SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

Indiana courts interpreted more product liability law in the 2012 Survey Period[1] as compared to recent years. This Survey addresses the most significant product liability cases and provides some additional perspective and context where appropriate. This Survey follows the basic structure of the Indiana Product Liability Act ("IPLA").[2] The Survey does not attempt to address in detail all of the cases decided during the Survey Period that involved product liability issues, including those that were decided on procedural or non-product liability substantive issues.[3] Rather, this Survey focuses on cases discussing the important substantive concepts and provides background information on the IPLA where appropriate.

I. THE SCOPE OF THE IPLA

The IPLA[4] 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 requirements for IPLA liability: (1) a claimant who is "a user or consumer" and is also "in the class of persons that

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1. The Survey Period is October 1, 2011 to September 30, 2012.

2. IND. CODE §§ 34-20-1-1 to -9-1 (2013). 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. *See, e.g.*, Gonzalez-Servin v. Ford Motor Co., 662 F.3d 931 (7th Cir. 2011); Anyango v. Rolls-Royce Corp., 971 N.E.2d 654 (Ind. 2012); Cont'l Ins. Co. v. Wheelabrator Techs., Inc., 960 N.E.2d 157 (Ind. Ct. App. 2011), *trans. denied*, 974 N.E.2d 476 (Ind. 2012).

4. IND. CODE §§ 34-20-1-1 to -9-1 (2013).

5. *Id.* § 34-20-1-1(3).

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 in a defective condition unreasonably dangerous to [a] user or consumer" or to his or her 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 when determining who qualifies as an IPLA claimant. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by "user[s]" and "consumer[s]."[12] For purposes of the IPLA, "[c]onsumer" 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 the term 'consumer.'"[14] Although there

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

7. *Id.* § 34-20-1-1(2) and § 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 to the harm caused by a product's defective condition if that claimant falls outside of the IPLA's definition of "user" or "consumer."

were no cases decided during the 2012 Survey Period construing the statutory definitions of "user" and "consumer," there have been several cases in recent years that have done so.[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 "[s]eller" 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, an IPLA defendant must have sold, leased, or otherwise placed an allegedly defective product in the stream of commerce; second, the seller must be "in the business of selling the product;" and, third, the seller has expected the product to reach and, in fact, did reach 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, may be held liable to the same extent as a manufacturer pursuant to Indiana Code section 34-20-2-4 ("Section 2-4") "[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."[19]

Practitioners also must be aware that when the theory of liability is based upon "strict liability in tort,"[20] 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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15. *See, e.g.*, Pawlik v. Indus. Eng'g & Equip. Co., No. 2:07 CV 220, 2009 WL 857476 (N.D. Ind. Mar. 27, 2009); Vaughn v. Daniels Co. (W. Va.), Inc., 841 N.E.2d 1133 (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, 279 (Ind. 1999).

16. IND. CODE § 34-6-2-77(a) (2013).

17. *Id.* § 34-6-2-136.

18. *Id.* § 34-20-2-1. *See also, e.g.*, Williams v. REP Corp., 302 F.3d 660, 662-64 (7th Cir. 2002).

19. Kennedy v. Guess, Inc., 806 N.E.2d 776, 781 (Ind. 2004) (quoting IND. CODE § 34-20-2-4 (2013)).

20. Strict liability under the current IPLA applies only to cases in which the theory used to prove that a product is defective and unreasonably dangerous is a "manufacturing defect" theory. As in Part I.D *infra* discusses in more detail, the IPLA makes it clear that a negligence standard governs cases utilizing a "design defect" or a "failure to provide adequate warnings" theory. IND. CODE § 34-20-2-2 (2013). *See, e.g.*, Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002).

is not liable and is not a proper IPLA defendant.[21]

Indiana state and federal courts have been active in recent years construing the statutory definitions of "manufacturer" and "seller."[22] The 2012 Survey Period provided three more such cases. First, in *Pentony v. Valparaiso Department of Parks and Recreation*,[23] the plaintiff was injured on a slide at a Valparaiso playground.[24] The playground was completed in 1994; the plaintiff was injured in 2008.[25] The plaintiff sued the Valparaiso Department of Parks and Recreation ("Valparaiso"), alleging that it breached its duty in constructing, maintaining, and repairing the slide.[26]

Valparaiso moved for summary judgment, arguing that the IPLA's statute of repose barred plaintiff's claim.[27] The plaintiff argued that the IPLA did not apply because Valparaiso was not a "manufacturer" under Indiana Code section 34-6-2-77; the court agreed.[28] A "manufacturer" is "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."[29] Although Valparaiso participated in the design and construction of the play area, Valparaiso did not sell the play area to anyone.[30] Accordingly, the district court found that Valparaiso was not a "manufacturer" within the meaning of Indiana Code section 34-6-2-77.[31]

The other two cases involve the unique situation described above in which the seller of a product may be held liable as a manufacturer under IPLA when jurisdiction cannot be maintained over the manufacturer and when the seller is the manufacturer's "principal distributor or seller."[32] In *Warriner v. DC Marshall Jeep*,[33] the plaintiff was injured when his 2005 Jeep Wrangler collided with another car, rolled over, and caught fire.[34] The Wrangler was manufactured by Chrysler LLC.[35] The plaintiff leased the Wrangler through a dealership, DC Marshall, Inc.[36] In 2007, the plaintiff sued Chrysler and the dealership.[37] In 2009, Chrysler went through Chapter 11 bankruptcy proceedings, and the

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21. IND. CODE § 34-20-2-3 (2013).
22. *See, e.g.*, Mesman v. Crane Pro Servs., 512 F.3d 352, 356-58 (7th Cir. 2008).
23. 866 F. Supp. 2d 1002 (N.D. Ind. 2012).
24. *Id.* at 1004.
25. *Id*. at 1005.
26. *Id*. at 1004.
27. *Id*. at 1004-05.
28. *Id*. at 1006.
29. *Id.* (quoting IND. CODE § 34-6-2-77 (2013)).
30. *Id.*
31. *Id*.
32. *See* IND. CODE § 34-20-2-4 (2013).
33. 962 N.E.2d 1263 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 155 (Ind. 2012).
34. *Id.* at 1265.
35. *Id.* at 1264.
36. *Id.*
37. *Id.* at 1264-65.

plaintiff's claim against Chrysler was discharged.[38]

The plaintiff argued that the bankruptcy discharge resulted in the court no longer having jurisdiction over the actual manufacturer ("Chrysler"), and, therefore, the dealership should be held liable to the same extent as a "manufacturer" under Indiana Code section 34-20-2-4.[39] The court first examined whether a court is deprived of jurisdiction over a manufacturer when the manufacturer is discharged in bankruptcy.[40] The court held that bankruptcy discharge does not deprive the court of jurisdiction because discharge simply "enjoins a creditor or claimant from initiating or continuing a cause of action, but does not divest state courts of jurisdiction over an enjoined action."[41] As such, because the trial court retained jurisdiction over Chrysler despite the bankruptcy discharge, the dealership could not be held liable as a "manufacturer" pursuant to Indiana Code section 34-20-2-4.[42]

Brosch v. K-Mart Corp.[43] addressed the same issue under Section 2-4 as the court did in *Warriner*. There, the allegedly defective product at issue was a kitchen cabinet-type accessory called an "island."[44] One of two Chinese entities manufactured the island: Chensheng Furniture Company ("Chensheng") or Zhi Jia.[45] Dorel Asia SRL distributed the island, and K-Mart sold it.[46] In a summary judgment motion, the plaintiff argued that Dorel Asia SRL and K-Mart should be held liable under the IPLA to the same extent as a "manufacturer" under Section 2-4 because the court could not exercise jurisdiction over either Chensheng or Zhi Jia.[47] The plaintiff could not serve Chensheng in China because its "business registration had been cancelled."[48] And, although the plaintiff did achieve service on Zhi Jia, it did not answer the complaint.[49] The plaintiff further argued that Zhi Jia had no minimum contacts with Indiana, so the court did not have personal jurisdiction over Zhi Jia.[50]

The *Brosch* court concluded that the plaintiff's jurisdictional arguments were speculative.[51] With the identity of the actual manufacturer so unsettled, the court could not determine as a matter of law whether or not it had jurisdiction over the actual manufacturer.[52] Ultimately, the court found that the plaintiff failed to meet

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38. *Id.* at 1265.
39. *Id.* at 1266-67.
40. *Id.* at 1267.
41. *Id*. at 1268.
42. *Id*.
43. No. 2:08-CV-152, 2012 WL 3960787 (N.D. Ind. Sept. 10, 2012).
44. *Id.* at *1.
45. *Id.* at *3.
46. *Id.*
47. *Id.* at *5.
48. *Id.* at *4.
49. *Id.* at *5.
50. *Id.*
51. *Id.*
52. *Id.*

her burden of proof for summary judgment on the issue of whether Dorel and K-Mart could be treated as "manufacturers" under Section 2-4.[53]

C. Physical Harm Caused by a Product

Per 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."[54] It "does not include gradually evolving damage to property or economic losses from such damage."[55] The IPLA defines the term "[p]roduct" to "mean[ ] 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."[56]

A few decisions during the 2012 Survey Period examined the distinction between the sale of "products" and the provision of "services." In *Hathaway v. Cintas Corporate Services, Inc.* (*Hathaway II*),[57] the plaintiff worked as a plasma torch operator at company called Quik Cut, Inc.[58] The plaintiff was using the plasma torch cutter when a spark caused his shirt to catch on fire, leaving him with severe burns.[59] Cintas had provided the shirt to Quik Cut under a rental agreement.[60] Cintas also agreed to provide shirt repair and laundry services to Quik Cut.[61]

The plaintiff sued Cintas under a variety of theories, including negligence.[62] Cintas moved for summary judgment, among other claims, on the negligence claim, arguing that it was "subsumed by the IPLA."[63] The plaintiff argued that the IPLA did not apply to the negligence claim because the "relationship between Cintas and Quik Cut was primarily a service relationship, with goods only incidentally involved."[64]

Thus, the critical question for the court was whether the service aspects of the

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53. *Id.*

54. IND. CODE § 34-6-2-105(a) (2013).

55. *Id.* § 34-6-2-105(b). In a 2011 case, *Guideone Insurance Co. v. U.S. Water Systems, Inc.*, the court recognized that the economic loss doctrine precludes tort-based recovery in Indiana resulting from purely economic losses. 950 N.E.2d 1236, 1241, 1244 (Ind. Ct. App. 2011); *see also* Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc., No. IP 00-1378-C-H/K, 2002 WL 826386, at *3-4 (S.D. Ind. Apr. 29, 2002); Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492, 493-94 (Ind. 2001).

56. IND. CODE § 34-6-2-114 (2013).

57. 903 F. Supp. 2d 669 (N.D. Ind. 2012).

58. *Id.* at 671.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 678.

64. *Id.*

relationship were incidental to the product aspects or vice versa.[65] Cintas argued that the contract was predominantly for the sale of shirts.[66] The contract, however, demonstrated that Cintas also had agreed to provide exclusive laundry services.[67] The court concluded that there was a genuine issue of material fact regarding whether the relationship was predominantly for the sale of a service: "the service aspect of the relationship between Quik Cut and Cintas was not incidental. It made up a substantial portion of the relationship."[68] Accordingly, the court denied Cintas's motion for summary judgment on the negligence count.[69]

In addition to addressing whether the defendant was a "manufacturer" for the purpose of imposing the IPLA,[70] the court in *Pentony v. Valparaiso Department of Parks and Recreation*[71] also examined the "product or services" issue. As discussed earlier in *Pentony*, the plaintiff was injured on a slide at a Valparaiso playground.[72] In 1994, the city entered into a contract with Leathers and Associates Inc. ("Leathers") pursuant to which "Leathers agreed to prepare schematic design studies, consult with the playground committee to incorporate design changes requested by the committee, prepare working drawings and specifications, provide organizing and coordinating assistance, and recommend construction consultants."[73]

The playground was completed in 1994.[74] The plaintiff was injured in 2008 and sued the Valparaiso Department of Parks and Recreation ("Valparaiso") and Leathers for "negligent design, construction, and maintenance of the play area."[75] Leathers claimed that the design specifications it provided were "products," so the plaintiff's claim should fall within the IPLA's coverage.[76] If the IPLA applied, the plaintiff's claim would be barred by the IPLA's statute of repose.[77] The plaintiff argued that the IPLA was wholly inapplicable because her claim arose from Leathers's negligent provision of services as opposed to Leathers's provision of a product.[78]

The court reviewed the contract between Valparaiso and Leathers and found that Leathers was obliged to provide certain services: schematic design, design development, construction documents, and coordination with the playground

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65. *Id.*
66. *Id.* at 679.
67. *Id.* at 679-80.
68. *Id.* at 680.
69. *Id.*
70. *See* discussion accompanying *supra* note 23.
71. 865 F. Supp. 2d 947 (N.D. Ind. 2012).
72. *Id.* at 948.
73. *Id.* at 949.
74. *Id.*
75. *Id.* at 948.
76. *Id.* at 949-50.
77. *Id.*
78. *Id.* at 950.

committee.[79] "Viewing the contract as a whole," the court found that "the services involved in developing the drawings predominate[d,]" and "[t]he physical production of custom designed drawings for the play area [was] incidental to the service aspect of the transaction."[80] Because the contract predominantly involved services rather than products, the IPLA did not apply, and the IPLA's statute of repose did not bar plaintiff's claim against Leathers.[81]

D. Defective and Unreasonably Dangerous

IPLA liability only extends to products that are "in a defective condition."[82] The IPLA considers a product to be 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.[83]

Recent cases confirm that establishing one of the foregoing threshold requirements, but not both, will not result in liability under IPLA.[84]

Claimants in Indiana may prove that a product is in a "defective condition" by asserting only one or an aggregate of three theories: (1) the product has a defect in its design ("design defect"); (2) the product lacks adequate or appropriate warnings ("warning defect"); or (3) the product has a defect that is the result of a problem in the manufacturing process ("manufacturing defect").[85]

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79. *Id.* at 949-50.

80. *Id.* at 951.

81. *Id*.

82. IND. CODE § 34-20-2-1 (2013).

83. *Id.* § 34-20-4-1.

84. *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").

85. *See* First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp., 378 F.3d 682, 689 (7th Cir. 2004); 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); *Baker*, 799 N.E.2d at 1140. Although claimants are free to assert any of the three theories, or a combination, for proving that a product is in a "defective condition," the IPLA provides explicit statutory guidelines for 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 (2013). In addition, "[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably

Furthermore, a product is "unreasonably dangerous" under the IPLA 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."[86] 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.[87]

In recent cases where improper design or inadequate warnings has been alleged 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) is secondary to a threshold analysis that first examines whether, in fact, the product at issue is "unreasonably dangerous."[88]

The IPLA imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness. It also retains "strict" liability (a term traditionally applied to liability without regard to fault or liability despite the exercise of all reasonable care) only for those claims relying upon a manufacturing defect theory.[89] Indeed, the IPLA makes clear that, as in any negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements: duty, breach, and injury causation.[90] 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 have continued incorrectly employing the term "strict" liability when referring generically to all

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expectable use, when manufactured, sold, handled, and packaged properly." *Id.* § 34-20-4-4.

86. IND. CODE. § 34-6-2-146 (2013). *See also Baker*, 799 N.E.2d at 1140.

87. *See* 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); Hughes v. Battenfeld Glouchester Eng'g Co., No. TH-01-0237-C-T/H, 2003 WL 22247195, at *2 (S.D. Ind. Aug. 20, 2003) ("'[T]o be unreasonably dangerous, a defective condition must be hidden or concealed.' Thus, 'evidence of the open and obvious nature of the danger . . . negate[s] a necessary element of the plaintiff's prima facie case that the defect was hidden.'" (alterations in original) (citation omitted) (quoting Cole v. Lantis Corp., 714 N.E.2d 194, 199 (Ind. Ct. App. 1999))); *Baker*, 799 N.E.2d at 1140.

88. *See* Bourne v. Marty Gilman, Inc., No. 1:03-CV-1375-DFH-VSS, 2005 WL 1703201, at *3-7 (S.D. Ind. July 20, 2005) (involving an alleged design defect), *aff'd*, 452 F.3d 632 (7th Cir. 2006).

89. *See* Mesman v. Crane Pro Servs., 409 F.3d 846, 849-51 (7th Cir. 2005); *First Nat'l Bank & Trust Corp.*, 378 F.3d at 689 n.4; Conley v. Lift-All Co., No. 1:03-CV-1200-DFH-TAB, 2005 WL 1799505, at *6 (S.D. Ind. July 25, 2005); *Bourne*, 2005 WL 1703201, at *3.

90. The 2009 Indiana Supreme Court decision in *Kovach v. Caligor Midwest* fully articulates 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. 913 N.E.2d 193, 197-99 (Ind. 2009).

IPLA claims.[91] There were two such examples in cases decided during the 2012 Survey Period: in *Warriner v. DC Marshall Jeep*[92] and *Lautzenhiser v. Coloplast A/S*.[93]

Recently, there have also been some significant cases dealing with concepts of unreasonable danger and causation in the context of the IPLA,[94] including one during the 2012 Survey Period. In *Hathaway II*,[95] the plaintiff was a welder/plasma torch operator who was burned while operating a plasma cutter to cut metal.[96] He sued both the company that supplied his cotton work shirt and the plasma cutter's manufacturer.[97] The plaintiff asserted three IPLA theories against the plasma cutter's manufacturer: manufacturing defect, design defect, and warning defect.[98]

Initially, the court noted that a product may be dangerous without being considered unreasonably dangerous under the IPLA.[99] The manufacturer argued that the risk of fire associated with a spark emitted from the plasma cutter was

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91. *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); Vaughn v. Daniels Co. (W. Va.), Inc., 841 N.E.2d 1133, 1138-39 (Ind. 2006).

92. 962 N.E.2d 1263 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 155 (Ind. 2012). In *Warriner*, the plaintiff was injured in a rollover auto accident and sued the dealership that sold the vehicle, alleging IPLA theories of recovery against the dealership. *Id.* at 1264-65. Although the case is more remarkable for its analysis assessing whether the dealership could be held liable as a "manufacturer" under the IPLA (see *supra*, notes 29-42 and accompanying text), the court nevertheless mischaracterized plaintiff's design defect claim as a strict liability claim. *Id*. at 1267-68. Plaintiff filed the lawsuit in 2005, a full decade after the Indiana General Assembly modified the IPLA so that design claims are judged using a negligence standard as opposed to a strict liability standard that assesses liability without regard to fault or the exercise of reasonable care. *Id.* at 1264.

93. No. 4:11-cv-86-RLY-WGH, 2012 WL 4530804 (S.D. Ind. Sept. 29, 2012). In *Lautzenhiser*, the plaintiff sued the manufacturer of a medical device used to treat male stress urinary incontinence. *Id.* at *1. Plaintiff alleged warning defect claims, which are mischaracterized as "ordinary negligence" claims because they are clearly governed by the IPLA since there is no question that plaintiff was a "user" or "consumer" who sued a "manufacturer" for "physical harm" caused by a product. *Id.* at *3. Plaintiff also asserted "defective design" claims, which the court also mischaracterized in its decision as claims for which the manufacturer could be "strictly liable." *Id.* Later in the opinion, the court repeats the mischaracterization by incorrectly describing the IPLA as a "strict liability regime as against manufacturers." *Id.* at *4.

94. *See, e.g.*, Roberts v. Menard, Inc., No. 4:09-CV-59-PRC, 2011 WL 1576896 (N.D. Ind. Apr. 25, 2011); Price v. Kuchaes, 950 N.E.2d 1218, 1232-33 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 650 (Ind. 2011).

95. 903 F. Supp. 2d 669 (N.D. Ind. 2012).

96. *Id.* at 671.

97. *Id.*

98. *Id.* at 673-78.

99. *Id*. at 673.

open and obvious.[100] The court aptly recognized that the obviousness of the risk is not always conclusive proof that a product is not unreasonably dangerous, but it acknowledged that assessing the obviousness of the risk associated with the use of a product depends upon both the reasonable expectations of the user and the product's expected use.[101] The court observed that, "[i]n some cases, the obviousness of the risk will obviate the need for any further protective measures" or establish the "injured [consumer] knew about [the] risk but nonetheless chose to incur it."[102] Indeed, it noted that sometimes the risk could be so one-sided, or so open and obvious, that a plaintiff may never recover and the case may be decided as a matter of law, such as risks posed by a lighter, a running mower blade, or a BB gun.[103]

The manufacturer offered evidence that the plaintiff and his co-workers knew they had to protect themselves from sparks emitted by the plasma cutter to prevent fires and burns and that the hazards inherent in using the product did not go beyond those contemplated by the ordinary consumer.[104] The plaintiff countered with evidence that he and his co-workers "were able to safely use the plasma cutter while [wearing their cotton work] shirts, [so] the risk of fire was not open and obvious."[105] Ultimately, the court determined that summary judgment was inappropriate because "a reasonable jury could conclude that the plasma cutter was unreasonably dangerous."[106]

E. Decisions Involving Specific Defect Theories

This Article now turns to a few 2012 Survey Period cases in which plaintiffs attempted to demonstrate that products were defective and unreasonably dangerous by utilizing warning, design, and/or manufacturing defect theories.

1. Warning Defect Theory.—The IPLA contains a specific statutory provision covering the warning defect theory:

> 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

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100. Hathaway v. Cintas Corp. Servs., Inc. (*Hathaway I*), No. 1:10 CV 195, 2012 WL 4471603, at *4-5 (N.D. Ind. Sept. 26, 2012).

101. *Id*. at *4.

102. *Id.* at *4-5 (citing Bourne v. Marty Gilman, Inc., 452 F.3d 632, 637 (7th Cir. 2006); Mesman v. Crane Pro Servs., 409 F.3d 846, 851 (7th Cir. 2005)).

103. *Id*. at *5.

104. *Id*. The manufacturer relied on and analogized the case to *Bourne*, 452 F.3d at 637, and the examples of products not unreasonably dangerous cited therein.

105. *Hathaway I*, 2012 WL 4471603, at *5.

106. *Id*. at *6-7.

such warnings or instructions available to the user or consumer.[107]

"In failure to warn cases, the 'unreasonably dangerous' inquiry is" essentially the same as the requirement that the product's danger or alleged defect be "latent or hidden" for that cause of action to attach.[108]

During the Survey Period, federal courts in Indiana decided two cases that involve issues relating to allegedly defective warnings and instructions. In the first case, *Tague v. Wright Medical Technology, Inc.*,[109] Wright Medical Technology ("Wright") sought dismissal of warning claims pending against it by invoking "the learned intermediary doctrine."[110] The plaintiff alleged that her surgically implanted prosthetic hip device, which Wright had supplied, was defective.[111] She claimed that Wright had received numerous complaints about the device and had been sued because of the device's failures but had failed to issue any warnings about the "problems associated with the devices."[112] The plaintiff also alleged that Wright "failed to warn [her] of the dangers associated with the hip prosthetic, and that she suffered harm as a result."[113]

Wright moved to dismiss the plaintiff's warning claims, arguing first that under the learned intermediary doctrine, "manufacturers of prescription medical products have a duty only to warn physicians, rather than patients, of the risks associated with the use of the product."[114] Wright also argued that the plaintiff did not allege that Wright had failed to issue an appropriate warning to the physician who had implanted her prosthetic hip.[115] Instead, the plaintiff's allegations focused only upon warnings that *she* did not receive.[116]

Although it acknowledged that the plaintiff's claims focused on the warnings *she* did not receive, the *Tague* court nevertheless concluded that Wright, as the learned intermediary, should be counted among those who were alleged to not have passed along any warning.[117] The court, therefore, denied Wright's motion to dismiss, reasoning that even assuming Wright's only obligation was to warn

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107. IND. CODE § 34-20-4-2 (2013).

108. *See* First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp., 378 F.3d 682, 690 n.5 (7th Cir. 2004).

109. No. 4:12-CV-13-TLS, 2012 WL 1655760 (N.D. Ind. May 10, 2012).

110. *Id.* at *1-2. Indiana courts seem to use the phrases "learned intermediary" and "sophisticated intermediary" somewhat interchangeably to refer to the same doctrine. When the phrases are used properly, the authors can decipher no meaningful difference between the two "doctrines" emerging from the case law. Although not universally true, it appears that the "learned intermediary" moniker is the preferred term in medical drug and device litigation; whereas, the "sophisticated intermediary" label seems to be the preferred reference outside of this context.

111. *Id.* at *1.

112. *Id.* at *2.

113. *Id.* (internal quotation marks omitted) (citation omitted).

114. *Id.* (quoting Minisan v. Danek Med., Inc. 79 F. Supp. 2d 970, 978 (N.D. Ind. 1999)).

115. *Id.*

116. *Id.*

117. *Id.*

the physician, recovery under the facts alleged by the plaintiff was still plausible.[118]

In the second case, *Hathaway II*,[119] the plaintiff was burned when his cotton work shirt caught fire while he was operating a plasma metal cutter.[120] Hathaway's employer had previously entered into a rental agreement with a uniform supplier to provide work clothes for the company's employees.[121] The plaintiff sued both the plasma cutter manufacturer and the uniform supplier.[122] Hathaway's suit claimed, among other IPLA and non-IPLA theories, that his cotton work shirt was defective because the uniform supplier failed to warn him about the potential for injury when wearing 100% cotton clothing while performing welding or plasma cutting.[123] The uniform supplier argued that it was entitled to summary judgment because the plaintiff's employer was responsible for warning its employees about the dangers associated with the use of its product in the plaintiff's specific work environment.[124]

For the purposes of IPLA liability, warnings must usually be supplied to end users, but courts allow the duty to be delegated or limited in some instances.[125] One such instance involves a scenario where the product is sold to a "sophisticated intermediary" who has knowledge at least equal to the manufacturer, the manufacturer warns the intermediary, and the manufacturer can reasonably rely on the intermediary to warn the end user.[126] Occasionally, courts have concluded that the "sophisticated intermediary" inquiry can be made by a judge as a matter of law.[127] Such was the case in *Hathaway II*: the court concluded as a matter of law that all three requirements had been met, and the sophisticated intermediary doctrine precluded liability from being imposed on the supplier as a matter of law.[128]

That the uniform supplier had entered into a rental agreement with the plaintiff's employer was a key fact in *Hathaway II*[129] because that agreement made clear, among other things, that the clothes provided were "not flame

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118. *Id.*

119. 903 F. Supp. 2d 669 (N.D. Ind. 2012).

120. *Id.* at 671.

121. *Id.*

122. *Id.* The plaintiff advanced three IPLA claims against the uniform supplier—defective warning (discussed here), defective design, and manufacturing defect. The plaintiff also asserted a negligence claim. Each of his other claims is discussed in this Article within the section analyzing the theory underlying the claim. *See supra* Part I.D.

123. *Hathaway II*, 903 F. Supp. 2d at 675.

124. *Id.*

125. *Id.* at 676.

126. *Id.* (citing First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp., 378 F.3d 682, 691 (7th Cir. 2004)).

127. *Id.* (citing *First Nat'l Bank & Trust Corp.*, 378 F.3d at 691-93; Taylor v. Monsanto Co., 150 F.3d 806, 808-09 (7th Cir. 1998)).

128. *Id.* at 677-78.

129. *Id.* at 676-77.

retardant or acid resistant and contain[ed] no special flame retardant or acid resistant features."[130] The agreement also provided that the uniform supplier offered flame retardant and acid resistant clothing upon request.[131] Furthermore, under the terms of the rental agreement, the plaintiff's employer "agree[d] to notify its employees" that the uniforms supplied under the rental agreement were "not designed for use in areas of flammability risk."[132] Finally, the plaintiff's employer falsely warranted that none of its employees required flame-retardant or acid-resistant clothing.[133] Thus, the court found that the agreement provided sufficient evidence as a matter of law to establish all three elements of the sophisticated intermediary defense.[134]

2. Design Defect Theory.—State and federal courts applying Indiana law have rendered several important decisions in recent years addressing design defect theories.[135] During the 2012 Survey Period, Indiana courts added three more.

First, recall the *Hathaway* case.[136] The *Hathaway II* court was quick to recognize in its decision that strict liability does not apply in cases alleging design defects under the IPLA.[137] Though that has been true for many years, not all Indiana courts recognize that fact. According to the *Hathaway II* court, part of a plaintiff's burden in a design defect case in Indiana is to present evidence of a feasible alternative design.[138] On that point, the *Hathaway II* court wrote: "'Indiana requires the plaintiff to show that another design not only could have prevented the injury but also was cost-effective under general negligence principles.'"[139]

The plaintiff claimed that his cotton work shirt's design was defective because it "should have been treated with a flame retardant substance."[140] In other words, he presented evidence of an alternative design. The plaintiff, however, did not come forward with any evidence that it was cost-effective to treat 100% cotton shirts with a flame retardant.[141] Because the plaintiff failed to establish his proposed alternative design was cost-effective, the court entered summary judgment against him on his design defect claims.[142]

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130. *Id.* at 676.

131. *Id.*

132. *Id.*

133. *Id.* at 678.

134. *Id.* at 677-78.

135. *See, e.g.*, Mesman v. Crane Pro Servs., 409 F.3d 846 (7th Cir. 2005); Green v. Ford Motor Co., 942 N.E.2d 791 (Ind. 2011); TRW Vehicle Safety Sys., Inc. v. Moore, 936 N.E.2d 201 (Ind. 2010).

136. For the facts of this decision, see *supra* notes 58-64.

137. *Hathaway II*, 903 F. Supp. 2d at 674-75 (citing IND. CODE § 34-20-2-2 (2013)).

138. *Id.* at 675.

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

140. *Id.*

141. *Id.*

142. *Id.*

The two other significant design defect decisions during the 2012 Survey Period addressed issues concerning the necessity for, and the admissibility of, opinion witnesses. In the first case, *Lapsley v. Xtek, Inc.*,[143] the plaintiff worked as a millwright at a steel works.[144] The plaintiff "had just finished filling a large spindle mechanism with industrial strength grease" when "a loud 'shotgun like' bang was heard across the mill floor and [he] fell to the ground, covered in grease."[145] A stream of grease had been ejected from the spindle with such violent force that it pierced his body, broke several ribs, filled his chest cavity with grease, and created an exit wound through his back.[146]

The plaintiff sued the spindle manufacturer ("Xtek"), alleging design, manufacturing, and warning defects.[147] The district court granted summary judgment against the manufacturing defect claim for lack of evidence.[148] The district court also granted summary judgment for the Xtek's against the plaintiff's warnings defect claim because there "was no evidence of similar prior incidents such that defendant should have been aware of, and expected to warn [its employees] of, the risk of grease ejection."[149] The plaintiff did not appeal those rulings and, accordingly, the Seventh Circuit did not disturb them.[150]

Alternatively, the district court denied summary judgment on the design defect claim, and, "[a]fter a five-day trial, the jury returned a verdict of $2.97 million against Xtek."[151] Xtek argued on appeal that because "a design-defect claim also incorporates an element of foreseeability under Indiana law, the lack of evidence fatal to the failure-to-warn claim should have doomed the design-defect claim, as well."[152]

Prior to trial, Xtek had unsuccessfully moved to exclude the plaintiff's opinion witness's testimony on causation, but it did not object to his "testimony about reasonable care in design."[153] The Seventh Circuit emphasized that the opinion witness's "opinion about reasonable care in design (which includes an element of foreseeability under Indiana law) . . . certainly had the least support from data, but it was also completely unchallenged by Xtek during the trial."[154] Therefore, the Seventh Circuit did not "find an abuse of discretion in allowing [the opinion witness] to opine about foreseeability."[155]

The Seventh Circuit added that "reports of prior incidents are only one way

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143. 689 F.3d 802 (7th Cir. 2012).
144. *Id.* at 805.
145. *Id.*
146. *Id.*
147. *Id.* at 808.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 816.
155. *Id.*

to establish that a defendant in a design defect case should have known of a hazard."[156] Further, the court noted that the "assertions about what a reasonable thrust plate designer should contemplate might be vulnerable to criticism, but Xtek did not lay a glove on that opinion in the adversarial testing of the jury trial."[157] According to the court, Xtek failed to counter the witness's "brief but admissible testimony on the question of whether grease ejection was foreseeable to designers of the spindle assembly."[158] Thus, the failure to make timely and appropriate objections to questionable opinion testimony at trial, according to the *Lapsley* court, left no correctly preserved record to support even persuasive arguments of evidentiary error on appeal.[159]

The second decision dealing with opinion witness issues in the design defect context is *Hargis v. Wellspeak Enterprises, Inc.*[160] There, the plaintiff was injured "by a compression conveyer" while working on "a corrugated paper production line."[161] AJ Engineering designed the compression conveyor.[162] The plaintiff claimed that the compression conveyor was defectively designed because it did not have "a guard on the intake rollers."[163] The plaintiff sued AJ Engineering and Kohler Coating, the company that designed the gluer on the production line.[164]

At trial, the president of Kohler Coating, Herbert Kohler, testified about the design of the conveyor and opined that a nip guard on the conveyor would have prevented the injury.[165] He also opined that the safety benefits to users would outweigh the cost of such a safety feature.[166] A representative of AJ Engineering, James G. Wellspeak, also testified.[167] At the conclusion of a three-day trial, the jury rendered a verdict against AJ Engineering for $5.6 million.[168]

During trial, AJ Engineering moved, under Rule 50 of the Federal Rule of Civil Procedure, for judgment as a matter of law, arguing that the plaintiff must present expert testimony to succeed in a design defect case.[169] AJ Engineering contended that Kohler offered unsubstantiated lay opinions, and, accordingly, the jury had no basis to find in favor of the plaintiff.[170]

The court disagreed with AJ Engineering on several points. First, the court determined that not all design defect cases categorically require expert testimony:

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156. *Id.*
157. *Id.*
158. *Id.* at 817.
159. *Id.*
160. No. 1:08-cv-00339-RLY-TAB, 2012 WL 3144962 (S.D. Ind. Aug. 1, 2012).
161. *Id.* at *1.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at *3-4.
166. *Id.* at *4.
167. *Id.* at *5.
168. *Id.* at *1.
169. *Id.* at *1-2.
170. *Id.* at *2.

"expert testimony is not required in a product liability case if there is sufficient circumstantial evidence within the understanding of a lay juror from which the juror can draw a valid legal inference."[171]

Second, the court concluded that whether expert testimony was necessary in this case was a moot question because Kohler, in fact, gave expert testimony.[172] Kohler testified that he began working around corrugated production lines at an early age; he attended engineering school and was knowledgeable regarding the safety guards for conveyors in the industry.[173] Accordingly, the court found Kohler offered expert opinions regarding feasibility and benefits of the nip guard "based upon his thirty years of knowledge and experience with corrugated paper production lines[,] . . . [and] a reasonable jury could infer from his testimony that the design of the compression conveyor without a guard was defective and therefore unreasonably dangerous."[174]

Third, the court decided that the testimony of AJ Engineering's own witness, Wellspeak, negated the need for expert testimony on the cost-effectiveness of the safety guard.[175] Wellspeak testified that a guard was installed after the plaintiff's accident for $2800.[176] The court found that "the installation of a guard by Mr. Wellspeak after the accident negates the need for expert testimony to prove the cost-effectiveness of that alternative design."[177] Thus, the court found that the jury reasonably could have inferred the existence of a design defect from Wellspeak's testimony.[178]

Finally, the court rejected AJ Engineering's argument that Kohler's testimony failed to satisfy the requirements of Federal Rule of Evidence 702.[179] The court found that AJ Engineering did not timely object to Kohler's qualifications as an expert during his trial testimony, so the argument under Rule 702 was waived.[180]

3. Manufacturing Defect Theory.—In addition to the warning and design defect theories, the plaintiff in *Hathaway II*[181] also asserted a manufacturing defect theory.[182] In *Hathaway II*, the plaintiff claimed that the uniform supplier "intended to design a 'heavy [cotton work] shirt' and the shirt that [he] was wearing" that caught fire "was not a 'heavy shirt.'"[183] The shirt supplier, however, countered that the plaintiff had no evidence the shirt he was wearing that caught fire "varied in any way from the 100% cotton shirt [the manufacturer]

171. *Id.*
172. *Id.* at *3.
173. *Id.*
174. *Id.* at *4.
175. *Id.* at *5.
176. *Id.*
177. *Id.* (citing Lapsley v. Xtec, Inc. 689 F.3d 802, 815 (7th Cir. 2012)).
178. *Id.*
179. *Id.*
180. *Id.*
181. 903 F. Supp. 2d 669 (N.D. Ind. 2012).
182. *Id.* at 673-74.
183. *Id.* at 674.

intended to produce."[184] The court found there was simply no evidence in the record to support the plaintiff's argument that the manufacturer intended to make the cotton work shirt a "heavy" shirt.[185]

The plaintiff also claimed that an alternative design was available for the cotton work shirt.[186] The plaintiff further argued that the existence of this alternative design established that the work shirt that caught fire had a manufacturing defect.[187] However, the *Hathaway II* court also rejected this argument because it could not find any case law or evidence that the shirt in any way "deviated from the [manufacturer's] intended design."[188]

F. Regardless of the Substantive Legal Theory

In Indiana Code section 34-20-1-2, the Indiana General Assembly carved out a limited exception to the IPLA's exclusive remedy when the defendant otherwise fits the definition of a "seller" under the IPLA,[189] and the type of harm suffered by the claimant is not sudden, major property damage, personal injury, or death.[190] Under these circumstances, such theories of recovery constitute the "other" actions that Indiana Code section 34-20-1-2 does not limit.[191] So, what theories of recovery against "sellers" does section 34-20-1-2 permit to escape the IPLA's exclusive remedy requirement?[192] The answer is any claim that involves gradually-developing property damage or a claim for purely economic losses sounding in the common law of contracts, warranty, or the Uniform Commercial Code ("UCC") where all of the other elements necessary to demonstrate a typical contract-type claim are present.[193]

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184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. 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." IND. CODE § 34-6-2-77(a) (2013). "'Seller' . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption." *Id.* § 34-6-2-136.

190. *See id.* § 34-20-1-2.

191. *Id.*

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

193. Such a reading of the statute is consistent with the "economic loss doctrine" cases that preclude 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); Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d

The 2012 Survey Period added yet another case to Indiana's "economic loss doctrine" jurisprudence. In *Corry v. Jahn*,[194] the plaintiffs claimed as damages the costs of repair and replacement of building materials used during the construction of a home and the dimunition in the value of those products because of their allegedly inferior quality.[195] Because those were economic losses, the court held that they are recoverable only under a contract theory.[196] In practical effect, application of the economic loss doctrine to tort-based warranty and negligence claims is simply another way of giving effect to the "regardless of the substantive legal theory" language in Indiana Code section 34-20-1-1.

Thus, when it comes to claims for "physical harm" caused by a product, the exclusive IPLA-based cause of action subsumes common law or the UCC remedies.[197] Some courts have referred to the subsuming of those claims as "merger."[198] Whatever term is employed, the important thing for practitioners to remember is that the "merged" or "subsumed" claims do not survive. The claims are "governed" by the IPLA, and only theories of recovery sanctioned by the IPLA (claims asserting either manufacturing, design, or warning defects) survive.[199] The best examples of claims that should be subsumed are those seeking recovery for common law negligence not rooted in design or warning defects and tort-based breaches of warranty.[200] Several recent cases recognize and follow that approach.[201] Two cases decided during the 2012 Survey Period add to that list. In *Hathaway II*,[202] the court recognized that the alleged tort-based implied warranty claims are subsumed into the IPLA claims and dismissed those claims.[203] The court in *Lautzenhiser v. Coloplast A/S*[204] also recognized the concept that tort-based implied warranty claims should be "merged" with the IPLA-based claims, but, in an odd and perplexing twist, the court nonetheless refused to dismiss the tort-based implied warranty claims.[205]

492, 495-96 (Ind. 2001); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 488-89 (Ind. 2001).

194. 972 N.E.2d 907 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 1017 (Ind. 2013).

195. *Id.* at 917.

196. *Id.*

197. *Gunkel*, 822 N.E.2d at 152; *Progressive*, 749 N.E.2d at 495.

198. *See, e.g.*, Atkinson v. P&G-Clairol, Inc., 813 F. Supp. 2d 1021, 1025-26 (N.D. Ind. 2011); Ganahl v. Stryker Corp. No. 1:10-cv-1518-JMS-TAB, 2011 WL 693331, at *3 (S.D. Ind. Feb. 15, 2011).

199. *See supra* note 198.

200. *See supra* note 198.

201. *See supra* note 198.

202. 903 F. Supp. 2d 669 (N.D. Ind. 2012).

203. *Id.* at 673.

204. No. 4:11-cv-86-RLY-WGH, 2012 WL 4530804 (S.D. Ind. Sept. 29, 2012).

205. *Id.* at *3-5. The *Lautzenhiser* court's analysis of the tort-based warranty claims is perplexing. The court first concluded that the tort-based warranty claims "survive[d]" the defendant's motion to dismiss because vertical privity is not required. *Id.* at *4. The court reasoned that those tort-based warranty claims should not be outright dismissed and, instead,

By contrast, a number of peculiar decisions in recent years have ignored the IPLA's exclusive remedy when there is "physical harm" caused by a product.[206] Some of those cases have allowed "users" or "consumers" to pursue common law theories of recovery against "manufacturers" or "sellers" when there has been "physical harm" caused by a product *in addition to* the theories of recovery specifically governed or sanctioned by the IPLA.[207] Others have allowed claimants to pursue common law theories of recovery when there has been "physical harm" caused by a product, yet the claimant either was not a "user" or "consumer" or the defendant was not a "manufacturer" or "seller."[208] A couple of cases also have allowed personal injury common law negligence claims to proceed outside the scope of the IPLA when there was no "physical harm."[209] The latter cases, however, do not appear to be contrary to the IPLA because the presented facts removed them from the IPLA's coverage since there was no

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"merged" them together with the "ordinary negligence," "defective design," and "failure to warn" claims. *Id.* at *5. An alternative way of dealing with those claims would have been to dismiss them as the *Hathaway II* court did (*see supra* notes 181-88 and accompanying text) because the weight of authority in this area holds that tort-based warranty claims are no longer viable in Indiana in and of themselves and are, instead, subsumed into the claims recognized by the IPLA as either manufacturing defect, design defect, or warning defect claims.

206. *See, e.g.*, Deaton v. Robison, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007).

207. *See, e.g.*, *id.* (permitting the "user" of an allegedly defective black powder rifle to pursue "physical harm" claims against the rifle's "manufacturer" under *both* the IPLA *and* section 388 of the *Restatement (Second) of Torts*); Ritchie v. Glidden Co., 242 F.3d 713, 726-27 (7th Cir. 2001) (allowing 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*)).

208. *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); Kennedy v. Guess, Inc., 806 N.E.2d 776, 783-84 (Ind. 2004) (permitting a claimant to pursue a claim pursuant to section 400 of the *Restatement (Second) of Torts* against an entity that could not be treated as a "seller" or "manufacturer" for purposes of the IPLA when an allegedly defective product caused the "physical harm").

209. *See, e.g.*, 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); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 424, 426, 434-35 (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 was the result of the increased availability or supply of handguns). A case decided during the 2012 Survey Period, *Corry v. Jahn*, also includes breach of warranty and negligence claims stemming from allegedly faulty construction of a residence. 972 N.E.2d 907, 911-12 (Ind. Ct. App. 2012). Although the court's opinion refers to the plaintiffs' allegations as including claims for "defective" construction materials, *id*. at 913, the court does not conduct an IPLA analysis, but rather it assesses the alleged "defect" as one arising "from failure to employ adequate construction techniques." *Id*. at 915. Thus, the case does not appear to involve any allegations that implicate the IPLA.

"physical harm" caused by a product.[210]

During the 2012 Survey Period, two courts addressed issues relating to the scope of the IPLA's coverage in "physical harm" cases. First, in *Warriner v. DC Marshall Jeep*,[211] the court refused to allow claimant's so-called "negligent marketing" claim to proceed against the dealership that sold an allegedly defective vehicle that caused the claimant's personal injuries.[212] Although the *Warriner* court noted that there is no case law in Indiana recognizing a "negligent marketing" claim, the court nevertheless analyzed the allegations in the context of a "negligence" action.[213] The *Warriner* court ultimately concluded that the evidence the claimant offered to support the claim did not create a genuine issue of material fact for the jury's consideration, and the court thus affirmed the trial court's grant of summary judgment to the dealership.[214] Neither the parties nor the court in *Warriner* addressed the key, threshold issue of whether the so-called "negligent marketing" claim could be pursued in the first place in light of the IPLA's exclusivity in cases involving "physical harm" caused by the allegedly defective vehicle.

Next, in *Brosch v. K-Mart Corp.*,[215] the court allowed the plaintiff to maintain a claim for "physical harm" against the retail seller of an allegedly defective kitchen island under a common law negligence theory pursuant to section 400 of the Restatement (Second) of Torts.[216] As was the case in *Warriner*, neither the defendant nor the court in *Brosch* raised the key threshold issue of whether the common law "apparent manufacturer" doctrine applies at all in a case alleging "physical harm" caused by a product.[217]

Brosch is the most recent in the line of cases noted above that are very difficult to explain or reconcile with the Indiana General Assembly's intent that the IPLA provide the exclusive remedy for all claims that allege "physical harm" caused by a product.

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210. *See supra* note 189 and accompanying text.

211. 962 N.E.2d 1263 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 155 (Ind. 2012).

212. *Id.* at 1268-69. The court addressed the so-called "negligent marketing" claim after first concluding that the dealership could not be sued under the IPLA as a "manufacturer" pursuant to Indiana Code section 34-20-2-4 because the court could "hold jurisdiction over" Chrysler LLC, the vehicle's manufacturer. *Id*. at 1269. For a more detailed analysis of that issue, see *supra* notes 32-40 and accompanying text.

213. *Warriner*, 962 N.E.2d at 1268-69.

214. *Id.*

215. No. 2:08-CV-152, 2012 WL 3960787 (N.D. Ind. Sept. 10, 2012).

216. *Id.* at *4-6. Just as in *Warriner*, the court addressed the so-called "apparent manufacturer" theory of recovery after first concluding that there was a fact question precluding summary judgment as to whether the court "could hold jurisdiction over" the overseas manufacturer of the allegedly defective kitchen island pursuant to Indiana Code section 34-20-2-4. *Id.* at *4-5. The court referred to Indiana Code section 34-20-2-4's requirements as the "domestic distributor rule." *Id.* at *5-6.

217. *See id.*

II. EVIDENTIARY PRESUMPTION

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, [and] specifications."[218] Several decisions in recent years have addressed this rebuttable presumption,[219] including two during the 2012 Survey Period.

In the first case, *Wade v. Terex-Telelect, Inc.*,[220] the plaintiff was injured when he fell out of an aerial lift "bucket" attached to a boom mounted on the back of a utility truck.[221] Terex-Telelect, Inc. ("Terex") manufactured the bucket and boom involved.[222] The utility company for whom the plaintiff worked had prepared detailed specifications for the utility truck it was seeking.[223] These specifications had called for an exterior step and dielectric liner to protect workers inside the bucket from the risk of electrocution caused by contact with power lines.[224] The bucket produced by Terex to meet the power company's specifications had a molded exterior step with an internal recess that extended into the exterior molded step.[225] The company's detailed specifications had not called for an interior step and the dielectric liner covered the hollow cavity inside the exterior step.[226]

The plaintiff argued that the lack of a step inside the insulating dielectric bucket liner caused his fall.[227] He sued Terex, alleging it had negligently allowed the truck manufacturer to produce a defective lift truck based upon the utility company's specifications.[228] The plaintiff contended that because Terex had, in a few instances, supplied liners with molded interior steps for non-utility customers, Terex should not have allowed the truck manufacturer to follow the utility company's specifications and purchase an insulating dielectric bucket liner

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218. IND. CODE § 34-20-5-1 (2013).

219. *See*, *e.g.*, Flis v. Kia Motors Corp., No. 1:03CV1567-JDT-TAB, 2005 WL 1528227, at *1-4 (S.D. Ind. June 20, 2005); Schultz v. Ford Motor Co., 857 N.E.2d 977, 980-81 (Ind. 2006).

220. 966 N.E.2d 186 (Ind. Ct. App. 2012), *trans. denied*, 984 N.E.2d 219 (Ind. 2013) (mem.). The Indiana Supreme Court granted transfer on September 27, 2012, 975 N.E.2d 360 (Ind. 2012) (Table), and subsequently held oral argument. After oral argument, however, the Indiana Supreme Court issued another decision denying the petition to transfer without a substantive opinion.

221. *Id.* at 189-90.

222. *Id.* at 189.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 190.

228. *Id.*

without an interior step.[229]

Terex presented evidence at trial that it complied with industry standards and the Occupational Safety and Health Administration regulations that incorporated and codified the same industry standards by reference.[230] Terex also elicited testimony establishing that the bucket complied with industry standards in all other respects and that the applicable standards did not dictate a particular design for the bucket's ingress or egress.[231]

Terex argued that the jury should be instructed that if it found the bucket Terex provided was manufactured in conformity with the state of the art or that it complied with governmental standards, Terex was entitled to a rebuttable presumption that the bucket was not defective, and it, as the manufacturer, was not negligent.[232] The trial court agreed and so instructed the jury.[233] The jury returned a verdict that allocated all of the fault to the plaintiff and no fault to Terex or the truck manufacturer.[234]

On appeal, the plaintiff challenged the trial court's decision to instruct the jury about the rebuttable presumption.[235] In a two-to-one decision, a panel of the court of appeals reversed, concluding "there was not sufficient evidence" to support the instruction.[236] To gain the benefit of the presumption, the court reasoned, a manufacturer must show that it was "'the best technology reasonably feasible' at the time" the product was manufactured.[237] Although Terex had presented evidence that the bucket's liner was the best technology available for dielectric insulation,[238] the court concluded that such evidence may have established the liner was state of the art to prevent the risk of electrocution, but it was not "relevant" in a case in which the plaintiff fell out of the bucket as opposed to being electrocuted.[239] The court concluded that compliance with governmental standards is "relevant" only when "the standard itself . . . relate[s] to the risk or product defect at issue."[240]

Further, the majority determined that the rebuttable presumption instruction prejudiced the plaintiff because it "went to the very heart of [the plaintiff's] case," and therefore remanded for a new trial.[241] Because the applicable standards did not specifically permit or disallow interior steps, nor specify any concrete design

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229. *Id.*

230. *Id.* at 190-91.

231. *Id.* at 191.

232. *Id.* at 192 (citing IND. CODE § 34-20-5-1 (2013)).

233. *Id.* at 191.

234. *Id.*

235. *Id.* at 192.

236. *Id.* at 194.

237. *Id.* at 192-93 (quoting Indianapolis Athletic Club, Inc. v. Alco Standard Corp., 709 N.E.2d 1070, 1074 (Ind. Ct. App. 1999)).

238. *Id.* at 193.

239. *Id.*

240. *Id*. at 195.

241. *Id.*

parameters for bucket ingress and egress, the manufacturer's compliance with the standard did not entitle it to rely on the statutory rebuttable presumption of non-defectiveness and non-negligence.[242]

Significantly, the *Wade* majority did not discuss or address the permissive nature of the instruction—that the jury was free to find the product defective notwithstanding the presumption.[243] Further, despite the court's contrary interpretation, the language of the statute seems to refer to the product as a *whole*, not to a specific defect, component, or particularized risk raised by the plaintiff.[244] Thus, although the court's focus on the "particular risk" and specific "product defect" a plaintiff alleges seems like an innocuous observation, superimposing a particularized standard may begin to redefine state of the art or compliance from meaning "best technology reasonably feasible" to effectively meaning "without risk."

"[S]tate of the art" has long been defined as a product employing "the best technology reasonably feasible at the time it was manufactured."[245] The *Wade* majority acknowledged that the dielectric liner in the bucket "was the best technology reasonably feasible [at the time of manufacture] in terms of its capacity for dielectric insulation."[246] The *Wade* majority also recognized that nearly all of the buckets with dielectric insulating liners "utilized the same technology as the liner" on the truck at issue and that the same design concept had been used by a large majority of utility companies for years.[247]

The second 2012 Survey Period case that addressed the IPLA's evidentiary presumption is *Miller v. Bernard*.[248] In that case, the principal claim was that a particular batch of Promethazine Syrup Plain, made by Morton Grove Pharmaceuticals, Inc. ("MGP") and distributed by CVS Pharmacy, Inc. ("CVS"), had a manufacturing defect such that it contained too much of its active ingredient and, therefore, substantially contributed to the death of young girl to

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242. *Id.* at 194-95.

243. *Id.* at 195. The non-mandatory nature of the instruction was important to the Indiana Supreme Court in *Schultz v. Ford Motor Co.*, where the court concluded a nearly identical instruction gave continuing effect to the statutory presumption in Indiana Code section 34-20-5-1 and did not unfairly prejudice the plaintiffs. 857 N.E.2d 977, 987 (Ind. 2006). *See also* Bourke v. Ford Motor Co., No. 2:03-CV-136, 2007 WL 704127, at *2 (N.D. Ind. Mar. 5, 2007) ("Plaintiff concedes that [the] Instruction . . . is a correct recapitulation of the law."). The court of appeals never cited or discussed the Indiana Supreme Court's *Schultz* opinion.

244. *See* IND. CODE §34-20-5-1(1) (2013) ("[T]here is 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*: . . . was in conformity with the generally recognized state of the art applicable to the *safety of the product* at the time *the product* was designed, manufactured, packaged, and labeled." (emphasis added)).

245. *Wade*, 966 N.E.2d at 193 (citing Indianapolis Athletic Club, Inc. v. Alco Standard Corp., 709 N.E.2d 1070, 1074 (Ind. Ct. App. 1999)).

246. *Id.*

247. *Id.*

248. 957 N.E.2d 685 (Ind. Ct. App. 2011).

whom it was prescribed.[249]

However, MGP demonstrated that its product "conformed to the FDA-approved strength" of its active ingredient.[250] As a result, a panel of the Indiana Court of Appeals agreed that the rebuttable presumption applied.[251] After carefully analyzing plaintiffs' evidence offered to rebut the presumption, the testimony of plaintiffs' opinion witnesses, and the data from which the evidence and testimony was derived, the trial court found such evidence to be unreliable, inadmissible, and insufficient to rebut the presumption as a matter of law.[252] The trial court thus granted summary judgment in favor MGP.[253]

In an unexpected turn of events, the court of appeals reversed the trial court's grant of summary judgment to MGP and CVS without concluding that the trial court made any mistake of fact in its evidentiary analysis or abused its discretion in deeming plaintiffs' manufacturing defect evidence unreliable.[254] Rather, the *Miller* court reasoned that "a trial court's role at the summary judgment stage does not . . . involve analyzing the results of laboratory tests, comparing these results with experts' reference materials, or independently calculating the therapeutic range of prescription medications."[255] However, that reasoning is questionable to say the least because such an exercise seems to fit squarely within a trial court's gatekeeping responsibilities with respect to opinion evidence, whether offered in opposition to a dispositive motion or at trial. As a result, practitioners should be mindful that the *Miller* opinion seems to have confused the "conflicting evidence" standards of Indiana Rules of Civil Procedure Rule 56[256] with the "abuse of discretion" standard governing whether opinion evidence is admissible to create conflicting evidence in the first instance.

CONCLUSION

Courts were quite prolific during the 2012 Survey Period in applying substantive Indiana product liability law to a variety of interesting factual scenarios. Although the 2012 Survey Period revealed that some courts and practitioners continue to struggle with a few key product liability and evidentiary concepts, the 2012 decisions by and large help to clarify an ever-growing body of law in the product liability area in Indiana.

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249. *Id.* at 687-91.
250. *Id.* at 695.
251. *Id.* at 696.
252. *Id.* at 696 & n.13.
253. *Id.* at 691, 696.
254. *Id.* at 697.
255. *Id.*
256. *Id.* at 699.