

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2011 survey period¹ produced a handful of key decisions. As in previous years, this Survey addresses those cases and provides some relevant commentary and historical information where appropriate. The Survey follows the basic structure of the Indiana Product Liability Act (IPLA).² This Survey does not attempt to address in detail all of the cases decided during the Survey period that involve product liability issues.³ Rather, it examines select cases that discuss the important substantive product liability concepts.

I. THE SCOPE OF THE IPLA⁴

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.”⁵ When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold

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1. The survey period is October 1, 2010 to September 30, 2011.

2. IND. CODE §§ 34-20-1-1 to 9-1 (2011). 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. Two examples of cases involving product liability theories that were decided on procedural or other substantive issues are *Stuhlmacher v. Home Depot U.S.A., Inc.*, No. 2:10-CV-467, 2011 WL 1792853 (N.D. Ind. May 11, 2011) (discussing the sufficiency of pleading requirements in a product liability case), and *Eli Lilly & Co. v. Valeant Pharmaceuticals International*, 781 F. Supp. 2d 809 (S.D. Ind. 2011) (discussing the ability to recover defense costs incurred in a product liability case).

4. The background information contained in Part I is based off previous survey article submissions. See Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 44 IND. L. REV. 1377, 1377-86 (2011) [hereinafter Alberts et al., *2010 Developments*].

5. IND. CODE § 34-20-1-1(3) (2011).

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 by the defective condition”;⁶ (2) a defendant that is a manufacturer or a “seller . . . engaged in the business of selling [a] product”;⁷ (3) “physical harm caused by a product”;⁸ (4) a product that is “in a defective condition unreasonably dangerous to [a] user or consumer” or to his property;⁹ and (5) a product that “reach[ed] the user or consumer without substantial alteration in [its] condition.”¹⁰ Indiana Code section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements, “regardless of the substantive legal theory or theories upon which the action is brought.”¹¹

A. “User” or “Consumer”

The language the Indiana 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.”¹² 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.¹³

“User” has the same meaning as “consumer.”¹⁴ There are several published

6. *Id.* § 34-20-1-1(1); *id.* § 34-20-2-1(1).

7. *Id.* § 34-20-1-1(2); § 34-20-2-1(2). The latter section excludes, for example, corner lemonade stand operators and garage sale sponsors from IPLA liability.

8. *Id.* § 34-20-1-1(3).

9. *Id.* § 34-20-2-1.

10. *Id.* § 34-20-2-1(3).

11. *Id.* § 34-20-1-1.

12. *Id.*

13. *Id.* § 34-6-2-29.

14. *Id.* § 34-6-2-147. 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. *Id.* § 34-20-2-1(1). 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.” *Id.* Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken. In that regard, the IPLA does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject

decisions in the last ten years or so that construe the statutory definitions of “user” and “consumer.”¹⁵

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.”¹⁶ The IPLA defines a seller as “a person engaged in the business of selling or leasing a product for resale, use, or consumption.”¹⁷

Indiana Code section 34-20-2-1 adds three additional and clarifying requirements. First, it makes clear that an IPLA defendant must have sold, leased, or otherwise placed an allegedly defective product in the stream of commerce. Second, the seller must be engaged in the business of selling the product. And, third, the product must have been expected to reach and, in fact, reached the user or consumer without substantial alteration.¹⁸

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). Second, a seller can be deemed a statutory “manufacturer” and therefore can be held liable to the same extent as a manufacturer in one other limited circumstance.¹⁹ 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.”²⁰

to the harm caused by a product’s defective condition if that claimant falls outside of the IPLA’s definition of “user” or “consumer.”

15. See, e.g., *Pawlik v. Indus. Eng’g & Equip. Co.*, No. 2:07-cv-220, 2009 WL 857476, at *4-5 (N.D. Ind. Mar. 27, 2009); *Vaughn v. Daniels Co.* (W. Va.), 841 N.E.2d 1133, 1138-43 (Ind. 2006); *Butler v. City of Peru*, 733 N.E.2d 912, 918-19 (Ind. 2000); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 278-80 (Ind. 1999); see also Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 43 IND. L. REV. 873, 875-77 (2010) [hereinafter Alberts et al., *2009 Developments*]; Joseph R. Alberts & James Petersen, *Survey of Recent Developments in Indiana Product Liability Law*, 40 IND. L. REV. 1007, 1009-11 (2007); Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001); Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-37 (2000).

16. IND. CODE § 34-6-2-77(a) (2011).

17. *Id.* § 34-6-2-136.

18. *Id.* § 34-20-2-1; see, e.g., *Williams v. REP Corp.*, 302 F.3d 660, 662-64 (7th Cir. 2002); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730, 745-46 (N.D. Ind. 2002). See also Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1169-72 (2003).

19. IND. CODE § 34-20-2-4.

20. *Id.* *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 782-87 (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressed the circumstances under

Practitioners also must be aware that when the theory of liability is based upon “strict liability in tort,”²¹ Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller” and cannot otherwise be deemed a “manufacturer” is not liable and is not a proper IPLA defendant.²²

Indiana state and federal courts have been very active in recent years construing the statutory definitions of “manufacturer” and “seller.”²³ The 2011 survey period witnessed a bit of a novelty in this area, having produced a federal district court opinion dealing with whether drugs administered during a clinical trial are placed into the stream of commerce. In *Watson v. Covance, Inc.*,²⁴ the plaintiff alleged that she was injured after taking a drug in a clinical research study.²⁵ She claimed that the drug manufacturer failed to warn about the dangers of consuming the drug.²⁶ The manufacturer moved to dismiss the complaint because the drug had been administered in a clinical test and had not been introduced into the stream of commerce. Because Indiana Code section 34-20-2-1 imposes liability only on a person who “sells, leases, or otherwise puts into the stream of commerce” a defective product, the court concluded that there could be no failure-to-warn claim under the IPLA for a drug administered solely in a

which entities may be considered “manufacturers” or “sellers” under the IPLA. *See* *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 WL 33831, at *2-4 (S.D. Ill. Jan. 8, 2002).

21. 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.

22. *Id.* § 34-20-2-3. 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 18, at 1173-75.

23. *See* *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 356 (7th Cir. 2008); *Kucik v. Yamaha Motor Corp.*, No. 2:08-CV-161-TS, 2010 WL 2694962, at *7-8 (N.D. Ind. July 2, 2010); *State Farm Fire & Cas. v. Jarden Corp.*, No. 1:08-cv-1506-SEB-DML, 2010 WL 2541249, at *6-7 (S.D. Ind. June 16, 2010); *Pawlik v. Indus. Eng’g & Equip. Co.*, No. 2:07-cv-220, 2009 WL 857476, at *5-7 (N.D. Ind. Mar. 27, 2009); *Gibbs v. I-Flow, Inc.*, No. 1:08-cv-708-WTL-TAB, 2009 WL 482285, at *3-4 (S.D. Ind. Feb. 24, 2009); *LaBonte v. Daimler-Chrysler*, No. 3:07-CV-232, 2008 WL 513319, at *1-2 (N.D. Ind. Feb. 22, 2008); *Fellner v. Phila. Toboggan Coasters, Inc.*, No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068, at *4 (S.D. Ind. Aug. 2, 2006); *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2006 WL 1843351, at *3-4 (S.D. Ind. June 29, 2006); *Duncan v. M & M Auto Serv., Inc.*, 898 N.E.2d 338, 342 (Ind. Ct. App. 2008); *see also* Alberts et al., *2010 Developments*, *supra* note 4, at 1379-81; Alberts et al., *2009 Developments*, *supra* note 15, at 879-82; Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 42 IND. L. REV. 1093, 1098-1102 (2009) [hereinafter Alberts et al., *2008 Developments*].

24. No. 3:10-cv-99-RLY-WGH, 2010 WL 5058391 (S.D. Ind. Dec. 6, 2010).

25. *Id.* at *1.

26. *Id.*

clinical trial.²⁷

Another 2011 decision is worthy of a brief mention here although it did not deal directly with the statutory definitions. *Kolozsvari v. Doe*²⁸ provides a nice illustration of why a pharmacist's duty to warn is properly decided based upon Indiana common law negligence principles and is not within the scope of the IPLA. In *Kolozsvari*, the plaintiff sustained severe kidney damage after taking the drug OsmoPrep twice in preparation for a colonoscopy.²⁹ At the time she was prescribed OsmoPrep, she was also taking an ace inhibitor.³⁰ When the ace inhibitor and OsmoPrep are taken together, they can lead to kidney failure.³¹ The plaintiff filled her prescriptions for OsmoPrep at a CVS pharmacy, which also routinely filled her prescription for the ace inhibitor.³² Each time the pharmacist filled the prescription for OsmoPrep, he received a computerized warning stating that the use of OsmoPrep could lead to kidney failure.³³ He did not give these warnings to the plaintiff.³⁴ After taking the second dose of OsmoPrep, the plaintiff sustained kidney failure.³⁵ She sued the pharmacist and the pharmacy, alleging that the pharmacist had a duty to warn of the risks of OsmoPrep or withhold the medication.³⁶ The Indiana Court of Appeals agreed, finding that a pharmacist's duty of care arises as a matter of law out of the legislature's regulation of pharmacies and statutes requiring pharmacists to exercise professional judgment in the best interests of patients.³⁷ As such, the court concluded that the pharmacist had a duty to warn, and the plaintiff was thus entitled to pursue a negligence claim against him.³⁸

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.”³⁹ It “does not include gradually evolving damage to property or economic losses from such damage.”⁴⁰

27. *Id.* at *2.

28. 943 N.E.2d 823 (Ind. Ct. App. 2011).

29. *Id.* at 824-25.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 826.

37. *Id.* at 827-28.

38. *Id.* at 829.

39. IND. CODE § 34-6-2-105(a) (2011).

40. *Id.* § 34-6-2-105(b); *see, e.g.,* *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998); *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 493 (Ind. 2001); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 486 (Ind. 2001); *see also* *Great N. Ins.*

One case decided during the 2011 survey period, *Guideone Insurance Co. v. U.S. Water Systems, Inc.*,⁴¹ involved the application of the economic loss doctrine. In that case, two homeowners bought a reverse osmosis drinking water system at a Lowe's home improvement store.⁴² A few hours after the system was installed, the water supply line became disengaged from the water system and water flowed onto the homeowners' kitchen floor, causing more than \$100,000 in water damage.⁴³ The court determined that the economic loss doctrine precluded the homeowner's insurer from recovering in subrogation the value of the allegedly defective water filtration system itself.⁴⁴ The *Guideone* court also held that the "other property" exception to the economic loss doctrine would permit tort recovery for the flood damage to the home's floor and walls because they were separate and distinct from the water system and were not merely a component of the water system.⁴⁵

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. . . . 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."⁴⁶ Recent decisions have addressed situations in which courts were asked to decide whether "products" were involved.⁴⁷ Note that another reason why the defendant pharmacist in the *Kolozsvari* case discussed above is not within the purview of the IPLA is because he participated in a transaction that predominately involved the sale of a service rather than a product.

D. Defective and Unreasonably Dangerous

Only products that are in a "defective condition" are subject to IPLA liability.⁴⁸ 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:

Co. v. Buddy Gregg Motor Homes, Inc., No. IP 00-1378-C-H/K, 2002 WL 826386, at *3 (S.D. Ind. Apr. 29, 2002).

41. 950 N.E.2d 1236 (Ind. Ct. App. 2011).

42. *Id.* at 1239-40.

43. *Id.* at 1240.

44. *Id.* at 1244-45.

45. *Id.*

46. IND. CODE § 34-6-2-114 (2011); *see also* Fincher v. Solar Sources, Inc., 868 N.E.2d 1223, at *6 (Ind. Ct. App. 2007) (unpublished table disposition).

47. *See* Chappey v. Ineos USA LLC, No. 2:08-CV-271, 2009 WL 790194 (N.D. Ind. Mar. 23, 2009); Carlson Rests. Worldwide, Inc. v. Hammond Prof'l Cleaning Servs., No. 2:06 cv 336, 2008 WL 4889687, at *3-4 (N.D. Ind. Nov. 12, 2008); *see also* Alberts et al., 2009 *Developments*, *supra* note 15, at 882-84.

48. IND. CODE § 34-20-2-1 (2011); *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).

- (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.⁴⁹

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.⁵⁰

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect in its design (a “design defect”); (2) the product lacks adequate or appropriate warnings (a “warning defect”); or (3) the product has a defect that is the result of a problem in the manufacturing process (a “manufacturing defect”).⁵¹

Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of the IPLA. A product is “unreasonably dangerous” only if its use “exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary consumer who purchases [it] with the ordinary knowledge about the product’s characteristics common to the community of consumers.”⁵² A product is not unreasonably dangerous as a matter of law if it injures in a fashion that, by objective measure, is known to the community of persons consuming the product.⁵³

49. IND. CODE § 34-20-4-1.

50. *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))).

51. *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. P’ship*, No. 2:05-CV-040-PRC, 2006 WL 2873430, at *3 (N.D. Ind. Oct. 5, 2006). Although claimants are free to assert any of the 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].” IND. CODE § 34-20-4-3; *see also Hunt v. Unknown Chem. Mfr. No. One*, No. IP 02-389CMS, WL 23101798, at *9-11 (S.D. Ind. Nov. 5, 2003). 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.” IND. CODE § 34-20-4-4.

52. IND. CODE. § 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).

53. *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

In recent cases alleging improper design or inadequate warnings as the theory for proving that a product is in a “defective condition,” courts have recognized that the substantive defect analysis (i.e., whether a design was inappropriate or a warning was inadequate) should follow a threshold analysis that first examines whether, in fact, the product at issue is “unreasonably dangerous.”⁵⁴

The IPLA imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness and retains strict liability (liability despite the “exercise of all reasonable care”) only for those claims relying upon a manufacturing defect theory.⁵⁵ 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 generally 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.⁵⁶ 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.⁵⁷

“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.’ Thus, ‘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 WL 22247195, at *2 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 199 (internal citations omitted)).

54. See *Conley v. Lift-All Co.*, No. 1:03-cv-1200-DFH-TAB, 2005 WL 1799505, at *6 (S.D. Ind. July 25, 2005) (involving an alleged warning defect); *Bourne v. Marty Gilman, Inc.*, No. 1:03-CV-01375-DFH-VSS, 2005 WL 1703201, at *3-7 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect).

55. See *Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (2005); *Inlow II*, 378 F.3d at 689 n.4; *Conley*, 2005 WL 1799505, at *6; *Bourne*, 2005 WL 1703201, at *3; see also *Miller v. Honeywell Int’l, Inc.*, No. 107 F. App’x 643, 645-46 (7th Cir. 2004); *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).

56. See, e.g., *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *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); *Burt*, 212 F. Supp. 2d at 899-900; *Vaughn v. Daniels Co. (W. Va.)*, 841 N.E.2d 1133, 1138-39 (Ind. 2006).

57. The 2009 Indiana Supreme Court decision in *Kovach v. Caligor Midwest*, 913 N.E.2d 193 (Ind. 2009), articulates very well 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. See also *Kucik v. Yamaha Motor Corp., U.S.A.*, No. 2:08-CV-161-TS, 2010 WL 2694962, at *9 (N.D. Ind. July 2, 2010) (granting summary judgment because the plaintiff failed to demonstrate that a motorcycle contained a manufacturing or design defect that proximately caused the accident at issue or the plaintiff’s injuries); *Conley*, 2005 WL 1799505, at *13-14; see also *Alberts et al.*,

There were two key cases decided during the 2011 survey period dealing with concepts of unreasonable danger and causation in the context of the IPLA. The first case, *Price v. Kuchaes*,⁵⁸ involved a legal malpractice claim that arose because the statute of limitations expired on a husband's state-law loss of consortium claim while his wife's underlying personal injury claim was pending in the federal court.⁵⁹ In order for the husband to prove that his former attorney committed malpractice, he first had to demonstrate that he would have achieved a favorable outcome with respect to the product liability claims against the vaccine manufacturers.⁶⁰ The husband had to prove, among other things that the vaccine administered to his wife was defective and unreasonably dangerous, and that a defect in the vaccine proximately caused his wife's injury.⁶¹ The trial court held that the husband failed to meet his proof of burden under Indiana law and granted summary judgment.⁶²

On appeal, the husband argued first that a Missouri decision⁶³ should be applied to compel a finding that the vaccine at issue was defective and

2010 Developments, supra note 4, at 1381.

58. 950 N.E.2d 1218 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 650 (Ind. 2011).

59. Price's wife contracted polio after she came in contact with a child recently vaccinated against the disease. Initially, Price and his wife sued the manufacturers of the polio vaccine in Indiana state court. *Id.* at 1222. After receiving a letter from the manager of the vaccine manufacturer's legal department, the Prices voluntarily dismissed their state court claims and re-filed them in the U.S. Court of Federal Claims after being informed that polio vaccine compensation claims had to be brought pursuant to the National Childhood Vaccine Injury Act, Pub. L. No. 99-660, § 301, 100 Stat. 3743 (1986). *Price*, 950 N.E.2d at 1222. Although his wife obtained a judgment in her underlying federal court action, Price had to dismiss his consortium claim after litigating it for five years because it was not compensable under the Vaccine Act. *Id.* Three days after voluntarily dismissing his claims in the Court of Federal Claims, Price reinstated his Indiana state court suit to pursue the consortium claims. *Id.* In the interim, the statute of limitations for the product liability based claims against the vaccine manufacturers had expired and summary judgment was eventually granted in favor of the vaccine manufacturers. *Id.* at 1222-24. The procedural history of the underlying suit has been omitted as these details are not germane to the resolution of the product liability issues discussed in the subsequent, malpractice case digested here. See *Price v. Wyeth Holdings Corp.*, 505 F.3d 624 (7th Cir. 2007), for a complete discussion and analysis of the procedural history of the underlying suit against the product manufacturers. Thereafter, Price filed suit against the attorney who represented him claiming the attorney had committed malpractice by mishandling his consortium claims against the manufacturers of the polio vaccine that had injured his spouse. *Price*, 950 N.E.2d at 1223. Motions for summary judgment and cross summary judgment were filed and the lower court granted Price's motion, finding Price's former attorney had committed malpractice. *Id.* at 1224-25.

60. *Price*, 950 N.E.2d at 1230-31.

61. *Id.* at 1232.

62. *Id.* at 1233.

63. In *Strong v. American Cyanamid Co.*, 261 S.W.3d 493 (Mo. Ct. App. 2007), the court determined that there was sufficient evidence to affirm a jury verdict against the same vaccine manufacturer that its polio vaccine was defective.

unreasonably dangerous.⁶⁴ The Indiana Court of Appeals in *Price* refused to apply the Missouri decision to require such a result under Indiana law because the parties were not identical, and there was no evidence in the record that the lot of the virus at issue in the Missouri decision was the same.⁶⁵ The husband also argued that summary judgment was improper because there was conflicting expert witness testimony.⁶⁶ Indeed, the husband's expert opined that the vaccine was defective and unreasonably dangerous to persons coming into contact with its recipients.⁶⁷ The vaccine manufacturers designated a competing expert, who believed that the vaccine was not defective and unreasonably dangerous because it was manufactured, tested, released and sold in a manner consistent with all applicable federal standards and regulations.⁶⁸ The *Price* court pointed out that neither the husband nor the manufacturers had designated any evidence establishing that a defect in the vaccine proximately caused his spouse's injury, but neither had the manufacturers designated any evidence that a defect in the vaccine was *not* a proximate cause of his wife's injury.⁶⁹ Because there was conflicting evidence that the vaccine was defective and unreasonably dangerous and whether any such defect caused the wife's vaccine injury, the court reversed the summary judgment and remanded the case to the trial court.⁷⁰

In the second case, *Roberts v. Menard, Inc.*,⁷¹ the plaintiff decided to ride his motorcycle through a cart corral in the parking lot of a Menard's store. The plaintiff was injured when he struck a horizontal metal bar attached across the end of the corral, and he subsequently sued the premises owner and the manufacturer of the cart corral.⁷² A "human factors" opinion witness offered the view that it was reasonably foreseeable that people would "walk, run, skateboard, rollerblade or ride motorcycles or bicycles through the cart corral"⁷³ and that its design was unreasonably dangerous.⁷⁴

The court concluded that there was no evidence that either the unassembled

64. *Price*, 950 N.E.2d at 1232.

65. *Id.* at 1232-33.

66. *Id.*

67. *Id.*

68. *Id.* (citing Indiana Code section 34-20-5-1, which provides a rebuttable presumption that a produce is not defective if, when sold, it complies with applicable federal or state standards or regulations).

69. *Id.*

70. *Id.* at 1233-34, 1236.

71. No. 4:09-CV-59-PRC, 2011 WL 1576896 (N.D. Ind. Apr. 25, 2011).

72. *Id.* at *1, *8.

73. *Id.* at *4. A significant portion of the district court's opinion analyzes the qualifications, reliability and relevance of Robert's proffered expert's opinions. *Id.* at *1-6. The court ultimately struck the expert's opinions because, despite his lengthy credentials, his expertise was not in the area of parking lots, cart corrals, motorcycles or consumer expectations in parking lots and/or related to cart corrals. *Id.* at *2-3. Further, his testimony was unreliable because he had not performed an appropriate level of testing and analysis. *Id.* at *4-6.

74. *Id.* at *4, *14.

or the assembled version of the cart corral was defective or unreasonably dangerous.⁷⁵ The court first recognized that the unassembled cart corral frame was in no way dangerous when it left the manufacturer's possession or that the unassembled cart corral exposed anyone to greater risk of physical harm than an ordinary cart corral user would be exposed.⁷⁶ Once assembled, the court likewise determined that the cart corral was neither dangerous nor defective.⁷⁷ Moreover, the court pointed out that the plaintiff was injured by using the cart corral in a manner and for a purpose not reasonably foreseeable as a matter of law.⁷⁸ The cart corral's purpose was to store used carts in a parking lot.⁷⁹ It was wholly contained within a parking space, and driving a motorcycle through it was not a normal or predictable way for it to be used.⁸⁰ In addition, because driving a motorcycle through the cart corral is not an intended or normal use, the manufacturer owed no duty to warn about the dangers of riding a motorcycle through it.⁸¹

We now address in detail a few cases in which plaintiffs attempted to demonstrate that products were defective and unreasonably dangerous by utilizing warning, design, and manufacturing defect theories.

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

A product is defective . . . if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.⁸²

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the product's danger or its alleged defect be latent or hidden for that cause of action to attach.⁸³

During the survey period, federal and state courts in Indiana addressed a

75. *Id.* at *14.

76. *Id.*

77. *Id.* at *15.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. IND. CODE § 34-20-4-2 (2011); *see also* Deaton v. Robison, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007) (noting the standard for proving a warning defect case); Coffman v. PSI Energy, Inc., 815 N.E.2d 522, 527 (Ind. Ct. App. 2004) (noting the standard for proving a warning defect case).

83. *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, 1222-27 (2005).

number of cases that involved issues relating to allegedly defective warnings and instructions.⁸⁴ Three of those cases, *Schork v. Baxter Healthcare Corp.*,⁸⁵ *McGookin v. Guidant Corp.*,⁸⁶ and *James v. Diva International, Inc.*,⁸⁷ merit special attention because they addressed the recurring question of when federal law expressly or impliedly preempts state law. Two of them, *McGookin* and *James*, involved medical devices that were approved and registered by the federal Food and Drug Administration pursuant to the Medical Device Amendments of 1976 to the Food, Drug, and Cosmetic Act. Although the court in *McGookin* applied the statute's express preemption clause while the court in *James* did not, both courts appear to have reached the appropriate conclusions because the products under consideration in each case were registered and approved pursuant to different classifications and categories of regulation.⁸⁸

We begin, however, with the U.S. Supreme Court's decision in *PLIVA, Inc. v. Mensing*.⁸⁹ In *PLIVA*, a sharply divided Court decided an implied conflict preemption case that may have broad implications in any case involving products that are subject to federal statutory or regulatory approval and control. The plaintiffs claimed that their long term use of metoclopramide, a generic form of the brand-name drug Reglan, caused them to develop tardive dyskinesia, a severe neurological disorder. Plaintiffs sued the generic manufacturers, claiming "that 'despite mounting evidence that long term metoclopramide use carries a risk of tardive dyskinesia far greater than that indicated on the label,' none of the manufacturers had changed their labels to adequately warn of that danger."⁹⁰

Under the 1984 Drug Price Competition and Patent Term Restoration Act (commonly called the Hatch-Waxman Amendments), which amended the 1962 Drug Amendments to the Federal Food, Drug and Cosmetic Act, "[a] manufacturer seeking generic drug approval . . . is responsible for ensuring that its warning label is the same as the brand name's."⁹¹ Generic manufacturers

84. See, e.g., *Colter v. Rockwell Automation Inc.*, No. 3:08-CV-527 JVB, 2010 WL 3894560 (N.D. Ind. Sept. 29, 2010); *Gardner v. Tristar Sporting Arms, Ltd.*, No. 1:09-cv-0671-TWP-WGH, 2010 WL 3724190 (S.D. Ind. Sept. 15, 2010); *Lapsley v. Xtek, Inc.*, No. 2:05-CV-174 JVB, 2010 WL 1189809 (S.D. Ind. Mar. 23, 2010); *Meharg v. Iflow Corp.*, No. 1:08-cv-184-WTL-TAB, 2010 WL 711317 (S.D. Ind. Mar. 1, 2010); see also Alberts & Boyers, *supra* note 18, at 1183-85; Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L. REV. 1247, 1262-64 (2004); Alberts & Petersen, *supra* note 15, at 1028-33; Alberts et al., *2009 Developments*, *supra* note 15, at 881-82, 893-96; Alberts et al., *2008 Developments*, *supra* note 23, at 1110-14 & 1114-18; Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 41 IND. L. REV. 1165, 1184-87 (2008) [hereinafter Alberts et al., *2007 Developments*].

85. No. 4:10-cv-00005-RLY-WGH, 2011 WL 4402602 (S.D. Ind. Sept. 22, 2011).

86. 942 N.E.2d 831 (Ind. Ct. App. 2011).

87. 803 F. Supp. 2d 945 (S.D. Ind. 2011).

88. See *id.* at 947; *McGookin*, 942 N.E.2d at 833-34.

89. 131 S. Ct. 2567, *reh'g denied*, 132 S. Ct. 55 (2011).

90. *Id.* at 2573 (citations omitted).

91. *Id.* at 2574 (citations omitted).

could request the FDA to impose stronger warnings on the brand name label which, if implemented, would allow generic manufacturers to adopt in their own generic drug labeling, but they could not unilaterally or voluntarily adopt stronger warnings absent the FDA's permission.⁹²

The Court noted that this limitation creates an impossible position for the manufacturers because compliance of their duty under state law would cause a violation under federal law and vice versa.⁹³ And, importantly, the Court held that the plaintiffs could not attempt to rebut the preemptive conflict by arguing that a manufacturer first must prove that it tried to obtain federal agency approval to make the label changes state law required and that the agency rejected that effort.⁹⁴ The Court's ultimate holding was:

Before the [m]anufacturers could satisfy state law, the FDA—a federal agency—had to undertake special effort permitting them to do so. To decide these cases, it is enough to hold that when a party cannot satisfy its state duties without the [f]ederal [g]overnment's special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes.

Here, state law imposed a duty on the [m]anufacturers to take a certain action, and federal law barred them from taking that action. The only action the [m]anufacturers could independently take—asking for the FDA's help—is not a matter of state-law concern. Mensing and Demahy's tort claims are pre-empted.⁹⁵

Also important is that the *PLIVA* Court implicitly rejected the lower court's holding that the manufacturers could have simultaneously and voluntarily complied with both their federal and state law duties simply by stopping the sale of their products.⁹⁶ The plaintiffs petitioned for rehearing because the lower court did not address this theory, but their petition was summarily denied.⁹⁷ Thus, plaintiffs' "duty to stop sales" theory was preempted as well.⁹⁸

The conclusion that the majority's decision is revolutionary, not merely evolutionary, is punctuated by Justice Sotomayor's four-vote dissent complaining that "[i]t invents new principles of pre-emption law out of thin air[,] rewrites our decision in *Wyeth v. Levine*,^[99] [and] tosses aside our repeated admonition that courts should hesitate to conclude that Congress intended to pre-empt state laws

92. *Id.* at 2576-77.

93. *Id.* at 2578.

94. *Id.* at 2578-79.

95. *Id.* at 2580-81.

96. *Id.* at 2582.

97. 132 S. Ct. 55 (2011).

98. *See PLIVA*, 131 S. Ct. 2567; *see also* Fullington v. PLIVA, Inc., No. 4:10CV00236 JLH, 2011 WL 6153608, at *6 (E.D. Ark. Dec. 12, 2011); Gross v. Pfizer, Inc., 825 F. Supp. 2d 654, 659 (D. Md. 2011), *reh'g denied*.

99. 555 U.S. 555 (2009).

governing health and safety.”¹⁰⁰

Therefore, where a manufacturer must first obtain federal regulatory permission before altering a product’s warnings, design, chemical composition or method of manufacture, *PLIVA* teaches that any state law duty to make any such product-related change to avoid liability is impliedly preempted if in conflict with federal law.

Shortly after *PLIVA* was decided, it was applied in an Indiana federal court case, *Schork v. Baxter Healthcare Corp.*¹⁰¹ The plaintiff alleged that she was injured when she was given an injection of a generic version of Phenergan, allegedly manufactured by Baxter, and she sued Baxter for failure to warn.¹⁰² Baxter filed a motion for summary judgment on two grounds. First, Baxter argued that plaintiff had no evidence that the generic Phenergan administered to her was made by Baxter, rather than by some other generic manufacturer.¹⁰³ Second, Baxter argued that despite the fact that failure to warn claims against brand name drug manufacturers were not impliedly preempted by conflict with federal law under the U.S. Supreme Court’s decision in *Wyeth v. Levine*, which, coincidentally, involved brand name Phenergan and its manufacturer, all such claims against generic drug manufacturers were impliedly preempted nevertheless, an issue the *Wyeth* court did not address.¹⁰⁴

The district court agreed with Baxter that the plaintiff was required by Indiana law to identify Baxter as the manufacturer of the accused product, but held that the plaintiff had produced sufficient evidence to create a jury question on that point.¹⁰⁵ On the preemption question, *PLIVA* was decided while Baxter’s motion was pending and the district court held that it answered the question which *Wyeth* had not addressed.¹⁰⁶ Accordingly, the district court held that plaintiffs’ failure to warn claims against Baxter, a manufacturer of generic Phenergan, were impliedly preempted according to *PLIVA*’s holdings, even though the same state law claims against brand name Phenergan and its manufacturer would not be impliedly preempted under *Wyeth*.¹⁰⁷

In *McGookin*, Samantha McGookin was born with a heart disorder known as a complete heart block.¹⁰⁸ Three days after she was born, her doctors implanted a Guidant pacemaker to regulate her heartbeat.¹⁰⁹ The Guidant pacemaker was registered and approved by the FDA as a Class III medical device, the class of medical devices that receive the most stringent federal oversight and that must

100. *PLIVA*, 131 S. Ct. at 2582-83 (Sotomayor, J., dissenting).

101. No. 4:10-cv-00005-RLY-WGH, 2011 WL 4402602 (S.D. Ind. Sept. 22, 2011).

102. *Id.* at *2.

103. *Id.*

104. *Id.* at *2-3.

105. *Id.* at *3.

106. *Id.*

107. *Id.*

108. *McGookin v. Guidant Corp.*, 942 N.E.2d 831, 833 (Ind. Ct. App. 2011).

109. *Id.*

survive a rigorous premarket approval process.¹¹⁰

Samantha died at the age of only fourteen months, and her parents sued Guidant under the IPLA along with a number of other theories.¹¹¹ After a partial summary judgment based upon the express preemption clause in the Medical Device Amendments of 1976 (MDA), followed by a jury verdict in Guidant's favor, her parents argued on appeal that Guidant could have voluntarily strengthened the warnings and precautions on the pacemaker's FDA-approved label without prior FDA approval. Because of this, they claimed the trial court erred in granting partial summary judgment applying the MDA's express preemption clause.¹¹²

In response to the plaintiff's claim that Guidant should be liable for its failure to add warnings that are permitted, but not required, by federal law,¹¹³ the *McGookin* court relied on the U.S. Supreme Court's recent MDA express preemption decision in *Riegel v. Medtronic, Inc.*,¹¹⁴ in noting that "[w]e cannot imagine a plainer example of an attempt to impose a standard of care in addition to the FDA's specific federal requirements."¹¹⁵ The court, therefore, concluded that the trial court "properly held" that the parents' claims are preempted.¹¹⁶

In *James v. Diva International, Inc.*, the plaintiff claimed that her use of a menstrual product, the DivaCup[®], caused her to develop toxic shock syndrome.¹¹⁷ Unlike the Class III pacemaker considered in *McGookin*, the DivaCup[®] was registered and classified as a Class II medical device.¹¹⁸ Moreover, the DivaCup[®] was registered through section 510(k) of the MDA, which requires the manufacturer to demonstrate to the FDA only that the produce is substantially equivalent in design and function to a preexisting device on the market prior to the effective date of the MDA.¹¹⁹ Thus, the DivaCup[®] was registered and approved without being subject to the rigorous premarket approval process applicable to genuinely new medical devices that are generally applicable to Class III devices.¹²⁰

The district court held that the regulations and FDA requirements applicable to the DivaCup[®] are of general applicability to all such devices and are insufficiently device-specific to trigger the MDA's express preemption clause.¹²¹ Because there were no "special controls, performance standards, post-market surveillance, or guidelines" applicable to the particular device at issue, the court

110. *Id.* at 832, 835.

111. *Id.* at 833.

112. *Id.* at 835.

113. *Id.* at 838.

114. 522 U.S. 312 (2008).

115. *McGookin*, 942 N.E.2d at 838.

116. *Id.*

117. *James v. Diva Int'l, Inc.*, 803 F. Supp. 2d 945, 946-47 (S.D. Ind. 2011).

118. *Id.* at 947.

119. *Id.*

120. *Id.*

121. *Id.* at 951.

refused to preempt the claim.¹²²

2. *Design Defect Theory*.—State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.¹²³ During the 2011 Survey period, the Indiana Supreme Court once again reminded Indiana practitioners in *Green v. Ford Motor Co.*,¹²⁴ that Indiana recognizes a specific kind of design defect claim in the so-called “crashworthiness” context.¹²⁵ The crashworthiness doctrine¹²⁶ recognizes that because vehicle collisions are inevitable,¹²⁷ vehicle manufacturers must take care in designing a vehicle so as to not subject the user to an unreasonable risk of injury during a collision.¹²⁸ The doctrine expands the notion of proximate cause and allows a user to recover for injuries sustained in a collision that were caused or enhanced by a design defect in the vehicle, even though the design defect may not or did not cause the initial collision.¹²⁹

In the design defect context, there is a lingering issue in the wake of the Indiana Supreme Court’s decision in *TRW Vehicle Safety Systems, Inc. v. Moore*.¹³⁰ Although the *Moore* case was addressed in detail in last year’s survey article,¹³¹ that lingering issue merits a closer look here. The *Moore* decision recognizes that plaintiffs making substantive design defect allegations in Indiana are required to prove that “the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product.”¹³² Such a standard

122. *Id.* at 952.

123. *See, e.g.*, *Mesman v. Crane Pro Servs.*, 512 F.3d 352 (7th Cir. 2008); *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632 (7th Cir. 2006); *Myers v. Briggs & Stratton Corp.*, No. 1:09-cv-0020-SEB-TAB, 2010 WL 1579676 (S.D. Ind. Apr. 16, 2010); *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710 (N.D. Ind. Oct. 31, 2006); *TRW Vehicle Safety Sys., Inc. v. Moore*, 936 N.E.2d 201 (Ind. 2010); *Fueger v. CNH Am. LLC*, 893 N.E.2d 330 (Ind. Ct. App. 2008); *Lytle v. Ford Motor Co.*, 814 N.E.2d 301 (Ind. Ct. App. 2004); *Baker v. Heye-Am*, 799 N.E.2d 1135 (Ind. Ct. App. 2003).

124. 942 N.E.2d 791 (Ind. 2011), *reh’g denied*, 2011 Ind. LEXIS 521 (June 20, 2011).

125. *Id.* at 795-96.

126. The Eighth Circuit Court of Appeals first enunciated the “crashworthiness doctrine” in *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968).

127. Stated differently, because statistically a certain number of motor vehicle collisions will occur, collisions are included in the expected use of a vehicle. *Green*, 942 N.E.2d at 793 (citing *Miller v. Todd*, 551 N.E.2d 1139, 1142 (Ind. 1990)).

128. *Id.* (citing *Larsen*, 391 F.2d at 503).

129. *Id.* (citing *Miller*, 551 N.E.2d at 1142); *see also* *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1154 (Ind. Ct. App. 1990).

130. 936 N.E.2d 201 (Ind. 2010).

131. *See* Alberts et al., *2010 Developments*, *supra* note 4, at 1391-96. The 2009 survey article addressed the Indiana Court of Appeals decision in the same case, though there it was styled *Ford Motor Co. v. Moore*, 905 N.E.2d 418 (Ind. Ct. App. 2009), *rev’d in part*, 936 N.E.2d 201 (Ind. 2010). *See* Alberts et al., *2009 Developments*, *supra* note 15, at 899.

132. *TRW*, 936 N.E.2d at 209. Recall, however, that in cases alleging improper design to prove that a product is in a “defective condition,” the substantive defect analysis may need to

merely repeats the statutory language of Indiana Code section 34-20-2-2. Curiously, the *Moore* court refused to specifically delineate additional proof requirements in design defect cases despite the fact that several recent decisions by federal courts interpreting Indiana law have required that plaintiffs espousing a design defect theory must demonstrate that another design not only could have prevented the injury, but was effective, safer, more practicable, and more cost-effective than the one at issue.¹³³ On that point, one panel of the Seventh Circuit (Judge Easterbrook writing) described “a design-defect claim in Indiana [as] a negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents.”¹³⁴ 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.”¹³⁵

In *Moore*, the court did not require proof of “any additional or more particular standard of care in product liability actions alleging a design defect,” other than that quoted above in Indiana Code section 34-20-2-2.¹³⁶ The *Moore* court justifies its pronouncement in a footnote by pointing out that the American Law Institute’s *Restatement (Third) of Torts* utilizes a variation of the alternative design model adopted by the Seventh Circuit as described above and the Indiana General Assembly did not specifically articulate such an “analytical framework” in the IPLA.¹³⁷ That line of thinking is interesting because five years earlier in *Schultz v. Ford Motor Co.*¹³⁸ the Indiana Supreme Court openly endorsed a description of the design defect standard that included proof of a feasible alternative.¹³⁹

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 WL 1703201, at *3-7 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006).

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

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

135. *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 Circuit case postulated 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] multiplied by 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).

136. *TRW*, 936 N.E.2d at 209.

137. *Id.* at 209 n.2.

138. 857 N.E.2d 977 (Ind. 2006).

139. *Id.* at 985 n.12. There, the *Schultz* court cited with approval the summary of Indiana’s proof requirements in design defect cases that was set forth in the 2006 product liability survey. See Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 39

Although the *Moore* court declined to do anything but recite the statutory language in Indiana Code section 34-20-2-2 when it comes to the proof required in design defect claims, the feasibility of an alternative design is implicit in the very statutory language that the *Moore* court cited. As addressed in detail in previous sections of this Survey, plaintiffs in an Indiana product liability case asserting a design defect must first show that the alleged defect in design caused the product to be unreasonably dangerous. They then must prove by a preponderance of the evidence that the product's manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product. Indiana courts have long recognized that the concept of an alternative design is central to that analysis. Moreover, Indiana courts have also long recognized that a plaintiff pursuing a design defect theory must prove that a manufacturer using reasonable care would have designed the product differently, that the different or alternative design would have eliminated the defect, and that the defect-eliminating alternative design would have reduced the product's risks below the "unreasonably dangerous" threshold.

Therefore, it is clear that a plaintiff attempting to prove a design defect claim under the IPLA must, in practical reality, prove a defect-eliminating alternative design. Otherwise, the IPLA would be read to reinstate the doctrine of strict liability for design defects and the IPLA clearly does not contemplate that. Indeed, the statute was drafted with the express purpose of replacing that obsolete doctrine in design defect theory cases with a negligence-based rule of reasonableness. Further, because the rule is one of reasonableness, the manufacturer's design decisions are on trial and the reasonableness of those design decisions must be measured against objective standards that necessarily involve the concept of "feasibility," such as how much an alternative design would cost, whether that alternative design would effectively perform the manufacturer's intended function and/or maintain the manufacturer's intended utility, and whether that alternative design would be accepted as a viable substitute in the relevant market.

In the final analysis, it would make little sense for practitioners or judges to read *Moore* as to require the fact-finder to disregard the feasibility of an alternative design in determining whether a manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product. Indeed, there is nothing in the IPLA or in the General Assembly's decision not to engraft portions of the *Restatement (Third) of Torts* that suggests it would be fair or appropriate to preclude a manufacturer or seller from offering evidence of

IND. L. REV. 1145 (2006). That article summarized those design defect proof requirements as follows:

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. 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.

Id. at 1158 (citations omitted).

the feasibility of alternative designs from an economic or efficacy standpoint in its effort to convince the fact-finder that its design was, in fact, reasonable under the circumstances.

3. *Manufacturing Defect Theory.*—There have been a handful of important manufacturing defect decisions in recent years,¹⁴⁰ but none during the 2011 survey period.

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.*”¹⁴¹ 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.”¹⁴²

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.”¹⁴³ The definition of physical harm “does not include gradual property damage to property or economic losses from such damage.”¹⁴⁴ Thus, reading the statutory language along with the relevant definitions, the Indiana General Assembly appears to have intended the IPLA to provide the exclusive remedy against an entity that the IPLA defines to be a product’s “manufacturer” or a “seller” by a “user” or “consumer” of a product when that product has caused sudden and major damage to property, personal injury, or death.

The Indiana General Assembly seemingly has carved out an exception to the IPLA’s exclusive remedy only when the defendant otherwise fits the definition of a “seller” under the IPLA¹⁴⁵ and when the type of harm suffered by the

140. See, e.g., *Gardner v. Tristar Sporting Arms, Ltd.*, No. 1:09-cv-0671-TWP-WGH, 2010 WL 3724190, at *4 (S.D. Ind. Sept. 15, 2010); *Campbell v. Supervalu, Inc.*, 565 F. Supp. 2d 969, 980-81 (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., *2008 Developments*, *supra* note 23, at 1135-39; see also *Gaskin v. Sharp Elec. Corp.*, No. 2:05-CV-303, 2007 WL 2819660 (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., *2007 Developments*, *supra* note 84, at 1176-80.

141. IND. CODE § 34-20-1-1 (2011) (emphasis added).

142. *Id.* § 34-20-1-2.

143. *Id.* § 34-6-2-105(a).

144. *Id.* § 34-6-2-105(b).

145. Recall that 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.” *Id.* § 34-6-2-

claimant is not sudden and major property damage, personal injury, or death.¹⁴⁶ Such theories of recovery appear to be the “other” actions the Indiana Code section 34-20-1-2 intended not to limit in the previous section, Indiana Code section 34-20-1-1. So what theories of recovery against “sellers” are intended by section 34-20-1-2 to escape the IPLA’s exclusive remedy requirement?¹⁴⁷ The vast majority (if not all) of those claims would appear to consist of gradually-developing property damage and the type of economic losses typically authorized by the common law of contracts, warranty, or the Uniform Commercial Code (UCC). This seems like the logical interpretation of section 34-20-1-2 because this section seeks not to limit all “other” claims, which, by necessary implication, must mean all claims “other” than the ones identified in the previous section (claims for personal injury, death, and sudden, major property damage).¹⁴⁸

Thus, when it comes to claims by users or consumers against manufacturers and sellers for physical harm caused by a product, the remedies provided by common law or the UCC should be “merged” into the IPLA-based cause of action.¹⁴⁹ Claims for economic losses or gradually developing property damage should not be merged into an IPLA claim so long as those actions are maintained

77(a). “Seller” . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.” *Id.* § 34-6-2-136.

146. *See id.* § 34-20-1-2.

147. 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. *Id.* § 34-20-1-2.

148. Notwithstanding this conclusion, Indiana courts and some federal courts interpreting Indiana law have not interpreted the IPLA in that way. Indeed, the courts have allowed claimants in decisions such as *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), *Goines v. Federal Express Corp.*, No. 99-CV-4307-JPG, 2002 WL 338381, at *5-6 (S.D. Ill. Jan. 8, 2002); *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 784 (Ind. 2004), to pursue personal injury common law negligence claims against “sellers” outside the IPLA even when personal injuries were the only alleged harm. *Kennedy* allowed personal injury claims to proceed against the “seller” of a product under common law negligence and section 400 of the *Restatement (Second) of Torts*. *Kennedy*, 806 N.E.2d at 784. *Ritchie* allowed personal injury claims to proceed against the “seller” of a product under a negligence theory rooted in section 388 of the *Restatement (Second) of Torts*. *Ritchie*, 242 F.3d at 726-27. *Goines* allowed personal injury claims to proceed against the “seller” of a product under a common law negligence duty recognized by a 1993 Indiana decision. *Goines*, 200 WL 338381, at *5-6.

149. This 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. *See, e.g.*, *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 151 (Ind. 2005); *Fleedwood Enters., Inc. v. Progressive N. Ins. Co.*, 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).

against entities defined by the IPLA as “sellers.”

Several recent Indiana cases have recognized that actions brought by users and consumers of products against manufacturers and sellers for physical harm caused by an allegedly defective product “merge” into the IPLA, and that the IPLA provides the exclusive remedy.¹⁵⁰ A trio of cases decided during the 2011 survey period continue that trend: *Atkinson v. P&G-Clairol, Inc.*,¹⁵¹ *Hathaway v. Cintas Corporate Services*,¹⁵² and *Ganahl v. Stryker Corp.*¹⁵³

There have been some cases in recent years that have allowed personal injury common law negligence claims to proceed outside the scope of the IPLA, either because the plaintiff was not a “user” or “consumer” of a product, the defendant was not a “manufacturer” or a “seller” of a product, or because there was no “physical harm” as the IPLA defines those terms. In those cases, the particular facts presented essentially removed them from the IPLA’s coverage in the first place, and there was, in effect, no real “merger” issue at all.¹⁵⁴

150. See *Myers v. Briggs & Stratton Corp.*, No. 1:09-cv-0020-SEB-TAB, 2010 WL 1579676 (S.D. Ind. Apr. 16, 2010); *Ryan ex rel. Estate of Ryan v. Philip Morris USA, Inc.*, No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006); *Fellner v. Phila. Toboggan Coasters, Inc.*, No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006); *Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc.*, No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. 2006); *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, No. IP98-0030-C-T/G, 2001 WL 1385889 (S.D. Ind. Aug. 24, 2001).

151. 813 F. Supp. 2d 1021, 1025 (N.D. Ind. 2011) (“[T]he IPLA supplants breach of implied warranty claims” and “damage from a defective product . . . may be recoverable under a tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product . . . itself and purely economic loss arising from the failure of the product . . . to perform as expected.”).

152. No. 1:10 CV 195, 2010 WL 4974117, at *1 (N.D. Ind. Dec. 1, 2010) (holding that the IPLA “supersedes” claims for breach of implied warranty of merchantability and implied warranty of fitness for a particular purpose).

153. No. 1:10-cv-1518-JMS-TAB, 2011 WL 693331, at *3 (S.D. Ind. Feb. 15, 2011) (choosing not to recognize plaintiffs’ so-called “strict liability failure to warn” claim under Indiana law because a negligence standard applies to claims asserting a warning defect; Indiana law does not recognize separate “state-law negligence claims” in addition to an IPLA claim).

154. See, e.g., *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1141-42 (Ind. 2006) (allowing plaintiff’s personal injury common law negligence claims after determining that Vaughn was not a “user” or “consumer” of the allegedly defective product, and therefore, the claims fell outside of the IPLA); *Duncan v. M&M Auto Serv., Inc.*, 898 N.E.2d 338, 342-43 (Ind. Ct. App. 2008) (limiting allegations to negligent repair and maintenance of a product as opposed to a product defect); *Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074, 1081 (Ind. Ct. App. 2008) (allowing plaintiff’s personal injury “common law” negligence claim based upon section 388 of the *Restatement (Second) of Torts* after determining that the defendant was not a “manufacturer” or “seller” under the IPLA); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 426 (Ind. Ct. App. 2007) (allowing a common law public nuisance claim to proceed outside the scope of the IPLA because the harm at issue was not “physical” in the form of deaths or injuries suffered as a result of gun violence, but rather the increased availability or supply of handguns); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 536-37 (Ind. Ct. App. 2004) (allowing plaintiff’s personal injury

There also have been a couple of peculiar decisions in recent years holding that claimants who have suffered sudden and major damage to property and/or personal injury nevertheless may maintain actions against product manufacturers and sellers based upon legal theories derived from authority outside the IPLA.¹⁵⁵ At least one of those decisions, however, is probably of limited value because the court relied on a case decided four years before the Indiana General Assembly enacted the 1995 amendments to the IPLA to add the “regardless of the substantive legal theory” language.¹⁵⁶

II. FAULT ALLOCATION

Indiana Code section 34-20-8-1(a) provides that “[i]n a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with . . . [the Indiana Comparative Fault Act].”¹⁵⁷ The Indiana Comparative Fault Act (ICFA) requires the finder of fact in an action based upon fault to determine the percentage of fault of the claimant, the defendant, and any non-party.¹⁵⁸ To determine the percentage of fault,” the ICFA states that the fact-finder must “consider the fault of all persons who caused or

common law negligence claims under section 392 of the *Restatement (Second) of Torts* after finding that the defendant at issue was neither a “manufacturer” nor a “seller” as the IPLA defines the terms).

155. Those decisions are *Deaton v. Robison*, 878 N.E.2d 499 (Ind. Ct. App. 2007), and *American International Insurance Co. v. Gastite*, No. 1:08-cv-1360-RLY-DML, 2009 WL 1383277 (S.D. Ind. May 14, 2009). The *Deaton* court held that liability could be imposed in a personal injury case against the manufacturer of an allegedly defective black powder rifle pursuant to both the IPLA and section 388 of the *Restatement (Second) of Torts*. *Deaton*, 878 N.E.2d at 501-03. In *Gastite*, the court refused to merge separate breach of express and implied warranty claims with IPLA-based claims against a manufacturer even though the harm suffered was property damage caused by a house fire. *Gastite*, 2009 WL 1383277, at *3-4. Both decisions, in effect, refused to “merge” the claims into the IPLA in factual situations clearly governed by the IPLA, thereby placing them at odds with cases such as *Myers*, *Ryan*, *Fellner*, *Cincinnati Insurance*, and *New Hampshire Insurance*.

156. 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.” *Gastite*, 2009 WL 1383277, at *3 n.1 (internal citation omitted) (citing *Hitachi Constr. Mach. Co. v. AMAX Coal Co.*, 737 N.E.2d 460, 465 (Ind. Ct. App. 2000)). 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. 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).

157. IND. CODE § 34-20-8-1(a) (2011).

158. *Id.* § 34-51-2-7(b)(1).

contributed to cause the alleged injury.”¹⁵⁹

The Indiana Supreme Court issued a key decision during the 2011 survey period in the context of fault allocation in a crashworthiness design defect case. In *Green v. Ford Motor Co.*,¹⁶⁰ a 1999 Ford Explorer operated by plaintiff Green hit a guardrail and went off the road before rolling down an embankment and landing upside down.¹⁶¹ Green sustained severe and permanent injuries in the collision.¹⁶² Green claimed his injuries were substantially enhanced because of defects in the vehicle’s restraint system.¹⁶³ Green filed suit in federal district court, and sought to exclude evidence of his own fault in the federal court proceedings.¹⁶⁴ According to the express statutory language of the IPLA,¹⁶⁵ Ford countered that the action was subject to comparative fault principles and, therefore, the fact-finder should consider Green’s fault in causing the collision.¹⁶⁶ The federal district court requested, via the “certified question” process pursuant to Indiana Appellate Rule 64, that the Indiana Supreme Court provide guidance about how to resolve the issue, which was posed as follows: “Whether, in a crashworthiness case alleging enhanced injuries under the [IPLA], the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault relates to the cause of the underlying accident.”¹⁶⁷

After discussing the origin of the crashworthiness doctrine and acknowledging its intent to allow injured users to recover for physical injury when a defect in the design of the product did not cause the initial collision but rather enhanced the injuries the user sustained in the collision, the Indiana Supreme Court found two statutory schemes enacted by the General Assembly that led it to the conclusion that a plaintiff’s fault must be considered.¹⁶⁸ First, earlier crashworthiness decisions were decided under common law or statutory product liability law that imposed strict liability and, when these earlier decisions were promulgated, contributory negligence was not available as a defense.¹⁶⁹ As a result, earlier decisions were not particularly helpful.¹⁷⁰ Second, product liability claims in Indiana are governed by the IPLA.¹⁷¹ Since the 1995 amendments to the IPLA, product liability claims in Indiana are to be determined in accordance with comparative fault principles.¹⁷²

159. *Id.*

160. 942 N.E.2d 791 (Ind. 2011), *reh’g denied*, 2011 Ind. LEXIS 521 (June 20, 2011).

161. *Id.* at 793.

162. *Id.*

163. *Id.*

164. *Id.*

165. IND. CODE § 34-20-8-1 (2011).

166. *Green*, 942 N.E.2d at 793.

167. *Id.* at 792.

168. *Id.* at 793-95.

169. *Id.* at 794.

170. *Id.*

171. *Id.*

172. *Id.*

The Indiana Supreme Court analyzed the language contained in the Indiana Comparative Fault Act¹⁷³ and the IPLA, concluding that Indiana's statutory scheme provides for a diverse array of factors to be considered in allocating comparative fault.¹⁷⁴ The IPLA and Indiana's Comparative Fault Act¹⁷⁵ define fault with expansive language, describing many forms of conduct which can and should be considered "fault."¹⁷⁶ "Both enactments require consideration of the fault of all persons 'who caused or contributed to cause' the harm."¹⁷⁷ Nonetheless, the legislature preserved the requirement of proximate cause to establish liability.¹⁷⁸ Consequently, the finder of fact must "consider and evaluate the conduct of all relevant actors" whom it is alleged caused or contributed to cause the harm, but the jury can only allocate comparative fault to those actors whose fault was also a proximate cause of the claimed injury.¹⁷⁹

When a claimant limits his or her claim to "enhanced injuries" caused by a "second collision," the fact finder must consider evidence of all relevant fault-related conduct, which includes the fault of the plaintiff alleged to have contributed to cause the injuries.¹⁸⁰ The jury must then determine whether the claimant's fault was a proximate cause.¹⁸¹ The Indiana Supreme Court, therefore, rewrote the originally-posed question, re-casting it as follows and answering it in the affirmative: "Whether, in a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault ~~relates to the~~ *is a proximate cause of the underlying accident harm for which damages are being sought.*"¹⁸²

The *Green* case is noteworthy because it makes clear that under both the IPLA and Indiana's Comparative Fault Act, a trier of fact is to consider a broad range of fault and allocate it when deciding whether a manufacturer will be held legally responsible for user's injury through an award of monetary damages. As provided in the express language in the IPLA, therefore, strict liability does not apply in Indiana product liability cases involving claims of design and warning defects.¹⁸³ These causes of actions are to be decided using Indiana's comparative fault scheme.¹⁸⁴

173. IND. CODE § 34-6-2-45 (2011).

174. *Green*, 942 N.E.2d at 794-95.

175. IND. CODE § 34-20-8-1.

176. *Green*, 942 N.E.2d at 795.

177. *Id.* (citing IND. CODE §§ 34-20-8-1(a), 34-51-2-79(b)(1), and 34-51-2-8(b)(1)).

178. *Id.* (citing IND. CODE § 34-51-2-3 and *Techniques v. Johnson*, 762 N.E.2d 104, 109 (Ind. 2002)).

179. *Id.*

180. *Id.* at 795-96.

181. *Id.* at 796.

182. *Id.*

183. IND. CODE § 34-20-2-3.

184. *Green*, 942 N.E.2d at 796.

CONCLUSION

The 1995 and 1998 amendments to the IPLA have been in effect now for several years. The 2011 survey period has added a few more cases to what is becoming a fairly robust body of case law interpreting the current version of the IPLA. Although there are some issues about which courts continue to disagree, the statute and the case law have combined in most areas to provide Indiana judges and practitioners with a solid basis to guide their decisions, shape their arguments, and advise their clients.