

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

This Survey reviews the significant product liability cases decided during the survey period. It offers select commentary and context,¹ following the basic structure of the Indiana Product Liability Act (“IPLA”).² While it does not address all related cases decided during the survey period in detail, this survey focuses on cases involving important substantive product liability concepts and offers appropriate background information about the IPLA. This survey will not discuss issues decided on procedural or non-product liability substantive grounds.

The 2013 Survey period probably will be remembered not so much for the breadth of coverage, but for the depth of analysis in a handful of significant cases. Although there were fewer cases this year addressing the scope of the IPLA, the cases generally tended to fall within the traditionally popular areas for substantive treatment, such as warning and design defects, the rebuttable presumption for regulated products, and use of expert witnesses in product liability cases.

I. THE SCOPE OF THE IPLA

The IPLA regulates actions against manufacturers or sellers by users or consumers.³ The IPLA regulates these actions when a product causes physical harm, “regardless of the substantive legal theory or theories upon which the action is brought.”⁴ Read together, Indiana Code sections 34-20-1-1 and -2-1 establish five unmistakable threshold requirements for IPLA liability: (1) a claimant who is a user or consumer and is also “in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the

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1. The survey period is October 1, 2012 to September 30, 2013.

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. *Id.* §§34-20-1-1 & 34-6-2-11.5.

4. *Id.* §§ 34-20-1-1 & 34-6-2-115.

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

A. User/Consumer and Manufacturer/Seller

Over the last decade or so, there have been a number of cases that addressed the scope and reach of the IPLA. Several of those cases have addressed who may file suit in Indiana as product liability plaintiffs because they are “users,”¹¹ or “consumers.”¹² By the same token, there is likewise a fairly robust body of case law that has helped to identify those people and entities that are “manufacturers”¹³

5. *Id.* §§ 34-20-1-1(1) & 34-20-2-1(1).

6. *Id.* §§ 34-20-1-1(2) & 34-20-2-1(2). For example, corner lemonade stand operators and garage sale sponsors are excluded from IPLA liability, according to the latter section.

7. *Id.* § 34-20-1-1(3).

8. *Id.* § 34-20-2-1.

9. *Id.* § 34-20-2-1(3).

10. *Id.* § 34-20-1-1.

11. *Id.* § 34-6-2-147.

12. *Id.* § 34-6-2-29. A literal interpretation of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined “user” or “consumer,” before proceeding with a claim under the IPLA, he or she also must satisfy another statutorily-defined threshold. *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, it does not appear that the IPLA provides 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 does not fall within the IPLA’s definition of “user” or “consumer.” Two of the leading recent cases addressing “users” and “consumers” include *Vaughn v. Daniels Co. (W. Va.) Inc.*, 841 N.E.2d 1133 (Ind. 2006), and *Butler v. City of Peru*, 733 N.E.2d 912 (Ind. 2000).

13. IND. CODE § 34-6-2-77 (2013). For purposes of the IPLA, 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.” *Id.* § 34-6-2-77(a). A few of the more recent influential cases that have evaluated whether an entity qualifies as a “manufacturer” under the IPLA include *Mesman v. Crane Pro Services*, 512 F.3d 352 (7th Cir. 2008), *Pentony v. Valparaiso Department of Parks & Recreation*, 866 F. Supp. 2d 1002 (N.D. Ind. 2012), and *Warriner v. DC Marshall Jeep*, 962 N.E.2d 1263 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 155 (Ind. 2012) (manufacturer/seller).

or “sellers”¹⁴ and, therefore, proper defendants in Indiana product liability cases. For the first time in several years, there were no significant cases during the 2013 Survey period that addressed user/consumer or manufacturer/seller issues.

B. 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.¹⁵ It “does not include gradually evolving damage to property or economic losses from such damage.”¹⁶ A “product” is “any item or good that is personalty at the time it is conveyed by the seller to another party,” but not a “transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”¹⁷ The 2013 Survey period added two more cases to those that recently have interpreted the “physical harm” requirement.¹⁸

In the first case, *Bell v. Par Pharmaceutical Companies, Inc.*, Pamela Bell (“Bell”) sued Par Pharmaceuticals, Inc. (“Par”) after she consumed medication that allegedly contained foreign objects.¹⁹ Specifically, Bell alleged that the cholestyramine mixture manufactured by Par contained blood and two latex glove

14. IND. CODE § 34-6-2-136 (2013). The IPLA defines a seller as “a person engaged in the business of selling or leasing a product for resale, use, or consumption.” *Id.* Indiana Code section 34-20-2-1 adds three additional and clarifying requirements as it relates to “sellers.” 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. *Id.*; see also *Williams v. REP Corp.*, 302 F.3d 660, 662-64 (7th Cir. 2002). Sellers can also be held liable as manufacturers in two ways. First, a seller may 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 may be held liable as 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.” *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 781 (Ind. 2004) (quoting IND. CODE § 34-20-2-4). When the theory of liability is based upon “strict liability in tort,” Indiana Code section 34-20-2-3 makes clear that a “seller” that cannot otherwise be deemed a “manufacturer” is not liable and is not a proper IPLA defendant.

15. IND. CODE § 34-6-2-105(a) (2013).

16. *Id.* § 36-6-2-105(b).

17. *Id.* § 34-6-2-114.

18. Some of the recent cases include *Fleetwood Enterprises, Inc. v. Progressive Northern Insurance Co.*, 749 N.E.2d 492, 493-34 (Ind. 2001), *Guideone Insurance Co. v. U.S. Water Systems, Inc.*, 950 N.E.2d 1236, 1244 (Ind. Ct. App. 2011), *Hathaway v. Cintas Corp. Services, Inc.*, 903 F. Supp. 2d 669 (N.D. Ind. 2012), *Pentony v. Valparaiso Department of Parks & Recreation*, 865 F. Supp. 2d 947 (N.D. Ind. 2012), and *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998).

19. *Bell v. Par Pharm. Cos.*, No. 1:11-CV-01454-TWP-MJD, 2013 WL 2244345, at *1 (S.D. Ind. May 21, 2013).

fingertips.²⁰ However, Bell spat out the latex gloves before she swallowed them.²¹ Further, Bell's only known symptom following the incident was nausea for half a day.²² Bell never sought medical treatment for the nausea, and she never tested positive for any condition resulting from exposure to foreign blood despite being tested numerous times.²³ Although she claimed to suffer from anxiety after the incident, Bell was never diagnosed with any physical or mental condition as a result of the incident, and she never sought or received counseling or therapy.²⁴

The Southern District of Indiana granted summary judgment in favor of Par, in part, because Bell could not show that the product harmed her.²⁵ Because Bell merely suffered from nausea temporarily following the incident and sought no additional medical treatment (other than the blood tests, which all came back negative), the court was not able to find any evidence of bodily injury.²⁶ Thus, the court found that these claims were insufficient to meet the requirement of "physical harm" under the IPLA.²⁷

The second case decided during the 2013 Survey period interpreting the "physical harm" requirement is *Barker v. CareFusion 303, Inc.*²⁸ There, the court addressed whether the plaintiffs' emotional distress claim could be pursued in a product liability action.²⁹ The plaintiffs were parents of an infant who suffered brain damage after a cardiac arrest induced by the rapid influx of "total parenteral nutrition" ("TPN").³⁰ The week-old infant was receiving TPN via a machine manufactured by the defendant.³¹ The machine malfunctioned as it was being powered down, and it delivered excessive TPN to the infant.³² The infant's parents witnessed the cardiac arrest and resuscitation efforts.³³ They sued the manufacturer for damages on behalf of the infant, and for their own emotional distress.³⁴ The manufacturer moved to dismiss the emotional distress claim arguing that the plaintiffs did not suffer "physical harm" as required by the IPLA.³⁵

20. *Id.*

21. *Id.*

22. *Id.* at *2.

23. *Id.*

24. *Id.*

25. *Id.* at *8.

26. *Id.*

27. *Id.* ("Because Ms. Bell cannot prove an essential element of her claim – that she was injured by the cholestyramine product – Par is entitled to summary judgment.")

28. No. 1:11-CV-00938-TWP-DKL, 2012 WL 5997494, at *1 (S.D. Ind. Nov. 30, 2012)

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at *2.

The court noted that at common law, Indiana allows the recovery of damages for emotional distress resulting from the negligence of another if the plaintiff satisfies “the bystander rule” or the “modified impact rule.”³⁶ However, this case arose from harm caused by a product, and the IPLA provides the sole remedy for product liability actions sounding in tort.³⁷ Thus, the plaintiffs’ emotional distress claim had to satisfy the requirements of the IPLA in order to survive.³⁸ The court concluded that the parents failed to show that they suffered physical harm, as they did not allege that they sustained any “bodily injuries, death, loss of services, [or] rights arising from any such injuries, or major property damage.”³⁹ The court declined to import the common law “bystander theory” into the IPLA.⁴⁰ Accordingly, the court dismissed the plaintiffs’ emotional distress count for failure to state a claim under the IPLA.⁴¹

C. Defective and Unreasonably Dangerous

IPLA liability only extends to products that are in “defective condition,”⁴² which exists if the product, at the time it is conveyed by the seller to another party, is: “(1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and (2) unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.”⁴³ Both are threshold proof requirements.⁴⁴

Indiana claimants may prove that a product is in a “defective condition” by asserting one or any combination of the following 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”).”⁴⁵

36. *Id.* at *3. The court discussed *Spangler v. Bechtel*, 958 N.E.2d 458, 466 (Ind. 2011), which found that at common law “independent, stand-alone actions for negligent infliction of emotional distress are not cognizable in Indiana. But actions seeking damages for emotional distress resulting from the negligence of another are permitted in two situations: where the plaintiff has (1) witnessed or come to the scene soon thereafter the death or severe injury of certain classes of relatives (i.e., the bystander rule) or (2) suffered a direct impact (i.e., the modified impact rule).” (internal citations omitted).

37. *Barker*, 2012 WL 5997494 at *3.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at *4.

42. IND. CODE § 34-20-2-1 (2013).

43. *Id.* § 34-20-4-1; Joseph R. Alberts et al., *Survey or Recent Developments in Indiana Product Liability Law* 46, IND. L. REV. 1151, 1152 (2013)

44. *See Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003).

45. *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. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 U.S. Dist. LEXIS 80046, at *14 (N.D. Ind. Oct. 31, 2006); *Baker*, 799 N.E.2d at 1140; Alberts et

An unreasonably dangerous product under the IPLA is one that “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.”⁴⁶ If a product injures in a fashion that is objectively known to the community of product consumers, it is not unreasonably dangerous as a matter of law.⁴⁷

Recently, when considering cases where improper design or inadequate warnings served as the theory for proving a product was in a “defective condition,” courts have recognized that substantive defect analysis (i.e., whether a design was inappropriate or a warning was inadequate) is secondary to an analysis that determines whether the product is “unreasonably dangerous.”⁴⁸

A negligence standard is imposed by the IPLA in all product liability claims relying upon a design or warning theory to prove defectiveness. Additionally, the IPLA retains “strict” liability (a term traditionally applied to liability without regard to fault or liability despite the exercise of all reasonable care) for claims relying upon a manufacturing defect theory.⁴⁹ Just like a claimant advancing a negligence theory, a claimant advancing design or warning defect theories must meet the traditional negligence elements: duty, breach, and injury causation.⁵⁰ Although the IPLA has for nearly twenty years made clear that “strict” liability applies only in cases involving alleged manufacturing defects, some courts have been slow to recognize that concept.⁵¹

al., *supra* note 43 at 1157. “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 expectable use, when manufactured, sold, handled, and packaged properly.’ *Id.* § 34-20-4-4.” Alberts et al., *supra* note 43 at n.85.

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

47. *See* *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174-75 (7th Cir. 1998); *Baker*, 799 N.E.2d at 1140.

48. *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), *aff’d*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect).

49. *See* *Mesman v. Crane Pro Svs.*, 409 F.3d 846, 849 (7th Cir. 2008); *Inlow II*, 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.

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

51. *See, e.g.*, *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1138-39 (Ind. 2006); *Warriner v. DC Marshall Jeep*,

Courts in Indiana have been fairly active in the past few years when it comes to dealing with concepts of unreasonable danger and causation in Indiana product liability actions.⁵² The 2013 Survey period added three more decisions in this area.

In *Beasley v. Thompson/Center Arms Co.*,⁵³ the plaintiff was injured when a muzzle-loading rifle exploded in his face.⁵⁴ He received the rifle as a gift from his father, who had acquired it from a friend.⁵⁵ The plaintiff testified that when he received the rifle, it appeared to be in relatively good shape, but he did not disassemble it, inspect it, or replace any parts.⁵⁶ The remains of the rifle were not fully recovered after the accident, so the plaintiff could not reassemble it to determine if it was defective.⁵⁷ Moreover, the plaintiff designated no evidence proving that the rifle reached the plaintiff without substantial alteration of the condition in which the defendant sold it.⁵⁸ The plaintiff relied on a *res ipsa loquitur*-type theory and argued that the mere fact that the rifle exploded proved that it was defective.⁵⁹ The court found that even if such a theory was sufficient to establish a defective condition, the plaintiff failed to show that the rifle had not undergone a substantial alteration between the time the defendant sold it and the time it entered the plaintiff's hands.⁶⁰ Without any evidence suggesting that the rifle was in a defective condition when it left the manufacturer, the plaintiff could not survive the manufacturer's motion for summary judgment.⁶¹

The next case addressing the "unreasonably dangerous" requirement was *Stuhlmacher v. The Home Depot U.S.A., Inc.*, wherein the plaintiff alleged personal injuries as a result of a fall from a ladder.⁶² In a motion for summary judgment, the defendant argued that the plaintiff failed to establish that the ladder was unreasonably dangerous.⁶³ However, after concluding that the plaintiff's

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

52. *Price v. Kuchaes*, 950 N.E.2d 1218, 1232-33 (Ind. Ct. App. 2011), *trans. denied*, 962 N.E.2d 650 (Ind. 2011); *Roberts v. Menard, Inc.*, No. 4:09-CV-59-PRC, 2011 WL 1576896 (N.D. Ind. Apr. 25, 2011). *See, e.g.*, *Hathaway v. Cintas Corp. Servs., Inc.*, 903 F. Supp. 2d 669 (N.D. Ind. 2012).

53. No. 2:11-CV-3-WTL-WGH, 2013 WL 968234, at *1 (S.D. Ind. Mar. 12, 2013).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at *2.

58. *Id.* ("A plaintiff asserting a claim for a manufacturing or design defect must show, *inter alia*, that (1) the product in question was in a defective condition unreasonably dangerous to the user; and (2) the product reached the plaintiff without substantial alteration of the condition in which the defendant sold the product.")

59. *Id.*

60. *Id.*

61. *Id.*

62. *Stuhlmacher v. Home Depot U.S.A., Inc.*, No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572 (N.D. Ind. June 21, 2013).

63. *Id.* at *13.

expert's testimony was admissible,⁶⁴ the court found that the expert "presented evidence that the ladder was both defective because it was not built to design specifications and dangerous because the defect caused cracking and the spreader bar to separate."⁶⁵ The expert testified that the ladder's rivets were over-tightened, which led to cracks, and, ultimately, to failure of the spreader bar when pressure was applied.⁶⁶ Thus, the plaintiff designated evidence sufficient to create a question of fact with regard to the "unreasonably dangerous" requirement because ". . . the over-tightening of the rivets and the consequential weakening of the rail was not observable to the user, nor was it obvious how much force the user was applying given the flexibility of the ladder. Therefore, the potential risk was not observable to the reasonably [sic] user."⁶⁷

The third case addressing this topic was *Bell v. Par Pharmaceutical Companies, Inc.*⁶⁸ As discussed above, the plaintiff in *Bell* alleged she was exposed to foreign objects in her medication.⁶⁹ Bell essentially argued that the can of cholestyramine powder that she received contained a manufacturing defect because something must have gone wrong in the manufacturing process to cause two latex glove fingertips, and what appeared to be blood, to be included in her medication.⁷⁰ The court addressed the issue of defective condition in the context of the rebuttable presumption of non-defectiveness set forth in Indiana Code section 34-20-5-1⁷¹ and found that Bell was not able to overcome this presumption.⁷² Specifically, the court found that Bell could not show that the product was in a defective condition when it left Par's control because she had no evidence of the latex pieces or the blood she alleged were in the product.⁷³ Although Bell argued that the latex glove tips had disintegrated in the glass she retained containing the foreign objects, Par presented expert testimony showing that it would have been impossible for the latex pieces, if present, to disintegrate or degrade under the conditions in which the mixture was stored.⁷⁴ In contrast,

64. *Id.* at *3-11.

65. *Id.* at *13.

66. *Id.*

67. *Id.*

68. No. 1:11-CV-01545-TWP-MJD, 2013 WL 2244345, at *1 (S.D. Ind. May 21, 2013).

69. *Id.* at *1. *See supra* Part I.B.

70. *Bell*, 2013 WL 2244345, at *6.

71. *See infra* Part II.

72. *Bell*, 2013 WL 2244345, at *7 ("To overcome the presumption that the cholestyramine powder was not defective, Ms. Bell [had to] present evidence to prove the following elements: (1) she was harmed by a product; (2) the product was sold 'in a defective condition unreasonably dangerous to any user or consumer'; (3) she was a foreseeable user or consumer; (4) Par was in the business of selling the product; and (5) the product reached Ms. Bell in the condition it was sold.") (internal citations omitted)). *See infra* Part II.

73. *Bell*, 2013 WL 2244345, at *7.

74. *Id.* At the direction of her attorney, Bell put the cup with the mixture in a plastic bag and stored it in her refrigerator until her deposition three years after the incident. *Id.* at *2. At the time of the deposition, the cup only contained the evaporated mixture. *Id.* Bell did not dispute the fact

Bell failed to present any expert testimony or otherwise explain what happened to the missing latex glove pieces or to prove that there was blood in the powder mixture.⁷⁵ However, the court noted that even if it were to accept Bell's unsupported assertion that there were pieces of latex and blood in the powder on the day of the incident, she had not set forth any evidence that the latex pieces had come from Par.⁷⁶ Although Bell argued that she could use "inferential evidence" to prove this necessary element of causation, the court rejected the argument.⁷⁷ Because the can of cholestyramine powder was under Bell's control at the time of the alleged injury, and she had previously opened and consumed medication from the can, the court held that Bell had failed to present any admissible evidence that would create a question of fact as to whether the latex pieces were present in the powder at the time it was sold.⁷⁸ In fact, the opposite was true. Par presented undisputed evidence that the packaging process would have detected the presence of foreign objects, that the manufacturing facility did not use latex gloves, and that there were no reported accident or work stoppages during the manufacturing process of the particular lot number.⁷⁹

D. Decisions Involving Specific 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 such warnings or instructions available to the user or consumer.⁸⁰

For a cause of action to attach in failure to warn cases, the "unreasonably dangerous" inquiry is very similar to the requirement that the danger or alleged defect be latent or hidden.⁸¹

that she had been unable to produce the latex pieces she alleged were in the powder. *Id.*

75. *Id.* at *7.

76. *Id.*

77. *Id.* at *8 (quoting *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1207 (7th Cir. 1995)) ("Ms. Bell claims that she has [introduced inferential evidence] by introducing the photographs of the cup and related testimony, creating a fact for the jury to decide. Aside from the fact that this purported evidence has already been stricken by the Court, Ms. Bell misapplies this test, as the court in *Whitted* was applying the theory of *res ipsa loquitur* to prove that a manufacturing defect existed, which necessarily requires that 'the injuring instrumentality be in the exclusive control of the defendant at the time of the injury.'").

78. *Id.*

79. *Id.*

80. Alberts et al., *supra*, note 43 at 1165; *see also* IND. CODE § 34-20-4-2 (2013).

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

Courts interpreting Indiana warning defect theories have been quite active in the past decade or so.⁸² This Survey will focus on three warning defect cases, all of which were decided by federal courts during the 2013 Survey period. First, in *Weigle v. SPX Corp.*,⁸³ the plaintiffs were injured when a semi-truck trailer fell off its support stand during an attempt to rebuild the trailer's braking system.⁸⁴ The support stand had a conical base with an extension tube.⁸⁵ The base was fully stabilized only when a support pin was inserted through holes bored in the extension tube.⁸⁶ If the support pin was not used, the extension tube retracted into the conical base and touched the ground; thus, any weight placed on the support stand was carried by the narrow tip of the extension tube—not distributed evenly onto the conical base.⁸⁷ The plaintiffs failed to insert the support pin, which caused the support stand to become unstable and tip over.⁸⁸ The support stand came with a “Parts List and Operating Instructions” booklet and a warning decal affixed to the product, both of which warned users to prevent personal injury by always using the support pin.⁸⁹ Plaintiffs alleged that the warnings were inadequate.⁹⁰

The Seventh Circuit noted that the adequacy of warnings is generally a question of fact; however, it can be determined as a matter of law when the facts are undisputed.⁹¹ Although the warnings clearly provided that users must insert the support pin to avoid personal injury, plaintiffs argued that the warnings were inadequate because they failed to explain why the support pin was mechanically important to the stability of the stand.⁹² The Seventh Circuit concluded that the warnings unequivocally required the use of the support pin.⁹³ The manufacturer was not required to provide the plaintiffs with a “physics lesson” on the mechanics of the support pin—“it is enough that [the manufacturer] instructed users on how to use the stand properly . . . and warned users of the inherent dangers of not following those instructions.”⁹⁴ Accordingly, the court concluded that the warnings were adequate as a matter of law, defeating plaintiffs' warning

82. Federal courts in Indiana decided two cases involving warning defect theories during the 2012 Survey period: *Tague v. Wright Med. Tech., Inc.*, No. 4:12-CV-13-TLS, 2012 WL 1655760 (N.D. Ind. May 10, 2012), and *Hathaway v. Cintas Corp. Servs., Inc.*, 903 F. Supp. 2d 669 (N.D. Ind. 2012).

83. *Weigle v. SPX Corp.*, 729 F. 3d 724 (7th Cir. 2013).

84. *Id.* at 726-27.

85. *Id.* at 727.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 727-28.

90. *Id.* at 728.

91. *Id.* at 731.

92. *Id.* at 732.

93. *Id.*

94. *Id.* at 733-34.

defect theory.⁹⁵

In the second case, *Stuhlmacher v. The Home Depot U.S.A., Inc.*, defendants argued that summary judgment should be granted on the issue of warning defect because the plaintiff failed to provide evidence to support the allegation that a lack of warning caused the plaintiff's fall from the subject ladder.⁹⁶ Although issues of causation are typically questions of fact for the jury, the court agreed with defendants' claim, finding that the plaintiff had failed to present *any* evidence tending to show that the warnings and instructions accompanying the ladder were deficient.⁹⁷ Namely, the plaintiff had not pointed "to any omissions or errors in the warnings [sic] labels or presented any argument on how additional warnings may have resulted in a different outcome."⁹⁸ In fact, the plaintiff had even stated in response to defendants' motion in limine that "this is not a case involving defective design and inadequate warnings."⁹⁹ In addition, the plaintiff testified in his deposition that "any warning would not have prevented him from climbing on or handling the ladder."¹⁰⁰ Based on these facts, the Northern District of Indiana ultimately granted defendants' motion for summary judgment.¹⁰¹

In the last of the 2013 warning defect federal cases, *Hartman v. Ebsco Industries, Inc.*,¹⁰² the plaintiff was injured when a muzzle-loading rifle unexpectedly discharged, causing a bullet and ramrod to pass through his hands and right arm.¹⁰³ In 2008, the plaintiff purchased and installed a conversion kit for the rifle, which was supposed to deliver a spark with a higher temperature to ignite Pyrodex pellets—a form of ammunition that was an alternative to the black powder charge typically used in the rifle at issue.¹⁰⁴ The plaintiff's expert opined that the accident was caused by the presence of a "latent ember" left in the barrel of the gun between shots.¹⁰⁵

The plaintiff argued that the conversion kit was defective under a warning defect theory because it did not contain an express warning to swab the barrel between shots to eliminate latent embers.¹⁰⁶ The plaintiff conceded, however, that the conversion kit did not create the latent ember; rather the spark that caused the accident was generated by a Pyrodex pellet still smoldering in the barrel after a

95. *Id.*

96. *Stuhlmacher v. Home Depot U.S.A., Inc.*, No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572, at *14 (N.D. Ind. June 21, 2013).

97. *Id.* at *15.

98. *Id.*

99. *Id.* (internal citation omitted).

100. *Id.*

101. *Id.*

102. No. 3:10-CV-528-TLS, 2013 WL 5460296, at *1 (N.D. Ind. Sept. 30, 2013).

103. *Id.*

104. *Id.*

105. *Id.* at *8.

106. *Id.* at *9.

previous shot.¹⁰⁷ Because the conversion kit did not cause the accident, the manufacturer of the conversion kit had no obligation to warn about the danger of an accident caused by another manufacturer's product—in this case, a smoldering Pyrodex pellet.¹⁰⁸ The court declined to impose a duty on the conversion kit's manufacturer to warn about "every possible propellant that could be used in conjunction with the [conversion kit]."¹⁰⁹ The court thus found that the plaintiff failed to show a warning defect in the conversion kit.¹¹⁰

2. *Design Defect Theory.*—State and federal courts have been busy in recent years when it comes to addressing design defect theories under Indiana law.¹¹¹ The 2013 Survey period added one more. Recall the *Weigle* case, which we discussed above in the context of an alleged warning defect.¹¹² It also presented a design defect theory. As noted above, the support stand was fully stabilized only when used in conjunction with a support pin.¹¹³ If the support pin was not used, the extension tube retracted into the conical base and touched the ground; thus, any weight placed on the support stand was carried by the narrow tip of the extension tube—not distributed evenly onto the conical base.¹¹⁴ The plaintiffs opposed the manufacturer's summary judgment motion by asserting that the support stand differed from most other support stands on the market in that the extension tubes could touch the ground when the support pin was not in place.¹¹⁵ In most other support stands on the market, the extension tube could not reach the ground in a fully retracted state.¹¹⁶ Given that industry standards suggested that the safest way to use a support stand was to set it at the lowest possible height, the plaintiffs argued that it was reasonably foreseeable that a user would retract the extension tube to a point where it might touch the ground.¹¹⁷ The plaintiffs also argued that the support stand did not meet the American Society of Mechanical Engineer's ("ASME") Portable Automotive Lifting Device standards because the extension tube could touch the ground in a retracted position if the user did not insert the support pin.¹¹⁸

107. *Id.* at *10.

108. *Id.*

109. *Id.* The court decided the defect issue in connection with an exception to the statute of repose, which allows the statute to be "reset" where a defective component is incorporated into an old product. *Id.* at *4.

110. *Id.* at *12.

111. *See, e.g.,* *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); *Lapsley v. Xtek, Inc.*, 689 F.3d 802 (7th Cir. 2012); *Mesman v. Crane Pro Servs., Inc.*, 409 F.3d 846 (7th Cir. 2005); *Hathaway v. Cintas Corp. Servs., Inc.*, 903 F. Supp. 2d 669 (N.D. Ind. 2012).

112. *See* discussion *supra* Part I.D.1.

113. *See Weigle v. SPX Corp.*, 729 F. 3d 724, 727 (7th Cir. 2013).

114. *Id.*

115. *Id.* at 729.

116. *Id.*

117. *Id.*

118. *Id.*

The Seventh Circuit noted that a plaintiff alleging a design defect under the IPLA must show that the product was 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.”¹¹⁹ The first requirement focuses on the manufacturer’s negligence and is met when the plaintiff shows “that the defendant failed ‘to take precautions that are less expensive than the net costs of the accident.’”¹²⁰ The second element focuses on the reasonable expectations of the consumer and is met when the plaintiff shows that “the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer.”¹²¹

The court found that the plaintiffs raised a genuine issue of material fact regarding negligence in the design process because there was a dispute regarding whether the support stand complied with ASME standards, and there was a lack of evidence that the manufacturer performed a hazard-risk analysis.¹²² The court also found that the plaintiffs raised a genuine issue of material fact with regard to the “unreasonably dangerous” element because the support stand differed in design from other support stands on the market, tending to show “that their design is not contemplated by reasonable persons among those considered expected users.”¹²³ Thus, the court concluded that a reasonable fact finder could find the support stand to be in a defective condition and unreasonably dangerous.¹²⁴

The manufacturer also argued that the adequacy of the product warnings precluded the court from considering the issue of design defect because a manufacturer should not be “required to design a safer product in anticipation of users ignoring adequate warnings.”¹²⁵ In making this argument, the manufacturer relied on *Marshall v. Clark Equipment Co.*, a case in which the Indiana Court of Appeals determined that adequate warnings may be used to defeat a design defect claim.¹²⁶ In something akin to a leap of faith, the *Weigle* court opined that the Indiana Supreme Court probably would not follow *Marshall*,¹²⁷ largely because the IPLA does not specifically set forth an “adequate warnings” defense.¹²⁸ The *Weigle* court also posits that “nothing in the IPLA indicates that [a finding of adequacy with regard to warnings] precludes a finding of a [design defect].”¹²⁹

There does not appear to be an objectively compelling reason why the

119. *Id.* at 734 (quoting IND. CODE § 34-20-4-1 (2013)).

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

121. *Id.* at 735 (quoting IND. CODE § 34-6-2-146 (2013)).

122. *Id.* at 735.

123. *Id.*

124. *Id.*

125. *Id.* at 736.

126. *Marshall v. Clark Equip. Co.*, 680 N.E.2d 1102, 1106 (Ind. Ct. App. 1997).

127. *Weigle*, 729 F.3d at 736-38.

128. *Id.* at 737.

129. *Id.* at 738.

Indiana Supreme Court would choose not to follow *Marshall*; it is a well-reasoned and well-articulated decision. As a result, the Indiana Supreme Court may wish to resolve this split of authority should the opportunity present itself.

E. Regardless of the Substantive Legal Theory

The Indiana General Assembly carved out a limited exception to the IPLA's exclusive remedy in Indiana Code section 34-20-1-2.¹³⁰ The exception occurs where the defendant would otherwise satisfy the IPLA's definition of "seller" and the harm suffered by the claimant is not sudden, major property damage, personal injury, or death.¹³¹ When these criteria are met, recovery theories can constitute the "other" actions not limited by Indiana Code section 34-20-1-2.¹³² Indiana Code section 34-20-1-2 does not permit any claim against a "seller" that involves purely economic losses sounding on the common law of contracts, warranty, or the Uniform Commercial Code ("UCC") or gradually developing property damage where all elements needed to demonstrate a typical contract-like claim are met.¹³³ "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."¹³⁴ When claims for "physical harm" caused by a product arise, the exclusive IPLA-based cause of action subsumes remedies found in common law or the UCC.¹³⁵ Some courts have referred to the subsuming of those claims as "merger."¹³⁶ Regardless of terminology, "merged" or "subsumed" claims fail. The IPLA controls those claims, and only IPLA sanctioned recovery (claims asserting either manufacturing, design, or warning defects) survive. "The best examples of claims that should be subsumed are those seeking recovery for

130. 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.

131. *See id.* § 34-20-1-2.

132. *Id.*

133. 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 492, 495-96 (Ind. 2001); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 488-89 (Ind. 2001). *See also Corry v. Jahn*, 972 N.E.2d 907 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 1017 (Ind. 2013).

134. Alberts et al., *supra* note 43 at 1169.

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

136. *See, e.g., Atkinson v. P&G-Clairel, Inc.*, 813 F. Supp. 2d 1021, 1027 (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).

common law negligence not rooted in design or warning defects and tort-based breaches of warranty.”¹³⁷ Several recent cases recognize and follow that approach, including a well-reasoned 2013 case, *Stuhlmacher v. The Home Depot U.S.A., Inc.*¹³⁸

Several recent decisions have disregarded the IPLA’s exclusive remedy where a product causes “physical harm.”¹³⁹ In some cases, courts have allowed “users” or “consumers” to utilize common law theories of recovery where “physical harm” has occurred against “manufacturer” or “seller” *in addition* to IPLA sanctioned recovery options.¹⁴⁰ Courts have also allowed claimants to

137. Alberts et al., *supra* note 43 at 1169.

138. No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572, at *15-16, (N.D. Ind. June 21, 2013) (merging common law negligence claims into IPLA-based claims and dismissing tort-based breach of implied warranty claims). *See, e.g.*, *Hathaway v. Cintas Corp. Servs, Inc.*, 903 F. Supp. 2d 669, 673 (N.D. Ind. 2012). Another 2012 federal decision, *Lautzenhiser v. Coloplast A/S*, No. 4:11-CV-86-RLY-WGH, 2012 WL 4530804 (S.D. Ind. Sept. 29, 2012), also recognized the concept that tort-based implied warranty claims should be “merged” with the IPLA-based claims, but, in a perplexing twist, the court nonetheless refused to dismiss the tort-based implied warranty claims. 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. Instead of dismissing those claims, the court “merged” them 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* court did 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.

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

140. *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). The two most recent examples where courts and the parties appeared to overlook the “merger” rule entirely are *Warriner v. DC Marshall Jeep*, 962 N.E.2d 1263 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 155 (Ind. 2012) and *Brosch v. K-Mart Corp.*, No. 2:08-CV-152, 2012 WL 3960787 (N.D. Ind. Sept. 10, 2012). In *Warriner*, although the claimant’s “negligent marketing” claim failed for lack of evidence, neither the parties nor the court 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. *Warriner*, 962 N.E.2d at 1268-69. In *Brosch*, the court allowed a 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. *Brosch*, 2012 WL 3960787, at *5-6. The *Brosch* 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 *4-5.

utilize common law recovery theories when a product caused physical harm but the claimant was not a “user” or “consumer” or the defendant was not a “manufacturer” or “seller.”¹⁴¹ Some cases also allowed personal injury common law negligence when no “physical harm” occurred.¹⁴² These cases do not fall under the IPLA because there was no “physical harm.”

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, or specifications.¹⁴³ Several decisions in recent years have addressed this rebuttable presumption,¹⁴⁴ including three more during the 2013 Survey period.

The first case, *Gresser v. The Dow Chemical Co.*,¹⁴⁵ involved allegations of

Brosch is the most recent in a line of Indiana 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.

141. *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”).

142. *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 in 2012, *Corry v. Jahn*, 972 N.E.2d 907, 911-12 (Ind. Ct. App. 2012), also includes breach of warranty and negligence claims stemming from allegedly faulty construction of a residence. The court’s opinion refers to the plaintiffs’ allegations as including claims for “defective” construction materials. *Id.* at 913. However, 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 implicate the IPLA.

143. IND. CODE § 34-20-5-1 (2013).

144. *See, e.g.,* *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 980-81 (Ind. 2006); *Wade v. Terex-Telelect, Inc.*, 966 N.E.2d 186, 191-95 (Ind. Ct. App. 2012), *trans denied*, 984 N.E.2d 219 (Ind. 2013); *Miller v. Bernard*, 957 N.E.2d 685, 695-96 (Ind. Ct. App. 2011); *Flis v. Kia Motors Corp.*, No. 1:03-CV-1567-JDT-TAB, 2005 WL 1528227, at *1-4 (S.D. Ind. June 20, 2005).

145. 989 N.E.2d 339 (Ind. Ct. App. 2013).

personal injuries following an application of an insecticide called “Dursban TC” at the plaintiffs’ residence. Because the insecticide at issue had been properly registered for use by the United States Environmental Protection Agency (“EPA”) in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), the court recognized that the insecticide’s manufacturer is entitled to Indiana’s statutory presumption of non-negligence:

[C]ompliance with FIFRA and Indiana law has a significant impact under IPLA’s consumer expectation-based product liability regime because the risk of harm has been evaluated by agencies charged with the duty of monitoring the effects of Dursban TC. Furthermore, Dursban TC’s labeling and warnings have been approved by agency experts.¹⁴⁶

In an effort to rebut the presumption, the Gressers tried to use evidence of a dispute between Dursban TC’s manufacturer and the EPA concerning the reporting of earlier claim settlements.¹⁴⁷ As the *Gresser* court correctly pointed out, however, such evidence “does not establish that Dursban TC was ever unregistered.”¹⁴⁸ “Indeed,” as the court also noted, “the Dursban TC label was amended to contain stronger warnings than past labels” as a result of the issue involving the disputed claim settlements and, thus, “the Gressers arguably benefitted from” the very dispute they tried to use to rebut the presumption.¹⁴⁹

The second statutory presumption case, *Stuhlmacher v. The Home Depot U.S.A., Inc.*,¹⁵⁰ involved allegations of personal injuries suffered as a result of a fall from a ladder.¹⁵¹ Other ladders taken from the same production batch as the one involved were tested and found to conform with the “authoritative safety guidelines,” ANSI A14.5 and OSHA.¹⁵² The ladder also was labeled in conformity with the ANSI requirements.¹⁵³ Plaintiffs conceded that the “design” of the ladder complied with applicable requirements.¹⁵⁴ This compliance, according to the court, created “a rebuttable presumption that the ladder was not defective.”¹⁵⁵ The plaintiffs, however, offered opinions of a mechanical engineer to rebut that presumption with respect to the specific ladder at issue.¹⁵⁶ Stuhlmacher’s engineer contended that the specific ladder at issue “was not produced in accordance with the design standards both because it used defective rivets and the rivets were over-tightened.”¹⁵⁷ “For these reasons,” the court

146. *Id.* at 345.

147. *Id.* at 346.

148. *Id.*

149. *Id.*

150. No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572, at *1 (N.D. Ind. June 21, 2013).

151. *Id.* at *1-2.

152. *Id.* at *1.

153. *Id.*

154. *Id.* at *13.

155. *Id.* at *14.

156. *Id.*

157. *Id.*

concluded, “it cannot be determined whether the subject ladder would have complied with the ANSI standards,” adding that “[c]ertainly, the ANSI would not approve the condition of a ladder that had cracks and would buckle under the type of use [the user] testified to conducting.”¹⁵⁸ Thus, sufficient evidence had been presented to rebut the presumption of non-defectiveness and the case could proceed.

The third case involving statutory presumption issues decided during the 2013 Survey period was *Bell v. Par Pharmaceutical Cos.*¹⁵⁹ We previously discussed the *Bell* case above in the context of the IPLA’s “physical harm,” “defective condition,” and “unreasonably dangerous” requirement.¹⁶⁰ Here, we address only that portion of the decision that involved Indiana’s statutory presumption. Recall that Bell claimed to have suffered “anxiety and worry” as a result of allegedly finding the tips of two latex gloves and blood in some prescription medication powder she had attempted to take after mixing it with water.¹⁶¹ The prescription medication contained cholestyramine powder, which is designed to lower high levels of cholesterol in the blood and act as a digestive aid.¹⁶² The named defendant in the case sold cans containing the powder that had been manufactured in bulk and packaged into cans by other entities.¹⁶³ The bulk manufacturing and packaging of cholestyramine is governed by Good Manufacturing Practices approved by the United States Food and Drug Administration (“FDA”).¹⁶⁴

The *Bell* court first determined that the statutory presumption applied because the defendant submitted unopposed declarations from quality assurance personnel indicating that the cholestyramine powder at issue was manufactured and packaged in accordance with practices approved by the FDA.¹⁶⁵ The court also noted that the batch records showed no indications that there was any deviation from these practices at the time the product at issue was manufactured or packaged.¹⁶⁶ Bell failed to present any evidence that the cholestyramine powder contained any type of a defect and, as a result, she could not rebut the presumption of non-negligence.¹⁶⁷

158. *Id.*

159. No. 1:11-cv-01454-TWP-MJD, 2013 WL 2244345 (S.D. Ind. May 21, 2013).

160. *See supra* Parts I.B. & C.

161. *Bell*, 2013 WL 2244345, at *1-2.

162. *Id.* at *1.

163. *Id.*

164. *Id.*

165. *Id.* at *7.

166. *Id.*

167. *Id.* Recall that Bell alleged that the medication she was given was defective because it contained pieces of two latex gloves. *Id.* at *1-2. Bell was, however, unable to produce those pieces. *Id.* at *7. Although Bell thought they may have disintegrated over time, there was “expert testimony showing that it would have been impossible for the latex pieces to disintegrate or degrade under the conditions which the cholestyramine mixture was stored since the date of the incident.” *Id.* Bell did not present any expert testimony or other evidence that would have provided an

III. STATUTES OF LIMITATION AND REPOSE

The IPLA contains a statute of limitation and a statute of repose for product liability claims.¹⁶⁸ The limitations period is two years from the date of accrual.¹⁶⁹ The repose period is ten years from the date the product at issue was first delivered to the initial user or consumer.¹⁷⁰ If, however, the action accrues more than eight years, but less than ten years, after initial delivery, then the claimant's full two year limitations period is preserved even if the repose period would otherwise expire in the interim.¹⁷¹

Although Indiana courts have issued a handful of cases in the last decade or so involving the statutory limitations and repose periods,¹⁷² there have not been any significant cases in this area in the past two or three years. There was, however, one decision during the 2013 Survey period that examined the applicability of the statute of repose. In that case, *Hartman v. Ebsco Industries, Inc.*,¹⁷³ the plaintiff was injured when a muzzle-loading rifle unexpectedly discharged.¹⁷⁴ The rifle was manufactured in 1994.¹⁷⁵ In 2008, the plaintiff purchased and installed a conversion kit.¹⁷⁶ The accident occurred on November 29, 2008, approximately fourteen years after the rifle was manufactured.¹⁷⁷

The manufacturer argued that the plaintiff's claim was barred by Indiana's ten-year statute of repose.¹⁷⁸ The court noted two exceptions to the statute of repose.¹⁷⁹ The first one arises where there has been a reconstruction or recondition of the product that lengthens the "useful life of a product beyond what was contemplated when the product was first sold."¹⁸⁰ The second exception arises where a defective component is incorporated into an old product. The presence of the new, defective component starts the statute of repose running

alternative explanation as to what happened to the missing latex pieces. *Id.* She also offered no expert testimony that there was any blood in the cholestyramine mixture. *Id.*

168. IND. CODE § 34-20-3-1 (2013).

169. *Id.* § 34-20-3-1(b)(1).

170. *Id.* § 34-20-3-1(b)(2).

171. *Id.*

172. *See, e.g.,* Technisand, Inc. v. Melton, 898 N.E.2d 303 (Ind. 2008); Ott v. AlliedSignal, Inc., 827 N.E.2d 1144 (Ind. Ct. App. 2005); C.A. v. Amlis at Riverbend, L.P., No. 1:06-CV-1736-SEB-JMS, 2008 U.S. Dist. LEXIS 2558, at *8 (S.D. Ind. Jan. 10, 2008); Campbell v. Supervalu, Inc., 565 F. Supp. 2d 969, 977 (N.D. Ind. 2008).

173. No. 3:10-CV-528-TLS, 2013 WL 5460296, at *1 (N.D. Ind. Sept. 30, 2013).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at *2.

179. *Id.* at *4.

180. *Id.*

anew.¹⁸¹ The plaintiff argued that the installation of the conversion kit turned the rifle at issue into “an entirely new rifle.”¹⁸²

The court disagreed. Nothing about the conversion kit served to lengthen the useful life of the rifle; it merely improved performance.¹⁸³ Moreover, the court noted that the conversion kit was installed by the plaintiff, not the manufacturer.¹⁸⁴ The court found that the “statute of repose is reset under the first exception only when the manufacturer, as opposed to the consumer, performs the reconstruction or reconditioning that lengthens the useful life of the product.”¹⁸⁵ With regard to the second exception, the court found that the plaintiff failed to show that the conversion kit was defective under either a design¹⁸⁶ or warning defect theory; accordingly, the statute of repose did not begin anew with the installation of the conversion kit.¹⁸⁷

IV. STATUTORY DEFENSES

The IPLA identifies three statutory defenses: (1) “use with knowledge of danger” (incurred risk);¹⁸⁸ (2) misuse;¹⁸⁹ and (3) modification/alteration.¹⁹⁰ Two

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at *6.

185. *Id.*

186. *Id.* at *9. The court concluded that the plaintiff’s expert’s opinion regarding an alternate design was inadmissible under *Daubert*.

187. *Id.* at *12. *See supra* Part I.D.

188. Indiana Code section 34-20-6-3 provides that “[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured.” IND. CODE § 34-20-6-3 (2013). Incurred risk is a defense that “involves a mental state of venturousness on the part of the actor, and demands a subjective analysis into the actor’s actual knowledge and voluntary acceptance of the risk.” *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 554 (Ind. 1987) (citing *Power v. Brodie*, 460 N.E.2d 1241, 1243 (Ind. Ct. App. 1984)). It is a “complete” defense in that it precludes a defendant’s IPLA liability (in design and warning defect cases) if it is found to apply to a particular set of factual circumstances. *See, e.g., Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1146 (Ind. 2006); *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1145 (Ind. Ct. App. 2003); *Hopper v. Carey*, 716 N.E.2d 566, 575-76 (Ind. Ct. App. 1999).

189. Indiana Code section 34-20-6-4 provides a defense in a product liability case under Indiana law if the “cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.” IND. CODE § 43-20-6-4 (2013). Stated in a slightly different way, misuse is a “use for a purpose or in a manner not foreseeable by the manufacturer.” *Henderson v. Freightliner, LLC*, No. 1:02-CV-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005) (quoting *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003)). The facts required to prove the misuse defense may be similar to (but are not necessarily identical as) those necessary to prove either that the product is in a condition “not contemplated by reasonable”

cases decided during the 2013 Survey period involve the concept of product misuse. In addition to substantive warnings and design defect issues, *Weigle v. SPX Corp.*,¹⁹¹ also discusses the misuse defense in some limited detail. There, the court examined whether the plaintiffs' failure to read and follow a product's warnings constituted a misuse.¹⁹² The products at issue were support stands that were used to support a truck trailer while mechanics performed repairs.¹⁹³ The plaintiffs were injured when the trailer fell off the stands.¹⁹⁴ The manufacturer had provided instructions that support pins were to be inserted completely through both walls of the extension tube.¹⁹⁵ A separate warning advised users to "[a]lways use the support pin."¹⁹⁶ Although it was undisputed that neither plaintiff read the instructions or inserted a support pin,¹⁹⁷ the court refused to grant summary judgment based upon the misuse defense because it found plaintiffs to "have designated evidence from which a fact finder could determine that use of the support stands without the pin was reasonably foreseeable."¹⁹⁸ That portion of the *Weigle* case that discusses misuse seems illogical when viewed in isolation because the manufacturer intended the product to be used with the support pins and plaintiffs unquestionably disregarded that warning. But the court already had determined before it reached the misuse issue that the manufacturer's warnings were adequate as a matter of law and that the plaintiffs could not pursue a warnings defect claim against the manufacturer.¹⁹⁹

*Stuhlmacher v. The Home Depot U.S.A., Inc.*²⁰⁰ also includes a discussion of misuse. This case, discussed in a number of different contexts above, involved an allegedly defective ladder. The defendants argued that the plaintiff did not use the ladder in the way it was intended because he had situated it such that he

users or consumers under Indiana Code section 34-20-4-1(1) or that the injury resulted from "handling, preparation for use, or consumption that is not reasonably expectable" under Indiana Code section 34-20-4-3. IND. CODE §§ 34-20-4-1(1) & -3 (2013).

190. Indiana Code section 34-20-6-5 applies when "any person" makes a modification or an alteration to a product after it has been delivered to the initial user or consumer so long as the modification or alteration: (1) is the "proximate cause of the physical harm"; and (2) is "not reasonably expectable to the seller." IND. CODE § 34-20-6-5 (2013). It is important to note that the modification/alteration defense is also largely built into the basic premise for product liability as set forth in Indiana Code section 34-20-2-1, which contemplates that the product be "expected to" reach and does, in fact, reach the user or consumer "without substantial alteration." *Id.* § 34-20-2-1.

191. 729 F.3d 724 (7th Cir. 2013).

192. *Id.* at 739-40.

193. *Id.* at 727-28.

194. *Id.*

195. *Id.* at 728.

196. *Id.*

197. *Id.*

198. *Id.* at 739.

199. *Id.* at 734. *See supra* Part I.D.

200. No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572, at *1 (N.D. Ind. June 21, 2013).

“squeezed the front and rear legs together,” thus buckling the spreader.²⁰¹ The defendants argued that such a misuse would create the same amount of pressure as a 600-pound person during normal use and the ladder was intended for someone who weighed less than 300 pounds.²⁰² According to the court, however, the plaintiff “shook the ladder to make sure it was level and that all the feet were on the ground.”²⁰³ Although the court recognized that the plaintiff’s actions “may have caused an impact greater than that created by a person climbing up the ladder . . . [w]hether it was reasonably foreseeable that a user would shake the ladder to assure its stability in the manner [in which plaintiff] did is a question better reserved for the jury.”²⁰⁴

V. FEDERAL PREEMPTION

Federal laws preempt state laws in three circumstances: “(1) when the federal statute explicitly provides for preemption; (2) when Congress intended to occupy the field completely; and (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁰⁵ A handful of cases decided by courts in Indiana have taken on the topic in recent years.²⁰⁶ The 2013 Survey period produced yet another.

In *Wilgus v. Hartz Mountain Corp.*,²⁰⁷ plaintiffs asserted several claims against Hartz and Wal-Mart for damages they allegedly suffered after using a Hartz flea and tick product to treat their dogs. After applying the flea and tick product to their dogs, one dog died and one became violently ill.²⁰⁸ Defendants moved for the dismissal based on federal preemption under FIFRA, which imposes regulations on the sale and distribution of pesticides in the United States.²⁰⁹ As the Hartz UltraGuard (“Hartz”) line of products contained pesticides, defendants argued that the sale and distribution of the product was regulated solely by FIFRA and the EPA.²¹⁰ The court found that plaintiffs’ claims were based on Hartz’s failure to warn of potential dangers associated with the product, despite the fact that the labeling complied with all FIFRA and EPA

201. *Id.* at *14.

202. *Id.*

203. *Id.*

204. *Id.*

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

206. *See, e.g., Cook v. Ford Motor Co.*, 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*; *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722, 727 (Ind. Ct. App. 2008), *trans. denied*; *Tucker v. SmithKline Beecham Corp.*, 596 F. Supp. 2d 1225, 1238 (S.D. Ind. 2008).

207. No. 3:12-CV-86, 2013 WL 653707, at *1 (N.D. Ind. Feb. 19, 2013).

208. *Id.*

209. *Id.* at *4.

210. *Id.*

regulations.²¹¹ Citing a recent decision on the same question issued by the Northern District of Ohio, the court found that because plaintiffs' claims were based on a failure to warn, they were preempted by FIFRA.²¹² The court found that FIFRA contained strict guidelines for pesticide labeling and clearly proscribed any state-law labeling requirement that would impose a labeling requirement that diverged from those set out in FIFRA and its implementing regulations.²¹³ Because the EPA mandated the warnings required on the Hartz line of products, a challenge based on the adequacy of those warnings was appropriately preempted by FIFRA.²¹⁴

CONCLUSION

Although there were not as many significant product liability decisions during the 2013 Survey period as there have been in recent years, the number of topics and overall scope of the decisions seemed to increase. Indeed, a couple of the 2013 cases addressed an impressive number of different product liability issues in the same opinion. It seems clear both from the arguments being made and the decisions being issued that judges and practitioners are becoming increasingly familiar with product liability landscape as we near the twentieth anniversary of the rather sweeping 1995 amendments to the IPLA.

211. *Id.* at *6-7.

212. *Id.* at *7 (citing *Smith v. Hartz Mountain Corp.*, No. 3:12-CV-00662, 2012 WL 5451726, at *2-4 (N.D. Ohio Nov. 7, 2012)).

213. *Id.*

214. *Id.*

