SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

JOSEPH R. ALBERTS*
ROBERT B. THORNBURG**
HILARY G. BUTTRICK***

INTRODUCTION

This Survey reviews the significant product liability cases decided during the survey period.[1] It offers select commentary and context, and organizes its treatment of the relevant cases into a basic structure that mirrors the Indiana Product Liability Act ("IPLA").[2] This Survey does not attempt to address all product liability cases decided during the survey period in detail. Rather, it focuses on cases involving important substantive product liability concepts arising under Indiana law and offers appropriate background information about the IPLA.[3]

The 2016 cases addressed what have been traditionally popular areas for substantive treatment, such as warning and design defects, the use of expert witnesses in product liability cases, and federal preemption.

I. THE SCOPE OF THE IPLA

The IPLA governs actions brought by "users" or "consumers" against

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* Senior Counsel, The Dow Chemical Company, Midland, Michigan and Dow AgroSciences LLC, Indianapolis, Indiana. B.A., *cum laude*, 1991, Hanover College; J.D., *magna cum laude*, 1994, Indiana University Robert H. McKinney School of Law. The authors thank Dean Barnhard for his research and editing assistance.

** Member, Frost Brown Todd LLC, Indianapolis. B.S., *cum laude*, Ball State University; J.D., 1996, Indiana University Maurer School of Law.

*** Assistant Professor of Business Law, Butler University College of Business, Indianapolis. B.A., *summa cum laude*, 1999, DePauw University; J.D., *summa cum laude*, 2002, Indiana University Robert H. McKinney School of Law.

1. The survey period is October 1, 2015 to September 30, 2016.

2. IND. CODE §§ 34-20-1-1 to -9-1 (2016). This Survey 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. There were some important cases decided during the 2016 survey period that involve product liability, but are not addressed in detail in this article because they involved procedural issues rather than substantive product liability issues. *See, e.g.*, Boles v. Eli Lilly & Co., No. 1:15-cv-00351-JMS-DKL, 2015 U.S. Dist. LEXIS 141922 (S.D. Ind. Oct. 19, 2015) (involving motions to sever and transfer); Falls v. Eli Lilly & Co., 618 Fed. App'x 866 (7th Cir. 2015) (concerning subject matter jurisdiction); Durocher v. Riddell, Inc., No. 1:13-cv-01570-SEB-DML, 2016 U.S. Dist. LEXIS 133160 (S.D. Ind. Sept. 28, 2016) (discussing proposed class certification); Timm v. Goodyear Dunlop Tires N. Am., Ltd., No. 2:14-CV-232-PPS-JEM, 2016 U.S. Dist. LEXIS 4677 (N.D. Ind. Jan. 14, 2016) (analyzing addition of parties per FRCP 20).

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"manufacturers" or "sellers" when a product causes "physical harm."[4] The IPLA defines each of those quoted terms, and case law has helped to refine and further delineate those definitions. When read together, Indiana Code sections 34-20-1-1 and 34-20-2-1 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 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 further establishes the IPLA governs every claim that satisfies those 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 addressing the scope and reach of the IPLA. Several of those cases 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 a fairly robust body of case law identifying people and entities that are "manufacturers"[13] or "sellers"[14] and,

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4. IND. CODE § 34-20-1-1 (2016).

5. *Id.* § 34-20-2-1(1).

6. *Id.* § 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.* § 34-20-1-1. A literal interpretation of the IPLA demonstrates 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 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 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 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.*, 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 (2016). For purposes of the IPLA, a manufacturer is "a person or

therefore, proper defendants in Indiana product liability cases.

The 2016 survey period contributed yet another decision to the growing body of case law in this area. In *Parks v. Freud America, Inc.*,[15] the plaintiff was using a grinder and was injured when the metal cutoff disc broke.[16] The plaintiff alleged that the disc was defectively manufactured, and he sued the seller of the disc, Home Depot, and the distributor of the disc, Freud.[17] The disc was designed and manufactured in India by Carborundum, who was not named as a defendant.[18] As a matter of course, Home Depot kept a log of returned items, as well as the customer's stated reason for the return.[19] At least 100 discs had been returned to Home Depot, with customers claiming that the discs were defective.[20] Home Depot claimed that it had no notice, however, of personal injury resulting from the discs.[21] Both Home Depot and Freud moved for summary judgment.[22]

Home Depot argued that it could not be held liable because it did not manufacture the disc,[23] and pursuant to Indiana Code section 34-20-2-3, "[a] product liability action based on the doctrine of strict liability in tort may not be

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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 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. 2012).

14. IND. CODE § 34-6-2-136 (2016). 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. *Id.* Second, the seller must be in the business of selling the product. *Id.* And, third, the seller expects 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 (1999). When the theory of liability is based upon "strict liability in tort," Indiana Code section 34-20-2-3 makes clear a "seller" that cannot otherwise be deemed a "manufacturer" is not liable and is not a proper IPLA defendant.

15. No. 2:14-cv-00036-LJM-WGH, 2016 U.S. Dist. LEXIS 7525 (S.D. Ind. Jan. 22, 2016).

16. *Id.* at *1-2.

17. *Id.* at *3-7.

18. *Id.* at *6.

19. *Id.* at *3-5.

20. *Id.* at *5.

21. *Id.* at *3.

22. *Id.* at *1.

23. *Id.* at *10.

commenced or maintained against a seller of a product . . . unless the seller is a manufacturer of the product."[24] The plaintiff argued that Home Depot nonetheless fell within the definition of "manufacturer" under Indiana Code section 34-6-2-77(a)(1)[25] because it had "actual knowledge" of the defect in the disc—prior customers had returned the discs complaining of various flaws.[26] Home Depot argued that it did not have "actual knowledge" of the particular defect in the disc that injured the plaintiff—in fact, the plaintiff's expert had to conduct multiple scientific tests to identify the manufacturing defect leading to the disc's failure.[27] In addition, Home Depot claimed that the customer complaints regarding returned discs were hearsay.[28] The court concluded that several of the customer complaints associated with returned discs referred to the discs cracking—the same type of failure noted by the plaintiff's expert.[29] The court found these complaints created a genuine issue of material fact regarding whether Home Depot was a seller with "actual knowledge" of the defect.[30] The customer complaints evidenced Home Depot's notice of previous failures, and thus were not hearsay.[31] The court denied Home Depot's motion for summary judgment on the IPLA claim.[32]

The distributor, Freud, also moved for summary judgment claiming that it could not be held liable under the IPLA because it was not the manufacturer of the disc.[33] The plaintiff argued that Freud could be held liable under the Act because the actual manufacturer, Carborundum (a foreign corporation), was not subject to personal jurisdiction in Indiana.[34] Indiana Code section 34-20-2-4 allows the court to treat a seller or distributor subject to the court's jurisdiction as a manufacturer "[i]f a court is unable to hold jurisdiction over a particular manufacturer of a product."[35] Although Carborundum had a U.S. subsidiary and sold products directly to distributors in the United States, the court concluded there was insufficient evidence to demonstrate that Carborundum's "contacts with Indiana [were] so frequent and systemic" that personal jurisdiction would be proper in Indiana.[36] Because there was a genuine issue of material fact regarding whether the court could obtain personal jurisdiction over Carborundum, Freud could be considered a manufacturer under Indiana Code section 34-20-2-4.[37]

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24. IND. CODE § 34-20-2-3 (2016).

25. *See id.* § 34-6-2-77(a)(1): "'Manufacturer' includes a seller who: (1) has actual knowledge of a defect in a product[.]"

26. *Parks*, 2016 U.S. Dist. LEXIS 7525, at *13.

27. *Id.* at *14.

28. *Id.*

29. *Id.* at *14-15.

30. *Id.* at *15.

31. *Id.*

32. *Id.*

33. *Id.* at *10.

34. *Id.* at *10-12.

35. IND. CODE § 34-20-2-4 (2016).

36. *Parks*, 2016 U.S. Dist. LEXIS 7525, at *12-13.

37. *Id.* at *13.

Parks joins decisions such as *Shelter Insurance Companies. v. Big Lots Stores, Inc.*,[38] and *Heritage Operating, LP v. Mauck*,[39] as the latest in a long line of cases addressing the circumstances under which retail sellers and distributors may be deemed to be a manufacturer under the IPLA.

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."[40] It "does not include gradually evolving damage to property or economic losses from such damage."[41] 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."[42] Although the 2016 survey period did not include any cases further refining the concept of "physical harm caused by a product," several recent cases have done so.[43]

C. Defective and Unreasonably Dangerous

IPLA liability only extends to products that are in "defective condition,"[44] 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) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption."[45] Both are threshold proof requirements.[46]

Indiana claimants may prove 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

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38. No. 3:12-CV-433 JVB, 2014 WL 4494382 (N.D. Ind. Sept. 10, 2014).

39. 37 N.E.3d 514 (Ind. Ct. App. 2015), *trans. denied*, 43 N.E.3d 1278 (Ind. 2016).

40. IND. CODE § 34-6-2-105(a) (2016).

41. *Id.* § 36-6-2-105(b).

42. *Id.* § 34-6-2-114.

43. *See, e.g.*, Bell v. Par Pharm. Cos., No. 1:11-CV-01454-TWP-MJD, 2013 WL 2244345 (S.D. Ind. May 21, 2013); Barker v. CareFusion 303, Inc., No. 1:11-CV-00938-TWP-DKL, 2012 WL 5997494 (S.D. Ind. Nov. 30, 2012); Hathaway v. Cintas Corp. Servs., Inc., 903 F. Supp. 2d 669 (N.D. Ind. 2012); Pentony v. Valparaiso Dep't of Parks & Recreation, 866 F. Supp. 2d 1002 (N.D. Ind. 2012); Miceli v. Ansell, Inc., 23 F. Supp. 2d 929, 932 (N.D. Ind. 1998); GuideOne Ins. Co. v. U.S. Water Sys., Inc., 950 N.E.2d 1236, 1244 (Ind. Ct. App. 2011); Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492, 493-94 (Ind. 2001).

44. IND. CODE § 34-20-2-1 (2016).

45. *Id.* § 34-20-4-1.

46. *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.").

the result of a problem in the manufacturing process ("manufacturing defect").[47] 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."[48] 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.[49] Courts in Indiana have been fairly active in recent years when it comes to dealing with concepts of unreasonable danger and causation in Indiana product liability actions.[50]

The IPLA, and specifically Indiana Code section 34-20-2-2, imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove a product is in a defective condition:

> [I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the

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

Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 47 Ind. L. Rev. 1129, 1133 n.45 (2014).

48. IND. CODE § 34-6-2-146 (2016); *see also Baker*, 799 N.E.2d at 1140.

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

50. *See* Alberts et al., *supra* note 47, at 1130; *see also* Piltch v. Ford Motor Co., 778 F.3d 628 (7th Cir. 2015), *reh'g denied*, (Apr. 1, 2015), Stuhlmacher v. Home Depot U.S.A., Inc., No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572 (N.D. Ind. June 21, 2013); Bell v. Par Pharm. Cos., No. 1:11-cv-01454-TWP-MJD, 2013 WL 2244345, at *1 (S.D. Ind. May 21, 2013); Beasley v. Thompson/Ctr. Arms Co., No. 2:11-cv-3-WTL-WGH, 2013 WL 968234 (S.D. Ind. Mar. 12, 2013); Hathaway v. Cintas Corp. Servs., Inc., 903 F. Supp. 2d 669 (N.D. Ind. 2012); 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. 2011).

warnings or instructions.[51]

Accordingly, the term "strict" liability is no longer applicable in design and warning cases to the extent the term "strict" connotes the imposition of liability without regard to fault or the exercise of reasonable care.[52] The IPLA contemplates the traditional type of "strict" liability (without fault or proof of negligence) only for so-called "manufacturing" defects—those that arise "in the manufacture and preparation of the product."[53] For manufacturing defects, liability can be established even if the seller has "exercised all reasonable care."[54]

Although the IPLA has made clear for nearly twenty years that "strict" liability applies only in cases involving alleged manufacturing defects, some courts have been slow to recognize that concept.[55] A misleading short title in the *Burns Indiana Statutes Annotated* compendium also may be contributing to some of the confusion in this area.[56] In the 1998 Replacement Volume, the *Burns* editors inserted a short title for Indiana Code section 34-20-2-2, entitled, "Strict liability—Design defect."[57] That short title unfortunately makes it appear to some readers as though strict liability applies either to the entire section (and thereby all three theories for proving defectiveness) or, at the very least, to design defect claims.[58] Neither is accurate because, as noted above, a close reading of the statute reveals "strict" liability (liability without fault or proof of negligence) applies only to cases involving manufacturing defect theories and not to cases alleging either design or warning theories.[59] Incidentally, the *West* editors did not use the same short title in the *West's Annotated Indiana Code*, choosing instead

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51. IND. CODE § 34-20-2-2 (2016). Just like a claimant advancing any other type of negligence theory, a claimant advancing a product liability design or warning defect theory must meet the traditional negligence elements: duty, breach, injury, and causation. *See* Kovach v. Caligor Midwest, 913 N.E.2d 193, 197-99 (Ind. 2009).

52. IND. CODE § 34-20-2-2 (2016).

53. *Id.*; *see also* Mesman v. Crane Pro Servs., 409 F.3d 846, 849 (7th Cir. 2005), *reh'g and petition for reh'g en banc denied*, (July 26, 2005), *appeal after new trial*, 512 F.3d 352 (7th Cir. 2008); First Nat'l Bank & Tr. Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 689 n.4 (7th Cir. 2004); Conley v. Lift-All Co., No. 1:03-CV-1200-DFH-TAB, 2005 WL 1799505, at *6 (S.D. Ind. July 25, 2005); Bourne v. Marty Gilman, Inc., No. 1:03–CV–1375–DFH–VSS, 2005 WL 1703201, at *3 (S.D. Ind. July 20, 2005), *aff'd*, 452 F.3d 632 (7th Cir. 2006).

54. IND. CODE § 34-20-2-2(1) (2016). "Strict" liability for defects "in manufactur[ing] and preparation" is also subject to the additional requirement that the "user or consumer has not bought the product from or entered into any contractual relation with the seller." *Id.* § 34-20-2-2(2).

55. *See, e.g.*, Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995); Warriner v. DC Marshall Jeep, 962 N.E.2d 1263 (Ind. Ct. App. 2012); Vaughn v. Daniels Co., 841 N.E.2d 1133, 1138-39 (Ind. 2006).

56. IND. CODE § 34-20-2-2 (2016).

57. *Id.*

58. *See, e.g.*, *Whitted*, 58 F.3d at 1206; *Warriner*, 962 N.E.2d 1263; *Vaughn*, 841 N.E.2d at 1138-39.

59. IND. CODE § 34-20-2-2 (2016).

to use a more accurate short title styled, "Exercise of reasonable care; privity."[60]

Recent decisions have both recognized the confusion[61] and have illustrated how application of the "strict" liability concept can profoundly affect the outcome of a case.[62] The 2016 survey period brought yet another decision that employs the term "strict" liability in the context of something other than a manufacturing defect theory.

D. Decisions Involving Specific Defect Theories

1. Design Defect Theory.—State and federal courts in Indiana have issued many recent decisions addressing design defect theories and the proof required to sustain that theory.[63] The 2016 survey period added another decision to the

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60. *Id.* The Indiana General Assembly originally codified in 1995 the language now found in Indiana Code section 34-20-2-2. That language was subsequently re-numbered in 1998 as part of a reorganization of title 34. Neither the 1995 enactment nor the 1998 recodification, as published by the Indiana General Assembly, included any section short title for the particular section involved here.

61. Jones v. Horseshoe Casino, No. 2:15-cv-00014-PPS-PRC, 2015 WL 3407872, at *2 (N.D. Ind. May 27, 2015); *see* Alberts et al., *supra* note 47, at 1132-33.

62. In *Heritage Operating, L.P. v. Mauck*, 37 N.E.3d 514 (Ind. Ct. App. 2015), *trans. denied*, 43 N.E.3d 1278 (Ind. 2016), the court initially resolved a manufacturer/seller issue as a matter of law, but in doing so, it presumed there was an operative IPLA-based "strict liability" claim. *Id.* at 522-24. A close reading of the decision reveals the plaintiffs' only real IPLA-based defect theory alleged an inadequate warning. *Id.* at 520. The decision does not indicate the plaintiffs were pursuing any design defect claims, nor did the plaintiffs appear to have asserted a "manufacturing defect" claim by contending the natural gas product itself suffered from some kind of problem or glitch in the manufacturing process. *Id.* at 519. The plaintiffs appeared to have recognized natural gas is what it is, and they did not appear to have taken any issue with the process of refining or producing it. *Id.* Accordingly, there was no "strict" liability theory Indiana Code section 34-20-2-2(1) would allow in the *Mauck* case. To the extent "strict" liability is a term associated with the concept of liability without regard to fault or proof of negligence, it is not a doctrine the IPLA recognizes as applicable to inadequate warning theories. *Id.* at 519. It is, therefore, peculiar that the *Mauck* court took such great pains to reject the Indiana Supreme Court's venerable *Webb v. Jarvis* three-part duty analysis applicable to negligence cases in favor of a separate duty analysis arising out of an older line of non-IPLA cases that treated natural gas as "a dangerous instrumentality." *Id.* at 521 (quoting Palmer & Sons Paving, Inc. v. N. Ind. Pub. Serv. Co., 758 N.E.2d 550, 554 (Ind. Ct. App. 2001)). Perhaps the fact that the *Mauck* court was under the impression that an IPLA-based warnings defect negligence case is functionally the same as a traditional "strict" liability case might help explain why it rejected the *Webb* test in favor of a special rule when natural gas is the "product" at issue. *Id.* at 522-24.

63. *See, e.g.*, Piltch v. Ford Motor Co., 778 F.3d 628 (7th Cir. 2015), *reh'g denied*, (Apr. 1, 2015); Simmons v. Philips Elecs. N. Am. Corp., No. 2:12-CV-39-TLS, 2015 WL 1418772 (N.D. Ind. Mar. 27, 2015); Weigle v. SPX Corp., 729 F.3d 724 (7th Cir. 2013); Lapsley v. Xtek, Inc., 689 F.3d 802 (7th Cir. 2012); Mesman v. Crane Pro Servs., Inc., 409 F.3d 846 (7th Cir. 2005), *reh'g and petition for reh'g en banc denied*, (July 26, 2005), *appeal after new trial*, 512 F.3d 352 (7th

mix. In *Terex-Telelect, Inc. v. Wade*,[64] the Indiana Court of Appeals addressed the admissibility of compliance with American National Standards Institute ("ANSI") standards in a design defect cases on a motion in limine ruling barring the evidence.[65] In *Terex-Telelect, Inc. v. Wade*, an apprentice electrician was working for Richmond Power installing a transformer from a bucket of a truck.[66] After finishing his job and lowering the boom in the lift truck, the worker detached his lanyard and prepared to exit the bucket.[67] While exiting, the worker missed the exterior step and fell twelve feet to the ground, rendering himself a quadriplegic.[68] He brought suit against Terex-Telelect, the manufacturer of the bucket, alleging that Terex-Telelect was negligent in the design of the bucket under the IPLA.[69] Specifically, he alleged that Terex-Telelect was negligent by not including a molded interior step in the bucket, since other buckets sold by Terex-Telelect contained a molded interior step.[70]

Terex-Telelect argued that it was not negligent because Terex-Telelect had complied with its customer, Richmond Power's, specifications and the applicable ANSI standard.[71] Plaintiff filed a motion in limine to exclude evidence concerning Terex-Telelect's compliance with ANSI's design standards because the standard did not specifically address the defect claimed—the absence of an interior step for egress from the bucket.[72] The trial court relied on *Terex I*[73] and decided evidence relating to ANSI standards was irrelevant because the standard did not address the specific defect alleged by Plaintiff.[74] Terex-Telelect then initiated an interlocutory appeal.[75]

The parties disputed whether evidence pertaining to ANSI standards was

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Cir. 2008); Hathaway v. Cintas Corp. Servs., Inc., 903 F. Supp. 2d 669 (N.D. Ind. 2012) (discussing design defects and products liability); 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); *see also* Alberts et al., *supra* note 47, at 1137-38.

64. 59 N.E.3d 298 (Ind. Ct. App. 2016), *trans. denied*, 2017 Ind. LEXIS 81, (Ind. Feb. 9, 2017).

65. *Id.* at 300.

66. *Id.* at 301.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 301-02.

72. *Id.* at 302.

73. Wade v. Terex-Telelect, Inc., 966 N.E.2d 186 (Ind. Ct. App. 2012). The case was originally tried in Shelby County, Indiana and resulted in a hung jury. The case was tried a second time in Hamilton County and resulted in a defense verdict. The case discussed herein is the result of an evidentiary ruling entered by the trial court prior to a third trial excluding all evidence of compliance with ANSI standards as irrelevant.

74. *Wade*, 59 N.E.3d at 302.

75. *Id.*

relevant under Indiana Evidence Rule 403.[76] Rule 403 provides that "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, or needless presentation of cumulative evidence."[77] Terex-Telelect argued that its compliance with ANSI standards was relevant because it tended to establish the reasonableness of Terex-Telelect's actions in designing the bucket.[78] Plaintiff argued that Terex-Telelect's compliance with ANSI standards was "wholly irrelevant" to the defect alleged: the lack of an interior step.[79] The court held compliance with ANSI standards was not relevant in product liability cases where the standard does not address the specific defect alleged, and admitting such evidence would only mislead or confuse the finder of fact.[80] Only time will tell if the holding in *Wade* will be limited to the unusual factual situation of the case or whether future courts will use the decision to restrict or bar the admissibility of standards-based evidence unless it specifically applies to the defect or alternative design advocated by an Indiana plaintiff. In light of Indiana's adoption of a negligence-based design defect theory, such a reading and application seems more restrictive than the Indiana General Assembly may have intended.

2. 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.[81]

For a cause of action to attach in failure to warn cases, the "unreasonably dangerous" inquiry is similar to the requirement that the danger or alleged defect be latent or hidden.[82]

Although there were no significant warnings defect decisions during the 2016 survey period, several courts in Indiana have issued decisions in the past fifteen years or so that have helped define the contours of the IPLA's warnings defect theory and what proof is required to sustain such a theory.[83]

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76. *Id.* at 304.

77. *Id.*

78. *Id.*

79. *Id.* at 305.

80. *Id.*

81. IND. CODE § 34-20-4-2 (2016).

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

83. *See, e.g.*, Simmons v. Philips Elecs. N.A. Corp., No. 2:12-CV-39-TLS, 2015 WL 1418772 (N.D. Ind. Mar. 27, 2015); Shelter Ins. Cos. v. Big Lots Stores Inc., No. 3:12-CV-433-JVB, 2014 WL 4494382 (N.D. Ind. Sept. 10, 2014); Weigle v. SPX Corp., 729 F.3d 724 (7th Cir. 2013); Hartman v. EBSCO Indus., Inc., No. 3:10-CV-528-TLS, 2013 WL 5460296 (N.D. Ind. Sept.

3. Manufacturing Defect Theory.—A manufacturing defect typically results from some type of unintended problem during the manufacturing process. Such problems are often the result of human or mechanical error in the manufacturing facility. The most common manufacturing defects involve contaminated formulations or products that otherwise fail in some way to conform to their intended design specifications. As noted above, the manufacturing defect theory is the only method of proving defectiveness in Indiana that is amenable to so-called "strict" liability to the extent that the term equates with liability imposed absent a finding of negligence or fault.[84] Indeed, the IPLA allows for manufacturing defect liability even if the seller has "exercised all reasonable care."[85]

The 2016 survey period added another opinion to the growing body of case law discussing manufacturing defect claims. In *Cincinnati Insurance Co. v. Lennox Industries, Inc.*,[86] Cincinnati Insurance, as a subrogee of its insured, sued Lennox Industries, Inc. as a result of a fire that damaged the insured's home.[87] Lennox designed, manufactured, sold, and distributed an air condensing unit that allegedly ignited and caused the fire.[88] The plaintiff alleged that the air condensing unit was manufactured, designed, and labeled in an unsafe, defective, and inherently dangerous condition.[89] Lennox Industries filed a motion for summary judgment, alleging that the plaintiff put forth insufficient evidence to prove that the air condensing unit was defective.[90]

The trial court denied Lennox's motion for summary judgment with regard to the manufacturing defect claim.[91] To prove a manufacturing defect theory, the court pointed out, as noted in the discussion above, that a plaintiff must demonstrate: (1) the product was defective and unreasonably dangerous, (2) the defective condition existed at the time the product left the defendant's control, and (3) the defective condition was the proximate cause of the plaintiff's

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30, 2013), *aff'd*, 758 F.3d 810 (7th Cir. 2014); Stuhlmacher v. Home Depot U.S.A., Inc., No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572 (N.D. Ind. June 21, 2013); Tague v. Wright Med. Tech., Inc., No. 4:12-CV-13-TLS, 2012 WL 1655760 (N.D. Ind. May 10, 2012); Hathaway v. Cintas Corp. Servs., Inc., 903 F. Supp. 2d 669 (N.D. Ind. 2012); *see also* Alberts et al., *supra* note 47, at 1134-37.

84. *See supra* notes 52-54 and accompanying text.

85. IND. CODE § 34-20-2-2 (1) (2016). "Strict" liability for defects "in manufactur[ing] and preparation" is also subject to the additional requirement that the "user or consumer has not bought the product from or entered into any contractual relation with the seller." *Id.* § 34-20-2-2(2).

86. No. 3:14-CV-1731, 2016 U.S. Dist. LEXIS 15385 (N.D. Ind. Feb. 9, 2016), *reconsideration granted in part and denied in part*, No. 3:14-CV-1731, 2016 U.S. Dist. LEXIS 54540 (N.D. Ind. Apr. 25, 2016).

87. *Id.* at *2.

88. *Id.*

89. *Id.*

90. *Id.* at *2-3, 18.

91. *Id.* at *22-23.

injuries.[92] The court was quick to recognize that the mere fact that an accident occurred, in this case a fire, does not create an inference that a product was defective or unreasonably dangerous.[93]

Indiana case law previously established four methods by which a plaintiff may prove a product defect: "Plaintiffs may produce an expert to offer direct evidence of a specific manufacturing defect; plaintiffs may use an expert to circumstantially prove that a specific defect caused the product failure; plaintiffs may introduce direct evidence from an eyewitness of the malfunction, supported by expert testimony explaining the possible causes of the defective condition; and plaintiffs may introduce inferential evidence by negating other possible causes."[94] The court clarified that these four methods were not exclusive, and may serve as "helpful tools" in the basic inquiry as to whether there is sufficient evidence of a defect.[95] In some rare circumstances, circumstantial evidence could suffice to produce a reasonable inference from which a jury could reasonably find a manufacturing defect.[96] Nonetheless, a plaintiff who relies upon inferential evidence by negating other possible causes is not to be required to rule out every other possible cause of the incident in order to survive a defendant's summary judgment motion.[97]

Although the plaintiff did not produce direct evidence of a specific defect that caused the fire, it did produce two opinion witnesses who opined the fire originated in the air condensing unit.[98] These witnesses investigated and ruled out other potential causes of the fire.[99] The homeowner testified that he had never serviced the air condensing unit, and, therefore, it had not been altered since it left Lennox's possession.[100] Accordingly, the court denied Lennox's motion for summary judgment because it believed the plaintiff satisfied the fourth method of proving a manufacturing defect, as articulated by Indiana case law—introducing inferential evidence of the defect by negating other possible causes.[101]

E. Regardless of the Substantive Legal Theory

Indiana Code section 34-20-1-1 makes clear that the IPLA governs all claims for "physical harm" (as the IPLA defines that term) caused by the manufacture or sale of an allegedly defective product "regardless of the substantive legal

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92. *Id.* at *17.

93. *Id.* at *18.

94. *Id.* (citing Ford Motor Co. v. Reed, 689 N.E.2d 751, 753 (Ind. Ct. App. 1997)).

95. *Id.* at *19.

96. *Id.* at *18 (quoting Gaskin v. Sharp Elecs. Corp., No. 2:05-CV-303, 2007 WL 2819660 (N.D. Ind. Sept. 26, 2007)).

97. *Id.* at *22.

98. *Id.* at *4-6.

99. *Id.* at *8.

100. *Id.* at *3-4, 21.

101. *Id.* at *18, 22-23.

theory or theories upon which the action is brought."[102] At the same time, Indiana Code section 34-20-1-2 provides that the IPLA "shall not be construed to limit any other action from being brought against a seller of a product."[103]

Indiana federal and state courts in recent years have nevertheless wrestled with identifying just exactly which claims the IPLA does not otherwise subsume or eliminate in light of the "regardless of substantive legal theory" language. The Indiana Supreme Court has made it clear that the IPLA does not provide a remedy for purely economic loss claims that are rooted in contract, warranty, and Uniform Commercial Code (UCC) theories of recovery.[104] Those claims may be pursued, if at all, only under a contract-based or a UCC-based theory of recovery and, thus, seem to be the obvious group of "other actions" to which Indiana Code section 34-20-1-2 refers. Such an interpretation is entirely consistent with Indiana's economic loss doctrine, which precludes tort recovery for purely economic losses and was addressed in detail in *Venturedyne, Ltd. v. Carbonyx, Inc.*,[105] a case decided during the 2016 survey period.

When it comes to losses that are not purely economic in nature, however, the law is not as clear as it probably should be. The "regardless of substantive theory" language in Indiana Code section 34-20-1-1 would seem to make the IPLA the exclusive remedy in all cases in which a claimant contends that the sale or manufacture of a defective product caused physical harm to a person or property that is not purely economic. Indeed, ordinary principles of statutory construction would require that any tension between Indiana Code section 34-20-1-1 and Indiana Code section 34-20-1-2 be resolved in favor of the exclusivity

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102. IND. CODE § 34-20-1-1 (2016).

103. *Id.* § 34-20-1-2.

104. A few years earlier, the Indiana Supreme Court in *Gunkel v. Renovations, Inc*., 822 N.E. 2d 150, 153 (Ind. 2005), *reh'g denied*, (May 25, 2005), likewise made clear that remedies for contract-based economic losses and IPLA-based personal injuries or property damage are two fundamentally different things: "Indiana law under the [IPLA] and under general negligence law is that damage from a defective product or service may be recoverable under a tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected." *Accord* Atkinson v. P&G-Clairol, Inc., 813 F. Supp. 2d 1021, 1025 (N.D. Ind. 2011) (recognizing the remedies available under the IPLA and the UCC are different and independent from one another).

105. No. 2:14-CV-00351-RL, 2016 U.S. Dist. LEXIS 80372 (N.D. Ind. June 21, 2016). The *Venturedyne* court quoted extensively from both *Gunkel* and *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010). In the latter case, the Indiana Supreme Court made clear that the economic loss rule precludes tort liability for so-called "purely economic losses," which are pecuniary losses "unaccompanied by any property damage or personal injury (other than damage to the product or service itself)." *Indianapolis-Marion Cty. Pub. Library*, 929 N.E.2d at 727. In practical effect, foreclosing tort-based warranty 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.

provision.[106] The majority of recent decisions applying Indiana law have recognized the exclusivity of the IPLA remedy when a claimant tries to use common law negligence or breach of implied warranty theories to sue for personal injuries or property damage attributable to the sale or manufacture of an allegedly defective product.[107] In those situations, the non-IPLA-based claims are preempted and should be dismissed.[108] The most recent case involving IPLA preemption is a 2016 case, *Cavender v. Medtronic, Inc.*[109] The plaintiff in

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106. The United States Supreme Court has often held a "statute's saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011) (internal quotation marks, brackets, and citations omitted).

107. *See, e.g.*, Lyons v. Leatt Corp., No. 4:15-CV-17-TLS, 2015 WL 7016469 (N.D. Ind. Nov. 10, 2015); Stuhlmacher v. Home Depot U.S.A., Inc., No. 2:10-CV-00467-JTM-APR, 2013 WL 3201572, at *15-16 (N.D. Ind. June 21, 2013); Hathaway v. Cintas Corp. Servs, Inc., 903 F. Supp. 2d 669, 673 (N.D. Ind. 2012); Lautzenhiser v. Coloplast A/S, No. 4:11-cv-86-RLY-WGH, 2012 WL 4530804 (S.D. Ind. Sept. 29, 2012); *Atkinson*, 813 F. Supp. 2d at 1024; Gardner v. Tristar Sporting Arms, Ltd., No. 1:09-cv-0671-TWP-WGH, 2010 WL 3724190, at *2 (S.D. Ind. Sept. 15, 2010); Kovach v. Caligor Midwest, 913 N.E. 2d 193, 197 (Ind. 2009); Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc., No. 4:05 cv 49, 2006 U.S. Dist. LEXIS 9807, at *2 (N.D. Ind. Feb. 7, 2006); Henderson v. Freightliner, LLC, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *3 (S.D. Ind. Mar. 24, 2005).

108. The "preempting" of common law negligence and tort-based implied warranty claims is consistent with the IPLA in cases where the tortfeasing conduct that allegedly caused the personal injury or property damage is the manufacture or sale of a defective product. There are, however, some situations in which either the allegedly tortfeasing conduct was something other than the manufacture or sale of a defective product, when the harm was not "physical" in nature, or when no "product" was involved in the first place. The IPLA does not preempt the common law theories in those types of cases because the liability does not arise from the sale or manufacture of a defective product, but rather some other type of negligent act or omission or harm. *See, e.g.*, Carson v. All Erection & Crane Rental Corp., 811 F.3d 993 (7th Cir. 2016) (explaining in a personal injury case, the allegedly tortfeasing conduct was not the manufacture or sale of a defective product, but rather the failure of the plaintiff's employer to properly inspect the product after it was delivered to a work site); Duncan v. M&M Auto Serv., Inc., 898 N.E.2d 338 (Ind. Ct. App. 2008) (describing in a personal injury case, the allegedly tortfeasing conduct was the negligent repair and maintenance of a product as opposed to a defect in its manufacture or sale); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422 (Ind. Ct. App. 2007) (explaining the alleged harm was not "physical" in the form of deaths or injuries from gun violence, but rather the result of the increased availability or supply of handguns); Corry v. Jahn, 972 N.E.2d 907 (Ind. Ct. App. 2012) (noting the allegedly tortfeasing conduct was the failure to employ adequate construction techniques rather than a defect in the manufacture or sale of a product); Vaughn v. Daniels Co., 841 N.E.2d 1133 (Ind. 2006) (discussing in a personal injury case, the injuries did not result from plaintiff's use of a "product").

109. No. 3:16-CV-232, 2016 U.S. Dist. LEXIS 154540 (N.D. Ind. Nov. 8, 2016). Although, technically, the 2016 survey period ended on October 1, 2016, this case contributes to the

Cavender alleged that she suffered personal injuries from a surgically implanted cardiac defibrillator.[110] Although she pleaded claims based upon manufacturing, design, and warning defects, the plaintiff made no mention of the IPLA in her complaint.[111] She also asserted separate common law negligence and breach of warranty claims.[112] Medtronic moved to dismiss the complaint, contending, among other things, that Indiana law does not allow the plaintiff to proceed with her common law-based negligence and breach of warranty claims.[113] As part of the discussion entitled "[IPLA] preemption," Judge William Lee recognized that the IPLA's "regardless of the substantive legal theory" language is "pretty darn clear" in terms of its exclusivity when it comes to common law-based tort claims.[114] Because the plaintiff made no mention whatsoever of the IPLA in the complaint, the court had to decide whether to dismiss the claims or to allow the plaintiff to re-plead.[115] Ultimately, the court decided to allow the plaintiff to re-plead some of her claims, but made clear that the IPLA is the exclusive remedy for all of her claims made under product liability theories of recovery.[116] Indeed, the court stated in no uncertain terms that "Cavender cannot maintain a common law negligence claim in this case" and that, accordingly, "any common law negligence claim Cavender includes in her complaint must be, and is hereby, dismissed with prejudice."[117] With regard to the breach of warranty claims, the issue was clouded because the plaintiff was not specific about just what type of warranty-based claims she wanted to pursue.[118] Although the court was clear that the IPLA preempts tort-based breach of implied warranty claims, the plaintiff appears to have contended during the motion to dismiss briefing that her warranty claims were brought pursuant to the UCC and, therefore, not preempted.[119] Because, however, the court could not discern with clarity the plaintiff's pleading intentions, it had little choice but to dismiss without prejudice with the following discussion and admonitions for re-pleading:

> [I]t is unclear from Cavender's complaint exactly what warranty claims she is alleging in the first place. She uses phrases like "Medtronic, Inc., expressly and impliedly warranted," "[Medtronic] breached those express and implied warranties," and "fitness of use," but that's as far as she goes. Those phrases imply several different breach of warranty theories, but Cavender fails to include any facts to elucidate those causes of

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discussion here in such a significant way that we have decided to include it in this year's survey.

110. *Id.* at *2.

111. *Id.* at *2-3, 8.

112. *Id.* at *3.

113. *Id.* Medtronic also argued that federal law preempts the claims. *Id.*

114. *Id.* at *8.

115. *Id.* at *8, 22.

116. *Id.* at *22.

117. *Id.* at *22-23.

118. *Id.* at *34.

119. *Id.* at *31.

> action. Instead, she resorts to arguing—just as she did regarding her claims under the IPLA—that because she made reference to breach of warranty claims and because such claims can be brought separately from IPLA claims, her complaint is sufficient . . . . Again, the court is optimistic that Cavender will clarify these claims in an amended complaint . . . . Like all her claims, Cavender's breach of warranty claim or claims face obstacles. Whether she can overcome those obstacles depends on what she pleads in her amended complaint.[120]

The court also found the IPLA preempted common law claims in another 2016 personal injury product liability case, *Parks v. Freud America, Inc.*[121] In *Parks*, Judge Larry McKinney determined the "IPLA *preempts* any common law negligence theory of liability with respect to the burden of proof."[122] Plaintiffs unsuccessfully tried to suggest that one of the defendants alleged to be in the chain of distribution of a high-speed power tool could be held liable on a common law theory outside of the IPLA as an apparent manufacturer pursuant to Restatement (Second) of Torts § 400.[123]

Some recent federal cases, including two decided during the 2016 survey period, have nodded in the direction of IPLA exclusivity in product liability cases, but describe the defunct common law-based claims as being "merged" or "subsumed" into the IPLA.[124] Although those terms are not incorrect in the context of common law personal injury negligence claims that would otherwise be covered by the negligence standard now applicable to design and warning defect theories under the IPLA, they do not aptly describe what should happen to tort-based breach of implied warranty claims because there is no analog for those claims in the IPLA. It is hard to imagine how such claims could survive on their own after being merged or subsumed when the very statute into which they are being folded does not endorse them as viable claims. The better term, therefore, seems to be "preempted," particularly when it comes to tort-based breach of implied warranty theories. And, the better practice seems to be dismissal as opposed to allowing them to survive post-"merger" along with viable IPLA

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120. *Id.* at *36-37 (citations omitted).

121. No. 2:14-cv-00036-LJM-WGH, 2016 U.S Dist. LEXIS 7525 (S.D. Ind. Jan. 22, 2016).

122. *Id.* at *16 (emphasis added).

123. *Id.*

124. *See, e.g.*, Cincinnati Ins. Co. v. Lennox Indus., Inc., No. 3:14-CV-1731, 2016 U.S. Dist. LEXIS 54540, at *3-4 (N.D. Ind. Apr. 25, 2016) (explaining common law tort-based breach of warranty claims were subsumed by the IPLA); Lyons v. Leatt Corp., No. 4:15-CV-17-TLS, 2015 WL 7016469, at *16 (N.D. Ind. Nov. 10, 2015) (same); Lautzenhiser v. Coloplast A/S, No. 4:11-cv-86-RLY-WGH, 2012 WL 4530804 (S.D. Ind. Sept. 29, 2012) (discussing tort-based implied warranty claims merged with the IPLA claims); Atkinson v. P&G-Clairol, Inc., 813 F. Supp. 2d 1021, 1024 (N.D. Ind. 2011) (noting tort-based breach of warranty claims merged with the IPLA); Gardner v. Tristar Sporting Arms, Ltd., No. 1:09-cv-0671-TWP-WGH, 2010 U.S. Dist. LEXIS 97188, at *6-7 (S.D. Ind. Sept. 15, 2010) (explaining IPLA subsumes both strict liability and negligence actions).

claims.

Notwithstanding the majority of the cases that recognize IPLA exclusivity or "preemption" in personal injury or property damage cases that involve the manufacture or sale of an allegedly defective product, a handful of peculiar decisions have allowed common law-based negligence claims to proceed *along with* or *in place of* IPLA-based claims when the tortfeasing conduct was the manufacture or sale of an allegedly defective product resulting in personal injuries or property damage.[125] Those decisions are difficult to square with the cases discussed above and the "regardless of substantive theory" language in the IPLA.

II. STATUTE OF REPOSE

The IPLA contains a statute of limitation and a statute of repose for product liability claims.[126] The limitations period is two years from the date of accrual.[127] The repose period is ten years from the date the product at issue was first delivered to the initial user or consumer.[128] 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.[129] Certain types of asbestos-related actions were excepted from the statute of repose.[130]

Of the handful of decisions that Indiana courts have issued in the last decade or so involving the statutory limitations and repose periods,[131] *Myers v. Crouse-*

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125. *See, e.g.*, Ritchie v. Glidden Co., 242 F.3d 713, 726-27 (7th Cir. 2001) (allowing a personal injury claimant to pursue a negligence theory based upon section 388 of the Restatement (Second) of Torts in a case in which the only alleged tortfeasing conduct was the sale of a defective product); Kennedy v. Guess, Inc., 806 N.E.2d 776, 783-84 (Ind. 2004) (allowing a personal injury plaintiff who could not otherwise impose liability against the defendant under the IPLA to nevertheless pursue a negligence theory based upon section 400 of the Restatement (Second) of Torts when the only alleged tortfeasing conduct was the sale of a defective product); *see also* Brosch v. K-Mart Corp., No. 2:08-CV-152, 2012 WL 3960787 (N.D. Ind. Sept. 10, 2012); Warriner v. DC Marshall Jeep, 962 N.E.2d 1263 (Ind. Ct. App. 2012); Deaton v. Robison, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007).

126. IND. CODE § 34-20-3-1 (2016).

127. *Id.* § 34-20-3-1(b)(1).

128. *Id.* § 34-20-3-1(b)(2).

129. *Id.*

130. *Id.* § 34-20-3-2, *declared unconstitutional by* Myers v. Crouse-Hinds Div. of Cooper Indus., Inc., 53 N.E.3d 1160 (Ind. 2016), *reh'g denied*, (Apr. 28, 2016).

131. *See, e.g.*, Hartman v. EBSCO Indus., Inc., No. 3:10-CV-528-TLS, 2013 WL 5460296, at *1 (N.D. Ind. Sept. 30, 2013), *aff'd*, 758 F.3d 810 (7th Cir. 2014); C.A. v. Amli 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); Technisand, Inc. v. Melton, 898 N.E.2d 303 (Ind. 2008); Ott v. AlliedSignal, Inc., 827 N.E.2d 1144 (Ind. Ct. App. 2005).

Hinds Division of Cooper Industries, Inc.,[132] which was decided during the 2016 survey period, is one of the more significant ones and certainly one of the most controversial. There, a narrow majority of the Indiana Supreme Court held section 2 of the IPLA, which excepted certain asbestos-related actions from the ten-year statute of repose, violated the Indiana Constitution.[133] Plaintiffs brought suit when they developed mesothelioma years after being exposed to asbestos at their respective jobs.[134] The principal issue was whether the plaintiffs' claims were barred under sections 1 and 2 of the IPLA and Indiana case law interpreting the IPLA.[135] Under existing case law and interpretation of the statute of repose, the actions were time-barred.[136]

The court noted that section 1 of the IPLA applied to product liability actions in general, and section 2 applied to asbestos-related actions against defendants "who both mined and sold raw asbestos."[137] Section 1 possessed a ten-year statute of repose, while no statute of repose applied to section 2.[138] In *AlliedSignal v. Ott*, the Indiana Supreme Court held defendants who sold asbestos-containing products, but did not mine and sell raw asbestos, were "within the ambit of Section 1."[139]

Plaintiffs alleged that the statute of repose provisions violated both the right to remedy clause[140] and equal privileges and immunities clause[141] of the Indiana Constitution.[142] For their equal privileges and immunities clause challenge, the plaintiffs alleged that section 2 drew an impermissible distinction between asbestos plaintiffs injured by defendants who both mined and sold raw asbestos or asbestos containing products, and asbestos plaintiffs who were injured by defendants who merely sold asbestos containing products and did not mine asbestos.[143] The court wrote, for equal privileges and immunities challenges, "[i]t is the claim . . . that defines the class."[144] In analyzing the claims, "it is the disparate classification alleged by the challenger, not other classifications, that warrants review."[145] To determine whether a statute complied with Indiana's equal privileges and immunities clause:

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132. 53 N.E.3d 1160 (Ind. 2016), *reh'g denied*, (Apr. 28, 2016).

133. *Id.* at 1168.

134. *Id.* at 1162.

135. *Id.* at 1162-63.

136. *Id.*

137. *Id.* at 1163; IND. CODE § 34-20-3-2 (2016); *see* AlliedSignal, Inc. v. Ott, 785 N.E.2d 1068 (Ind. 2003).

138. *Myers*, 53 N.E.3d at 1167.

139. 785 N.E.2d at 1073.

140. IND. CONST. art. 1, § 12.

141. IND. CONST. art. 1, § 23.

142. *Myers*, 53 N.E.3d at 1164.

143. *Id.*

144. *Id.* at 1165 (internal citations omitted).

145. *Id.*

> First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.[146]

For the first prong, the court determined section 2 of the IPLA created a disparate treatment for the classes at issue: asbestos victims who were injured by defendants who mined and sold asbestos could sue under section 2 and were not limited by a statute of repose, while plaintiffs injured by defendants who do not fit that category could only sue under section 1, and, thus, were subject to its ten-year statute of repose.[147] Under the second prong of the analysis, the court determined the two classes of asbestos victims were similarly situated, as they all suffered from asbestos-caused diseases with latency periods of more than ten years, yet only one class was excepted from the statute of repose.[148] The court held the unequal treatment of asbestos plaintiffs under section 2 violated the equal privileges and immunities clause of the Indiana Constitution.[149]

III. 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."[150] The most significant development in the law of preemption during the survey period came from the United States Supreme Court in *Puerto Rico v. Franklin California Tax-Free Trust*.[151] Ending decades of divided and conflicting opinions on the presumption against federal preemption, the majority held that "because the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."[152]

Federal preemption of product liability cases is an issue with which Indiana state and federal courts frequently have wrestled in the past several years.[153]

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146. *Id.* (citing Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994)).

147. *Id.* at 1165-66.

148. *Id.* at 1166.

149. *Id.*

150. 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)).

151. 136 S. Ct. 1938 (2016).

152. *Id.* at 1946 (internal quotation marks and citations omitted).

153. *See, e.g.*, Ossim v. Anulex Techs., Inc., No. 1:14-cv-00254-TWP-DKL, 2014 WL 4908574, at *2 (S.D. Ind. Sept. 30, 2014); Wilgus v. Hartz Mountain Corp., No. 3:12-CV-86, 2013

Indiana courts continued that trend with two more preemption decisions during the 2016 survey period.[154] The first such case, *Ward v. Soo Line Railroad Co.*,[155] involved field preemption. There, the plaintiff alleged that he was injured when the locomotive engineer's seat he was occupying collapsed.[156] The complaint asserted multiple claims against multiple defendants, including state law defective design, manufacture, and warning claims against the manufacturer of the seat (Seats) and the manufacturer's parent corporation (Nordic Group).[157] The plaintiff also brought a state law negligence claim against the company that installed the seat (GE).[158] Seats, Nordic Group, and GE moved to dismiss these state law claims on preemption grounds.[159]

Federal legislation, the Locomotive Inspection Act ("LIA"),[160] creates "a national safety standard for locomotive equipment."[161] The court noted that although LIA does not contain an express preemption provision, the U.S.

WL 653707, at *1 (N.D. Ind. Feb. 19, 2013); Cook v. Ford Motor Co., 913 N.E.2d 311 (Ind. Ct. App. 2009); Roland v. Gen. Motors Corp., 881 N.E.2d 722, 727 (Ind. Ct. App. 2008); Tucker v. SmithKline Beecham Corp., 596 F. Supp. 2d 1225, 1238 (S.D. Ind. 2008); *see also* Alberts et al., *supra* note 47, at 1143-45.

154. Another decision, *McAfee v. Medtronic, Inc*., No. 1:12-CV-417-RLM, 2016 U.S. Dist. LEXIS 59734 (N.D. Ind. May 5, 2016), was issued after reconsideration during the 2016 survey period. Its companion case, *McAfee v. Medtronic, Inc*., No. 1:12-CV-417 RLM, 2015 WL 3617755 (N.D. Ind. June 4, 2015), was addressed in last year's product liability survey article. *See* Alberts, et al., *supra* note 47, at 1144. Two additional cases discussed federal preemption, but not in great depth. In *In re Cook Medical, Inc.*, No. 1:14-ml-02570-RLY-TAB, 2016 WL 2854169 (S.D. Ind. May 12, 2016), Magistrate Judge Tim Baker overruled Defendant's motion for a protective order seeking to bar Plaintiffs from seeking discovery concerning Defendant's alleged failure to report adverse effects associated with its intravenous filters to the Food and Drug Administration. *In re Cook Medical, Inc.*, 2016 WL 2854169, at *3. Defendant argued that because "fraud-on-the-FDA" claims were impliedly preempted as held in *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), such discovery should be disallowed. *In re Cook Medical, Inc.*, 2016 WL 2854169, at *1-2. Magistrate Judge Baker agreed that (1) "fraud-on-the-FDA" claims were preempted, but Plaintiffs made no such claims; and (2) that Defendant's reports and reporting practices were relevant to Plaintiffs' substantive claims unaffected by preemption. *Id.* at *1-2.

In *Thompson v. St. Jude Medical, Inc.*, No. 2:16-cv-00041-LJM-MJD, 2016 WL 1089978 (S.D. Ind. Mar. 21, 2016), Judge Larry McKinney granted Defendants' motion to dismiss on the grounds that Plaintiff failed to allege that the medical device violated a specific federal standard, a necessary predicate to escape express preemption under the Medical Device Amendments of 1976, but did so without prejudice and with leave to amend. *St. Jude Medical, Inc.*, 2016 WL 1089978, at *1-2.

155. No. 2:14-CV-00001, 2016 U.S. Dist. LEXIS 80378 (N.D. Ind. June 21, 2016).

156. *Id.* at *1-2.

157. *Id.* at *2-3.

158. *Id.* at *3.

159. *Id.*

160. 49 U.S.C. §§ 20701-20703 (2012).

161. *Ward*, 2016 U.S. Dist. LEXIS 80378, at *13.

Supreme Court held in *Napier v. Atlantic Coast Line Railroad Co.*,[162] that Congress intended for federal legislation to occupy the field with regard to the regulation of locomotive equipment.[163] The court further noted that the Supreme Court in *Kurns v. Railroad Friction Products Corp.*[164] "held that the LIA preempted state law products liability claims against railroad component manufacturers and distributors."[165] The plaintiff's state law claims based on defective design and manufacture of the seat were clearly preempted by LIA; thus, the court granted Seats and Nordic Group's motion to dismiss those state law claims.[166] With regard to GE, the plaintiff alleged state law negligence claims stemming from GE's installation of the seat.[167] The plaintiff argued that this claim was not preempted by LIA because "a negligent installation claim is not contemplated by LIA."[168] The court rejected this argument, finding that LIA preemption extends to all claims pertaining to the construction of a locomotive: "Because claims of negligent installation of locomotive seats are directed at locomotive equipment, they are preempted by the LIA."[169]

Finally, the plaintiff argued that his state law claims were based upon a federal standard of care under LIA; therefore, the claims should be allowed to proceed because their enforcement would not undermine the goals of LIA.[170] The court rejected this argument, finding the plaintiff's complaint did not appear to be based on alleged violations of a federal standard of care under LIA; rather, it appeared to present state law claims sounding in product liability and common law negligence.[171] Thus, they were preempted by LIA.[172]

The second preemption case, *Lane v. Boston Scientific Corp.*,[173] addressed express preemption in the medical device context. In that case, the plaintiff suffered from back pain and was implanted with a medical device designed to deliver electrical pulses to his back.[174] The medical device began administering strong, painful shocks, and both the manufacturer and the plaintiff's doctor recommended that it be replaced.[175] The device was a Class III Medical Device, and thus subject to the following express preemption provision:

> [N]o State or political subdivision of a State may establish or continue in

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162. 272 U.S. 605, 611 (1926).
163. *Ward*, 2016 U.S. Dist. LEXIS 80378, at *5-6.
164. 565 U.S. 625 (2012).
165. *Ward*, 2016 U.S. Dist. LEXIS 80378, at *6.
166. *Id.* at *8, 20-21.
167. *Id.* at *8-10.
168. *Id.* at *9.
169. *Id.* at *10.
170. *Id.* at *14.
171. *Id.* at *17.
172. *Id.* at *18.
173. No. 3:14 CV 1982, 2016 U.S. Dist. LEXIS 130989 (N.D. Ind. Sept. 26, 2016).
174. *Id.* at *1-2.
175. *Id.* at *2.

> effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.[176]

Relying on *Medtronic, Inc. v. Lohr*[177] and *Bausch v. Stryker Corp.*,[178] the court noted that the preemption provision did not preclude a plaintiff from asserting a "parallel" state law claim "based on a violation of the federal laws and regulations applicable to the medical device."[179] Thus, the essential question was whether the plaintiff's complaint sufficiently set forth state law claims based on violations of federal law.[180] The plaintiff's complaint alleged the device was not manufactured in compliance with federal requirements, it was adulterated in violation of federal standards, and it failed to conform to the FDA-approved specifications for the product.[181] The manufacturer argued that these claims failed to sufficiently plead a parallel state law claim and should thus be dismissed on preemption grounds.[182] Specifically, the manufacturer argued that the plaintiff's allegations were conclusory and unsupported by facts.[183] Simply because the device malfunctioned did not necessarily mean that it was manufactured in violation federal regulations—the device could have failed due to mishandling during implantation, or any other number of reasons.[184]

The court denied the manufacturer's motion to dismiss, largely because the plaintiff could not be expected to plead the claims with more specificity in the absence of discovery.[185] Much of the case law relied upon by the manufacturer was outside the Seventh Circuit.[186] The relevant Seventh Circuit precedent, *Bausch v. Stryker Corp.*,[187] suggested that dismissal would be inappropriate where, as here, discovery was necessary to obtain the confidential information necessary to more specifically define the claims.[188] Thus, the court concluded the plaintiff's allegations were sufficient to "plead a plausible state claim based on possible violation(s) of federal standards."[189]

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176. 21 U.S.C. § 360k(a) (2012).
177. 518 U.S. 470 (1996).
178. 630 F.3d 546 (7th Cir. 2010).
179. *Lane*, 2016 U.S. Dist. LEXIS 130989, at *3.
180. *Id.* at *4.
181. *Id.* at *4-5.
182. *Id.* at *5.
183. *Id.* at *5-6.
184. *Id.* at *6.
185. *Id.* at *7-8.
186. *Id.* at *6.
187. 630 F.3d 546 (7th Cir. 2010).
188. *Lane*, 2016 U.S. Dist. LEXIS 130989, at *7-8.
189. *Id.* at *9.

IV. EVIDENTIARY ISSUES IN PRODUCT LIABILITY CASES

Indiana state and federal courts frequently address evidentiary issues that arise in product liability cases. Those cases do not always interpret the IPLA in the same ways as the cases addressed in the sections above. They are, however, valuable for product liability practitioners because they provide guidance as to the proof necessary to establish liability in cases in which the operative theory of recovery is one that the IPLA embraces. Admissibility of opinion witness testimony has been the most frequently addressed issue in this context.[190] Two cases decided during the 2016 survey period once again involved the admissibility of opinion testimony. One of those cases also dealt with the use of Rule 30(b)(6) corporate representative testimony. This Article will consider the opinion witness admissibility issues first.

Recall that the *Cincinnati Insurance Co. v. Lennox Industries, Inc.*[191] case involved product liability claims stemming from a fire.[192] Defendant Lennox moved to strike the cause-and-origin investigative report offered by a fire investigator from whom the plaintiff sought to elicit opinion testimony.[193] The investigator opined that the fire originated inside the air condensing unit.[194] Lennox also moved to strike the opinion of a purported opinion witness with regard to electrical engineering.[195] The engineer conducted exams and tests, and concluded that the fire originated inside the air condensing unit at the compressor connection.[196] However, the engineer clarified that he was not offering an opinion about whether the fire resulted from a defective or unreasonably dangerous characteristic of the air condensing unit.[197] Lennox moved to strike the investigator's report because it was "unsubstantiated" and improper under *Daubert*.[198] Lennox further argued that the reports were inadmissible hearsay because they were not sworn to or subscribed under penalty of perjury.[199]

The court denied Lennox's motion to strike to the extent it challenged the

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190. *See, e.g.*, Piltch v. Ford Motor Co., 778 F.3d 628 (7th Cir. 2015) (describing role of expert testimony in context of both design defect theory and manufacturing defect theory); Leal v. TSA Stores, Inc., No. 2:13 CV 318, 2014 WL 7272751, at *1 (N.D. Ind. Dec. 17, 2014) (explaining the need for expert testimony in design case); Simmons v. Philips Elecs. N. Am. Corp., No. 2:12-CV-39-TLS, 2015 WL 1418772, at *1 (N.D. Ind. Mar. 27, 2015) (noting technical requirements for expert affidavits).

191. No. 3:14-CV-1731, 2016 U.S. Dist. LEXIS 15385 (N.D. Ind. Feb. 9, 2016), *reconsideration granted in part and denied in part*, No. 3:14-CV-1731, 2016 U.S. Dist. LEXIS 54540 (N.D. Ind. Apr. 25, 2016).

192. *Id.* at *2.

193. *Id.* at *4, 10; FED. R. CIV. P. 26(a)(2)(B).

194. *Lennox*, 2016 U.S. Dist. LEXIS 15385, at *4.

195. *Id.* at *5, 10.

196. *Id.* at *6.

197. *Id.*

198. *Id.* at *10.

199. *Id.*

admissibility of the expert reports, because motions to strike are heavily disfavored and usually only granted in circumstances under which the contested evidence caused prejudice to the moving party.[200] In this case, the court found it could consider the reports without needing to employ a motion to strike.[201]

The court held the reports were admissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Down Pharmaceuticals, Inc*.[202] Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.[203]

Additionally, *Daubert* created a two-pronged test for admissibility of evidence based upon the "scientific knowledge" mentioned in Rule 702.[204] Admissible evidence must be both relevant and reliable.[205] To be reliable, "scientific evidence must be reliable in the sense that the expert's testimony must present genuine scientific knowledge."[206] To be relevant, "the testimony must assist the trier of fact to understand the evidence in the sense that it is relevant to or 'fits' the facts of the case."[207]

In the *Lennox* case, the court found the reports from the investigator and the electrical engineer were both reliable and relevant.[208] According to the court, both of them used the scientific method and relied upon the National Fire Protection Association Guide for Fire and Explosion Investigations[209] to conduct their investigations and reach their conclusions.[210] The court reasoned that the testimony of both witnesses would help a jury in determining the cause of the fire at issue.[211] The court, therefore, held the testimony and reports of both witnesses

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200. *Id.*
201. *Id.* at *11.
202. 509 U.S. 579 (1993).
203. FED. R. EVID. 702.
204. 509 U.S. at 592.
205. *Lennox*, 2016 U.S. Dist. LEXIS 15385, at *11.
206. *Id.* at *12.
207. *Id.*
208. *Id.* at *13.
209. NAT. FIRE PROTECTION ASS'N, GUIDE FOR FIRE AND EXPLOSION INVESTIGATIONS 921 (2012).
210. *Lennox,* 2016 U.S. Dist. LEXIS 15385, at *13.
211. *Id.* at *15.

were admissible under Federal Rule of Evidence 702 and *Daubert*.[212]

Timm v. Goodyear Dunlop Tires North American, Ltd.[213] also dealt with opinion witness admissibility issues in the context of a motion to strike and a motion to compel.[214] The case involved a motorcycle accident and an allegedly defective tire.[215] The plaintiffs sued multiple defendants, including the manufacturer of the motorcycle, Harley-Davidson, and the manufacturer of the motorcycle tire, Goodyear Dunlop Tires North America ("Goodyear").[216] The plaintiffs served a discovery request on Goodyear seeking "[a]ny and all communications, whether by mail, email, or otherwise advising or discussing and [sic] alleged or suspected failure or defect in a Dunlop D402 tire mounted on the rear of a Harley-Davidson motorcycle involved in a crash accident."[217] The D402 tire had been manufactured since 1990 in many sizes and load capacities.[218] Goodyear objected to the request as burdensome and overly broad.[219] Notwithstanding that objection, Goodyear agreed to produce responsive documents based on a narrower scope and timeframe.[220] The plaintiffs did not meet and confer with Goodyear regarding its response.[221] Instead, they filed a motion to compel seeking discovery on all Dunlop tires "mounted on the rear of a Harley-Davidson motorcycle that suddenly deflated."[222] Goodyear responded to the motion to compel, and the plaintiffs filed a reply.[223] The reply requested that Goodyear produce additional items that were not discussed in the plaintiffs' original motion to compel.[224] The plaintiffs also filed several exhibits with their reply that contained information covered by the parties' protective order.[225]

Goodyear moved to strike the reply and the exhibits.[226] The court granted Goodyear's motion to strike the plaintiffs' reply because it sought "relief other than that requested in the initial Motion to Compel and include[d] new arguments, information that must be disregarded by the Court."[227] The court also struck the exhibits that were subject to the protective order because they related

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212. *Id.*

213. No. 2:14-CV-232-PPS-JEM, 2016 U.S. Dist. LEXIS 89063, at *2 (N.D. Ind. July 8, 2016).

214. No. 2:14-CV-232-PPS-JEM, 2015 U.S. Dist. LEXIS 169136, at *2 (N.D. Ind. Dec. 17, 2015).

215. *Id.* at *3.

216. *Id.* at *1-3.

217. *Id.* at *7.

218. *Id.* at *11.

219. *Id.* at *9.

220. *Id.* at *9-10.

221. *Id.* at *10.

222. *Id.* at *3.

223. *Id.* at *3-4.

224. *Id.* at *4.

225. *Id.*

226. *Id.*

227. *Id.* at *6.

to the improperly raised issues in the plaintiffs' reply.[228] In addition, the court denied the plaintiffs' motion to compel.[229]

The court first noted that the plaintiffs failed to meet and confer with Goodyear before filing their motion to compel, which was a violation of Federal Rule of Civil Procedure 37 and Local Rule 37-1 of the Northern District of Indiana.[230] In addition, the plaintiffs' original document request was overly broad, and the plaintiffs did not identify any problems with Goodyear's proposed narrowing of the discovery request.[231] Finally, the information sought in the plaintiffs' motion to compel was significantly broader than the information sought in their original document request—the document request was limited to Dunlop D402 tires, while the motion to compel sought information on all Dunlop tires.[232] The court denied the plaintiffs' motion to compel, and directed Goodyear to submit an itemization of its costs and attorneys' fees incurred in preparing its response.[233]

As briefly noted above, the *Timm* decision also provides some guidance regarding the proper role of 30(b)(6) testimony.[234] Recall that the case involved a motorcycle accident and an allegedly defective tire.[235] The plaintiffs sued multiple defendants, including the manufacturer of the motorcycle (Harley-Davidson) and the manufacturer of the tire (Goodyear).[236] The plaintiffs sought several depositions[237] and, specifically requested that those depositions provide information regarding testing of the tire at issue and information regarding an agreement between the Harley-Davidson and Goodyear.[238] The plaintiffs argued that the defendants were obligated to produce witnesses with personal knowledge of these topics.[239] The defendants argued that these topics were more properly addressed in a 30(b)(6) deposition, and that 30(b)(6) representatives had been made available to the plaintiffs.[240]

The crux of the plaintiffs' argument was that the 30(b)(6) witnesses did not have personal knowledge of all of the facts; therefore, their testimony would be inadmissible hearsay.[241] The court pointed out that the plaintiffs apparently

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228. *Id.* at *6-7.

229. *Id.* at *14.

230. *Id.* at *10-11.

231. *Id.* at *11-12.

232. *Id.* at *12.

233. *Id.* at *14.

234. Timm v. Goodyear Dunlop Tires N. Am. Ltd., No. 2:14-CV-232-PPS-JEM, 2016 U.S. Dist. LEXIS 89063 (N.D. Ind. July 8, 2016).

235. *Id.* at *2.

236. *Id.* at *1-3.

237. *Id.* at *3.

238. *Id.* at *4-5.

239. *Id.*

240. *Id.* at *5-6.

241. *Id.* at *6-7.

misunderstood the nature of 30(b)(6) representatives.[242] Such a representative can testify from his or her personal knowledge, but that representative is also authorized to testify to matters known within the organization.[243] Thus, the mere fact that a 30(b)(6) representative does not have first-hand knowledge of all of the matters about which he or she testifies is not disqualifying.[244] The court noted, however, that a party may need to produce additional fact witnesses if the 30(b)(6) representative "could not provide sufficient information about the topics they were designated to address."[245] In this case, however, the plaintiffs' motion to compel failed to identify an area of testimony that could not be handled by a 30(b)(6) representative.[246] In fact, the plaintiffs' motion to compel did not specify "whose deposition(s) Plaintiffs would like to take, the topics of the deposition(s), and why previous depositions were insufficient to explore those topics."[247] In the absence of such information, the court was unable to determine whether it could compel the defendants' response.[248]

242. *Id.* at *7.
243. *Id.*
244. *Id.* at *7-8.
245. *Id.* at *8.
246. *Id.* at *8-9.
247. *Id.* at *9.
248. *Id.*