. CODE § 34-20-2-2 (2008); *see also Westchester Fire Ins.*, 2006 WL 3147710, at *5; *Bourne*, 452 F.3d at 637.

251. To excuse that requirement would be tantamount to excusing the reasonable care statutory component of design defect liability. By way of example, a manufacturer could not be held liable under the IPLA for adopting design "A" unless there was proof that through reasonable care the manufacturer would have instead adopted design "B." To make that case, a claimant must show the

In addition, the IPLA adopts "comment k" of the Restatement (Second) of Torts for all products and, by statute, "[a] product is not defective . . . if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly."[252] Thus, a manufacturer technically cannot make the "comment k" statutory defense available until and unless the claimant demonstrates a rebuttal. That raises interesting questions in light of Indiana's quirky treatment of Trial Rule 56 under *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*[253] In federal court, under a *Celotex*[254] standard, a manufacturer may file a summary judgment motion based upon the "comment k" defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design. Under Indiana's treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design.[255] Regardless of the procedure governing the motion itself, the claimant still must prove the existence of a safer, feasible alternative design to rebut the IPLA's "comment k" defense.[256]

The Indiana Supreme Court in *Schultz v. Ford Motor Co.*[257] endorsed the foregoing burden of proof analysis in design defect claims in Indiana.[258] State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.[259] The 2008 survey period

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availability of design "B" as an evidentiary predicate to establish before proceeding to the other "reasonable care" elements.

252. IND. CODE § 34-20-4-4 (2008).

253. 644 N.E.2d 118 (Ind. 1994).

254. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

255. IND. TRIAL R. 56.

256. *See, e.g.*, Bourne v. Marty Gilman, Inc., 452 F.3d 632, 637 (7th Cir. 2006); McMahon v. Bunn-o-matic Corp., 150 F.3d 651, 657 (7th Cir. 1998); Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995); Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc., No 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006); Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

257. 857 N.E.2d 977 (Ind. 2006).

258. *Id.* at 985 n.12 ("For a discussion of the burden of proof at summary judgment in a design defect claim, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 39 IND. L. REV. 1145, 1158-60 (2006).").

259. *See, e.g.*, *Bourne*, 452 F.3d 632, 633, 638-39 (holding that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law). *Bourne* is a significant decision for Indiana product liability practitioners because it reinforces at least four important precepts: (1) "defective condition" and "unreasonably dangerous" are not interchangeable terms; (2) the concept of "open and obvious" remains relevant in Indiana product liability law even though it is no longer a stand-alone defense; (3) whether a product presents an unreasonable danger can and should, under the proper circumstances, be decided by a judge as a matter of law; and (4) a claimant's expert testimony must be sufficient, even at summary judgment stage, to satisfy Indiana's safer, feasible alternative design requirement in cases in which the claimant pursues a design defect claim. *See generally id.*; *see also Westchester*

produced a couple of additional cases to add to the scholarship in this area.

In the first of the 2008 design defect cases, *Mesman v. Crane Pro Services*,[260] plaintiff John Mesman worked in a plant owned and operated by a company called Infra-Metals. Infra-Metals manufactured steel products.[261] Mesman suffered serious leg injuries when a load of steel sheets fell on him while he was unloading the sheets from a railcar at the Infra-Metals plant.[262] The plant used a crane to unload steel sheets from railcars.[263] The crane had a beam that was fastened to the plant's ceiling directly above the rail siding.[264] The crane also had a hoist, suspended from the beam, which the operator could move up and down and sideways along the beam.[265] In addition, the crane had a "spreader beam" connected to the hoist, as well as chains connecting each end of the spreader beam to "scoops" for gripping loads.[266] An operator's cab was attached to the beam on the ceiling.[267]

Before the accident, Infra-Metals hired Konecranes to rebuild the then fifty-year-old crane.[268] Konecranes evaluated the design and operation of the crane and made several changes. First, it supplemented the controls in the operator's cab with a hand-held remote-control device that the operator could use to control the crane from the ground.[269] "To raise the load the operator would press the up button on the remote and to lower if he [or she] would press the down button."[270] Second, Konecranes installed alongside the "up" and "down" buttons on the remote-control device an emergency stop button, which the operator could press if he or she "sensed an impending collision between the load and the cab."[271] The operator could also reverse the direction of the hoist by pressing the "down"

Fire Ins., 2006 WL 3147710 (dismissing design defect claim based on allegations that a defectively designed wood flour product spontaneously combusted and caused a fire because the plaintiff presented no evidence showing there was a safer, reasonably feasible alternative); Lytle v. Ford Motor Co., 814 N.E.2d 301 (Ind. Ct. App. 2004) (holding, inter alia, that the theories offered by plaintiffs' opinion witnesses regarding the inadvertent unlatching of a seatbelt were not reliable and that designated evidence failed to show that Ford's seatbelt design was defective or unreasonably dangerous); Baker v. Heye-Am., 799 N.E.2d 1135 (Ind. Ct. App. 2003) (holding that fact issues precluded summary judgment with respect to whether the placement of, and lack of a guard for, a maintenance stop button rendered a glass molding machine defective or unreasonably dangerous or both).

260. 512 F.3d 352 (7th Cir. 2008).

261. *Id.* at 353.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

button on the remote.[272] Because, however, the "up" and "down" control had a deceleration feature to reduce wear and tear on the crane, the spreader beam would continue to rise for three seconds after the "down" button was pressed.[273] In those three seconds, the beam would still travel about a foot until it stopped and began moving downward.[274] Accordingly, pressing the "down" button would not stop the upward motion as fast as pressing the emergency stop button.[275]

Even with these alterations, when a boxcar was located underneath the section of the ceiling beam to which the cab was attached, "there was only a foot or two of clearance between the rim of the boxcar and the cab overhead."[276] As such, the possibility existed that a load of steel could be jarred loose and could fall on anyone standing beneath it if the spreader beam struck the cab while the hoist was lifting it.[277]

On the day of the accident, the crane operator was standing about twenty feet away from a boxcar that was underneath the empty cab.[278] Mesman was standing in the boxcar as he fastened a load of steel sheets to the scoops beneath the crane's spreader beam.[279] The operator pressed the "up" button on the remote.[280] As the beam and the load rose, the operator saw that the spreader beam was going to hit the cab; however, instead of pressing the emergency-stop button (which would have brought the load to a dead stop), he pressed the "down" button.[281] Because of the deceleration feature, the beam continued to rise for several seconds, hitting the cab, and causing the load to fall on Mesman.[282]

Mesman and his wife sued Konecranes. A jury initially determined that the crane operator's mistake was the principal cause of the accident, assigning two-thirds of the responsibility for the accident to Infra-Metals.[283] The jury also found that Konecranes' renovated crane design contributed to the accident,

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272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* Konecranes also added a limit switch that would automatically stop the spreader beam when it came too close to the beam in the ceiling. *Id.* The switch was set to prevent the spreader from touching that beam only when the cab was not directly over the spreader. *Id.* That was the case because the floor of the cab was lower than the beam from which it hung. *Id.* To prevent the spreader from touching the cab when directly underneath it, the limit would have had to be set lower than would permit convenient unloading of boxcars that were underneath any other section of the beam. *Id.* at 353-54. Accordingly, the limit switch could not prevent a collision between the load and the cab. *Id.* at 354.

276. *Id.* at 353.

277. *Id.*

278. *Id.* at 354.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 353. The plaintiffs could not join Infra-Metals in the suit because the company was Mesman's employer. *Id.*

assigning one-third of the responsibility to Konecranes.[284] The jury awarded the Mesmans a large verdict, but the trial judge set it aside and entered judgment for Konecranes.[285] The trial judge alternatively decided that Konecranes was, at the very least, entitled to a new trial because the jury had been "confused by irrelevant evidence and had ignored critical instructions."[286] In the first appeal, the Seventh Circuit reversed the entry of judgment for Konecranes because, under the circumstances, it did not believe that the verdict for Mesman was unreasonable.[287] The Seventh Circuit affirmed, however, the trial judge's decision to grant Konecranes a new trial.[288] The parties retried the case and the jury returned a defense verdict for Konecranes.[289] The magistrate judge presiding at the retrial refused to set the verdict aside and the Mesmans appealed.[290]

The court devoted a significant amount of attention in its opinion to a critique of the crane's design and possible alternatives. According to the *Mesman* court, the accident would have been avoided if Konecranes had removed the cab or eliminated the deceleration feature.[291] The court also provided another possible alternative design that the parties did not discuss—an "electronic eye or other electronic sensor that would have stopped the hoist automatically when the spreader beam was dangerously close to the underside of the cab."[292] Konecranes recommended at least one of the alternatives—removal of the cab—to Infra-Metals, but Infra-Metals declined "because it wanted the option of being able to operate the crane from within the cab."[293] The court also noted that eliminating the deceleration feature on the remote control or decreasing the period of deceleration were not "ideal" solutions because the crane would "wear out sooner."[294]

As the Seventh Circuit has in recent Indiana design defect cases, the *Mesman* panel confirmed its adherence to the "Learned Hand negligence" formula, positing that "risk of injury has to be weighed against the cost of averting it."[295] Specifically, the court noted,

> In Judge Learned Hand's negligence formula, failure to take a precaution is negligent only if the cost of the precaution (what Judge Hand called

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284. *Id.*

285. *Id.*

286. *Id.*

287. *See id.* at 355.

288. *Id.* at 356.

289. *Id.* at 353.

290. *Id.*

291. *Id.* at 354. The accident might also have been avoided had Konecranes "modified the limit switch so that the limit could be lowered when a load was being unloaded beneath the cab." *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 355.

295. *Id.* at 354.

> the 'burden' of avoiding the accident) is less than the probability of the accident that the precaution would have prevented multiplied by the loss that the accident if it occurred would cause . . . . (i.e., $B < PL$).[296]

Put another way, "the cheaper the precaution, the greater the risk of accident; likewise, the greater the harm caused by the accident, the likelier it is that the failure to take the precaution was negligent."[297]

One of the principal bases of the second appeal was the presiding judge's refusal to instruct the jury about the "Learned Hand negligence formula."[298] The particular instruction offered by plaintiffs was as follows:

> If you find that in renovating the crane the defendant failed to take effective precautions less expensive than the damages which [*sic*] could reasonably be expected to result from the crane's foreseeable use or misuse, then you may find the defendant negligent. Even if you determine that the particular failure which [*sic*] occurred was not likely to occur, you may still find the defendant liable if the costs of preventing the harm were lower than the costs of a reasonably foreseeable injury.[299]

The Seventh Circuit disagreed that the instruction should have been tendered, recognizing that the judge instead "gave the standard Indiana pattern instruction on negligence, a correct statement of Indiana law that a federal court in a diversity suit is bound by."[300] The court explained that the instruction the plaintiffs offered was not really the "Hand formula," but rather a "garbled version of it."[301] On this point, the court wrote:

> The Hand formula requires, as we have seen, discounting (multiplying) the harm if an accident should occur by the probability that it would occur unless a precaution were taken, and then comparing the product of that multiplication to the cost of the precaution. Thus, if the harm from the accident would be very great and the cost of preventing it very low, the defendant might be negligent even if the probability of the accident was also low. That may be this case. Suppose the probability (*P* in Hand's formula) were .001, the loss if the accident occurred (*L*) $1 million, and the cost of avoiding the accident (*B*, for burden of precaution) $500. Then because $500 is less than $1 million × .001 (=$1,000), the injurer would be adjudged negligent. (The numbers in the example are merely illustrative, of course.) But this was not what the proposed instruction would have directed the jury to consider.[302]

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296. *Id.* (citing United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)).

297. *Id.*

298. *Id.* at 356.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 356-57.

The Mesmans also complained on appeal about an "open and obvious" danger jury instruction that included the following statement: "[A] manufacturer has no duty to warn of *and is not liable for* open and obvious dangers."[303] The court agreed that the instruction was confusing and should not have been given, noting that the parties probably intended to say that "a manufacturer is not liable for failing to warn of an open and obvious danger rather than that he is not liable for failing to prevent the danger."[304] According to the Seventh Circuit, the latter interpretation "would be squarely contrary to Indiana law."[305] Even though the court determined that the instruction was erroneous, the court did not believe reversal was warranted largely because the plaintiffs failed to explain how the instruction likely influenced the jury in light of their "full opportunity to present multiple theories of liability to the jury."[306]

The *Mesman* court appreciated that the plaintiffs had a difficult time at trial countering Konecranes's efforts to shift all responsibility for the accident to Infra-Metals, Mesman's employer.[307] According to the court,

> Konecranes argued that by recommending that Infra-Metals remove the cab, which Infra-Metals refused to do, and by offering training for Infra-Metals'[s] employees on the new decelerator function, which Infra-Metals also declined, Konecranes had done all it could reasonably be expected to do and therefore that Infra-Metals bore all the blame for the accident.[308]

According to the Seventh Circuit, because the plaintiffs did not argue that Konecranes's effort to shift all blame for the accident to Infra-Metals was a "red herring," the misleading "open and obvious" instruction cannot have determined the jury's verdict.[309] As the court wrote:

> The defendant's principal argument was not that the danger was obvious, whether to the accident victim or to the crane's operator, but that the safety precautions were adequate and that the culpable cause of the accident was Infra-Metals'[s] failure to instruct the operator adequately in the safe operation of the crane. Apparently the jury was persuaded. There are no grounds for setting aside its verdict.[310]

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303. *Id.* at 357.

304. *Id.*

305. *Id.*

306. *Id.* at 357-58.

307. *Id.* at 358.

308. *Id.* Indeed, "Konecranes had convinced the jury in the first trial to place two-thirds of the blame for the accident on Infra-Metals; the second jury may have thought three-thirds a better estimate . . . . Not that such apportionments always make sense when the issue is liability rather than contribution among joint tortfeasors." *Id.*

309. *Id.* at 359.

310. *Id.*

In the product liability context, the most resounding effect of the *Mesman* decision probably will be the Seventh Circuit's treatment of the concept of "open and obvious" danger. Although most of the discussion about the concept of "open and obvious" danger in the *Mesman* opinion is presented in the context of the IPLA's "incurred risk" defense, the Seventh Circuit certainly made a point of including a broader discussion earlier in its opinion by referring to the first appeal. Referring to its earlier opinion, the court wrote that "[t]he only really contestable issue [in the first appeal] was whether any precaution was necessary besides the emergency-stop button, since, had the operator pressed it instead of the down button, the accident would not have occurred."[311] The court also explained that "Konecranes argued that by pressing the down button the operator had exposed Mesman to a danger that was 'open and obvious' to the operator, and that a defendant should not be liable for accidents resulting from open and obvious dangers."[312] At that point, although the Seventh Circuit recognized that Indiana has replaced the "open and obvious" defense with a defense of "incurred risk," the court recognized that the concept is not limited only to the statutory defense:

> The fact that a risk is open and obvious remains relevant to liability. It is circumstantial evidence that the user knew of the danger and thus "incurred" the risk. But it also bears on the question whether the risk was great enough to warrant protective measures beyond what the user himself could be expected to take.[313]

Recall the Seventh Circuit's 2007 decision in *Bourne v. Marty Gilman, Inc*.[314] We introduced that case in Part I.D.1.[315] There, the Seventh Circuit affirmed Judge David Hamilton's decision holding that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law.[316] The Seventh Circuit agreed that the goal post was not unreasonably dangerous as a matter of law because it was obvious to an objective, reasonable person that a goal post collapsing under the weight of celebrating fans poses a risk of serious injury.[317]

Bourne examined whether the product was defective and unreasonably dangerous as a matter of law, not whether the "incurred risk" defense applied as a matter of law.[318] Like *Bourne*, *Mesman* also confirms that the concept of "open

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311. *Id.* at 355.

312. *Id.*

313. *Id.*

314. 452 F.3d 632 (7th Cir. 2007).

315. *See supra* notes 137-38.

316. *Bourne*, 452 F.3d at 633, 638-39.

317. *Id.* at 634-36.

318. *Id.* at 635-36. The plaintiffs in *Bourne* relied on the Seventh Circuit's first decision in *Mesman v. Crane Pro Services, Inc.*, 409 F.3d 846 (7th Cir. 2005), for the proposition that Indiana law no longer permits a manufacturer to avoid liability in a design defect case simply because a

and obvious" danger remains relevant in Indiana product liability cases even though the 1995 amendments to the IPLA eliminated the so-called "open and obvious" defense. "[O]bviousness," the *Bourne* court recognized, "remains a relevant inquiry because . . . the question of what is unreasonably dangerous depends upon the reasonable expectations of consumers and expected uses."[319] "In some cases, the obviousness of the risk will obviate the need for any further protective measures, or obviousness may prove that an injured user knew about a risk but nonetheless chose to incur it."[320]

The other 2008 case adding to the scholarship in the area of design defects is *Fueger v. CNH America LLC* (*Fueger II*).[321] In that case, Fueger suffered near fatal injuries while working on a Case Uni-Loader (skid loader) on his father's farm.[322] Nearly two years after the incident, Fueger filed suit against CNH America (Case) alleging that the skid loader was defective and unreasonably dangerous.[323] Case moved for summary judgment and Fueger responded, including an affidavit from an expert.[324] Case deposed plaintiff's expert and at the summary judgment hearing the expert's affidavit and portions of his deposition transcript were made part of or read into the record.[325] The lower

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defect is "open and obvious." *Bourne*, 452 F.3d at 636. The *Bourne* court was quick to distinguish *Mesman* as a case involving application of the "incurred risk defense," which the defendant in *Bourne* did not plead nor argue in the case before the court. *Id.* at 636-37. For a discussion of precisely that distinction, see Joseph R. Alberts, James Petersen & Ann L. Thrasher Papa, *Survey of Recent Developments in Indiana Product Liability Law*, 39 IND. L. REV. 1145, 1165-70, 1188-91 (2006).

319. *Bourne*, 452 F.3d at 634-35 (citing IND. CODE §§ 34-20-4-1, 34-6-2-146 (2008); *Mesman*, 409 F.3d at 850-51; FMC Corp. v. Brown, 551 N.E.2d 444, 446 (Ind. 1990)).

320. *Id.* (citing *Mesman*, 409 F.3d at 850-51; *FMC Corp.*, 551 N.E.2d at 446).

321. 893 N.E.2d 330 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008).

322. *See* Fueger v. Case Corp. (*Fueger I*), 886 N.E.2d 102, 103 (Ind. Ct. App.), *aff'd on reh'g*, 893 N.E.2d 330 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008). There were two *Fueger* decisions issued by the court of appeals during the 2008 survey period. The first, *Fueger I*, primarily analyzed the defendant Case's motion to strike the affidavit of plaintiff's expert with little substantive analysis or treatment of the product liability claims alleged in the suit. The second, *Fueger II*, was issued several months later after CNH America filed a petition for rehearing. *Fueger II*, 893 N.E.2d at 331. The second decision more substantively addressed Fueger's product liability claims against CNH America and whether plaintiff had designated sufficient evidence to overcome CNH America's motion for summary judgment; however, the second decision contained little information about the facts of the incident. Thus, most of the facts provided to place the decision in context come from the first decision while the analysis of the IPLA comes from the second. Beyond stating that Fueger suffered serious injuries, neither case contains any meaningful discussion of what Fueger claims happened, how he was injured, what he claims was the specific design defect in CNH America's skid loader, what the feasible alternative design was, and how it may have prevented or lessened the injury.

323. *Fueger I*, 886 N.E.2d at 103.

324. *Id.* at 104.

325. *Id.*

court struck the expert's affidavit and granted Case's motion for summary judgment.[326]

The court of appeals reversed, holding that plaintiff's expert was qualified to render opinions about the skid loader and that the trial court erred when it struck the testimony.[327] On rehearing, the court reaffirmed its decision to permit plaintiff's expert's testimony and explained its decision that plaintiff had designated sufficient evidence to establish that the skid loader possessed a defective and unreasonably dangerous design.[328] On rehearing, Case advanced three primary arguments. Case asserted that the skid loader was not defective at the time of its sale and that plaintiff failed to establish that the product had not been substantially altered by the time Fueger was injured.[329] Next it claimed that plaintiff had not established a feasible alternative design.[330] Finally, Case argued that plaintiff failed to show that the skid loader was not state-of-the-art.[331] The court rejected Case's arguments, determining that the plaintiff had designated sufficient evidence to create a question of fact on each issue.[332]

Initially, the court of appeals noted that the IPLA governed all product liability actions in Indiana.[333] The court then moved to Case's first claim—that the skid loader was substantially changed from when it was first sold.[334] Under the IPLA, a manufacturer can only be liable for harm caused by a product if the product reaches the user or consumer without substantial alteration from its condition when first sold.[335] Case premised its argument on the fact that Fueger's father testified that the skid loader had some items in disrepair, such as the fact that the seat bar would not stay up by itself and that the left control lever would stick and not return to center.[336] Relying on *E.Z. Gas, Inc. v. Hydrocarbon Transportation, Inc.*,[337] Case claimed that the items of disrepair created a

326. *Id.*

327. *Id.* at 107. Without analysis, the court also opined that because plaintiff's expert's affidavit and Case's expert's affidavit conflicted, a question of fact remained about plaintiff's defective design claims so the trial court erred in granting Case's summary judgment motion. *See id.*

328. Fueger v. CNA America LLC (*Fueger II*), 893 N.E.2d 330, 331-33 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008).

329. *Id.* at 331.

330. *Id.*

331. *Id.*

332. *Id.* at 333.

333. *Id.* at 331 (quoting IND. CODE § 34-20-1-1 (2008)).

334. *Id.*

335. *Id.* at 331-32; *see also* IND. CODE § 34-20-2-1 (2008).

336. *Fueger II*, 893 N.E.2d at 331-32.

337. 471 N.E.2d 316 (Ind. Ct. App. 1984).

substantial change[338] in the design of the unit and caused the accident.[339] Plaintiff's expert claimed that the design of the skid loader had not been modified or altered since it was first sold.[340] Instead, he claimed, the items of disrepair identified by Fueger's father were reasonably expected from normal wear and tear.[341] The expert further claimed that the placement of the on/off switch and the condition of the seat bar and lift control lever were all safety design defects.[342] Because of the claim that the wear and tear was not a substantial change, but rather a design defect, the court of appeals explained that the expert's testimony created a question of fact as to whether the skid loader had been substantially changed since it was first sold, which was inappropriate for summary disposition.[343]

Case next claimed that Fueger had failed to establish a question of fact as to a feasible alternative design.[344] On this point, the court of appeals pointed to plaintiff's expert's testimony that he had observed another skid loader of roughly the same age equipped with foot controls.[345] The Case skid loader was equipped with hand controls.[346] The expert added that "he had also studied other [similar] vintage machines and found various features of [the others that he believed were] considerably safer than the Case skid loader."[347] Moreover, the other machines were manufactured with different types of interlock systems for access to the controls.[348] Again the court concluded that Fueger had designated sufficient evidence to create a question of fact as to whether a cost-effective design existed that may have prevented his injuries.[349]

Fueger is noteworthy for its treatment of both the alteration and feasible alternative design issues vis-à-vis design defect. The skid loader was nearly ten years old when the incident occurred.[350] The IPLA's statute of limitations is ten years.[351] One must assume the owner of the product, Fueger's father, knew about the skid loader's "items of disrepair" and, as they existed when the incident

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338. *E.Z. Gas* provides that, "a substantial change is defined as any change which increases the likelihood of malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use of the product." *Id.* at 319.

339. *Fueger II*, 893 N.E.2d at 332.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. Fueger v. Case Corp. (*Fueger I*), 886 N.E.2d 102, 103 (Ind. Ct. App.), *aff'd on reh'g*, 893 N.E.2d 330 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008). The skid loader was manufactured by Case on March 3, 1994, and Fueger was injured on July 7, 2003. *Id.*

351. IND. CODE § 34-20-3-1 (2008).

occurred, had not corrected them. It is understandable that mechanical devices can fail and perhaps even foreseeable that they may fail due to lack of maintenance, but it may not be appropriate to hold a manufacturer liable for an injury when the owner of the product has failed to maintain the product or where a user, with knowledge of the disrepair, uses the equipment and apparently the "items of disrepair" cause the injury.

More explanation and analysis from the court on these issues would have provided more guidance and made the decision more helpful to practitioners. Merely stating that plaintiff's expert opines that more than nine years into the life of a product the product is not working properly, i.e. its need for repair and maintenance, is normal wear and tear and evidence of a design defect[352] leaves a reader less than satisfied. No one would disagree that some level of "disrepair" may be expected from normal wear and tear, but without more explanation, positing that it is evidence of a design defect leaves a reader desiring a more thorough analysis.

Without information concerning the plaintiff's mechanism of injury and how the design of the product caused or contributed to the cause of the plaintiff's injury, the court of appeals analysis of alternative design is similarly less than instructive. The court penned that plaintiff's expert had examined another manufacturer's skid loader of roughly the same age and that his study of others led him to conclude that many other features on other machines were considerably safer than Case's skid loader.[353] Nonetheless, there is no substantive discussion of the quality of the safety mechanisms. As with the court's treatment of the skid loader's disrepair, the court's analysis of the plaintiff's requirement to establish a feasible alternative design similarly leaves anyone looking to the decision for guidance wanting more.

3. Manufacturing Defect Theory.—A federal decision issued by Judge Roger Cosbey in 2008, *Campbell v. Supervalu, Inc.*,[354] is the latest case to substantively address issues arising in the context of manufacturing defects.[355] In *Campbell*, a five-year old boy became seriously ill with *E. coli* poisoning after eating ground beef purchased at a Cub Foods grocery store in Fort Wayne.[356] Nearly thirteen years later, the boy and his parents sued Supervalu, Inc., an entity that operates a chain of food stores.[357] The plaintiffs contended that Supervalu introduced *E. coli* bacteria into the ground beef during the grinding and packaging process.[358]

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352. *Fueger II*, 893 N.E.2d at 332.

353. *Id.*

354. 565 F. Supp. 2d 969 (N.D. Ind. 2008).

355. *Gaskin v. Sharp Electronics Corp*., No. 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007) is another recent opinion addressing substantive issues raised in the context of an alleged manufacturing defect. For a detailed analysis of *Gaskin*, *see* Alberts, Petersen & Thornburg, *supra* note 98, at 1176-80.

356. *Campbell*, 565 F. Supp. 2d at 971-72.

357. *Id.* at 973 (noting that the boy became ill in September 1993 and brought suit in September 2006).

358. *Id.* at 972-73.

The plaintiffs filed suit in September 2006, alleging claims of negligence, product liability, and breach of an implied warranty of fitness.[359] The case was thereafter removed to federal court.[360]

Judge Cosbey granted summary judgment to Supervalu, determining that the IPLA's statute of repose barred all claims and that, in any event, the claims also failed because there was no evidence that Supervalu owned the grocery store at the time the incident occurred. Additionally, there was no evidence that the ground beef was within its control during the relevant time or that the ground beef, in fact, contained the bacteria that caused the illness.[361] The statute of repose issue is addressed below.[362] This Survey does not focus on the issues involving Supervalu's alleged responsibility for the Cub Foods store; such issues largely involve interpretation and timing of relevant contractual arrangements, which are outside the scope of this Survey.[363] We will, however, devote some discussion to the substantive proof issues raised as they relate to the plaintiffs' manufacturing defect claim.

The evidence presented revealed that the ground beef at issue was sold in the store's meat department, in typical packaging, and that there was nothing unusual about its appearance or odor at the time of purchase.[364] After returning home, the boy's mother placed the package in the refrigerator and, later that evening, browned it and incorporated it into a Hamburger Helper meal.[365] Several other people ate the ground beef in addition to the child.[366] There is no evidence that there was anything unusual about the food's taste, color, or appearance.[367] "The leftovers were stored in a closed plastic container in the refrigerator."[368] The next day, the child became seriously ill and suffered from acute and chronic renal failure, insulin-dependent diabetes mellitus, and congestive heart failure.[369] Another child who ate the ground beef became ill a day or two later, but not as

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359. *Id.* at 973.

360. *Id.*

361. *Id.* at 974-81.

362. *See infra* Part II.B.

363. Although the evidence examined is largely contractual in nature, the court examined such evidence in a tort context and with the purpose of determining whether Supervalu owed a "duty" to the plaintiffs. *See Campbell*, 565 F. Supp. 2d at 978-79. In doing so, the court concluded that Supervalu owed no "duty" to the plaintiffs because there was insufficient evidence that Supervalu owned or operated the Cub Foods store at issue at the time the ground beef was purchased, and/or that Supervalu had control of the beef or the packaging or grinding equipment at the time the beef was sold to the plaintiffs. *Id.* at 978-81.

364. *Id.* at 972.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

severely.[370] None of the adults who ate the hamburger became sick.[371] The Indiana State Department of Health (ISDOH) subsequently tested some of the frozen leftovers of the Hamburger Helper meal.[372] The laboratory analysis was inconclusive and could not determine whether there was or was not *E. coli* in the ground beef.[373]

In virtually every food contamination case, plaintiffs assert manufacturing defect theories in their attempt to prove that the food in question was in a "defective condition." Indeed, a manufacturing defect theory is usually the only one that fits because most food contamination cases, by necessity, do not involve warnings or improper design. Rather, the factual allegations are that the allegedly tainted food product did not conform to its intended specifications, almost always as a result of spoliation, contamination, or some other problem with its processing, shipping, or storage.

It is peculiar, therefore, that Judge Cosbey appears to have theorized that the plaintiffs intended to pursue only a "simple negligence" claim and had abandoned their "strict liability" claim.[374] That description makes little sense because the only operative product liability theory involved in the case was an alleged manufacturing defect. Indeed, because IPLA sections 2-1 and 2-2 make it clear that strict liability attaches only to claims alleging manufacturing defect theories,[375] there does not appear to have been a "simple negligence" claim available for plaintiffs to pursue to the extent plaintiffs were pursuing claims under the current IPLA.[376]

Regardless of whether plaintiffs intended to pursue a "strict liability" claim or not, that is, in point of fact, what the IPLA requires them to have pursued because a manufacturing defect is really the only theory that applies under the circumstances.[377] Accordingly, we suggest that practitioners should view the court's disposition of the case in that context—as if plaintiffs were utilizing a manufacturing defect theory to prove the beef in question was contaminated with bacteria and, therefore, in a "defective condition."

Among the bases for the court's disposition was a close analysis of the sufficiency of plaintiffs' causation evidence. Plaintiffs argued that there was a genuine issue of material fact concerning whether the ground beef was contaminated with *E. coli* and whether it caused the child's injuries.[378] The plaintiffs pointed to the treating physician's diagnosis of "Hemolytic Uremic

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370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 972-73.

374. *Id.* at 974 n.6.

375. *See* IND. CODE §§ 34-20-2-1, -2 (2008).

376. Judge Cosbey nevertheless provided an explanation "in order to complete the record" about why each of the claims (IPLA-based negligence, IPLA-based strict liability, and breach of warranty) were time-barred. *Campbell*, 565 F. Supp. 2d at 974 n.6.

377. *See* IND. CODE §§ 34-20-2-1, -2 (2008).

378. *Campbell*, 565 F. Supp. 2d at 973.

Syndrome and her conclusion that the child's stool sample tested positive for *E. coli*, emphasizing that [the physician opined that the child's] symptoms [were] typical of someone who ingested *E. coli* within the preceding one to eight days."[379] The plaintiffs also relied on the evidence that both the child and his cousin "shared the same meal and subsequently became ill over the next two days."[380] Finally, they argued that although the test results on the ground beef were inconclusive, they could not be read to mean that the beef was free of any *E. coli* bacteria.[381]

The court determined that there was simply insufficient evidence as a matter of law to justify a finding that there was a causal connection between the child's illness and the ground beef:

> "While [causation] is generally a question of fact, it becomes a question of law where only a single conclusion can be drawn from the facts." Consequently, evidence that merely establishes a possibility of cause, or which lacks reasonable certainty or probability, is not enough by itself to support a verdict; in short, liability may not be predicated purely upon speculation . . . . At the outset, it is important to note that there is nothing in the record demonstrating that *E. coli* was even present in the ground beef sold to the [plaintiffs], let alone that Supervalu did anything to introduce it into the product . . . . At best, the [plaintiffs] have established that the ground beef was one possible source, among many others, for the introduction of the *E. coli* bacteria into [the child's] body. Indeed, even [the treating physician] does not link the cause of [the child's] illness to his ingestion of the ground beef any more than she links it to anything else he presumably consumed in the *eight* days preceding the onset of his illness. Thus . . . it adds nothing to the causation analysis because in effect it is a tautology: the ground beef may or may not have introduced the *E. coli* into [the child's] body; and in fact, practically anything he ingested over the previous eight days could have been the culprit. This purported opinion testimony does not support the [plaintiffs'] claim as it does nothing to resolve a fact in issue. Similarly, the [plaintiffs'] testimony that both [the child] and his cousin became sick after eating the meal does little to show that it was more likely than not that the beef was to blame. After all, four others also consumed the same meal, in fact, more of it, and experienced no such symptoms. Furthermore . . . that the lab tests were inconclusive does nothing to tip the balance in the [plaintiffs'] favor and merely underscores the speculative nature of the evidence and the ultimate conclusion, that the true source of the *E. coli* remains unknown.[382]

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379. *Id.* at 980.

380. *Id.*

381. *Id.*

382. *Id.* at 980-81 (quoting Hamilton v. Ashton, 846 N.E.2d 309, 316 (Ind. Ct. App. 2006)) (other citations omitted).

As a result, Judge Cosbey concluded that "to ask a jury to decide whether the beef was the cause of [the child's] illness would invite nothing but speculation" and that "without a causal link between [the child's] illness and the ground beef, the [plaintiffs] have no viable claim under any theory."[383]

E. Regardless of the Substantive Legal Theory

Indiana Code section 34-20-1-1 provides that the IPLA "governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought*."[384] 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."[385]

In cases where a person who is a user or consumer under the IPLA sues an entity that is a manufacturer or seller under the IPLA for what is indisputably a physical harm caused by a product, the IPLA seems to require courts to merge all claims or theories of recovery into the IPLA and that the IPLA should provide the sole basis for the operative theories and claims that may be pursued. Recently-decided cases such as *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,[386] *Ryan v. Philip Morris USA, Inc.*,[387] and *Fellner v. Philadelphia Toboggan Coasters, Inc.*,[388] all reinforce the IPLA merger premise when

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383. *Id.* at 981.

384. IND. CODE § 34-20-1-1 (2008) (emphasis added).

385. *Id.* § 34-20-1-2.

386. No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006). There, a fire that allegedly started in a toaster manufactured by the defendant, Hamilton Beach/Proctor Silex (Hamilton Beach), destroyed a couple's home and personal property. *Id.* at *1. Cincinnati Insurance insured the couple's home and brought a subrogation action against Hamilton Beach, asserting claims for negligence, breach of warranty, strict liability, violation of the Magnuson-Moss Warranty Act, and negligent failure to recall. *Id.* Hamilton Beach moved to dismiss the negligence, warranty, Magnuson-Moss, and negligent failure to recall claims. *Id.* The court agreed that the IPLA subsumes and incorporates all negligence and tort-based warranty claims. *Id.* at *2.

387. No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006). In *Ryan*, the widow of a man who allegedly died as a result of smoking asserted causes of action against several cigarette manufacturers for product liability, negligence, and fraud. *Id.* at *1. The defendants argued that the IPLA provides the sole and exclusive remedy for personal injuries allegedly caused by a product. *Id.* at *2. The court agreed, holding that the IPLA unequivocally precludes a plaintiff's common law negligence and fraud claims. *Id.*

388. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006). The *Fellner* case involved a person who was killed when she was ejected from a wooden roller coaster at Holiday World amusement park. *Id.* at *1. One of the defendants that the personal representative of Fellner's estate sued was Koch Development Corp. (Koch), the entity that owned and operated both Holiday World and the roller coaster involved. *Id.* Plaintiff sought to hold Koch liable for negligence, strict liability, and breach of implied warranties. *Id.* Like the decisions in *Cincinnati*

plaintiffs offer tort-based theories of recovery arising out of physical harm caused by a product and when the defendant is a manufacturer or seller of that allegedly-offending product.

When the plaintiff's harm is economic in nature, he has, by definition, not suffered a "physical harm" as the IPLA defines that term.[389] Consequently, it makes sense that contract-based warranty theories of recovery are among the claims and theories that are intended to fall within the category of "any other action" that Indiana Code section 34-20-1-2 does not limit, and recent decisions have routinely agreed.[390] It also makes sense that non-IPLA based statutory or "common law" liability imposed against entities that are not manufacturers or sellers and, therefore, not otherwise covered by the IPLA, would also fall into the

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Insurance and *Ryan*, the *Fellner* decision held that the tort-based implied warranty claim merged into plaintiff's IPLA-based product liability claims, resulting in dismissal of the breach of implied warranty claim because it was not a stand-alone theory of recovery. *Id.* at *4. As noted above, however, it is important to point out that the *Fellner* decision employs the term "strict liability" as if it is synonymous with all IPLA-based product liability claims. *Id.* It is not. The IPLA imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the exercise of "all reasonable care") only for those claims relying upon a manufacturing defect theory. IND. CODE § 34-20-2-2 (2008); *see also* Mesman v. Crane Pro Servs., 409 F.3d 846, 849 (7th Cir. 2005) ("Under Indiana's products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design . . . ."); First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 690 n.4 (7th Cir. 2004) ("Both Indiana's 1995 statute . . . and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles."); Conley v. Lift-All Co., No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *12-13 (S.D. Ind. July 25, 2005) ("The IPLA effectively supplants [the plaintiff's] common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff's common law claims will therefore be treated as merged into the IPLA claims."); Bourne v. Marty Gilman, Inc., No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 (S.D. Ind. July 20, 2005) ("[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence."), *aff'd*, 452 F.3d 632 (7th Cir. 2006); Miller v. Honeywell Int'l, Inc., No. IP98-1742C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002), *aff'd*, 107 Fed. App'x 693 (7th Cir. 2004); Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); Birch v. Midwest Garage Door Sys., 790 N.E.2d 504, 518 (Ind. Ct. App. 2003). Thus, when interpreting the *Fellner* decision, practitioners should recognize that the court merged the tort-based breach of implied warranty claim into the IPLA claim even though only plaintiff's manufacturing defect theory involves "strict liability."

389. *See* IND. CODE § 34-6-2-105(b) (2008).

390. *E.g.*, *Fellner*, 2006 WL 2224068, at *4; *see also* N.H. Ins. Co. v. Farmer Boy AG, Inc., IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at *10-11 (Dec. 19, 2000) (holding that a claim alleging breach of implied warranty in tort has been superceded by IPLA-based liability, and thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

category of "any other action" that Indiana Code section 34-20-1-2 does not limit.

A few recent Indiana cases, however, have had seemingly little trouble allowing non-IPLA-based claims, whether under the guise of statutory or other "common law" claims, to be maintained against product manufacturers and sellers for physical harm a product causes. The 2008 survey period provides two examples. In *Kovach v. Alpharma, Inc.*,[391] addressed in detail above in Part I.D.1., the parents of a child who died from an overdose of codeine following surgery sued the manufacturers and sellers of the cup used to dispense the codeine. The cup was made of flexible translucent plastic and denoted various volume measurement graduation markings, including milliliters (ml), drams, ounces, teaspoons, tablespoons, and cubic centimeters.[392] The "measurement markers [were] located on the interior surface of the [c]up and [had] a similar translucency as the [c]up."[393]

The child's parents asserted against the cup manufacturers and sellers a Uniform Commercial Code (UCC)-based claim for breach of the implied warranty of merchantability, a UCC-based claim for breach of implied warranty of fitness for a particular purpose, an IPLA-based "strict liability in tort" claim, and an IPLA-based "negligence" claim.[394] The trial court granted summary judgment to the cup manufacturers and sellers as to each of the foregoing four claims, presumably because it found insufficient evidence to sustain a verdict that the cup was defective and/or unreasonably dangerous.[395]

In a 2-1 decision, the court of appeals reversed in part and affirmed in part, ultimately allowing what it called both "strict liability" and "negligence" claims to be offered to the jury in addition to a UCC-based implied warranty of merchantability claim.[396] Though the authors recognize that the Indiana Supreme Court granted transfer in *Kovach* in February 2009, we nevertheless analyze it in this Survey because the issue it raises may be important to Indiana judges and practitioners as they await the Indiana Supreme Court's decision.

In doing so, the majority's opinion states that

> [a]ctions brought under the [IPLA] and the UCC "represent two different causes of action . . . [t]he [IPLA] governs product liability actions in which the theory of liability is negligence or strict liability in tort, while the UCC governs contract cases which are based on a breach of

391. 890 N.E.2d 55 (Ind. Ct. App. 2008), *trans. granted*, (Ind. Feb. 27, 2009).

392. *Id.* at 61.

393. *Id.*

394. *Id.*

395. *Id.* We presume from the surrounding context that the trial court so found. Because the court of appeals described the trial court as having "summarily" granted summary judgment without any findings of fact or conclusions of law, the opinion is devoid of specific reasoning for the trial court's decision to grant summary judgment. *See id.* at 65. We also note here that the cup manufacturers and sellers cross-appealed, arguing that the trial court erred by denying a motion to exclude the opinion testimony of plaintiffs' expert witness. *Id.* at 61.

396. *Id.* at 72.

> warranty." . . . The UCC and the Product Liability Act provide alternative remedies. Also, the adoption of the Product Liability Act did not vitiate the provisions of the UCC.[397]

The case to which the majority cites for that proposition, *Hitachi Construction Machinery Co. v. AMAX Coal Co.*,[398] relies on a case decided in 1991, four years before the 1995 amendments to the IPLA took effect.[399]

Deaton v. Robison[400] is the other published decision handed down during the 2008 survey period that seems to countenance both IPLA-based and non-IPLA-based liability against product manufacturers and sellers for the same physical harm.[401] Although making it clear initially that the case "falls within the provisions of the [IPLA]," the *Deaton* opinion also notes that Indiana has "adopted" Section 388 of the Restatement (Second) of Torts, which seeks to impose common law liability upon possessors of defective and unreasonably dangerous chattel.[402] Recall that the dangerous chattel involved in *Deaton* was a black powder rifle.[403] It would, therefore, appear as though the court of appeals panel in *Deaton* believed that imposition of common law Restatement-based liability against the rifle's manufacturer in addition to IPLA-based liability would have been acceptable had the case been allowed to proceed to the jury.[404]

The judges deciding *Kovach* and *Deaton* seem to have no qualms allowing

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397. *Id.* at 67-68 (quoting Hitachi Constr. Mach. Co., v. AMAX Coal Co., 737 N.E.2d 460, 465 (Ind. Ct. App. 2000)).

398. 737 N.E.2d 460 (Ind. Ct. App. 2000).

399. The case that the *Kovach* and *Hitachi* majority rely upon for that point is *B&B Paint Corp. v. Shrock Manufacturing, Inc.*, 568 N.E.2d 1017, 1020 (Ind. Ct. App. 1991). *See Kovach*, 890 N.E.2d at 67.

400. 878 N.E.2d 499 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

401. *Deaton* is also discussed previously. *See supra* Part I.D.1.

402. *Deaton*, 878 N.E.2d at 501.

403. *Id.*

404. *Id.* Recall the *Campbell* case addressed *supra* Part I.D.3. in which a child suffered serious injuries after eating ground beef that allegedly was contaminated with *E. coli* bacteria. *Campbell v. Supervalu, Inc.*, 565 F. Supp. 2d 969, 971-73 (N.D. Ind. 2008). There, in the context of applying the IPLA's statute of repose to time-bar plaintiffs' claims, the court unmistakably concluded that the IPLA governs all of the claims alleging physical harm arising out of injuries suffered by a child allegedly as a result of eating ground beef that was contaminated with *E. coli*. *Id.* at 975-77. That decision, on the surface, seems to be a recognition that all claims, including all non-IPLA-based implied warranty claims were merged into the IPLA and were all time barred by its ten-year statute of repose. Deeper analysis reveals, however, that Judge Cosbey nevertheless provided an explanation in a footnote "in order to complete the record" about why each of the claims (IPLA-based negligence, IPLA-based strict liability, and breach of warranty) were time-barred. *Id.* at 974-75 n.6. In doing so, it is difficult to determine whether he believes that implied warranty claims *may* exist in addition to IPLA-based claims arising out of the same physical harm or whether his efforts were merely offered in the abstract to demonstrate that the a separate statutory limitations period barred the implied warranty claims even if they *could* be separately pursued. *Id.*

non-IPLA-based claims and theories to proceed against manufacturers and sellers of products for the same physical injuries that the IPLA is intended to govern. We do not know whether that is deliberate or merely because they were unaware of the issues identified here. Regardless, these cases require us to ponder the significance of the "regardless of the operative theory of liability" language in Indiana Code section 34-20-1-1.[405] It would seem as though the legislature used that limiting language for a reason, and it seems fairly clear that the intention was to eliminate all claims and theories of liability against manufacturers and sellers of products that cause physical harm that are not specifically enumerated in the IPLA itself.

As noted above, the type of legal theories and claims to which Indiana Code section 34-20-1-2 appears to except from the IPLA's reach fall into one of three categories: (1) those that do not involve physical harm (i.e., economic losses that are otherwise covered by contract or warranty law); (2) those that do not involve a "product;" and (3) those that involve entities that are not "manufacturers" or "sellers" under the IPLA.

A comparison of three published cases all decided during the 2008 survey period illustrates some important distinctions in this context and may provide practitioners with useful guidance when trying to determine the intended scope of the IPLA. First, recall that in *Mesman*,[406] the Seventh Circuit chastised the judge presiding over the trial for permitting Konecranes to argue that it could not be responsible under the IPLA for the location of the crane's cab because it had not manufactured the crane, but rather merely repaired it.[407] As the Seventh Circuit pointed out, the IPLA does not consider entities who merely performed repairs a "manufacturer" for purposes of a design defect claim unless the facts demonstrate that the entity performing the purported "repair" actually did more than just make repairs.[408]

As it turned out, the Seventh Circuit was convinced that Konecranes did much more than merely repair the crane because it "alter[ed the crane's] design to enable it to be operated from ground level rather than just from the overhead cab."[409] Konecranes should not, therefore, have been permitted to shield itself from IPLA liability.[410] The Seventh Circuit, however, concluded that the presiding judge's error in permitting Konecranes to argue that it should not be liable under the IPLA was ultimately "inconsequential, because the plaintiffs were permitted to claim common law negligence."[411] Although the opinion does not elaborate any further, that statement makes sense if the "common law negligence" claim to which the court refers is a separate negligence count against

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405. IND. CODE § 34-20-1-1 (2008).

406. Addressed *supra* Part I.D.2.

407. Mesman v. Crane Pro Servs., 512 F.3d 352, 356 (Ind. 2008).

408. *Id.* (citing Lenhardt Tool & Die Co. v. Lumpe, 703 N.E.2d 1079, 1085 (Ind. Ct. App. 1998); Richardson v. Gallo Equip. Co., 990 F.2d 330 (7th Cir. 1993)).

409. *Id.*

410. *Id.*

411. *Id.*

Konecranes for performing repairs in a negligent fashion and that those negligent repairs caused the physical injuries alleged. In that connection, the Seventh Circuit's disposition seems perfectly appropriate. Konecranes was, in effect, allowed to try to extricate itself from IPLA-based liability by arguing it merely made repairs. If the jury agreed that Konecranes merely repaired the crane, then it could still be liable if the jury found that it made those repairs negligently under Indiana common law.

The situation in *Mesman* seems fundamentally different from the situation in *Kovach*.[412] In *Kovach*, the court permitted both IPLA-based and non-IPLA-based common law theories to proceed at the same time against entities that were clearly covered and otherwise governed by the IPLA by virtue of their status as manufacturers and sellers.[413] In such situations, the IPLA appears to make clear that the IPLA (and only the IPLA) governs and specifically provides which claims and theories can be asserted against product manufacturers or sellers for the physical harm the product caused.[414] That would seem to be precisely why the IPLA includes the "regardless of theory of liability" language.[415] Many would argue that *Kovach* and cases like it go too far when they allow statutory or common law claims to proceed against entities that are undeniably product manufacturers and sellers arising out of the same physical harm that the IPLA is intended to govern.

In *Mesman*, by contrast, the Seventh Circuit's commentary about an additional "common law negligence" claim[416] does not appear to present the same peculiarity as *Kovach*, so long as the "common law negligence" to which the Seventh Circuit refers is negligence against Konecranes arising out of poor quality repairs to the crane. As it appears the Seventh Circuit correctly recognized, the erroneous instruction would result in one of two eventualities: (1) the jury would reject Konecranes's "we only repaired" argument and it would, therefore, face IPLA-based liability as a manufacturer of the crane; or, in the alternative, (2) the jury would accept the "we only repaired" argument and Konecranes would face the prospect of common law liability. The important distinction between *Mesman* and *Kovach* is that the defendant in *Mesman* could not face the prospect of *both* IPLA-based and non-IPLA-based liability arising out of the same physical harm. That is precisely what the *Kovach* defendants face and what other manufacturer and seller defendants in product liability cases may continue to face as a result of decisions such as *Kovach*.

As noted a number times above, the Indiana Supreme Court granted transfer in *Kovach* in February 2009. Perhaps this will be among the issues that the court clarifies in its decisions.

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412. *Kovach* is discussed in detail *supra* Part I.D.1.

413. *See* Kovach v. Alpharma, Inc., 890 N.E.2d 55 (Ind. Ct. App. 2008), *trans. granted*, (Ind. Feb. 27, 2009).

414. *See* IND. CODE § 34-20-1-1 (2008).

415. *Id.*

416. *Mesman*, 512 F.3d at 356.

The second case, *Smith & Wesson Corp. v. City of Gary*,[417] is also interesting. There, the City of Gary sued the manufacturers and sellers of handguns under a variety of different legal theories, including public nuisance, negligent distribution, and negligent design.[418] After the trial court initially dismissed the claims, the case worked its way through both the Indiana Court of Appeals and the Indiana Supreme Court, resulting in two different published opinions.[419] The court of appeals's opinion in October 2007 marked the third published opinion in the trilogy. The 2007 decision by the court of appeals affirmed a ruling allowing the manufacturers and sellers to face potential liability pursuant to Indiana's public nuisance statute.[420]

The precise nature of the physical harm suffered is the seminal question in terms of available claims in a case such as *Smith & Wesson*. If actual deaths and injuries as a result of the guns sold by the manufacturers and sellers constituted the "physical harm" underlying the nuisance claim, then the IPLA would govern the claims against them and all theories would merge.[421] There would be no public nuisance theory available, nor would there be separate claims available for negligent "distribution" or "marketing." The only post-merger theories that would be available are found in the IPLA itself, namely failure to warn and defective design.[422] A close review of the case, however, reveals that the "harm" underlying the City of Gary's public nuisance claim was not actual deaths or injuries suffered as a result of gun violence, but rather the increased availability or supply of handguns "to criminals, juveniles, and others who may not lawfully purchase them."[423] In summarizing the nuisance allegations, the Indiana Supreme Court wrote as follows:

> The City alleges that the dealer-defendants have participated in straw purchases and other unlawful retail transactions, and that manufacturers and distributors have intentionally ignored these unlawful transactions.

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417. 875 N.E.2d 422 (Ind. Ct. App. 2007), *trans. denied*, (Ind. Jan. 12, 2009).

418. *Id.* at 425 (quoting City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1227-29 (Ind. 2003). The Indiana Supreme Court had remanded the case; thus, the court of appeals relied on the supreme court's treatment of the facts. *Id.* at 424-26.

419. *See* 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); City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003).

420. *Smith & Wesson*, 875 N.E.2d at 424. There is no question that the defendants remaining in the case were gun manufacturers and/or sellers as the IPLA contemplates the terms. *Id.* at 424 n.1, 425. The dispositive issue on appeal had nothing to do with the IPLA. The issue, as stated by the court of appeals, was "[w]hether the Protection of Lawful Commerce in Arms Act ('PLCAA'), 15 U.S.C. §§ 7901-7903, bars the City's nuisance claims." *Id.* at 424. Because the court concluded that the PLCAA does not bar the City of Gary's claims, the court did not address the constitutional issues the parties also raised. *Id.*

421. *See* IND. CODE § 34-20-1-1 (2008); *see also supra* notes 386-88 and accompanying text.

422. *See* IND. CODE §§ 34-20-4-1 (defective product), 34-20-4-2 (failure to warn) (2008).

423. *Id.* at 426 (citing *City of Gary ex rel. King*, 801 N.E.2d at 1231).

> The result is a large number of handguns in the hands of persons who present a substantial danger to public safety in the City of Gary . . . . Taken as true, these allegations are sufficient to allege an unreasonable chain of distribution of handguns sufficient to give rise to a public nuisance generated by all defendants.[424]

Accordingly, the *Smith & Wesson* court's decision to allow the City of Gary to pursue its alleged public nuisance theories against the gun manufacturers and sellers does not seem inconsistent with Indiana law, even though those claims exist outside the purview of the IPLA.

The third case, *Dutchmen Manufacturing, Inc. v. Reynolds*,[425] allowed non-IPLA-based liability to be imposed, but that was in a case in which neither a "product" nor a "manufacturer" or "seller" was involved. There, "Dutchmen was a tenant in a recreational vehicle (RV) manufacturing facility in Goshen."[426] "While Dutchmen was leasing the facility, . . . it constructed some scaffolding and installed several work platforms for use in the manufacturing process . . . . The scaffolds were mechanical platforms that hung from the building's ceiling and could be raised and lowered."[427] When Dutchmen moved out of the manufacturing facility, it left behind the platforms for the new tenant, Keystone RV.[428] The plaintiff, a Keystone employee, was injured when one of the scaffolds broke.[429]

The plaintiff's principal legal theory against Dutchman was based upon Section 388 of the Restatement (Second) of Torts.[430] In refusing to reverse a jury verdict for the plaintiff, the court of appeals in *Dutchmen* concluded, among other things, that there was sufficient evidence of poor workmanship to allow the plaintiff to present a Section 388 claim to the jury.[431] The trial court made clear that Dutchmen could not be liable under any product liability theory because "Dutchmen [was] not engaged in the business of constructing and/or selling the scaffolding . . . , for resale, use or consumption."[432] The trial court also made clear that, "[t]he incident in this case was an isolated dealing and Dutchmen is not a seller or manufacturer of a product which would invoke the [IPLA]."[433]

Mesman, *Smith & Wesson*, and *Dutchmen* all allow non-IPLA-based claims to go forward, but those cases are all different from *Kovach* and *Deaton* in important ways. In *Mesman*, the non-IPLA-based "common law" theory was allowed to go the jury only as a "back up" in the event that the jury found

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424. *Id.* (quoting *City of Gary ex rel. King*, 801 N.E.2d at 1241) (other citations omitted).
425. 891 N.E.2d 1074 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008).
426. *Id.* at 1078.
427. *Id.*
428. *Id.* at 1079.
429. *Id.*
430. *Id.* at 1079-81.
431. *Id.*
432. *Id.* at 1080.
433. *Id.*

Konecranes not to be a manufacturer, but rather only a "repairer" of the crane involved. In *Smith & Wesson*, there was no "physical harm" involved, only an alleged public nuisance arising out of the availability of the guns at issue. And, in *Dutchmen*, there was neither a product involved nor a manufacturer or seller of it. None of those cases involved, as did *Kovach* and *Deaton*, manufacturers and/or sellers facing both non-IPLA-based and IPLA-based liability for physical harm caused by a product.

II. STATUTES OF LIMITATION AND REPOSE

The IPLA contains a statute of limitation and a statute of repose for product liability claims. Indiana Code section 34-20-3-1 provides:

> (a) This section applies to all persons regardless of minority or legal disability. Notwithstanding [Indiana Code section] 34-11-6-1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.
> (b) Except as provided in section 2 of this chapter, a product liability action must be commenced:
> (1) within two (2) years after the cause of action accrues; or
> (2) within ten (10) years after the delivery of the product to the initial user or consumer.
> However, 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.[434]

Product liability cases involving asbestos products, however, have a unique statute of limitations. Indiana Code section 34-20-3-2(a) provides that "[a] product liability action based" upon either "property damage resulting from asbestos" or "personal injury, disability, disease, or death resulting from exposure to asbestos . . . must be commenced within two (2) years after the cause of action accrues."[435] That rule applies, however, "only to product liability actions against . . . persons who mined and sold commercial asbestos," and 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."[436]

Federal trial courts in Indiana issued two decisions during the 2008 survey period that disposed of cases because of the IPLA's statute of repose. In the first case, *C.A. v. AMLI at Riverbend, L.P.*,[437] four-year-old C.A. and three-year-old L.A. suffered serious burns on August 11, 2006, when an electric range

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434. IND. CODE § 34-20-3-1 (2008).

435. *Id.* § 34-20-3-2(a).

436. *Id.* § 34-20-3-2(d). For a discussion of the asbestos-related statute of repose, see *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144 (Ind. Ct. App. 2005).

437. No. 1:06-cv-1736-SEB-JMS, 2008 U.S. Dist. LEXIS 2558 (S.D. Ind. Jan. 10, 2008).

manufactured by Whirlpool fell on them in their apartment.[438] The children's parents filed suit on their behalf in the Marion County Circuit Court on November 1, 2006, against, among others, Whirlpool and the apartment's property management company, AMLI.[439] The plaintiffs asserted product liability claims against Whirlpool.[440]

Whirlpool filed a motion for summary judgment, arguing that the IPLA's statute of repose barred the plaintiffs' product liability action.[441] In support of its motion, Whirlpool designated an affidavit executed by Marvin McDowell, a Product Safety Manager at Whirlpool from 1990 to 2002.[442] McDowell asserted in his affidavit that he knew about the process Whirlpool used to apply serial numbers to electric ranges, and that, based upon the serial number on the electric range at issue, Whirlpool manufactured it in the fourteenth week of 1985.[443]

The plaintiffs moved to strike McDowell's declarations regarding the age of the electric range because he admitted in his deposition that his knowledge came from an oral history relayed to him and, therefore, was not really based upon personal knowledge.[444] The court concluded that the plaintiffs' arguments were "unconvincing."[445] According to the court, Whirlpool established that McDowell had sufficient personal knowledge regarding the serial number of the electric range at issue.[446]

Whirlpool further asserted that the range at issue already had been installed in the plaintiffs' apartment when AMLI purchased the apartment complex on July 13, 1993.[447] Whirlpool designated the affidavit of Charlotte Sparrow, Vice President of AMLI Residential Partners, L.L.C.[448] Sparrow asserted in her affidavit that a review of the AMLI records revealed no records to indicate that the electric range at issue in plaintiffs' apartment was ever removed or replaced after it was installed on July 13, 1993.[449]

Plaintiffs moved to strike Sparrow's affidavit, arguing that Sparrow failed to comply with Rule 56(e) of the Federal Rules of Civil Procedure, which requires

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438. *Id.* at *2.

439. *Id.* at *2-3.

440. *Id.* at *2.

441. *Id.* at *3.

442. *Id.* at *6-7. As the party seeking summary judgment based on the Indiana Statute of Repose, Whirlpool had the initial burden of identifying evidence establishing that the electric range at issue was installed more than ten years before the accident. *Id.* at *14-15.

443. *Id.* at *7.

444. *Id.* at *10. Plaintiffs also pointed out that during McDowell's deposition, McDowell was not able to, on the spot, interpret the manufacturing year of a Whirlpool stove based on a serial number that contained an "X" and, therefore, plaintiffs argued that McDowell lacked knowledge about the manufacturing date of the stove at issue. *Id.* at *11-12.

445. *Id.* at *12.

446. *Id.* at *12-13.

447. *Id.* at *7.

448. *Id.*

449. *Id.*

that "'sworn or certified copies of all papers . . . referred to in an affidavit shall be attached thereto or served therewith'" because Sparrow failed to attach the documents she relied upon, and therefore, plaintiffs' counsel had no way of cross-examining the legitimacy of Sparrow's conclusions.[450] The court denied the plaintiffs' motion to strike.[451] Because the thrust of Whirlpool's argument was based upon an absence of records suggesting that the electric range was removed or replaced, Sparrow did not need to attach any records to support this argument.[452] Furthermore, the court pointed out that plaintiffs' counsel failed to identify the documents they believed should have been attached to Sparrow's affidavit.[453]

According to the court, the IPLA

> provides for a two-year statute of limitations, limited by a ten-years-from-delivery clause . . . [a]n action must be brought within two years after it accrues, but in any event within ten years after the product is first delivered to the initial user or consumer, unless the action accrues more than eight but less then ten years after the product's introduction into the stream of commerce.[454]

Whirlpool's designation of evidence established that there were no genuine issues of material fact that the electric range was installed before 1993.[455] Additionally, plaintiffs did not introduce any evidence of their own to contradict Whirlpool's designation.[456] Because plaintiffs did not file suit until November 1, 2006—more than ten years after the electric range was installed in the plaintiffs' apartment—the court granted Whirlpool's motion for summary judgment.[457]

In *Campbell v. Supervalu, Inc.*,[458] plaintiffs Duane and Connie Campbell purchased ground beef at a Cub Food grocery store. They claimed that the beef was tainted with *E. coli* bacteria and made their son, Michael, seriously ill.[459] They filed suit against Supervalu, Inc., the successor in interest to the Cub Food grocery store,[460] approximately thirteen years after purchasing the ground beef alleging that Supervalu's grocery store chain introduced the *E. coli* bacteria into

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450. *Id.* at *8-9 (quoting FED. R. CIV. P. 56(e)).

451. *Id.* at *10.

452. *Id.* at *9.

453. *Id.*

454. *Id.* at *6 (internal quotation omitted) (citations omitted).

455. *Id.* at *13-14.

456. *Id.* at *14.

457. *Id.* at *15.

458. 565 F. Supp. 2d 969 (N.D. Ind. 2008).

459. *Id.* at 971. *Campbell* is also discussed *supra* Parts I.D.3 and I.E.

460. The Campbells purchased the beef at the Cub Food Store owned at the time by Rogers Markets, Inc. *Id.* at 971. On March 14, 1994, Rogers Markets, Inc. assigned to Supervalu its leasehold interest in the real estate where the Cub Food store was located. *Id.* at 973. Supervalu's grocery chain is now known as Scott's. *Id.* at 971.

the ground beef and, therefore, was liable under theories of negligence, product liability, and breach of implied warranty of fitness.[461]

Supervalu filed a motion for summary judgment, asserting among other defenses, that the IPLA's statute of repose[462] time barred the Campbells' claims.[463] The Campbells responded by presenting a two-fold argument. First, they maintained that Supervalu waived its statute of repose defense by failing to raise it in a previous motion to dismiss pursuant to Rule 12(g) of the Federal Rules of Civil Procedure.[464] Second, the Campbells argued that the statute of repose did not apply to their "simple" negligence action.[465]

The court concluded that Supervalu did not waive the statute of repose defense by electing not to assert it in its first motion to dismiss.[466] The court noted that Rule 12(g) is limited specifically to Rule 12 motions and does not operate to waive affirmative defenses, such as the statute of repose defense.[467] Furthermore, there can be no wavier of the statute of repose defense because the defense that plaintiff has failed to state a claim can be raised: (1) "in any pleading [pursuant to] Federal Rule of Civil Procedure 7(a)"; (2) "in a motion for judgment on the pleadings"; or (3) "even at trial."[468] Supervalu included the statute of repose defense as an affirmative defense in its answer, which was sufficient.[469]

The court also concluded that the IPLA's statute of repose applied to the Campbells' "simple negligence" action against Supervalu.[470] In 1995, the Indiana General Assembly amended the IPLA, which expressly made it applicable to "all actions brought by a user or consumer against a manufacturer or seller for physical harm caused by a product regardless of the substantive legal theory or theories upon which the action is brought."[471] Thus, the language of the IPLA, according to the court, makes it clear that the Indiana General Assembly intended the IPLA to govern *all* product liability actions regardless of the underling theory

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461. *Id.* at 973.

462. IND. CODE § 34-20-3-1 (2008).

463. *Campbell*, 565 F. Supp. 2d at 973. Supervalu also argued it was entitled to summary judgment because "it did not own or operate the Cub Foods store on September 22, 1993, so it owed no duty to the Campbells and were not the cause in fact of [the alleged injury]." Supervalu further argued that there was no evidence that the good beef was tainted with *E. coli* bacteria or that it caused Michael's illness.

464. *Id.* at 974-75. Rule 12(g) of the Federal Rules of Civil Procedure provides that "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." FED. R. CIV. P. 12(g).

465. *Campbell*, 565 F. Supp. 2d at 974-75.

466. *Id.* at 975.

467. *Id.*

468. *Id.* (citing FED. R. CIV. P. 12(h)(2)).

469. *Id.*

470. *Id.* at 976.

471. *Id.*

of liability, including the Campbells' "simple negligence" theory.[472] The undisputed facts established that the ground beef was delivered to the Campbells on September 22, 1993.[473] Because the Campbells did not file suit against Supervalu until September 8, 2006—nearly thirteen years after the cause of action accrued—the IPLA statute of repose barred each of their claims.[474]

III. EVIDENTIARY PRESUMPTION FOR COMPLIANCE WITH STATE-OF-THE-ART AND GOVERNMENT STANDARDS

The IPLA, via Indiana Code section 34-20-5-1, entitles a manufacturer or seller to a rebuttable presumption that the product causing the physical harm is not defective and that the product's manufacturer or seller is not negligent if, before the sale by the manufacturer, the product:

> (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or
> (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.[475]

Recent decisions in *Bourke v. Ford Motor Co.*,[476] *Flis v. Kia Motors Corp.*[477] and *Schultz v. Ford Motor Co.*[478] all meaningfully address the foregoing

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472. *Id.* (citing Stegemoller v. ACandS, Inc., 767 N.E.2d 974, 975 (Ind. 2002)).

473. *Id.*

474. *Id.* The Seventh Circuit also dealt with a product liability statute of limitations issue, though it did so in the context of interpreting North Carolina law. In *Klein v. DePuy, Inc.*, 506 F.3d 553 (7th Cir. 2007), the Seventh Circuit affirmed the trial court's ruling that North Carolina's six year statute of repose applied to the plaintiff's claims against DePuy, an Indiana manufacturer of prosthesis, that the replacement hip was defective, and that the defects caused him injury and damage. *Id.* at 559. The court ruled that the traditional rule of *lex loci delicti*—the state where the last event necessary to make an actor liable for the alleged wrong takes place—governed the choice of law issue. *Id.* at 555 (citing Simon v. United States, 798, 805 (Ind. 2004)). Because the last event necessary to make DePuy liable occurred in North Carolina and the plaintiff resided, consulted with doctors, underwent hip surgery, and received post-surgery care in North Carolina, the North Carolina six-year statute of repose applied. *Id.* at 555-56.

475. IND. CODE § 34-20-5-1 (2008).

476. No. 2:03-CV-136, 2007 U.S. Dist. LEXIS 15871 (N.D. Ind. Mar. 5, 2007).

477. No. 1:03-cv-1567-JDT-TAB, 2005 WL1528227 (S.D. Ind. June 20, 2005).

478. 857 N.E.2d 977 (Ind. 2006). The Indiana Supreme Court decided *Schultz* during the 2006 survey period. *Id.* at 979. The plaintiff (Schultz) was injured when he lost control of his Ford Explorer. The vehicle rolled over and the roof collapsed, rendering Schultz a quadriplegic. *Id.* Schultz and his wife sued Ford, alleging negligence and defective roof design. *Id.* Ford denied liability and defended the suit. *Id.* During trial Ford relied in part on its compliance with Federal

presumptions.[479] There were no significant published Indiana decisions during the 2008 survey period that addressed the IPLA's rebuttable presumptions.[480]

Motor Vehicle Safety Standard (FMVSS) 216, which governed minimum vehicle roof strength. *Id.* at 979 n.1. The trial court gave an instruction based on Indiana Code section 34-20-5-1. The instruction provided that Ford was entitled to a rebuttable presumption that it was not negligent and the Ford Explorer was not defective by virtue of its compliance with FMVSS 216. *Id.* at 979-80. The jury rendered a verdict in favor of Ford. *Id.* at 979. Schultz contended that the giving of the instruction was reversible error. *Id.* at 981. The Indiana Supreme Court disagreed and affirmed the trial court. *Id.* at 989. Relying on the last sentence contained in Indiana Evidence Rule 301—that presumptions shall have continuing effect—the Indiana Supreme Court rejected the bursting bubble theory of presumptions. *Id.* at 982-85. The court acknowledged that the presumption recognized by Indiana Code section 34-20-5-1 was not a presumption in a traditional legal sense. *Id.* at 985. Nonetheless, giving "continuing effect" to a presumption through a jury instruction furthered the policies that created the presumption in the first place. *Id.* at 986. By authorizing the instruction the court reasoned that it "recognize[d] the policy embodied by the [l]egislature in [the governmental compliance statute], regardless of whether the provision conform[ed] to the conventional definition of a legal 'presumption.'" *Id.* at 986. Finally, the *Schultz* court addressed the concern that the use of the word "presumption" in an instruction could have a prejudicial effect on juries. *Id.* at 986-87. The court suggested that it might be less prejudicial to use words such as "infer" or "assume"; however, the inclusion of the verb "presume" and the noun "presumption" in the jury instruction at issue did not amount to reversible error because on balance the instruction was fair to both parties. *Id.* at 987. Therefore, the court affirmed the trial court's decision to give the jury instruction. *Id.* at 989.

479. For a detailed discussion about all three cases, see Alberts, Petersen & Thornburg, *supra* note 98, at 1195-1200.

480. Two cases decided during the 2008 survey period referenced the rebuttable presumption. In both, the defendants attempted to establish the presumption at the summary judgment stage of the proceedings. In the first, *Fueger v. CNH America LLC* (*Fueger II*), 893 N.E.2d 330 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008), CNH America (Case) claimed that its skid loader was state-of-the art. *Id.* at 332. For a more detailed discussion of the claims at issue in *Fueger II*, see *supra* Part I.D.2. Case relied on expert testimony that established that many, if not all skid loaders possessed the same ignition feature as the product at issue and that the product complied with a standard, SAE J1388 Personal Protection for Skid Steer Loaders, promulgated by the Society of Automotive Engineers. *Fueger II*, 893 N.E.2d at 332-33. Plaintiff countered that the SAE standard was not promulgated by the government and that his expert testified that Case's skid loader was not state of the art. *Id.* at 333. The court of appeals held that the conflicting expert testimony created a question of fact about whether the skid loader was state of the art. *Id.* The second case is an unpublished opinion, *Lind v. Menard, Inc*., No. 45A04-0707-CV-408, 2008 WL 324018 (Ind. Ct. App. 2008). For a more detailed discussion of the facts of the *Lind* case, see *supra* note 134. In *Lind*, the seller argued that a drain cleaning product complied with applicable national standards entitling it to the presumption. *Id.* at *2-3. The seller relied on 15 U.S.C. § 1261 (2006) and 16 C.F.R. § 1500 (2008), which contained detailed labeling requirements for hazardous substances deemed "misbranded" if they did not contain the information specified in the sections. *Id.* Because the product's label did not contain the signal words "DANGER," "WARNING" or "CAUTION" as the standards specified, the court of appeals held that it was not entitled to the

IV. 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."[481] 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."[482] It is a "complete" defense in that it precludes a defendant's IPLA liability (in design and warning defect cases) if it is found to apply to a particular set of factual circumstances.[483]

Although there were no significant published decisions during the 2008 survey period that substantively addressed the incurred risk defense directly, practitioners should be mindful of the discussion in Part I.D., *supra*, particularly as the concept of "open and obvious danger" relates to the incurred risk defense.

B. Misuse

Indiana Code section 34-20-6-4 provides that 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."[484]

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rebuttable presumption, and a question of fact precluded summary judgment concerning the adequacy of the seller's warnings and instructions. *Id.* *3.

481. IND. CODE § 34-20-6-3 (2008).

482. Cole v. Lantis Corp., 714 N.E.2d 194, 200 (Ind. Ct. App. 1999) (citing Schooley v. Ingersoll Rand, Inc., 631 N.E.2d 932, 939 (Ind. Ct. App. 1994)).

483. Vaughn v. Daniels Co. (W. Va.), Inc., 841 N.E.2d 1133, 1146 (Ind. 2006) ("Incurred risk acts as a complete bar to liability with respect to negligence claims brought under the [I]PLA." (citing IND. CODE §§ 34-51-2-1 to -19)). On that point, the *Vaughn* decision is consistent with several earlier cases, *see, e.g.*, Baker v. Heye-America, 799 N.E.2d 1135, 1145 (Ind. Ct. App. 2003); Hopper v. Carey, 716 N.E.2d 566, 575 (Ind. Ct. App. 1999); *Cole*, 714 N.E.2d at 194, all of which stated that incurred risk is a complete defense in Indiana. *Cf.* Mesman v. Crane Pro Servs., 409 F.3d 846 (7th Cir. 2005); Coffman v. PSI Energy, Inc., 815 N.E.2d 522 (Ind. Ct. App. 2004). Although it held that no IPLA-based claims survived summary judgment, the *Vaughn* court did allow a common law negligence claim to proceed against Daniels and, accordingly, allowed the issue of Vaughn's fault to remain in the case for the jury's consideration solely in connection with the negligence claim. *Vaughn*, 841 N.E.2d at 1145-46. For a discussion about the nature of the negligence claim that the court allowed to survive summary judgment, see Alberts & Petersen, *supra* note 99, at 1037-39.

484. IND. CODE § 34-20-6-4 (2008). Stated in a slightly different way, misuse is a "'use for a purpose or in a manner not foreseeable by the manufacturer.'" Henderson v. Freightliner, LLC, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005)

Knowledge of a product's defect is not an essential element of establishing the misuse defense. The facts necessary to prove the defense of "misuse" many times may be similar to the facts necessary to prove either that the product is in a "condition . . . not contemplated by reasonable" users or consumers under Indiana Code section 34-20-4-1(1)[485] or that the injury resulted from "handling, preparation for use, or consumption that is not reasonably expectable" under Indiana Code section 34-20-4-3.[486]

Recent decisions in cases such as *Barnard v. Saturn Corp.*[487] and *Burt v. Makita USA, Inc.*[488] have resolved the applicability of the misuse defense as a matter of law. On the other hand, a 2005 case, *Henderson v. Freightliner, LLC*,[489] held that the incurred risk issue should be presented to a jury.[490]

(quoting Barnard v. Saturn Corp., 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003)).

485. IND. CODE § 34-20-4-1(1) (2008).

486. *Id.* § 34-20-4-3.

487. 790 N.E.2d 1023 (Ind. Ct. App. 2003). *Barnard* was a wrongful death action against the manufacturers of an automobile and its lift jack. *Id.* at 1026-27. Plaintiff's decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. *Id.* at 1027. The jack gave way, trapping the decedent underneath the car. *Id.* Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow. *Id.* at 1026-27. 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. *Id.* at 1030. The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed. *Id.* at 1025. 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 the injuries that he sustained." *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question. For a more detailed analysis of *Barnard*, see Alberts & Bria, *supra* note 103, at 1286-87.

488. 212 F. Supp. 2d 893 (N.D. Ind. 2002). In *Burt*, the plaintiff was injured by a circular saw's blade guard. *Id.* at 894. 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.

Id. 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 section 34-20-4-1(1) had not been met, which necessarily also meant that the defense of "misuse" had been established as a matter of law. *Id.*; *see also* Alberts & Boyers, *supra* note 23, at 1195-96.

489. No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005).

490. In *Henderson*, defendants argued that plaintiff Henderson began working on a diesel truck's air suspension system without first bleeding the air pressure, which was a misuse because the truck's service manual required that mechanics, among other things, "disconnect the leveling valve and exhaust all air from the air springs." *Id.* at *5, *10. Judge Hamilton decided that the

Although the *Vaughn* case involved the court's resolution of a "misuse" issue, the court addressed plaintiff's purported "misuse" not as an IPLA-based defense to a product liability claim, but rather as an element of the jury's consideration in connection with Vaughn's common law negligence claim.[491]

The statutory definition of "misuse" quoted above appears 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 seem to confirm that "misuse" should not be considered "fault" and, therefore, misuse should be a complete defense as is incurred risk.[492] Recent decisions, however, continue to reach inconsistent results when it comes to that issue. Three decisions, *Burt v. Makita USA, Inc.*,[493] *Morgen v. Ford Motor Co.*,[494] and *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*,[495] have concluded that misuse is a complete defense. On the other hand, decisions in cases such as *Chapman v. Maytag Corp.*[496] and *Barnard v. Saturn Corp.*[497] have determined that the degree of a user's or a consumer's misuse is a factor to be assessed in determining that user's or consumer's "fault," which must then be compared with the "fault" of the alleged tortfeasor(s).[498]

There were no significant published decisions during the survey period that addressed misuse.

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disputed issues of fact noted above precluded him from granting summary judgment that the misuse defense foreclosed recovery as a matter of law. *Id.* at *10-14.

491. Vaughn v. Daniels Co. (W. Va.), Inc., 841 N.E.2d 1133, 1145-46 (Ind. 2006). For a more detailed discussion about the negligence claim that the *Vaughn* court allowed to survive against Daniels, see Alberts & Petersen, *supra* note 99, at 1037-39.

492. The district judge in *Chapman v. Maytag Corp.*, 297 F.3d 682 (7th Cir. 2002), recognized as much. He also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement. *Id.* at 689.

493. 212 F. Supp. 2d 893, 897 (N.D. Ind. 2002).

494. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *aff'd in part, vacated in part*, 797 N.E.2d 1146 (Ind. 2003).

495. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

496. 297 F.3d 682 (7th Cir. 2002). In *Henderson*, Judge Hamilton cited *Chapman* for the proposition that "[t]he misuse defense is not necessarily a complete defense but is an element of comparative fault." Henderson v. Freightliner, LLC, NO. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005) (citing *Chapman*, 297 F.3d at 689). For a more detailed analysis of *Chapman*, see Alberts & Boyers, *supra* note 23, at 1196-97.

497. 790 N.E.2d 1023 (Ind. Ct. App. 2003). According to the *Barnard* court, "the defense of misuse should be compared with all other fault in a case and does not act as a complete bar to recovery in a products liability action." *Id.* at 1029 (citing *Chapman*, 297 F.3d at 689). The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed. *Id.* at 1029-30. "By specifically directing that the jury compare all 'fault' in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme." *Id.* at 1030; *see also* Alberts & Bria, *supra* note 103, at 1286-87.

498. *See* IND. CODE § 34-20-8-1 (2008).

C. Modification and Alteration

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

> It 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 cause of physical harm where the modification or alteration is not reasonably expectable to the seller.[499]

The modification/alteration defense is incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1. Indeed, the Indiana Code provides:

> [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 is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if . . . 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.[500]

The interplay between these two statutes as it relates to a product's condition is important for courts and practitioners to understand. As briefly discussed above in Part I.D.1., evidence of a product's condition after leaving the manufacturer's or seller's control is significant *both* as an IPLA-mandated threshold requirement for which the plaintiff bears the burden of proof, as well as an IPLA-based affirmative defense for which the defendant bears the burden of proof.[501]

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499. *Id.* § 34-20-6-5. Before the 1995 Amendments to the IPLA, product modification or alteration operated as a complete defense. *See* Foley v. Case Corp., 884 F. Supp. 313, 315 (S.D. Ind. 1994).

500. IND. CODE § 34-20-2-1 (2008).

501. *Gaskin v. Sharp Electronics, Corp.*, No 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007), briefly addressed the "alteration" defense. *Gaskin* involved allegations that a television caused a fatal house fire. *Id.* at *2. The court recognized that plaintiffs had to prove that the allegedly defective condition in the television at issue existed at the time it left the manufacturer's control in order to satisfy an essential element of their prima facie case. *Id.* at *22. Whether there was a substantial alteration in the television between the time when it left the manufacturer's control and the time when it came into the plaintiff's possession, according to the court, was an affirmative defense to the foregoing essential element of the plaintiff's prima facie case. *Id.* at *23. The plaintiffs in *Gaskin* pointed to evidence that the television was purchased only two months prior to the fire, it was purchased from Best Buy in pristine condition, it was not mishandled by anyone, and it was never in need of repair. *Id.* at *24. Accordingly, the court concluded that there was sufficient evidence to allow the jury to ultimately determine whether plaintiffs could satisfy their burden of establishing a prima facie case and whether defendants could

In a product liability case in Indiana, the IPLA requires the plaintiff, in order to establish his or her prima facie case, to demonstrate, first, that the product was in a defective condition at the time the seller or manufacturer conveyed it to another party,[502] and, second, that the product reached him or her "without substantial alteration."[503] If a plaintiff's evidence is insufficient to meet those requirements as a matter of law either before or at trial, then he or she has failed to establish a prima facie product liability case.

The defendant, on the other hand, can and should introduce evidence to establish either that the product was substantially altered before it reached the plaintiff or that it was substantially modified or altered after delivery to the initial user or consumer and such modification or alteration proximately caused the damages alleged. Establishing the former negates a prima facie component of plaintiff's case. Establishing the latter provides the basis for the statutory modification/alteration defense. In many cases, the same evidence will prove both points, such as a situation in which the initial user or consumer substantially altered the product before selling it to the plaintiff.

There were no significant published decisions during the survey period that addressed modification or alteration.

V. COMPARATIVE FAULT AND THE IPLA

The IPLA incorporates, in large measure, Indiana's comparative fault principles for all product liability actions. A defendant cannot be "liable for more than the amount of fault . . . directly attributable to that defendant," nor can a defendant "be held jointly liable for damages attributable to the fault of another defendant."[504] In addition, the IPLA requires the trier of fact to compare the "fault of the person suffering the physical harm, as well as the fault of all others whom caused or contributed to cause the harm."[505] For purposes of the IPLA, "fault" is

> an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following:
> (1) Unreasonable failure to avoid an injury or to mitigate damages.
> (2) A finding under [Indiana Code section] 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.[506]

The IPLA also contemplates assessment of fault for non-parties:

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satisfy their burden of demonstrating the existence of a substantial alteration. *Id.*

502. IND. CODE. § 34-20-4-1 (2008).

503. *Id.* § 34-20-2-1.

504. *Id.* § 34-20-7-1.

505. *Id.* § 34-20-8-1(a).

506. *Id.* § 34-6-2-45(a).

> In 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.[507]

The Indiana Court of Appeals's 2007 decision in *Dorman v. Osmose, Inc.*,[508] is the most recent significant opinion in this area.[509] There were no published product liability decisions during the survey period that addressed comparative fault issues in a substantive way.

VI. FEDERAL PREEMPTION

"'[F]ederal law preempts state law in three situations: (1) when the federal statute explicitly provides for preemption; (2) when Congress intends to occupy the field completely; and (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress.'"[510]

A. Express Preemption

In *Riegel v. Medtronic, Inc.*,[511] the United States Supreme Court held that the express preemption provision of the Medial Device Amendments Act of 1976 (MDA)[512] to the federal Food, Drug, and Cosmetic Act, prohibits common law claims challenging the safety of a medical device with respect to which the United States Food and Drug Administration (FDA) has granted premarket approval.[513]

The MDA creates three levels of oversight for medical devices, depending upon the level of risk that the devices present.[514] Class I devices are subject to mere labeling requirements, the lowest level of supervision for medical

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507. *Id.* § 34-20-8-1(b).

508. 873 N.E.2d 1102 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 42 (Ind. 2008).

509. For a detailed analysis of *Dorman*, see Alberts, Petersen & Thornburg, *supra* note 98, at 1205-08.

510. Thornburg v. Stryker Corp., No. 1:05-cv-1378-RLY-TAB, 2007 U.S. Dist. LEXIS 43455, *5 (S.D. Ind. July 3, 2007) (quoting JCW Invs., Inc. v. Novelty, Inc., 482 F.3d 910, 918 (7th Cir. 2007)).

511. 128 S. Ct. 999 (2008).

512. 21 U.S.C. § 360k(a) (2006).

513. 128 S. Ct. at 1011. Justice Scalia wrote the court's opinion, joined by six other justices. *Id.* at 1002. Justice Stevens filed an opinion concurring in part and concurring in the judgment. *Id.* at 1011 (Stevens, J., concurring). Justice Ginsberg wrote a dissenting opinion. *Id.* at 1013 (Ginsburg, J., dissenting).

514. *Id.* at 1003 (majority opinion). Before the enactment of the MDA, individual states primarily controlled the introduction of new medical devices into the market. *Id.* The enactment of the MDA afforded the federal government a "regime of detailed federal oversight." *Id.*

devices.[515] Class II devices are subject to "'special controls' such as performance standards and postmarket surveillance measures."[516] Class III devices undergo a "rigorous regime of premarket approval."[517] In the premarket approval process, the FDA reviews the device design, labeling, and manufacturing specifications and makes a determination as to whether the specifications provide a "reasonable assurance of safety and effectiveness."[518]

The MDA includes a pre-emption provision, § 360k(a), which provides as follows:

> Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.[519]

Plaintiff Charles Riegel suffered serious injuries during an arterial insertion procedure when a balloon catheter manufactured by Medtronic, Inc. ruptured.[520] The catheter is a Class III device that the FDA approved through the premarket approval process.[521] Riegel and his wife sued Medtronic, alleging that the catheter's manufacture, design, and labeling "violated New York common law, and that these defects caused Riegel to suffer severe and permanent injuries."[522]

The district court held that § 360k(a) pre-empted the Riegels' causes of action for strict liability, breach of implied warranty, negligence and negligent manufacturing.[523] The district court also held that the MDA pre-empted the wife's loss of consortium claim to the extent it was derived from the preempted claims.[524] The Second Circuit Court of Appeals affirmed.[525] The United States Supreme Court agreed with both the district court and Second Circuit, holding that § 360k(a) precluded plaintiffs' common law claims that challenged the safety or effectiveness of the catheter.[526]

Based upon the language of § 360k(a), the *Riegel* Court addressed the following issues: (1) whether the federal government established requirements

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515. *Id.*
516. *Id.*
517. *Id.* at 1003-04.
518. *Id.*
519. 21 U.S.C. § 360k(a) (2006); *see also Riegel*, 128 S. Ct. at 1003.
520. *Riegel*, 128 S. Ct. at 1005.
521. *Id.*
522. *Id.*
523. *Id.* at 1005-06.
524. *Id.* at 1006.
525. *Id.*
526. *Id.* at 1011.

applicable to Medtronic's catheter; and (2) whether the plaintiffs' common-law claims were based on New York requirements with respect to the device that are "'different from, or in addition to' the federal ones, and that relate to safety and effectiveness."[527]

The Court determined that the federal government had, in fact, established requirements applicable to the catheter.[528] The Court noted that the rigorous pre-market approval process is "specific to individual devices."[529] The Court contrasted the catheter, which underwent the rigorous premarket approval regime before entering to the market, to the device at issue in *Medtronic, Inc. v. Lohr*,[530] which did not undergo the premarket approval process before entering the market, but rather, was granted approval under a grandfathering process.[531] The Court in *Lohr* held that the grandfather approval process did not impose device-specific requirements.[532] The Court proclaimed:

> Unlike general labeling duties, premarket approval is specific to individual devices. And it is no sense an exemption from federal safety review—it *is* federal safety review. Thus, the attributes that *Lohr* found lacking in § 510(k) review are present here. While § 510(k) is focused on equivalence, not safety, pre-market approval is focused on safety, not equivalence. While devices that enter the market through § 510(k) have never been formally reviewed under the MDA for safety or efficacy, the FDA may grant pre-market approval only after it determines that a device offers a reasonable assurance of safety and effectiveness. And while the FDA does not require that a device allowed to enter the market as a substantial equivalent take any particular form for any particular reason, the FDA requires a device that has received premarket approval to be made with almost no deviations from the specifications in its approval application, for the reason that the FDA has determined that the approved form provides a reasonable assurance of safety and effectiveness.[533]

With regard to the second issue, the Court determined that § 360k(a) preempted the Riegels' common-law claims because their claims were based upon New York "requirements" with respect to the catheter, that such requirements were "different from, or in addition to" the federal ones, and that they related to the safety and effectiveness of the device.[534] Adhering to the view of five Justices in *Lohr*—that common-law negligence and strict liability claims imposed "requirements"—the Court recognized that a state tort law requiring a

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527. *Id.* at 1006 (quoting 21 U.S.C. § 360k(a) (2006)).

528. *Id.* at 1007.

529. *Id.*

530. 518 U.S. 470 (1996).

531. *Riegel*, 128 S. Ct. at 1006-07.

532. *See id.* at 1006.

533. *Id.* at 1007 (internal quotations and citations omitted).

534. *Id.* at 1007-11.

device to be safer than the model approved by the FDA would disrupt the federal regulatory scheme, and that the state "requirements" were, therefore, preempted.[535] The majority opinion also addressed the dissent's view that Congress, in enacting the express preemption provision of the MDA, did not intend to preempt state tort remedies.[536] The majority rejected the dissent's view and emphasized that "[i]t is not [the Court's] job to speculate upon congressional motives," and that the preemption statute, by its plain language, overtly prohibits state tort claims.[537]

As a final point, the Court declined to address the Riegels' argument that the state requirements for medical devices were not different from or in addition to the federal requirements; rather, they paralleled the federal requirements.[538] The Riegels raised such an argument for the first time in their merits brief before the Supreme Court.[539] They did not present that argument in their briefs to the Second Circuit or in their petition for certiorari.[540]

B. Conflict Preemption

Tucker v. SmithKline Beecham Corp.,[541] is a wrongful death claim against SmithKline Beechman Corp. (GSK), arising out of a September 2002 suicide of man who had been taking the pharmaceutical drug, Paxil.[542] The lawsuit alleged that GSK breached its duty to warn about "an increased risk of suicide in adults taking Paxil."[543] The court initially dismissed all of the state law claims that were based upon an inadequate warning theory, finding them to be pre-empted because the Food and Drug Administration (FDA) required GSK to include language in its drug labels that conflicted with the warning that plaintiff argued was required under Indiana law.[544] On reconsideration, however, the court vacated its judgment.[545]

GSK argued that conflict pre-emption[546] precluded the state law claims because they

> directly conflicted with (1) the FDA-mandated labeling for Paxil; (2) the FDA's "consistent and repeated" determinations, during the period

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535. *Id.* at 1007-08.

536. *Id.* at 1009; *see also id.* at 1015 (Ginsberg, J., dissenting).

537. *Id.* at 1009 (majority opinion).

538. *Id.* at 1011.

539. *Id.*

540. *Id.*

541. 596 F. Supp. 2d 1225 (S.D. Ind. 2008).

542. *Id.* at 1226-27.

543. *Id.* at 1227.

544. *Id.*

545. *Id.*

546. "Conflict preemption arises when it is impossible to comply with both state and federal requirements or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*

> before and after [the suicide] in September 2002, that there is no scientific basis for the suicide warning [plaintiff] claims GSK should have included in its labeling for adults; and (3) the FDA's statement in May 2006 that it regards the additional warnings advocated by [plaintiff] as "false, misleading, and potentially harmful to the public," and that placement of those warnings on the label for Paxil would render the drug misbranded and unlawful as a result.[547]

The plaintiff countered by arguing that there is no basis for conflict pre-emption because the FDA did not preclude GSK from including in its label "Paxil-specific warning language, such as contained in its 2006 label."[548] The plaintiff further argued that even if there was a basis for conflict pre-emption at the time the matter was in litigation, there was no conflict in 2002 when GSK could have warned about the suicide risks specific to the case at hand.[549]

In vacating the judgment in favor of plaintiff, the court first observed that pursuant to FDA regulations, drug manufacturers have a continuous duty to revise warnings.[550] The FDA regulation in place controls the labeling requirements for prescription drugs:

> *Warnings.* Under this section heading, the labeling shall describe serious adverse reaction and potential safety hazards, limitations in use imposed by them, and steps that should be taken if they occur. *The labeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug*; a causal relationship need not have been proved.[551]

Although GSK argued that the FDA retained exclusive authority over the labeling requirements for prescription drugs, the FDA regulations clearly impose upon the drug manufacturer the "ongoing ability, authority, and responsibility to strengthen a label."[552] The FDA may later disapprove of strengthening a label, but "the FDA's power to disapprove does not make the manufacturer's voluntarily strengthened label a violation of federal law" that is required for conflict pre-emption.[553] The regulations that governed drug manufacturers in 2002 were similar to the current FDA regulations.[554]

The preamble to the FDA's regulations "asserted that state failure-to-warn lawsuits, such as the one brought . . . here, have directly threatened the agency's ability to regulate manufacturer dissemination of risk information for prescription

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547. *Id.*

548. *Id.*

549. *Id.*

550. *Id.* at 1228.

551. 21 C.F.R. § 201.80(e) (2008) (emphasis added).

552. *Tucker*, 596 F. Supp. 2d at 1229.

553. *Id.*

554. *Id.* at 1229-30. The obligations will likely remain in effect in the future. *Id.* at 1230 n.4.

drugs."[555] However, the court gave the FDA's position on preemption little weight as its recent regulations, which supported pre-emption, were promulgated without notice and comment.[556]

The court also gave little weight to GSK's argument that a conflict exists in that "drug manufacturers will be forced to walk a tightrope between being sanctioned by the FDA for 'overwarning' and being sanctioned by the court for 'underwarning'" if the plaintiff was allowed to pursue her state law claims.[557] The court found GSK's argument flawed in one key respect:

> [I]n spite of the FDA's direction regarding Paxil's label in May 2007, GSK still had (and has) the obligation to revise its label to strengthen a warning upon reasonable evidence of an association of a serious hazard, particularly with respect to this individual drug. If GSK were to receive such evidence, it would be obligated to revise its label in spite of the FDA's direction in May 2007. In fact, when it issued its instruction that GSK revise Paxil's label, the FDA advised GSK that if GSK disagreed with the FDA's belief that Paxil-specific analysis should be included in the SSRI labeling revisions, GSK could request a meeting with the FDA. The FDA's offer, upon which GSK did not act, is consistent with GSK's ongoing obligations under the regulations. In other words, the FDA's revisions were not necessarily the final word on Paxil's label and did not put GSK into a position where it was impossible for GSK to comply with both state and federal law.[558]

Accordingly, the court vacated its judgment, thus, reopening the state law tort claims.[559]

The Indiana Court of Appeals also weighed in on federal preemption in *Roland v. General Motors Corp.*[560] The court held that the plaintiff's state law tort claims were pre-empted because they conflicted with the Federal Motor Vehicle Safety Standard (FMVSS) 208, which gave car manufacturers the choice to install lap only or lap/shoulder safety belts.[561] On July 3, 2004, plaintiff, Jenean Roland, was involved in an accident with another vehicle while driving a 1998 Chevrolet Cavalier convertible manufactured by General Motors (GM).[562] Roland's ten-year-old son was in the rear center seat, restrained by a "Type-1 two point (lap only) safety belt with a manual adjusting device."[563] At the time of the accident, the Cavalier complied with all FMVSS regulations, including FMVSS 208, which authorized GM to choose to install either a "Type-1 or Type-2

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555. *Id.* at 1230 (internal quotation omitted).

556. *Id.* at 1231-33 (granting only *Skidmore* deference).

557. *Id.* at 1233-35.

558. *Id.* at 1235-36.

559. *Id.* at 1238.

560. 881 N.E.2d 722 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008).

561. *Id.* at 729.

562. *Id.* at 724.

563. *Id.*

(lap/shoulder) safety belt, with either an automatic or manual adjusting device."[564]

Ms. Roland and her son filed suit in Indiana state court against GM, claiming that the Cavalier was defectively and negligently designed because GM failed to install a lap/shoulder belt in the center rear seat.[565] In response, GM filed a motion for partial summary judgment arguing that "any claim predicated on [GM]'s choice of the lap belt option in the center rear seat was pre-empted" by FMVSS 208, which was promulgated by the Department of Transportation (DOT) and its subdivision, the National Highway Traffic Safety Administration (NHTSA).[566] The trial court granted GM's motion for partial summary judgment, which the Indiana Court of Appeals affirmed.[567]

On appeal, the Rolands acknowledged that FMVSS 208 provided GM with the option of installing either a lap only or lap/shoulder seat belt, but the Rolands argued that the existence of such a choice does not foreclose their state law claim because FMVSS 208 is only "a minimum safety standard that may be augmented by state common law" and accordingly, "[GM was] negligent in failing to do more than the minimum require[ments imposed by federal law]."[568] In support of their position, the Rolands cited the U.S. Supreme Court decision, *Sprietsma v. Mercury Marine*.[569] In *Sprietsma*, the plaintiff's wife was killed in a boating incident when an outboard motor's propeller struck her.[570] In *Spreitsma*, plaintiff filed a state common law tort action against the manufacturer of the motor, arguing that the motor was unreasonably dangerous because it did not incorporate a propeller guard.[571] The Court held that plaintiff's claims were not preempted by the Coast Guard's decision not to adopt a regulation requiring propeller guards because, although the Coast Guard intentionally declined to require propeller guards, it did not convey an authoritative message of a federal policy against them.[572] Accordingly, the Rolands argued that the NHTSA's decision to provide automobile manufactures the choice of seat belt restraints is essentially the same as the Cost Guard's decision in *Sprietsma*.[573]

In 1966, Congress enacted the federal Safety Act as a means of curbing the "soaring rate of death and debilitation on the Nation's highways."[574] The Safety Act includes a pre-emption provision "that explicitly pre-empts any [s]tate *legislative* or *regulatory* enactment that covers the same aspect of performance

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564. *Id.*

565. *Id.*

566. *Id.*

567. *Id.* at 724, 729.

568. *Id.* at 725.

569. 537 U.S. 51 (2002).

570. *Id.* at 54.

571. *Id.* at 55.

572. *Id.* at 66-67.

573. *Roland*, 881 N.E.2d at 728-29.

574. *Id.* at 725 (quoting S. REP. NO. 89-301, at 1 (1966), *reprinted in* 1996 U.S.C.C.A.N. 2709, 2709).

as a [f]ederal standard but is not identical to the [f]ederal standard."[575] The Safety Act also contains a "savings clause," which provides that "compliance with a [f]ederal motor vehicle safety standard does not exempt any person from any liability under common law."[576]

In another U.S. Supreme Court case, *Geier v. American Honda Motor Co*.,[577] the Court recognized that "the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims."[578] However, the Court concluded that the saving clause "does not bar the ordinary working of conflict pre-emption principles."[579] Indeed, in *Geier*, the court held that FMVSS 208 preempted a state common law tort action where the plaintiff claimed the defendant automobile manufacturer negligently failed to install air bags in various vehicles, which was a choice provided to the manufacturer pursuant to FMVSS guidelines.[580] The Court remarked that the Department of Transportation (DOT) deliberately chose to provide automobile manufacturers with a range of choices among various passive restraint devices in order to promote FMVSS 208 safety objectives.[581] The Court ultimately held that the common law tort claims were preempted because they would present a hindrance to the variety of passenger restraint choices available to automobile manufacturers.[582]

The court of appeals in *Roland* noted that the NHTSA's regulation of seat belts was deliberate and motivated by the same policy concerns identified by the Supreme Court in *Geier*.[583] According to the *Roland* court, the NHTSA's decision to provide automobile manufactures the choice of seat belts restraints is not the same as the Coast Guard's decision in *Sprietsma*.[584] Indeed, as the *Roland* court wrote, "*Sprietsma* involved a complete absence of regulatory action

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575. *Id.* at 726 (internal quotations omitted).

576. *Id.* (internal quotations omitted).

577. 529 U.S. 861 (2000).

578. *Id.* at 871.

579. *Id.* at 869.

580. *Id.* at 865.

581. *Id.* at 875. The range of "choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance." *Id.*

582. *Id.* at 886.

583. Roland v. Gen. Motors Corp., 881 N.E.2d 722, 727 (Ind. Ct. App.), *trans denied*, 898 N.E.2d 1218 (Ind. 2008). The Rolands sought to distinguish *Geier* on grounds that it involved only passive restraints (airbags) as opposed to active restraints (seat belts); however, the court found that *Geier* applied regardless of the type of restraint at issue as the policy concerns underlying the regulations were the same. *Id.* The *Roland* court followed several other jurisdictions in making this decision. *See, e.g.*, Carden v. Gen. Motors Corp., 509 F.3d 227 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2911 (2008).

584. *Id.* at 728-29.

with regard to propeller guards. The present case, however, involves a choice made available as part of the comprehensive regulatory action expressed in FMVSS 208."[585] Accordingly, the court held that FMVSS 208 preempted the Rolands' common law tort action.[586]

CONCLUSION

The 2008 survey period was another productive one in terms of the number of decisions issued by state and federal courts in Indiana. All in all, however, the 2008 survey period demonstrated that, although more than a decade has passed since the Indiana General Assembly made sweeping revisions to the IPLA in 1995, some of the IPLA's provisions continue to challenge both courts and practitioners alike.

585. *Id.* at 729.

586. *Id.*