

# **SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW**

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## **INTRODUCTION**

With respect to Indiana product liability litigation, most observers probably will remember the 2009 survey period<sup>1</sup> more for questions that courts did not answer than for those they did answer. Indeed, it is apparent that practitioners and judges who deal with product liability matters in Indiana continue their struggle to come to grips with the intended scope of the Indiana Product Liability Act (IPLA).<sup>2</sup> This Survey does not attempt to address in detail all of the cases decided during the survey period that involve product liability issues.<sup>3</sup> Rather, it examines selected cases that discuss the more important substantive concepts. This Survey also provides some background information, context, and commentary when appropriate.

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1. The survey period is October 1, 2008, to September 30, 2009.

2. IND. CODE §§ 34-20-1-1 to 9-1 (2008). 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. This Article does not address those decisions in detail because of space constraints, even though they may be interesting to Indiana product liability practitioners. *See generally* Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C., 900 N.E.2d 801 (Ind. Ct. App. 2009) (addressing the differences between damage caused by a defective product as opposed to defective rendering of services in a general negligence context), *trans. granted, opinion vacated*, 919 N.E.2d 547 (Ind. 2009), *remanded by* 929 N.E.2d 838 (Ind. Ct. App. 2010), *adopted by* No. 06S05-0907-CV-332, 2010 Ind. LEXIS 397 (Ind. June 29, 2010).

## I. THE SCOPE OF THE IPLA

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

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.<sup>7</sup> 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."<sup>8</sup> 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";<sup>9</sup> (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";<sup>10</sup> (3) "physical harm caused by a product";<sup>11</sup> (4) a product that is "in a defective condition unreasonably dangerous to [a] user or consumer" or to his property;<sup>12</sup> and (5) a product that "reach[ed] the user or consumer without substantial alteration in [its] condition."<sup>13</sup> Indiana Code section 34-20-1-1 makes clear that the IPLA governs

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4. Pub. L. No. 141, § 28, 1978 Ind. Acts 1308, 1308-10.

5. Pub. L. No. 297, § 1, 1983 Ind. Acts 1815.

6. Pub. L. 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. Pub. L. No. 1, 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. *Id.* § 34-20-2-1(1). Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." *Id.* § 34-20-1-1(1). 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." *Id.*

10. Indiana Code section 34-20-1-1(2) identifies proper IPLA defendants as "manufacturers" or "sellers." *Id.* § 34-20-1-1(2). 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. *Id.*

11. *Id.* § 34-20-1-1(3).

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. The instruction requires a plaintiff to "prove each of the

and controls all claims that satisfy these five requirements, “regardless of the substantive legal theory or theories upon which the action is brought.”<sup>14</sup>

*A. “User” or “Consumer”*

The language the General Assembly employs in the IPLA is important for determining who qualifies as an IPLA claimant. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.”<sup>15</sup> 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.<sup>16</sup>

“User” has the same meaning as “consumer.”<sup>17</sup> Several published decisions in recent years construe the statutory definitions of “user” and “consumer.”<sup>18</sup>

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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 a 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 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.

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*

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.<sup>19</sup> 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.”<sup>20</sup> 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 for 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.”

Courts in Indiana have been relatively quiet since 2006 when it comes to interpreting the terms “user” or “consumer.”<sup>21</sup> One federal trial court decision during the 2009 survey period, however, addressed the issue. In *Pawlik v. Industrial Engineering & Equipment Co., Inc.*,<sup>22</sup> the plaintiff was injured loading a crate containing electrical duct heaters onto the truck of his employer, Circle R Mechanical, Inc. Industrial manufactured the duct heaters and encased them

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*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. IND. CODE § 34-20-2-1(1) (2008).

20. *Id.* 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.

21. 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 1139.

22. No. 2:07-CV-220, 2009 WL 857476 (N.D. Ind. March 27, 2009).

in a wooden shipping crate.<sup>23</sup> The duct heaters were ultimately scheduled to be delivered to and installed at a facility in Portage, Indiana.<sup>24</sup> As the plaintiff was loading the crate onto the truck, at least one of the wooden slats on the crate detached, causing the plaintiff to fall backward and sustain injury.<sup>25</sup> The plaintiff filed a complaint against Industrial alleging that the crate was defective.<sup>26</sup> Industrial filed a motion for summary judgment arguing, among other things, that the plaintiff was not a user or consumer under the IPLA.<sup>27</sup>

The court began its analysis by turning to Indiana Code section 34-20-1-1, which requires a plaintiff to qualify as a user or consumer in order to recover under the IPLA.<sup>28</sup> The court found that neither the plaintiff nor Circle R were “users” or “consumers.”<sup>29</sup> The products to be delivered and installed—the duct heaters—were not “used” or “consumed” by the plaintiff.<sup>30</sup> Circle R and the plaintiff were simply the intermediaries charged with transport and installation.<sup>31</sup> Under these circumstances, the court concluded that the IPLA claim failed because neither the plaintiff nor his employer qualified as a user or consumer.<sup>32</sup>

#### 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.”<sup>33</sup> “Seller” . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.”<sup>34</sup> 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.”<sup>35</sup>

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23. *Id.* at \*1.

24. *Id.*

25. *Id.*

26. *Id.* at \*2.

27. *Id.*

28. *Id.* at \*4.

29. *Id.* at \*5.

30. *Id.*

31. *Id.*

32. *Id.*

33. IND. CODE § 34-6-2-77(a) (2008).

34. *Id.* § 34-6-2-136.

35. *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

Courts hold sellers 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.<sup>36</sup>

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.<sup>37</sup> Indiana Code section 34-20-2-4 provides that a seller may be deemed a “manufacturer” “[i]f a court is unable to hold jurisdiction over a particular manufacturer” and if the seller is the “manufacturer’s principal distributor or seller.”<sup>38</sup>

Practitioners also must be aware that when the theory of liability is based upon “strict liability in tort,”<sup>39</sup> Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller” and cannot otherwise be deemed a “manufacturer”

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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).

36. IND. CODE § 34-6-2-77(a) (2008).

37. *Id.* § 34-20-2-4.

38. *Id.* *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” referred to the power of the court to hear a particular case. *Id.* at \*12. The defendant argued that the phrase equates to “personal jurisdiction.” *Id.* 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.

39. The phrase “strict liability in tort,” to the extent that it 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 a negligence standard governs cases utilizing a design defect or a failure to warn theory, not a “strict liability” standard. IND. CODE § 34-20-2-2 (2008).

is not liable and is not a proper IPLA defendant.<sup>40</sup>

This has been a relatively active area of product liability law in recent years and a number of recent Indiana decisions, particularly from Indiana federal courts, have addressed the statutory definitions of “seller” and “manufacturer.”<sup>41</sup> The 2009 survey period continued that trend, producing three more decisions from Indiana federal courts in this context.

The first case, *Duncan v. M & M Auto Service, Inc.*,<sup>42</sup> involved the explosion of a van’s natural gas fuel tank. M & M, the defendant, installed the natural gas system on the van.<sup>43</sup> During the installation, M & M used a fuel conversion kit purchased from Jasper Engine.<sup>44</sup> M & M also performed routine maintenance on

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40. *Id.* § 34-20-2-3. 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). *Id.* Glidden also did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* The *Ritchie* court’s citation omits what is now Indiana Code section 34-20-2-3, a potentially significant omission. 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.* The IPLA makes it clear that liability without regard to the exercise of reasonable care (strict liability) applies only to product liability claims alleging a manufacturing defect theory, and a negligence standard controls claims alleging design or warning defect theories. *See, e.g.,* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002); *see also* *Alberts & Boyers, supra* note 35, at 1173-75.

41. *E.g.,* *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 356 (7th Cir. 2008) (finding that defendant company rebuilt a crane and altered its design to enable it to be operated from ground level rather than from an overhead cab could not avoid IPLA liability under those circumstances); *LaBonte v. Daimler-Chrysler*, No. 3:07-CV-232, 2008 WL 513319, \*1-2 (N.D. Ind. Feb. 22, 2008) (finding that a defendant company that purchased the assets of seat belt manufacturer and subsequently discharged debts in bankruptcy was entitled to summary judgment because it was found to be neither the manufacturer of the seat belt nor liable as a successor corporation to the manufacturer). For a detailed discussion about *Mesman* and *LaBonte*, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 42 IND. L. REV. 1093, 1098-1102 (2009). *See also* *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-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).

42. 898 N.E.2d 338 (Ind. Ct. App. 2008).

43. *Id.* at 340.

44. *Id.*

the natural gas system.<sup>45</sup> The plaintiff was injured when gas escaped while he was filling the van's fuel tank.<sup>46</sup> The plaintiff alleged both that the fuel tank should have been equipped with a redundant check valve that would have prevented gas from escaping and that M & M should have known that this valve was necessary.<sup>47</sup>

M & M filed a motion for summary judgment arguing that under Indiana Code section 34-20-2-3, it could not be subject to a product liability claim because it did not manufacture the fuel system.<sup>48</sup> The plaintiff argued that although M & M was not the actual manufacturer of the natural gas system, M & M should be treated as an "apparent manufacturer" because M & M's invoice for the fuel system did not state the name of the fuel system's manufacturer.<sup>49</sup> Under Indiana Code section 34-20-2-3, however, a product liability action based on the doctrine of strict liability in tort cannot be commenced against a seller of a product unless the seller is also the manufacturer of the product or part of the product alleged to be defective.<sup>50</sup> Thus, M & M argued that because it did not manufacture the natural gas system, it could not be liable under a strict liability theory even though it sold the product.<sup>51</sup> The court agreed and found that M & M could not be held liable under a strict liability theory as an apparent manufacturer.<sup>52</sup>

The *Pawlik* case, addressed above in the "user" and "consumer" context, is the second of the three 2009 survey period decisions confronting the issue of whether a named defendant qualified as a "seller" of a "product" under the IPLA. In *Pawlik*, the U.S. District Court the Northern District of Indiana addressed whether the manufacturer of a product can be liable when the product's shipping package comes apart and causes injury.<sup>53</sup> In *Pawlik*, the plaintiff was injured while loading a crate containing duct heaters.<sup>54</sup> Part of the crate detached, causing the plaintiff to fall backward and sustain injury.<sup>55</sup> The plaintiff sued the manufacturer of the duct heater, Industrial, who moved for summary judgment arguing that it was not the "manufacturer" of the crate for purposes of the IPLA.<sup>56</sup>

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45. *Id.*

46. *Id.*

47. *Id.* at 340-41.

48. *Id.* at 341-42.

49. *Id.* at 342.

50. IND. CODE § 34-20-2-3 (2008).

51. *Duncan*, 898 N.E.2d at 342. The court noted that in *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 783 (Ind. 2004), the Indiana Supreme Court recognized the apparent manufacturer theory; however, the court noted that theory was recognized as applying only to negligence claims because Indiana Code section 34-20-2-3 specifically requires the seller to be a manufacturer of the product in order to be held liable on a strict liability theory. *Id.*

52. *Id.*

53. No. 2:07 CV 220, 2009 WL 857476, at \*5 (N.D. Ind. Mar. 27, 2009).

54. *Id.* at \*1.

55. *Id.*

56. *Id.* at \*2.



The court agreed with Industrial: “The crate contained and protected the Industrial products and was not meant to be opened and unpacked until its receipt at the installation site. Industrial does not sell crates, nor can Industrial be classified as a manufacturer of crates.”<sup>57</sup> Because the crate was gratuitously provided as a means to transport the duct heaters, the court found that Industrial was not a “manufacturer” or “seller” of crates under the IPLA.<sup>58</sup>

The third decision applying the IPLA’s definition of a “seller” to a named defendant in a product liability case is *Gibbs v. I-Flow, Inc.*<sup>59</sup> The court’s discussion about the “manufacturer” or “seller” requirement took place in the context of determining whether the plaintiff’s motion for remand to state court should be granted.<sup>60</sup> In *Gibbs*, the plaintiff claimed that he suffered a complete loss of cartilage in his shoulder after the insertion of a pain pump that continuously released dangerous doses of anesthetics.<sup>61</sup> The plaintiff sued the manufacturer of the pain pump, I-Flow, and the individual I-Flow sales representative, Rowland.<sup>62</sup> The plaintiff alleged that Rowland sold the pain pump, with knowledge of a defect in the product, to the plaintiff’s doctor and instructed the plaintiff’s doctor on the medications and procedure for filling the pain pump.<sup>63</sup> The defendants sought to remove the case to federal court, arguing that the plaintiffs fraudulently joined Rowland to defeat diversity.<sup>64</sup> They argued that the plaintiff could not maintain product liability claim against Rowland because Rowland was neither a manufacturer nor a seller of the pain pump.<sup>65</sup> The court found that the plaintiffs properly joined Rowland because Rowland could be considered a manufacturer under Indiana Code section 34-6-2-77(a)(1), which defines a manufacturer as a seller who has “actual knowledge of a defect in a product.”<sup>66</sup>

On the motion to remand to state court, the district court had to determine whether there was a “reasonable possibility” that the plaintiff would succeed on its product liability claim against Rowland.<sup>67</sup> The court found that Rowland could qualify as a manufacturer under Indiana Code section 34-6-2-77(a)(1) because the plaintiff alleged that Rowland had actual knowledge of the problems with the pain pump.<sup>68</sup> The court also found that Rowland could qualify as a seller under Indiana Code section 34-6-2-136 because, “as a sales representative, she was employed to promote and sell the pain pumps to doctors and medical

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57. *Id.* at \*6.

58. *Id.*

59. No. 1:08-cv-708-WTL-TAB, 2009 U.S. Dist. LEXIS 14895 (S.D. Ind. Feb. 24, 2009).

60. *Id.* at \*1.

61. *Id.* at \*2.

62. *Id.* at \*3.

63. *Id.* at \*2-3.

64. *Id.* at \*3.

65. *Id.* at \*7.

66. *Id.* at \*8 (citing IND. CODE § 34-6-2-77(a)(1) (2008)).

67. *Id.* at \*6.

68. *Id.* at \*9.

offices.”<sup>69</sup> Thus, the court held that the plaintiff had a “reasonable possibility” of prevailing on his product liability claim against Rowland, and Rowland was not fraudulently joined.<sup>70</sup>

### *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.”<sup>71</sup> It “does not include gradually evolving damage to property or economic losses from such damage.”<sup>72</sup>

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.”<sup>73</sup> “The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”<sup>74</sup>

During the 2009 survey period, federal trial courts in Indiana twice issued decisions addressing whether “products” were involved. First, in *Carlson Restaurants Worldwide, Inc. v. Hammond Professional Cleaning Services*,<sup>75</sup> the plaintiff operated a TGI Friday’s restaurant in Merrillville, Indiana, which caught fire on May 10, 1996.<sup>76</sup> The plaintiff sued Ansul Incorporated (“Ansul”), which manufactured the restaurant’s fire suppression system.<sup>77</sup> The plaintiff claimed that the fire suppressant was “defective in design and unreasonably dangerous[.]”

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69. *Id.*

70. *Id.* at \*11.

71. IND. CODE § 34-6-2-105(a) (2008).

72. *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 when 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).

73. IND. CODE § 34-6-2-114(a) (2008).

74. *Id.* § 34-6-2-114(b); *see also* *Fincher v. Solar Sources, Inc.*, No. 42A01-0701-CV-25, 2007 WL 1953473, \*6 (Ind. Ct. App. July 6, 2007) (mem.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007) (agreeing with the trial court that coal sludge is not a product under the IPLA, but rather a “waste by-product of a coal mining operation” that is “not marketable or ever in a marketed state,” nor ever “intended for consumption or for any use by any consumer”).

75. No. 2:06 cv 336, 2008 U.S. Dist. LEXIS 91878 (N.D. Ind. Nov. 12, 2008).

76. *Id.* at \*1-4.

77. *Id.* at \*2.

and that Ansul was negligent in its maintenance and service of the system.<sup>78</sup> The Ansul system utilized a low pH chemical fire suppressant agent called “Ansulex.”<sup>79</sup> The Ansul system was installed at the restaurant in March or April 1995.<sup>80</sup> Because of problems with Ansulex crystallizing and clogging the nozzles, Ansul implemented a program a few months later, in November 1995, under which technicians examined the tanks for crystallization and added EDTA to the tank to help prevent crystallization and corrosion.<sup>81</sup> The first such service visit inspection occurred on April 26, 1996, at which time an “Ansul Inspected” sticker was affixed to the system to denote performance of the newly required corrective actions for prevention of crystallization, and the inspection report included the notation, ‘Ansul Inspected EDTA added.’<sup>82</sup>

Because the plaintiff did not file suit until October 6, 2006, Ansul moved for summary judgment, arguing that Indiana’s ten-year product liability statute of repose<sup>83</sup> barred the claims.<sup>84</sup> The plaintiff responded by arguing that although the system itself was delivered more than ten years before the fire, “the Ansulex chemical fire suppressant stored in the system tank and released upon heat sensor activation is the liability-triggering product.”<sup>85</sup> The plaintiff contended that the delivery of the fire suppressant material in April 1996 in effect injected a new “liability-triggering product” into the mix, thereby triggering a new ten-year statutory repose period and precluding summary judgment.<sup>86</sup> The court agreed with the plaintiff, and denied the motion for summary judgment, reasoning as follows:

Adding new Ansulex to the fire suppression system appears to be “merely adding a component, without extending the life of the original product” . . . . But adding EDTA to the defective Ansulex, which had been found to crystallize and corrode the fire suppression systems, in an effort to thwart crystallization . . . appears to be an attempt to extend the life of the original faulty chemical product. In short, the change in chemicals was not a mere repair, but is a restructuring or reconditioning . . . which Ansul described . . . as “corrective actions” implemented to “eliminate the possibility of this situation affecting new systems.”<sup>87</sup>

In *Chappey v. Ineos USA L.L.C.*,<sup>88</sup> the plaintiff was an employee of a BP Amoco facility in Whiting, Indiana, who claimed that she “‘became extremely

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78. *Id.*

79. *Id.*

80. *Id.* at \*3.

81. *Id.*

82. *Id.* at \*3-4.

83. IND. CODE § 34-20-3-1 (2008).

84. *Carlson*, 2008 U.S. Dist. LEXIS 91878, at \*4.

85. *Id.* at \*9.

86. *Id.* at \*9-11.

87. *Id.* at \*11-12.

88. No. 2:08-CV-271, 2009 U.S. Dist. LEXIS 24807 (N.D. Ind. Mar. 23, 2009).

ill and sickened with Legionnaires disease” while working there.<sup>89</sup> Plaintiff offered various theories of liability, including negligence, negligence per se, nuisance, product liability and “one or more undisclosed ‘Indiana labor law[s].’”<sup>90</sup> Her complaint, however, was vague about exactly what caused her alleged problems: she alleged only that “[m]anufacturer’s [sic] supplied or installed unsafe items, including a water heater/system, plumbing device or other similar item at [her place of employment], which caused or contributed to cause dangerous levels of toxins, contaminants or bacteria . . . to become present [there].”<sup>91</sup> Defendant INEOS and one of its related entities filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending that the plaintiff’s allegations failed to identify a product.<sup>92</sup> The court agreed, concluding that the plaintiff had “not alleged that INEOS was a manufacturer or a seller of any product” and that she likewise had “failed to specifically identify a product.”<sup>93</sup> Accordingly, the court dismissed her product liability claim.<sup>94</sup>

#### *D. Defective and Unreasonably Dangerous*

Only products that are in a “defective condition” are subject to IPLA liability.<sup>95</sup> 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.<sup>96</sup>

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.<sup>97</sup>

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

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89. *Id.* at \*2.

90. *Id.* at \*2-3.

91. *Id.* at \*13.

92. *Id.*

93. *Id.* at \*14.

94. *Id.*

95. IND. CODE § 34-20-2-1 (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).

96. IND. CODE § 34-20-4-1 (2008).

97. *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))).

of a malfunction or impurity in the manufacturing process (a “manufacturing defect”).<sup>98</sup>

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].”<sup>99</sup> 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.”<sup>100</sup>

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.<sup>101</sup> 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.”<sup>102</sup> A product

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98. 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); see also *Troutner v. Great Dane Ltd.*, No. 2:05-CV-040-PRC, 2006 WL 2873430, \*3 (N.D. Ind. Oct. 5, 2006) (confirming 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).

99. IND. CODE § 34-20-4-3 (2008). See also *Hunt v. Unknown Chem. Mfr. No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at \*27-37 (S.D. Ind. Nov. 5, 2003) (holding that homeowner who spread ashes from lumber treated with chromium copper arsenate on his garden could not pursue product liability claim because his use of the lumber was not, legally speaking, foreseeable, intended, or expected).

100. IND. CODE § 34-20-4-4 (2008).

101. See *id.*

102. *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.*, 777 N.E.2d 1120, 1128 (Ind. Ct. App. 2002)). 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 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

is not 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.<sup>103</sup>

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a “defective condition,” recent decisions, including some by Judge Hamilton, 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 dangerous.”<sup>104</sup>

The IPLA provides that liability attaches for placing a product in a “defective condition”<sup>105</sup> 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.”<sup>106</sup> What the IPLA bestows, however, in terms of liability despite the exercise of “all reasonable care [i.e., fault],”<sup>107</sup> 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

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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. *See, e.g.,* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002) (holding that plaintiff injured when a blade guard on a circular table saw struck him in the eye “wholly failed to show a feasible alternative design that would have reduced the risk of injury”); *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) (finding 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).

103. *See Baker*, 799 N.E.2d at 1140; *see also* *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (finding 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 Gloucester 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 v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999)).

104. *See Conley v. Lift-All Co.*, No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at \*13-14 (S.D. Ind. July 25, 2005) (involving an alleged warnings defect); *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).

105. IND. CODE § 34-20-2-1 (2008).

106. *Id.* § 34-20-2-2.

107. *Id.* § 34-20-2-2(1).

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.<sup>108</sup>

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.<sup>109</sup> 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. Courts have discussed strict liability even when those claims allege warning and design defects and clearly accrued after the 1995 IPLA amendments took effect.<sup>110</sup>

The IPLA makes clear that, 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.<sup>111</sup> *Kovach v.*

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108. *Id.* § 34-20-2-2.

109. *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, 689 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.”); *see also* *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at \*37-38 (S.D. Ind. Oct. 15, 2002); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Birch ex rel. Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

110. *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, 3-4 (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.*, 841 N.E.2d 1133, 1138-39 (Ind. 2006).

111. *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;

*Caligor Midwest*,<sup>112</sup> a case decided during the 2009 survey period, nicely illustrates that point. Indeed, perhaps no Indiana decision has better articulated the concept that plaintiffs must establish all negligence elements, including causation, as a matter of law in a product liability case to survive summary disposition. In *Kovach*, a nine-year-old boy was diagnosed with enlarged nasal tissue that caused a variety of complications.<sup>113</sup> He underwent surgery for the condition and following the procedure was prescribed 15 milliliters (mL) of acetaminophen with codeine for pain relief.<sup>114</sup> After the surgery, a nurse gave the boy the medicine in a translucent medicine cup with translucent interior markings for measuring liquids.<sup>115</sup> The nurse was familiar with the medicine cup she used, had used it frequently before, and understood how to interpret its markings.<sup>116</sup> She claimed that she filled the cup halfway and gave the boy 15 mL of the drug as prescribed, but the child's father, who was in the room, testified that the cup was full.<sup>117</sup>

After being discharged and returning home, the boy went into respiratory arrest and was transported to a hospital, where he died from asphyxia.<sup>118</sup> An autopsy revealed that the boy had died of an opiate overdose.<sup>119</sup> At the time of his death, his blood contained more than twice the recommended therapeutic level of codeine.<sup>120</sup>

The boy's parents sued, among others, the manufacturers and distributors of the medicine cup (the "Cup Defendants") under theories of negligence and strict liability under the IPLA, breach of implied warranty of merchantability, and implied warranty of fitness for a particular purpose.<sup>121</sup> The parents claimed that their son's codeine overdose resulted from imprecise markings on the medicine cup.<sup>122</sup>

The Cup Defendants successfully moved for summary judgment.<sup>123</sup> One of their arguments was that no causal connection existed between the alleged defects in the cup and the child's codeine overdose.<sup>124</sup> The plaintiffs offered opinion testimony from an associate professor of pharmacology who had

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and (4) [the defendant's] alleged failure to provide adequate warnings was the proximate cause of his injuries.") (citations omitted).

112. 913 N.E.2d 193 (Ind. 2009), *reh'g denied*, No. 49S04-0902-CV-88, 2009 Ind. LEXIS 1514 (Ind. Dec. 3, 2009).

113. *Id.* at 195.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 195-96.

122. *Id.* at 196.

123. *Id.* at 196, 200.

124. *Id.* at 196.



analyzed the cup and determined that it was not suitable for measuring and dispensing precise doses of medication.<sup>125</sup> That opinion testimony estimated that measurements performed using the medicine cup posed a twenty percent to thirty percent chance of error. The professor concluded that any of the cup's volume measurements would have a twenty percent to thirty percent margin of error.<sup>126</sup> The Cup Defendants tried unsuccessfully to exclude the plaintiff's opinion witness.<sup>127</sup>

The plaintiffs appealed the entry of summary judgment for the Cup Defendants and the Cup Defendants cross-appealed the denial of their motion to exclude the plaintiffs' opinion testimony.<sup>128</sup> The court of appeals reversed the entry of summary judgment, determining that the trial court did not err in admitting and considering the opinion witness's affidavit.<sup>129</sup> Chief Judge Baker dissented from the majority opinion, opining that the plaintiffs had failed to establish that a defect in the cup was the proximate cause of their son's death.<sup>130</sup>

The Indiana Supreme Court agreed with Chief Judge Baker's dissent, finding no causal connection between the alleged design and warning defects and the overdose.<sup>131</sup> The *Kovach* court reasoned that "proximate cause" consisted of both factual causation and scope of liability.<sup>132</sup> The court noted that "[t]o establish factual causation, the plaintiff must show that but for the defendant's allegedly tortious act or omission, the injury at issue would not have occurred."<sup>133</sup> For the scope of liability doctrine, the question is "whether the injury was a natural and probable consequence of the defendant's conduct, which in the light of the circumstances, should have been foreseen or anticipated."<sup>134</sup> Courts impose liability only in when the ultimate injury was a reasonably foreseeable consequence of the defendant's tortious act or omission.<sup>135</sup> The court then wrote that even though causation-in-fact is ordinarily a factual question for the jury, the issue can become a question of law to be resolved by the court "where reasonable minds cannot disagree as to causation-in-fact."<sup>136</sup>

Although the Indiana Supreme Court acknowledged that witness testimony conflicted about whether the medicine cup was half full or full, it did not find this

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* For a full analysis and discussion of the court of appeals's decision, see Alberts et al., *supra* note 41, at 1118-23, 1141-42.

130. *Kovach*, 913 N.E.2d at 196.

131. *Id.* at 198-99.

132. *Id.* at 197 (citing *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243-44 (Ind. 2003)).

133. *Id.* at 197-98 (citing *City of Gary*, 801 N.E.2d at 1243-44).

134. *Id.* at 198 (citing *City of Gary*, 801 N.E.2d at 1244).

135. *Id.*

136. *Id.* (citing *Peters v. Forster*, 804 N.E.2d 736, 743 (Ind. 2004)).

dispute convincing.<sup>137</sup> The boy was prescribed 15 mL of acetaminophen with codeine, half the volume of the cup.<sup>138</sup> A full cup would have contained twice as much pain reliever, approximately 30 mL.<sup>139</sup> The cup was translucent, and the medicine at issue was red.<sup>140</sup> The nurse administering the medication knew that she was to dispense a half cup (15 mL) and anyone who saw the cup would have been able to see whether it was half full or full.<sup>141</sup> Moreover, the boy's father testified that he observed the nurse give the boy a full cup of the medicine and an autopsy revealed that the boy had twice the therapeutically indicated amount of codeine in his blood.<sup>142</sup> The court concluded that imprecise measurements on the dosing cup did not cause the boy's tragic death was not caused by imprecise measurements on the dosing cup, but instead by the fact that he received a double dose of codeine.<sup>143</sup> The court declined to attribute his death to any design defect in the cup.<sup>144</sup>

The Indiana Supreme Court declined to address whether a warning against the cup's use for precise measurements was needed in the case at hand or in other circumstances because even had the warning been given, it would not have prevented the boy's death.<sup>145</sup> The court discussed the court of appeals use of the "read-and-heed" presumption to establish causation and concluded that the presumption did not eliminate the need to prove causation in failure-to-warn cases.<sup>146</sup> The court wrote that, "[t]he most the presumption does is establish that a warning would have been read and obeyed. It does not establish that the defect in fact caused the plaintiff's injury."<sup>147</sup> The plaintiff still must establish causation by showing "that the danger that would have been prevented by an appropriate warning was the danger that materialized in the plaintiff's case."<sup>148</sup> If the "read-and-heed" presumption had been applied, then the court would assume the surgical nurse "would have read such a warning and chosen a precision applicator to administrate the codeine."<sup>149</sup> But the boy's death still would have occurred because a double dose of codeine caused the death, not just an imprecise dose.<sup>150</sup> In other words, the type of harm the warning targeted did

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137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 199.

147. *Id.*

148. *Id.* (citing 2 DAN D. DOBBS, *THE LAW OF TORTS* § 367 (2001); 1 DAVID G. OWEN ET AL., *MADDEN & OWEN ON PRODUCTS LIABILITY* § 9:11 (3d ed. 2000)).

149. *Id.*

150. *Id.*

not cause the boy's death.<sup>151</sup>

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

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.<sup>152</sup>

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.<sup>153</sup>

Federal and state courts in Indiana have been busy in recent years when addressing issues in cases involving allegedly defective warnings and instructions. Some of those cases include: *Deaton v. Robison*,<sup>154</sup> *Clark v.*

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151. *Id.*

152. 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).

153. *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).

154. 878 N.E.2d 499 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008). In *Deaton*, the Indiana Court of Appeals affirmed the trial court's judgment in favor of the manufacturer of a black powder rifle that the plaintiff alleged to be defective and unreasonably dangerous. *Id.* at 500-01. The court concluded that the rifle was not an unreasonable or concealed hazard for purposes of the IPLA, but rather, a manifest and obvious risk that the plaintiffs appreciated. *Id.* at 503-04. For a more complete discussion of *Deaton*, *see* Alberts et al., *supra* note 41, at 1110-14.

Practitioners and judges in Indiana . . . 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; and (2) in determining whether the “incurred risk” defense applies.

*Id.* at 1114 (footnotes omitted); *see also* IND. CODE § 34-20-6-3 (2008).

Practitioners and judges in Indiana should also recognize that *Deaton* . . . 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

*Oshkosh Truck Corp.*,<sup>155</sup> *Ford Motor Co. v. Rushford*,<sup>156</sup> *Tober v. Graco Children's Products, Inc.*,<sup>157</sup> *Williams v. Genie Industries, Inc.*,<sup>158</sup> *Conley v. Lift-All Co.*,<sup>159</sup> *First National Bank & Trust Corp. v. American Eurocopter Corp. (Inlow II)*,<sup>160</sup> and *Birch v. Midwest Garage Door Systems*.<sup>161</sup>

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danger.

Alberts et al., *supra* note 41, at 1114; *see also* IND. CODE §§ 34-20-6-3(1)-(2) (2008). 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. Alberts et al., *supra* note 41, at 1114.

155. No. 1:07-cv-0131-LJM-JMS, 2008 WL 2705558 (S.D. Ind. July 10, 2008). The *Clark* court precluded a repossession agent who suffered injuries when he slipped raised rollback bed of the truck he used from pursuing a failure-to-warn claim against the truck manufacturer. *Id.* at \*4. The court concluded that the manufacturer had no duty to warn of any dangers associated with the rollback bed's open and obvious condition because, among other things, the agent was aware of the bed's slick nature. *Id.* The court did, however, conclude that he had designated enough evidence to pursue claims that the manufacturer failed to provide adequate instructions on how to operate the rollback bed. *Id.* at \*5. *Clark* may prove troublesome to those trying to interpret and apply it because the court 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. The IPLA and recent case law 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. *E.g.*, *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 636-37 (7th Cir. 2006). If not, the inquiry should be at an end even if it is possible that a plaintiff could present sufficient evidence to defeat summary judgment concerning whether the product could be said to be in a "defective condition." *Id.* at 635. In that context, the *Clark* decision is peculiar because it reached the conclusion that the defective condition (the slippery rollback bed) did not render the truck unreasonably dangerous as a matter of law, yet the court nevertheless resurrected the plaintiffs' claim because there was arguably sufficient evidence to demonstrate that the manufacturer's use instructions could have been better. *Clark*, 2008 WL 2705558, at \*4-5. For a more detailed discussion on these and related issues, *see* Alberts et al., *supra* note 41, at 1114-18.

156. 868 N.E.2d 806 (Ind. 2007). For a more detailed discussion and commentary about *Rushford*, *see* Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 41 IND. L. REV. 1165, 1184-87 (2008).

157. 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).

158. 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 157, at 1032-33.

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

160. *First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682 (7th Cir. 2004). In the *Inlow* case, a helicopter rotor blade struck and killed the Consec general counsel, Lawrence Inlow, as he passed in front of the helicopter after disembarking. *Id.* at 685.

The 2009 survey period produced additional cases involving warning defect theories that merit discussion here. First, in *Cook v. Ford Motor Co.*,<sup>162</sup> the plaintiffs filed suit against Ford after their daughter suffered a serious brain injury when the front passenger side air bag in the family's 1997 F-150 pickup truck deployed during an accident.<sup>163</sup> The air bag at issue could be manually disabled.<sup>164</sup> The plaintiffs claimed that their daughter's injury resulted from defective instructions and warnings concerning the air bag and its deactivation switch.<sup>165</sup>

The injured girl's mother was the primary driver of the vehicle and, before the collision, had read neither the owner's manual nor any of the warnings inside the vehicle.<sup>166</sup> The injured girl's father had reviewed a section of the owner's manual explaining how and when to engage the four-wheel drive and deactivate the front passenger side air bag.<sup>167</sup> At the top of one of the pages in the owner's manual was a colored box marked with a triangle and an exclamation point contained the following language: "Keep the passenger air bag turned on unless there is a rear-facing infant seat installed in the front seat. When the passenger air bag switch is turned off, the passenger air bag will not inflate in a

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The Seventh Circuit Court of Appeals held 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.

161. 790 N.E.2d 504 (Ind. Ct. App. 2003). In *Birch*, a young girl sustained serious injuries when a 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 to an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 515, 518-19. Additionally, the court concluded that there was no duty to warn the plaintiffs about changes to federal safety regulations because the system manual the plaintiffs received included numerous warnings about the type of system installed and that no additional information would have added to the plaintiffs' understanding of the product. *Id.* at 516, 518-19. For a more detailed analysis of *Birch*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L. REV. 1247, 1262-64 (2004); see also *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 895-96 (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); *McClain v. Chem-Lube Corp.*, 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 product's inherent dangers, because evidence showed that both defendants knew that the product at issue was to be used at high temperatures during welding), *disapproved by* *Shultz v. Ford Motor Co.*, 857 N.E.2d 977 (Ind. 2006). For a more detailed analysis of *Burt* and *McClain*, see Alberts & Boyers, *supra* note 35, at 1183-85.

162. 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*, No. 49A02-0802-CV-130, 2010 Ind. LEXIS 184 (Ind. Feb. 25, 2010).

163. *Id.* at 315.

164. *Id.* at 316.

165. *Id.* at 315.

166. *Id.* at 316.

167. *Id.*

collision.”<sup>168</sup> After reading this page, the girl’s father believed that the only time the front passenger side air bag needed to be deactivated was when a child sat in a rear facing child seat in the front seat.<sup>169</sup> Like his wife, he never read the warning on the sun visor that read:

WARNING TO AVOID SERIOUS INJURY:

For maximum safety protection in all types of crashes, you must always wear your safety belt.

Do not install rearward-facing child seats in any front passenger seat position, unless the air bag is off.

Do not sit or lean unnecessarily close to the air bag.

Do not place any objects over the air bag or between the air bag and yourself.

See the Owner’s Manual for further information and explanations.<sup>170</sup>

In addition to the aforementioned warnings that neither of the girl’s parents examined, the owner’s manual also contained warnings and information in the section “Seating and safety restraints.”<sup>171</sup> This section instructed all occupants to wear safety belts and ensure that children be seated where they could be properly restrained to prevent risk of injury.<sup>172</sup> Another page of the owner’s manual read, “if possible, place children in the rear seat of your vehicle. Accident statistics suggest that children are safer when properly restrained in rear seating positions than when they are restrained in front seating positions.”<sup>173</sup>

At the time of the accident, the girl was riding in the front seat of the truck, her two-year-old brother secured in a car seat in the back seat.<sup>174</sup> Before the collision, the girl had unbuckled her seat belt, leaving her unrestrained when the truck was rear-ended.<sup>175</sup> The girl sustained major head trauma when the front air bag deployed.<sup>176</sup>

The plaintiffs presented their claims against Ford to a jury for several days.<sup>177</sup> Before the trial’s conclusion, Ford moved for a directed verdict and requested a mistrial.<sup>178</sup> The court granted Ford’s motion for a mistrial and scheduled a second trial.<sup>179</sup> Before the second trial, the court granted Ford’s motion for

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 316-17. “[E]ach warning is in a colored box marked with an exclamation point inside a triangular symbol.” *Id.* at 317.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 317-18.

178. *Id.* at 318.

179. *Id.*

summary judgment with respect to the failure to warn claim and, thereafter, entered final judgment.<sup>180</sup>

The Indiana Court of Appeals reversed, concluding that a manufacturer's duty to warn encompasses both a duty to provide instructions for the safe use of a product, and a duty to provide a warning about the inherent dangers of improper use of the product.<sup>181</sup> The *Cook* court then noted that a negligence standard governed warning and instruction defect claims under the IPLA and, consequently, a party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances.<sup>182</sup>

After first determining that federal law does not preempt plaintiff's warning and instruction claims, the court of appeals turned to the adequacy of Ford's warnings and instructions.<sup>183</sup> Plaintiffs claimed that the trial court erred when it granted Ford's motion for summary judgment because there were factual questions concerning whether the owner's manual instructions and warnings were defective and caused the girl's injury.<sup>184</sup> Relying on Indiana's read-and-heed presumption,<sup>185</sup> Ford countered that the parents' failure to read the warnings and instructions contained in the owner's manual defeated their claims.<sup>186</sup> The court did not agree.<sup>187</sup>

Initially, the court noted that there was no doubt that Ford owed a duty to provide warnings about the truck's air bags.<sup>188</sup> Ford's warning in the owner's manual instructed owners to leave the front passenger side air bag on unless a rear facing child seat was in the front seat.<sup>189</sup> The plaintiffs designated opinion testimony that air bags posed a danger to all children in the front seat, not just those in rear-facing child seats, as well as testimony from a Ford engineer suggesting that Ford was aware as early as the mid-1990s that airbags posed a danger to children.<sup>190</sup> Further, the girl's father testified that he was aware of Ford's directive to deactivate the air bag if a rear facing child seat was placed in the front seat, but all of the other instructions in the owner's manual (which he

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180. *Id.*

181. *Id.* at 319, 331 (citing *Rushford v. Ford Motor Co.*, 868 N.E.2d 806, 810 (Ind. 2007)).

182. *Id.* at 319-20 (quoting IND. CODE § 34-20-2-2 (2008)).

183. A substantial portion of the court's analysis addresses whether federal law preempts the plaintiffs' claims. We address that portion of the court's decision concerning federal preemption in Part IV, *infra*.

184. *Cook*, 913 N.E.2d at 326.

185. "[W]here [a] warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in [sic] defective condition, nor is it unreasonably dangerous." *Id.* at 326, n. 8 (quoting *Dias v. Daisy-Heddon*, 390 N.E.2d 222, 225 (1979) (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j (1976))).

186. *Id.* at 326 n.8.

187. *Id.* at 326-31.

188. *Id.* at 326.

189. *Id.*

190. *Id.*

read after the accident) would not have altered his conduct because none of them would have contradicted his belief that the air bag provided greater protection to a front seat occupant.<sup>191</sup>

The court of appeals pointed out that whether an act or omission is a breach of a duty is often a question of fact reserved for a jury.<sup>192</sup> Even if the court employed the read-and-heed presumption, the owner's manual directed users to leave the air bag on unless a rear facing child seat was placed in the front seat.<sup>193</sup> The parents testified that the other warnings and instructions contained in the owner's manual would not have altered their conduct because these warnings did not alert them to the dangers air bags posed to children seated in the front seat. This testimony, coupled with Ford's use of permissive language in other instructions (such as to place children in the rear seat if possible), lead the court to conclude that a jury should decide whether Ford's warnings were adequate.<sup>194</sup>

The court next addressed proximate cause.<sup>195</sup> Plaintiffs claimed that "but for" Ford's failure to instruct them to deactivate the air bag for all child passengers or to specifically warn about the dangers the air bag posed to children, their daughter's injury would not have occurred.<sup>196</sup> Ford, on the other hand, claimed that the instructions were not the proximate cause of the injury because had the parents read and heeded the instructions to place their daughter in the back seat and to remain belted at all times, her injuries either would not have occurred or would not have been as severe.<sup>197</sup> Neither party disputed that the child's injury would not be as severe had she remained belted.<sup>198</sup> Similarly, neither party disputed that the girl's injuries would not have occurred at all had she been in the back seat.<sup>199</sup> Nonetheless, again because the court believed the language Ford employed in its warnings was permissive (directing owners to place children in the back seat "if possible") the court concluded that a question of fact remained for the jury to decide whether the failure to place the girl in the back seat was a reasonably foreseeable intervening cause.<sup>200</sup>

*Gibbs v. I-Flow, Inc.*,<sup>201</sup> is another warnings defect case decided during the 2009 survey period that deserves some detailed analysis. In *Gibbs*, the court discussed the learned intermediary doctrine in the context of a motion to remand to state court.<sup>202</sup> The plaintiff brought a failure to warn claim after a pain pump manufactured by I-Flow and sold by a sales representative Rowland allegedly

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191. *Id.* at 326-27.

192. *Id.* at 327.

193. *Id.* at 327-28.

194. *Id.*

195. *Id.* at 328.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 330-31.

201. No. 1:08-cv-708-WTL-TAB, 2009 U.S. Dist. LEXIS 14895 (S.D. Ind. Feb. 24, 2009).

202. *Id.* at \*12.



injured him.<sup>203</sup> The defendants argued that the plaintiffs fraudulently joined Rowland to defeat diversity.<sup>204</sup> The defendants claimed that under the learned intermediary doctrine, the plaintiff could not succeed on a claim against Rowland because the plaintiff's physician was an intermediary who should have recognized the danger and warned the plaintiff accordingly.<sup>205</sup> The learned intermediary doctrine provides that "there is no duty to warn when a product is sold to a 'knowledgeable or sophisticated intermediary' whom the manufacturer has warned."<sup>206</sup> But "the intermediary must have knowledge or sophistication equal to that of the manufacturer, and the manufacturer must be able to rely reasonably on the intermediary to warn the ultimate consumer."<sup>207</sup> The plaintiff argued that Rowland knew about the risks of the pain pump but failed to inform the plaintiff's doctor of these risks.<sup>208</sup> The plaintiff also claimed that Rowland misrepresented the facts regarding the risks.<sup>209</sup> Based upon these allegations, the court could not conclude that the learned intermediary doctrine would bar plaintiff's claims against Rowland; thus, remand was appropriate.<sup>210</sup>

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.<sup>211</sup> 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.<sup>212</sup> One panel of the Seventh Circuit (Judge Easterbrook writing) 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."<sup>213</sup> Phrased 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."<sup>214</sup>

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203. *Id.* at \*2.

204. *Id.* at \*3.

205. *Id.* at \*12-14.

206. *Id.* at \*12 (quoting *Taylor v. Monsanto Co.*, 150 F.3d 806, 808 (7th Cir. 1998)).

207. *Id.* (quoting *Taylor*, 150 F.3d at 808).

208. *Id.* at \*13.

209. *Id.*

210. *Id.* at \*13-14.

211. 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).

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

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

214. *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) (citing *Bourne*, 452 F.3d at 638). Another recent Seventh

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.<sup>215</sup>

In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard.<sup>216</sup> 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.<sup>217</sup>

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."<sup>218</sup> 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.*<sup>219</sup> In federal court, under a *Celotex*<sup>220</sup> standard, a manufacturer may file for summary judgment based upon the "comment k" defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design.<sup>221</sup> Under Indiana's treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design.<sup>222</sup> Regardless of the procedure governing the motion itself, the claimant still must prove the existence of a safer, feasible alternative design to rebut the

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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) (explaining Judge Learned Hand's articulation of the "B<PL" negligence formula).

215. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(B) (1998).

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

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

218. IND. CODE § 34-20-4-4 (2008).

219. 644 N.E.2d 118, 123 (Ind. 1994).

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

221. *Id.* at 324.

222. See IND. TRIAL R. 56.

IPLA's "comment k" defense.<sup>223</sup>

The Indiana Supreme Court in *Schultz v. Ford Motor Co.*<sup>224</sup> endorsed the foregoing burden of proof analysis in design defect claims in Indiana.<sup>225</sup> State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.<sup>226</sup> The 2009 survey period added to the scholarship in this area.

Perhaps one of the most significant design defect cases decided in recent years and certainly during this Survey period, *Ford Motor Co. v. Moore*,<sup>227</sup> may prove to be fleeting guidance because the Indiana Supreme Court granted transfer on September 11, 2009.<sup>228</sup> Nonetheless, the decision is noteworthy because of the court's collection, analysis, and summary of Indiana law in design defect cases. In *Moore*, the driver and sole occupant of 1997 Ford Explorer died when the vehicle's left front tire tread separated.<sup>229</sup> Despite wearing a properly

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223. 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.*, 912 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

224. 857 N.E.2d 977 (Ind. 2006).

225. *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).").

226. See, e.g., *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 359 (7th Cir. 2008) (holding that reversal not required even though jury instruction was confusing and, at least in part, inaccurate in a case alleging design defects against defendant company hired to rebuild a fifty-one-year-old crane); *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); *Westchester Fire*, 2006 WL 3147710, at \*5 (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); *Fueger v. CNH Am. LLC*, 893 N.E.2d 330, 333 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008) (holding that plaintiff's expert was qualified to render opinions about the skid loader's allegedly defective design and that plaintiff had designated sufficient evidence to defeat summary judgment as to design defect issue); *Lytle v. Ford Motor Co.*, 814 N.E.2d 301, 317-18 (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, 1143-44 (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).

227. 905 N.E.2d 418 (Ind. Ct. App.), *trans. granted, opinion vacated*, 919 N.E.2d 552 (Ind. 2009).

228. *Ford Motor Co. v. Moore*, 919 N.E.2d 552 (table) (Ind. 2009).

229. *Ford Motor Co.*, 905 N.E.2d at 421.

fastened seat belt,<sup>230</sup> the driver was ejected through the vehicle's sunroof that was closed and latched before the collision.<sup>231</sup> The driver's estate sued the tire manufacturer, the vehicle's seller, Ford, and TRW Vehicle Safety Systems, Inc.<sup>232</sup> The seller and tire manufacturer settled before trial.<sup>233</sup>

The driver's estate claimed that the Explorer was negligently designed in several ways. Ford and TRW claimed that the driver's death was the result of the severe nature of the crash.<sup>234</sup> Ford and TRW also relied on Indiana's rebuttable presumption<sup>235</sup> that the product was not defective and they were not negligent because the seat belt assembly and sunroof designs complied with applicable government regulations and were state-of-the-art.<sup>236</sup> The court instructed the jury that it could return a verdict against Ford if it found that Ford "[had] placed into the stream of commerce a defectively designed, unreasonably dangerous product and was negligent in the design of the product, with that product being either the seatbelt assembly or the sunroof."<sup>237</sup> A similar instruction was given about TRW, but TRW's product was defined as "being the seatbelt assembly."<sup>238</sup> The jury returned a verdict against Ford and apportioned fault. Ford and TRW appealed, challenging the sufficiency of the estate's design defect evidence.<sup>239</sup>

The Indiana Court of Appeals began its analysis by acknowledging that the IPLA governed the estate's claims and that a negligence standard applied.<sup>240</sup> As a result, the estate had to establish the existence of a duty, breach of that duty, and an injury resulting from the breach.<sup>241</sup> In other words, the estate had to establish Ford and TRW failed to exercise reasonable care under the circumstances.<sup>242</sup> The event that caused the collision was a tire failure.<sup>243</sup> Nonetheless, the crashworthiness doctrine would allow the estate to recover if a design defect (seat belt assembly or sunroof) caused or enhanced the driver's injuries.<sup>244</sup> The doctrine required more than the conclusion that the product failed causing injury, but also that the product failed to provide reasonable protection under the circumstances.<sup>245</sup> As part of meeting its burden of proof, the estate had to demonstrate "that a feasible, safer, more practicable product design

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230. TRW Vehicle Safety Systems, Inc. made the seat belt. *Id.*

231. *Id.*

232. *Id.* at 422.

233. *Id.*

234. *Id.*

235. See IND. CODE § 34-20-5-1 (2008).

236. *Ford Motor Co.*, 905 N.E.2d at 422.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 422-23.

241. *Id.* at 423.

242. *Id.*

243. *Id.*

244. *Id.* (citing *Miller v. Todd*, 551 N.E.2d 1139, 1140 (Ind. 1990)).

245. *Id.* (citing *Miller*, 551 N.E.2d at 1143).

would have afforded better protection.”<sup>246</sup> Phrased another way, Indiana law requires a plaintiff to establish “another design not only could have prevented the injury but also was cost-effective under general negligence principles.”<sup>247</sup>

The *Moore* court recognized that expert opinion testimony is typically required to establish a design defect.<sup>248</sup> Once the expert had been permitted to testify, establishing a defect in a crashworthiness case requires more than just opinion testimony.<sup>249</sup> “Opinions must be supported by reliable data, such as testing, studies, or statistics to show the feasibility of alternative design proposals.”<sup>250</sup> Although hands-on testing is not an absolute prerequisite, some level of intellectual rigor, such as reviewing experimental, statistical, or scientific data generated by those in the field, is needed.<sup>251</sup> The court concluded that

in a negligent design/crashworthiness case [a plaintiff] must go beyond criticism of a defendant’s design and proof of product failure. The plaintiff must proffer a demonstrably better design that is feasible to implement in order to show that the defendant was negligent in selecting and implementing a design deemed to be inferior.<sup>252</sup>

The *Moore* court next turned to the estate’s proposed alternative seat belt assembly theories. Plaintiff’s expert theorized that when four conditions were met, an intermittent release of seatbelt webbing could occur; however, the expert was unable to produce any testing to replicate the actual conditions of the accident at issue.<sup>253</sup> The expert also described and recommended the use of a different latch plate in the seatbelt system than what Ford and TRW had used, but no other evidence was offered to demonstrate that if the alternative was implemented an overall safety improvement would occur.<sup>254</sup> Moreover, the expert’s theories that seat belt pretensioners were feasible alternative designs was similarly without support because the expert did not have any real world data or a statistical study comparing the nature and number of injuries to the seat belt assembly used in the Explorer at issue to the alternative proposed.<sup>255</sup>

The court recognized that an IPLA claimant must prove that the defendant failed to exercise reasonable care under the circumstances in designing the product.<sup>256</sup> The court would not permit the expert “to establish the existence of a design defect by his mere assertion.”<sup>257</sup> “In plain words, an assertion is only a

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246. *Id.* at 423-24.

247. *Id.* at 424 (quoting *Pries v. Honda Motor Co., Ltd.*, 31 F.3d 543, 546 (7th Cir. 1994)).

248. *Id.* at 426 (quoting *Pries*, 31 F.3d at 546).

249. *Id.*

250. *Id.*

251. *Id.* at 427.

252. *Id.*

253. *Id.* at 428.

254. *Id.*

255. *Id.* at 430-32.

256. *Id.* at 431 (citing IND. CODE § 34-20-2-2 (2008)).

257. *Id.* (quoting *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995)).

hypothesis until there is evidence to support its truth.”<sup>258</sup>

The court of appeals next addressed claims that the sunroof was defectively designed.<sup>259</sup> As noted above, the driver was ejected through the sunroof and the accident reconstruction expert opined that the sunroof had dislodged during the vehicle’s first roll.<sup>260</sup> It was believed that the driver was ejected during a later roll of the vehicle and a medical examiner testified that the driver “should have survived” if he remained in the vehicle.<sup>261</sup> The estate presented another expert who testified that it would cost only one or two dollars to strengthen the sunroof and that the brackets used to retain the sunroof were not strong enough because they failed and were bent.<sup>262</sup> The expert went on to opine that there were numerous ways to reinforce the sunroof, but he did not build an alternative and test it.<sup>263</sup> Further, the estate did not present any evidence, statistical or otherwise, that the benefits of modifying the sunroof to make it more robust and better able to retain occupants outweighed the incumbent costs and would improve safety.<sup>264</sup> The court concluded that the estate failed to present sufficient evidence that Ford and TRW had breached a duty of reasonable care and reversed the jury’s verdict.<sup>265</sup>

The Indiana Court of Appeals’ unpublished decision in *Green v. Ford Motor Co.*<sup>266</sup> is another design defect case decided during the 2009 survey period. As in *Moore*, the plaintiff was injured in a single vehicle accident involving a Ford Explorer.<sup>267</sup> The plaintiff sued Ford, claiming that the Explorer was defectively designed because it was particularly susceptible to rolling over.<sup>268</sup> Ford moved to dismiss the claims because the post-crash vehicle involved in the crash irreparably compromised its ability to defend the claim had been irreparably compromised.<sup>269</sup>

The plaintiff never had possession of the vehicle after his accident, was unemployed when the accident occurred, and said that he lacked the ability and the funds to purchase the Explorer after the crash.<sup>270</sup> Television video crews, however, videotaped the vehicle after the crash, some digital photographs were taken of the vehicle, and Green had the opportunity to inspect it before it was destroyed.<sup>271</sup>

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258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 432.

263. *Id.*

264. *Id.*

265. *Id.* at 432-33.

266. No. 1:08-cv-0163-LJM-TAB; 2008 U.S. Dist. LEXIS 96278 (S.D. Ind. Nov. 25, 2008).

267. *Id.* at \*1-2.

268. *Id.* at \*2.

269. *Id.* at \*1, \*3-4.

270. *Id.* at \*2-3.

271. *Id.* at \*3.

According to the court, Ford's motion to dismiss should be denied if Ford could adequately defend itself without the vehicle.<sup>272</sup> The plaintiff contended that Ford did not need the Explorer because his defect theory challenged the design of the vehicle, not a specific defect that was peculiar to his vehicle.<sup>273</sup> The court agreed with the plaintiff, recognizing that the design defect was a constant that was unaffected by the accident in question and the vehicle was not necessary for Ford's defense.<sup>274</sup> The vehicle's unavailability did not destroy the design of the vehicle, and both parties had access to other evidence concerning the design of the vehicle such as schematics, expert testimony, and testing.<sup>275</sup>

The court reached the same conclusion with regard to the plaintiff's allegations that the seat belt system was defectively designed.<sup>276</sup> Ford argued that it needed the vehicle to be able to inspect the seat belt to determine whether the plaintiff was wearing it at the time of his accident.<sup>277</sup> The court rejected Ford's argument, pointing out that other avenues were available to Ford to attempt to determine whether the plaintiff was properly belted.<sup>278</sup>

3. *Manufacturing Defect Theory.*—There were no key decisions involving manufacturing defect theories from courts in Indiana during the 2009 survey period, although there have a handful of important decisions in that area in recent years.<sup>279</sup>

#### *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.*”<sup>280</sup> 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.”<sup>281</sup>

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272. *Id.* at \*5.

273. *Id.* at \*7.

274. *Id.* at \*8-9 (citations omitted).

275. *Id.*

276. *Id.* at \*10.

277. *Id.*

278. *Id.*

279. *Campbell v. Supervalu, Inc.*, 565 F. Supp. 2d 969, 980 (N.D. Ind. 2008) (holding that evidence was insufficient as a matter of law to allow jury to decide whether ground beef purchased at a local grocery store caused child's *E. coli* poisoning). For a more detailed discussion about *Campbell* in the manufacturing defect context, see Alberts et al., *supra* note 41, at 1135-39. See also *Gaskin v. Sharp Elec. Corp.*, No. 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007) (addressing substantive issues raised in the context of an alleged manufacturing defect). For a detailed analysis of *Gaskin*, see Alberts et al., *supra* note 156, at 1176-80.

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

281. *Id.* § 34-20-1-2.

Many recent Indiana decisions reveal that judges and practitioners are struggling mightily in their attempts to determine legislative intent with regard to the interplay between those two provisions. The struggle usually involves how to handle claims that seek recovery based upon alleged breaches of warranty or other UCC-based theories of recovery.

There is a strong argument that the IPLA provides the exclusive remedy against a product's manufacturer or seller when that product has caused "physical" harm to a person or property because that is the only practical interpretation that gives effect to the phrase "*regardless of the substantive legal theory or theories upon which the action is brought.*"<sup>282</sup> Such language seems to be persuasive evidence of legislative intent to ensure that IPLA provides the sole and exclusive remedy against a product's manufacturer or seller when the product at issue has caused the "physical" harm alleged. Indeed, the IPLA is quite clear that, for its purposes, "physical harm" means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property."<sup>283</sup> It "does not include gradually evolving damage to property or economic losses from such damage."<sup>284</sup> Accordingly, if the damage caused by the use or consumption of a product is purely economic in nature and does not involve "physical" property or personal injury as the IPLA defines the term, then the claimant has, by definition, not suffered a loss for which the IPLA provides the remedy. Rather, the exclusive remedies available to claimants who have sustained economic losses or other non-physical losses would seem to be found either in the common law or in UCC/contract-based authority. Such actions appear to be among the "other action[s]" that Indiana Code section 34-20-1-2 makes clear that the General assembly did not intend to limit.<sup>285</sup>

Thus, the IPLA and UCC/contract-based authority do not seem to be "alternative" remedies, but rather separate ones—each to be merged with the other depending upon the type of loss sustained.<sup>286</sup> Economic losses merge into one UCC/contract-based cause of action and "physical" losses (as the IPLA defines

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282. *Id.* § 34-20-1-1 (emphasis added).

283. *Id.* § 34-6-2-105(a).

284. *Id.* § 34-6-2-105(b).

285. Indeed, the legal theories and claims to which Indiana Code section 34-20-1-2 appear 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.

286. That concept is consistent with Indiana law insofar as Indiana courts have not allowed claims for economic losses to be merged into tort actions. Indeed, the economic loss doctrine precludes a claimant from maintaining a tort-based action against a defendant when the only loss sustained is an economic as opposed to a "physical" one. *E.g.*, *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 151 (Ind. 2005); *Fleetwood Enters., Inc. v. Progressive N. Ins. Inc.*, 749 N.E.2d 492, 495-96 (Ind. 2001); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 488-89 (Ind. 2001).



them) merge into one IPLA-based cause of action. A number of recent decisions, such as *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,<sup>287</sup> *Ryan ex rel. Estate of Ryan v. Philip Morris USA, Inc.*,<sup>288</sup> *Fellner v. Philadelphia Toboggan Coasters, Inc.*,<sup>289</sup> and *New Hampshire Insurance Co. v. Farmer Boy AG, Inc.*,<sup>290</sup> have recognized the distinction, often holding that breach of warranty claims “merge” with the IPLA when the harm is “physical” in nature as opposed to purely economic.

One case decided during the 2009 survey period, however, did not merge breach of warranty claims with IPLA-based claims, even though the case involved “physical harm” as defined by the IPLA. In *American International Insurance Co. v. Gastite*,<sup>291</sup> the court did not merge separate breach of express and implied warranty claims with IPLA-based claims,<sup>292</sup> apparently believing that

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287. 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.

288. No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006). In *Ryan*, the widow of a man who allegedly died because 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.* at \*2-3.

289. 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. Like the decisions in *Cincinnati 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.

290. No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at \*9-11 (S.D. Ind. Dec. 19, 2000) (holding that a claim alleging breach of implied warranty in tort had been superseded 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).

291. No. 1:08-cv-1360-RLY-DML, 2009 U.S. Dist. LEXIS 41529 (S.D. Ind. May 14, 2009).

292. There was some question about whether the plaintiff in *Gastite* had sufficiently stated cognizable claims both as to its express and implied warranty theories. The court found that the plaintiff had, indeed, pleaded sufficient facts to support the express warranty claim, but concluded that it had not properly supported a claim for breach of implied warranty of merchantability. *Id.* at \*10-11. The plaintiff apparently intended to state a claim for breach of the implied warranty of merchantability, but contended that the product was not fit for its intended use and purpose, which actually is the evidentiary predicate for a breach of the implied warranty of fitness for a particular purpose claim. *Id.* at \*11. Accordingly, the court went light on the plaintiff, refusing to dismiss

the plaintiff could pursue them alternatively and separately against a defendant even though the physical harm (property damage caused by a house fire) is without question the type of harm that the IPLA is intended to cover.<sup>293</sup> In a footnote, the *Gastite* court wrote that, “[a]lthough the IPLA provides a single cause of action for a user seeking to recover in tort from a manufacturer for harm caused by a defective product . . . a plaintiff may maintain a separate cause of action under a breach of warranty theory.”<sup>294</sup> The authority cited for that statement is *Hitachi Construction Machine Co. v. AMAX Coal Co.*<sup>295</sup> Reliance on *Hitachi* to support that point is tenuous at best, though, because the authority cited in *Hitachi* on that point is from 1991, four years before the Indiana General Assembly changed the law when it enacted the 1995 amendments to the IPLA to add the “regardless of the substantive legal theory” language.<sup>296</sup>

Two other decisions issued during the 2009 survey period help to establish that courts and practitioners probably will continue to struggle with the “merger” issue. In both cases, the courts simply refused to take on the issue. In *Collins v. Pfizer, Inc.*,<sup>297</sup> the estate of a man who committed suicide sued the manufacturer of a smoking cessation drug on the theory that the drug caused the suicide.<sup>298</sup> The original complaint included claims for negligence, strict liability, breach of express warranty, and breach of implied warranty, in addition to several other theories of recovery.<sup>299</sup> The drug manufacturer argued that the IPLA “subsumed or preempted” the warranty claims.<sup>300</sup> The *Collins* court recognized that “the relationship between tort claims under the IPLA and contract-based claims for breach of warranty under the UCC is still evolving in Indiana law.”<sup>301</sup> The court continued:

[B]reach of warranty claims are treated as not subsumed by the IPLA because they are contractual in nature. Yet damages can include consequential damages, including ‘injury to person or property proximately resulting from any breach of warranty.’ Ind. Code § 26-1-2-715(2)(b). That provision seems to open the door to a claim that looks very much like a product liability claim in tort. Adding to the mystery is the fact that it is not yet clear, at least to this court, what a claim for breach of warranty adds to a plaintiff’s defective product claim under the

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the breach of implied warranty claim with prejudice and instead granting the plaintiff leave to amend its complaint to try to properly plead its theory the second time around. *Id.*

293. *Id.* at \*9-11.

294. *Id.* at \*7 n.1.

295. 737 N.E.2d 460, 465 (Ind. Ct. App. 2000).

296. See *supra* note 6 and accompanying text. The case upon which the *Hitachi* panel relied is *B&B Paint Corp. v. Shrock Manufacturing, Inc.*, 568 N.E.2d 1017, 1020 (Ind. Ct. App. 1991).

297. No. 1:08-cv-0888-DFH-JMS; 2009 U.S. Dist. LEXIS 3719 (S.D. Ind. Jan. 20, 2009).

298. *Id.* at \*1.

299. *Id.*

300. *Id.* at \*2.

301. *Id.* at \*5.

IPLA. Contractual remedies do not extend to punitive damages.<sup>302</sup>

Alas, though, the *Collins* court refused to decide the issue because it was struggling to figure out “what difference the answer would make.”<sup>303</sup> Indeed, the court posited, “would it be possible, logically or practically, for plaintiff to lose on her IPLA claims but to win on a breach of warranty claim?”<sup>304</sup> Similarly, “[w]ould winning on a breach of warranty claim in addition to the IPLA claims authorize any additional damages?”<sup>305</sup> Accordingly, the court concluded that it saw “no need for or benefit to anyone from a federal court’s prediction of Indiana law on this question.”<sup>306</sup>

The Indiana Supreme Court had a similar opportunity in *Kovach v. Caligor Midwest*<sup>307</sup> to weigh in and perhaps settle the issue, but it too did not accept the invitation. In *Kovach*, the plaintiffs alleged that a nurse gave their son a fatal overdose of pain medication after a surgical procedure.<sup>308</sup> The plaintiffs sued the manufacturers and distributors of the medicine cup used to administer the medication, alleging design and warning theories.<sup>309</sup> As noted in Part I.D. above, the court ultimately affirmed the trial court’s grant of summary judgment based upon a lack of evidence of proximate causation.<sup>310</sup> The *Kovach* plaintiffs asserted claims against the manufacturer and distributors of the cup both under the IPLA and under UCC-based implied warranty theories.<sup>311</sup> A majority panel of the Indiana Court of Appeals concluded that the UCC and the IPLA provide “alternative remedies,” and it allowed both IPLA and UCC claims to remain in the case.<sup>312</sup>

The Indiana Supreme Court acknowledged that it has “never addressed whether the [I]PLA preempts warranty-based theories of recovery for physical harm, but several federal district courts and other panels of the Court of Appeals have held that tort-based breach-of-warranty claims have been subsumed into the [I]PLA.”<sup>313</sup> Even if two separate alternative theories are permissible under the

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302. *Id.* at \*5-6 (citing *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 984 (Ind. 1993)).

303. *Id.* at \*12.

304. *Id.*

305. *Id.*

306. *Id.*

307. 913 N.E.2d 193 (Ind. 2009), *reh’g denied*, No. 49S04-0902-CV-88, 2009 Ind. LEXIS 1514 (Ind. Dec. 3, 2009).

308. *Id.* at 195.

309. *Id.* at 195-96.

310. *Id.* at 195, 199. The court did so because the undisputed facts established “that if an overdose caused the death it[,] as due to a quantity of drug essentially double the prescribed amount” and that “[n]one of the claimed defects . . . would have caused an overdose of that magnitude.” *Id.* at 195.

311. *Id.* at 197.

312. *Id.*

313. *Id.* (citing, among others, *Cincinnati Ins. Hamilton Beach/Proctor-Silex, Inc.*, No. 4:05

facts, the *Kovach* court recognized that all such theories “require proof that the injury sustained was proximately caused by the alleged product defect.”<sup>314</sup> And, because the court concluded they were not, it did not believe it needed to answer whether the UCC and IPLA theories are merged or alternative theories: “We therefore do not resolve the relationship between the [I]PLA and the UCC today, as that issue is directly raised only by amici, and presented obliquely, if at all, by the parties.”<sup>315</sup>

Other decisions interpreting the IPLA in recent years (including two during the 2009 survey period) have allowed non-IPLA-based claims—usually under the guise of “common law” authority—to be maintained when the IPLA is inapplicable either because the plaintiffs were not users or consumers, or the defendants were not manufacturers or sellers of a product, or no physical harm was involved, or the allegations were limited to negligent repair or maintenance of a product as opposed to a product defect.<sup>316</sup> One of the 2009 cases, *Duncan v. M&M Auto Service, Inc.*,<sup>317</sup> involved the latter scenario.<sup>318</sup>

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CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006), and *N.H. Ins. Co. v. Farmer Boy AG*, No. IP98-0031-GT/G, 2000 WL 33125128 (S.D. Ind. Dec., 19, 2000)).

314. *Id.*

315. *Id.*

316. *E.g.*, *Ritchie v. Gildden Co.*, 242 F.3d 713 (7th Cir. 2001); *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002) (applying Indiana law); *Vaughn v. Daniels Co.*, 841 N.E.2d 1133 (Ind. 2006); *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004); *Deaton v. Robinson*, 878 N.E.2d 499 (Ind. Ct. App. 2007); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004). A couple of other cases merit attention. In *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007), *reh'g denied* (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 978 (Ind. 2009), the alleged harm underlying the City of Gary's public nuisance claim was not the 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.” *Id.* at 426 (citing *City of Gary*, 801 N.E.2d at 1231). Accordingly, there was no “physical harm” involved in that case, as the IPLA defines the term. *Dutchmen Manufacturing, Inc. v. Reynolds*, 891 N.E.2d 1074 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008), is another example of a case in which the court allowed non-IPLA-based liability to be imposed, but that case did not involve a “product” nor was a “manufacturer” or “seller” involved.

317. 898 N.E.2d 338 (Ind. Ct. App. 2008).

318. Plaintiff was injured in an explosion while filling a van's natural gas tank. *Id.* at 340. His expert witness claimed that the defendant auto repair shop negligently installed a fuel conversion kit that was necessary to allow the van to run on natural gas. *Id.* at 340-41. The natural gas system contained a check valve designed to ensure that natural gas flows only in one direction. *Id.* His expert believed that a second, redundant check valve should have been installed so as to prevent gas from escaping in the event that the first check valve failed and that a redundant check valve would have been important to have. *Id.* Plaintiff's operative theory of recovery in the case was that the auto repair shop “negligently installed and maintained” the natural gas system. *Id.* at 341. The court refused to allow any liability to be imposed against the repair shop under the IPLA as a manufacturer. *Id.* at 342. Although the *Duncan* court affirmed the trial court's grant of

In *Pawlik v. Industrial Engineering and Equipment Co.*,<sup>319</sup> the second of the two 2009 cases in this area, the plaintiff, an employee of a company specializing in installing heating equipment, was injured while trying to load onto a truck a large shipping crate containing three electrical heaters manufactured by defendant Industrial Engineering and Equipment Company (“Industrial”).<sup>320</sup> Industrial sold duct heaters through a distributor that, in turn, shipped them to plaintiff’s employer for installation at a Portage, Indiana facility.<sup>321</sup> Industrial manufactured the heater in the 310-pound crate at issue.<sup>322</sup> For protection during shipping, the heaters were wrapped with plastic, placed on a standard wood pallet, then encased in a crate constructed of 1” x 6” wood slat boards fastened to the pallet by staples and nails.<sup>323</sup> While unloading the crates, plaintiff decided to “just manhandle” the heavy crate in an effort to save time.<sup>324</sup> During the course of “manually tugging on the wooden crate,” plaintiff claimed that at least one slat detached, causing him to fall backwards into the bed of the truck and causing him a severe cut as well as changes in personality and mood.<sup>325</sup>

Plaintiff’s claims against Industrial included both IPLA-based product liability theories and express and implied warranty theories.<sup>326</sup> The court dismissed the IPLA-based claims against Industrial, concluding that it was not the manufacturer or seller of the crate and that plaintiff was not a user or consumer.<sup>327</sup> Having done so, the court went on to note that claims against Industrial for negligence and breach of express and implied warranties nevertheless “survive.” The *Pawlik* court cited the Indiana Supreme Court’s decision in *Vaughn v. Daniels Co.*<sup>328</sup> in rejecting any notion or implication by Industrial that “because the IPLA factors are not fulfilled, all liability is barred.”<sup>329</sup>

## II. STATUTES OF LIMITATION AND REPOSE

The IPLA contains a statute of limitation and a statute of repose for product

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summary judgment to the repair shop, it did not end its discussion by disposing of the IPLA claim but rather undertook an analysis of plaintiffs’ claims in the context of a “common law” negligence claim based upon Section 400 of the Restatement (Second) of Torts. *Id.* at 342-43.

319. No. 2:07 cv 220, 2009 U.S. Dist. LEXIS 27800 (N.D. Ind. Mar. 27, 2009).

320. *Id.* at \*2-3. At the time of his injury, plaintiff was an employee of a contractor specializing in manufacturing and installing commercial and industrial heating, ventilation, air conditioning, and plumbing systems.

321. *Id.* at \*2.

322. *Id.*

323. *Id.* at \*2-3.

324. *Id.*

325. *Id.* at \*4.

326. *Id.* at \*5.

327. *Id.* at \*13-16.

328. 841 N.E.2d 1133, 1146 (Ind. 2006).

329. 2009 U.S. Dist. LEXIS at \*17.

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.<sup>330</sup>

The Indiana Supreme Court issued an important decision during the 2009 survey period interpreting the IPLA's statute of limitations in light of the statute of limitations applicable to actions brought under Indiana's Wrongful Death Act (IWDA). In *Technisand, Inc. v. Melton*,<sup>331</sup> the Indiana Supreme Court analyzed the interplay between the statutes of limitation in the IWDA and the IPLA.<sup>332</sup> In that case, the decedent died of leukemia on July 25, 2002.<sup>333</sup> The decedent's employer provided the decedent's counsel with a letter and Material Safety Data Sheet stating that the decedent could have been exposed to carcinogenic formaldehyde fumes as a result of her work with resin-coated sand<sup>334</sup> manufactured by Technisand.<sup>335</sup>

In October 2003, the decedent's estate ("the Estate") filed a lawsuit against the decedent's employer and several other companies.<sup>336</sup> On November 29, 2004, the decedent's doctor informed the Estate that the decedent's exposure to formaldehyde "may have placed [her] at a greater risk for leukemia."<sup>337</sup> Based

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330. IND. CODE § 34-20-3-1 (2008). Recent decisions have used the IPLA's statute of repose to dispose cases as untimely. *E.g.*, *C.A. v. Amlis at Riverbend, L.P.*, No. 1:06-cv-1736-SEB-JMS, 2008 U.S. Dist. LEXIS 2558, at \*8 (S.D. Ind. Jan. 10, 2008); *Campbell v. Supervalu, Inc.*, 565 F. Supp. 2d 969, 977 (N.D. Ind. 2008). For more detailed discussions about these cases, see Alberts et al., *supra* note 41, at 1147-51. In addition, product liability cases involving asbestos products have a unique statute of limitations. See IND. CODE § 34-20-3-2(a). For a discussion of the asbestos-related statute of repose, see *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144 (Ind. Ct. App. 2005). There were no key cases decided during the 2009 survey period involving the asbestos statute of repose.

331. 898 N.E.2d 303 (Ind. 2008).

332. *Id.* at 303.

333. *Id.* at 304.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

on this information, the estate amended its complaint and added Technisand as a defendant on February 16, 2005.<sup>338</sup>

Technisand filed a motion for summary judgment claiming that the complaint was not timely filed.<sup>339</sup> Technisand argued that IWDA provided the applicable statute of limitations, which required the claim to have been brought within two years of the decedent's death.<sup>340</sup> The Estate argued that the relevant statute of limitation was found in the IPLA, which required the action to be brought within two years after the cause of action accrued.<sup>341</sup> The trial court denied the motion for summary judgment.<sup>342</sup> The Indiana Court of Appeals affirmed the trial court's decision.<sup>343</sup> The Indiana Supreme Court, however, reversed.<sup>344</sup>

The Indiana Supreme Court began its discussion by stating that the IPLA allows an action to be brought within two years after the cause of action accrues.<sup>345</sup> The court noted that under *Degussa Corp. v. Mullens*,<sup>346</sup> the cause of action under the IPLA accrues when a doctor informs the plaintiff that there is a reasonable possibility that the product caused the injury.<sup>347</sup> The Estate argued that the action was timely filed because the Estate received the doctor's letter on November 29, 2004, and amended its complaint on February 16, 2005.<sup>348</sup>

The Indiana Supreme Court found that this analysis was incorrect because it failed to take into account Indiana's Survival Statute,<sup>349</sup> which provides that where an individual dies because of personal injuries, the claim or cause of action does not survive the decedent's death.<sup>350</sup> Rather, the cause of action becomes one for wrongful death.<sup>351</sup> The court relied on the *Ellenwine v. Fairley*<sup>352</sup> and *Randolph v. Methodist Hospitals, Inc.*<sup>353</sup> cases in concluding that where the limitations period for the IWDA expires before the limitation period for the IPLA, the claim must be filed within the statute of limitations for the IWDA.<sup>354</sup>

Under the Survival Act, the decedent's products liability claim against Technisand ended at her death and only the Wrongful Death Act claim

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338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 306.

345. *Id.* at 304; IND. CODE § 34-20-3-1(b)(1) (2008).

346. 744 N.E.2d 407, 411 (Ind. 2001).

347. *Technisand*, 898 N.E.2d at 304.

348. *Id.*

349. IND. CODE § 34-9-3-1 (2008).

350. *Technisand*, 898 N.E.2d at 305.

351. *Id.*

352. 846 N.E.2d 657, 665-66 (Ind. 2006).

353. 793 N.E.2d 231, 237 (Ind. Ct. App. 2003).

354. *Technisand*, 898 N.E.2d at 305-06.

survived.<sup>355</sup> Wrongful Death claims require wrongful death actions to be commenced within two years of the decedent's death. The Estate conceded that it did not sue Technisand within two years of death.<sup>356</sup> Thus, the Estate could not use the IPLA statute of limitations as an alternative to the wrongful death statute of limitations.<sup>357</sup>

### III. EVIDENTIARY PRESUMPTIONS AND DEFENSES

Although there were no key decisions issued during the 2009 survey period that dealt with the IPLA's evidentiary presumptions or its defenses, judges and practitioners should nevertheless be mindful of their existence and of recent case law interpreting and applying them.

#### A. *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 that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product" conformed with the "generally recognized state of the art" or with applicable government codes, standards, regulations, or specifications.<sup>358</sup> Recent decisions in *Bourke v. Ford Motor Co.*,<sup>359</sup> *Flis v. Kia Motors Corp.*,<sup>360</sup> and *Schultz v. Ford Motor Co.*<sup>361</sup> all meaningfully address the foregoing presumptions.<sup>362</sup>

#### B. *Use with Knowledge of Danger (Incurred Risk) Defense*

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."<sup>363</sup> 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."<sup>364</sup> 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

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355. *Id.*

356. *Id.*

357. *Id.*

358. IND. CODE § 34-20-5-1 (2008).

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

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

361. 857 N.E.2d 977 (Ind. 2006).

362. For a detailed discussion about all three cases, see Alberts et al., *supra* note 156, at 1195-1200.

363. IND. CODE § 34-20-6-3 (2008).

364. *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, 940 (Ind. Ct. App. 1994)).



apply to a particular set of factual circumstances.<sup>365</sup>

### C. Misuse Defense

Indiana Code section 34-20-6-4 provides that “[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.”<sup>366</sup> 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)<sup>367</sup> 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.<sup>368</sup>

### D. Modification/Alteration Defense

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.<sup>369</sup>

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365. *Vaughn v. Daniels Co.*, 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 § 34-20-6-3)). On that point, the *Vaughn* decision is consistent with several earlier cases, *see, e.g.*, *Baker v. Hey-Am.*, 799 N.E.2d 1135, 1145 (Ind. Ct. App. 2003); *Hopper v. Carey*, 716 N.E.2d 566, 575, 576 (Ind. Ct. App. 1999); *Cole*, 714 N.E.2d at 200, 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 157, at 1037-39.

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

367. IND. CODE § 34-20-4-1(1) (2008).

368. *Id.* § 34-20-4-3.

369. *Id.* § 34-20-6-5. Before the 1995 Amendments to the IPLA, product modification or alteration operated as a complete defense. *See, e.g.*, *Foley v. Case Corp.*, 884 F. Supp. 313, 315

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, which 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.<sup>370</sup>

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, 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.<sup>371</sup>

#### IV. FEDERAL PREEMPTION

Federal laws preempt state laws in three circumstances: "(1) when the federal statute explicitly provides for preemption; (2) when Congress intended to occupy the field completely; and (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>372</sup> Federal preemption has been a hot topic both in federal and

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(S.D. Ind. 1994).

370. IND. CODE § 34-20-2-1 (2008).

371. *See, e.g.*, *Gaskin v. Sharp Elecs. Corp.*, No. 3:05-CV-303, 2007 U.S. Dist. LEXIS 72347, at \*22-26 (N.D. Ind. Sept. 26, 2007). 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 (IND. CODE. § 34-20-4-1 (2008)) and, second, that the product reached him or her "without substantial alteration." *Id.* § 34-20-2-1. 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.

372. *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2007 U.S. Dist. LEXIS 43455, at \*5 (S.D. Ind. June 12, 2007) (quoting *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 918 (7th

Indiana courts in recent years.<sup>373</sup> Indeed, the 2009 survey period produced yet another Indiana preemption decision. In *Cook v. Ford Motor Company*,<sup>374</sup> the court of appeals held that federal law does not preempt warning defect claims arising out of a motor vehicle accident in which a girl riding in the passenger seat of a pickup truck suffered head injuries.<sup>375</sup> The girl's parents claimed that Ford, the manufacturer of the pickup truck, failed to provide them with adequate warnings of the dangers the air bags posed to unrestrained children riding in the front seat.<sup>376</sup>

Ford argued, among other things, that regulations promulgated under the National Traffic and Motor Vehicle Safety Act ("Safety Act")<sup>377</sup> preempted the plaintiffs' claims.<sup>378</sup> Specifically, Ford claimed that Federal Motor Vehicle Standard 208<sup>379</sup> (FMVSS 208) proscribed the air bag warnings automobile manufacturers compelling their use and therefore preempted the Cooks' claims.<sup>380</sup> The version of FMVSS 208 applicable to the truck at issue required automobile manufacturers to include a specific warning affixed to the sun visors. There was no dispute that the truck at issue displayed that warning.<sup>381</sup>

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Cir. 2007)).

373. *E.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 332-33 (2008) (holding that the express preemption provision of the 1976 Medical Device Amendments Act of 1976 to the federal Food, Drug, and Cosmetic Act, prohibits common law claims challenging the safety of a medical device with respect to which the U.S. Food and Drug Administration has granted premarket approval); *Tucker v. SmithKline Beecham Corp.*, 596 F. Supp. 2d 1225, 1238 (S.D. Ind. 2008) (holding Indiana state law-based inadequate warning claims were not preempted); *Roland v. General Motors Corp.*, 881 N.E.2d 722, 727 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008) (finding Federal Motor Vehicle Standards 208 preempted Indiana state law-based defective design claims).

374. 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*, No. 49A02-0802-CV-130, 2010 Ind. LEXIS 184 (Ind. Feb. 25, 2010).

375. *Id.* at 325-26. For a more detailed discussion of the facts of the decision and the full text of the pertinent warnings and instructions, see *supra* Part I.D.1.

376. *Id.* at 316-17.

377. 49 U.S.C. § 30101 (2006).

378. *Cook*, 913 N.E.2d at 318, 320-26.

379. 49 C.F.R. § 571.208 (2009).

380. *Cook*, 913 N.E.2d at 321.

381. *Id.*

WARNING TO AVOID SERIOUS INJURY:

For maximum safety protection in all types of crashes, you must always wear your safety belt.

Do not install rearward-facing child seats in any front passenger seat position, unless the air bag is off.

Do not sit or lean unnecessarily close to the air bag.

Do not place any objects over the air bag or between the air bag and yourself.

See the owner's manual for further information and explanations.

*Id.*

FMVSS also contained requirements for warnings to be placed in owner's manuals:

The vehicle owner's manual shall provide in a readily understandable format:

- (a) Complete instructions on the operation of the cutoff device;
- (b) A statement that the [airbag] cutoff device should only be used when a rear-facing infant restraint is installed in the front passenger seating position; and
- (c) A warning about the safety consequences of using the cutoff device at other times.<sup>382</sup>

The plaintiffs did not dispute that the visor in the truck complied with FMVSS 208 and contained the required language.<sup>383</sup> The plaintiffs, however, took issue with the owner's manual language "that the passenger side air bag should be turned on 'unless there is a rear-facing infant seat installed in the front seat'" and with the lack of sufficient language warning of the consequences of placing children in the front seat of the vehicle with air bags.<sup>384</sup>

On the other hand, the plaintiffs' claim did not, according to the Indiana Court of Appeals, conflict with federal regulations because FMVSS 208 required that an air bag warning be included but only generally described the content of such a warning.<sup>385</sup> Thus, the court of appeals concluded that the plaintiffs' claim that the airbag warning in the owner's manual should have been worded slightly differently did not conflict with FMVSS 208 because the National Highway Traffic Safety Administration refused to establish precise language to be included in the owner's manual.<sup>386</sup> The *Cook* court believed that FMVSS 208 was intended to set a floor and not a ceiling.<sup>387</sup>

The *Cook* court distinguished the facts presented in *Geier v. American Honda Motor Co.*,<sup>388</sup> a leading case involving FMVSS 208 from the U.S. Supreme Court.<sup>389</sup> At the same time, the *Cook* court was persuaded that the

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382. *Id.* at 322 (quoting 49 C.F.R. § 571.208).

383. *Id.* at 321-22.

384. *Id.*

385. *Id.* at 325.

386. *Id.* FMVSS 208 required manufacturers to include a warning in the owner's manual cautioning that the airbag should only be deactivated if a rear-facing child seat was placed in the front seat and otherwise to warn of the consequences if the air bag was deactivated in other circumstances. 49 C.F.R. § 571.208 (2009). The *Cook* court apparently perceived plaintiffs' theory to be that Ford insufficiently warned of the consequences of the danger the air bag posed to children sitting in the front seat. 913 N.E.2d at 322.

387. *Cook*, 913 N.E.2d at 325.

388. 529 U.S. 861 (2004).

389. *Cook*, 913 N.E.2d at 320-23. The *Cook* court wrote that in *Geier*, there was a detailed framework for 1987 model year vehicles to be equipped with different types of passive restraint systems; the regulation gave the manufacturers options from which to choose and a timeframe to comply with the regulation. *Id.* at 324-25. If *Geier's* defect claims were allowed to go forward, his

preemption issue it faced was similar to that addressed by the U.S. Supreme Court in *Wyeth v. Levine*,<sup>390</sup> even though the two regulatory schemes governing the products were different.<sup>391</sup> As in *Wyeth*, the plaintiffs in *Cook* were seeking to have Ford improve its warnings.<sup>392</sup> The *Cook* court concluded that the duty the plaintiffs sought to impose does not conflict with FMVSS 208 and does not stand as an obstacle to accomplishing federal objectives regarding air bag warnings.<sup>393</sup>

The central theme of the court of appeals decision is that FMVSS 208 afforded manufacturers some flexibility in drafting the warnings and instructions addressing the use of airbags, and thus federal preemption was inappropriate. But as the court of appeals recognized, the *Wyeth* court addressed conflict preemption in the unique context of the Federal Food and Drugs Act and the FDA's passive label approval process,<sup>394</sup> not administrative regulations, such as the federal motor vehicle safety standards promulgated pursuant to an agency's rulemaking authority. Practitioners should not overlook or trivialize this difference. Only with the passage of time will Indiana practitioners and scholars divine whether the court of appeals' decision is an ill-advised extension of *Wyeth*.

#### CONCLUSION

Although the 2009 survey period produced slightly fewer key decisions in product liability cases than recent years, the level of legal scholarship was impressive. Perhaps above all else, however, the 2009 survey period left unanswered some important questions and some challenging issues that Indiana judges and practitioners alike will continue to confront.

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claims would supersede the options expressly allowed by the standard and would accelerate the timeframe for implementation of the various alternative passive restraint systems permitted by the regulation. *Id.* This impermissibly conflicted with the standard and, therefore, the defect claim was preempted. *Id.*

390. 129 S. Ct. 1187 (2009).

391. *Cook*, 913 N.E.2d at 325.

392. *Id.*

393. *Id.*

394. *Wyeth*, 129 S. Ct. at 1197-98, 1203.