# X. Products Liability

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## A. *Introduction*

Judicial activity in Indiana during the survey period centered primarily on the development of two areas: First, the open and obvious danger rule after *Bemis Co. v. Rubush*,[1] and second, time limitations after the enactment of section five of the Indiana Product Liability Act.[2] Additionally, the issue of tort recovery for economic loss was introduced in Indiana at the federal district court level.[3]

These areas of judicial activity are the main focus of this Article. Legislative matters, such as the effect of Indiana's Comparative Fault Act on certain product liability issues, and the change in language of the 1983 amendment to the Indiana Product Liability Act dealing with the limiting standard of care required of a product seller under strict liability,[4] will also be addressed in this Article.[5]

## B. *Open and Obvious Dangers*

*1. Failure to Warn.*—In 1981, this writer stated that "[s]everal recent opinions handed down by the Indiana Court of Appeals are certain to substantially increase the product liability exposure of manufacturers of workplace products who sell in Indiana."[6] This statement referred specifically to four appellate court decisions[7] which would have expanded

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[1]427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982). *See infra* notes 6-80 and accompanying text.

[2]IND. CODE § 33-1-1.5-5 (1982) (amended 1983). *See infra* notes 84-194 and accompanying text. It should be noted here that during the survey period, the cases construed the unamended version of this statute. The 1983 amendments did not materially change the import of the statute for purposes of this Article. Therefore, all citations refer to the pre-1983 amendment form. The amended version of the statute appears at IND. CODE § 33-1-1.5-5 (Supp. 1984).

[3]*See infra* notes 195-206 and accompanying text.

[4]*See infra* notes 207-13 and accompanying text.

[5]*See infra* notes 69-80 and accompanying text (open and obvious dangers) and notes 181-82 and accompanying text (indemnity).

[6]Leibman, *Workplace Product Liability: Crumbling Indiana Defenses*, 25 RES GESTAE 312, 312 (1981) (footnote omitted).

[7]Conder v. Hull Lift Truck Inc., 405 N.E.2d 538 (Ind. Ct. App. 1980), *vacated*, 435 N.E.2d 10 (Ind. 1982); American Optical Co. v. Weidenhamer, 404 N.E.2d 606 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983); Shanks v. A.F.E. Indus. Inc., 403 N.E.2d 849 (Ind. Ct. App. 1980), *vacated*, 416 N.E.2d 833 (Ind. 1981); Bemis Co. v. Rubush, 401 N.E.2d 48 (Ind. Ct. App. 1980), *vacated*, 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

plaintiff recovery potential under Indiana common law. But with its decision during the current survey period in *American Optical Co. v. Weidenhamer*,[8] the Supreme Court of Indiana has now completed the process of substantially reversing all four of these cases.[9]

In *Weidenhamer*,[10] the Indiana Supreme Court rejected the appellate court's application of the principle that "'where the manufacturer is obligated to give an adequate warning of danger the giving of an inadequate warning is as complete a violation of its duty as would be the failure to give any warning.'"[11] The plaintiff, Weidenhamer, was a lathe operator employed by the International Harvester Company.[12] While at work, his right eye was injured when a heavy blow shattered the right lens of the safety glasses he was wearing. Weidenhamer then sued the two manufacturers of lenses who supplied Harvester, American Optical Company and U.S. Service Safety Company.

At trial, a conflict in the testimony arose as to how the accident had occurred. Weidenhamer claimed to have no idea what actually had hit him. Yet other witnesses, reconstructing the accident scenario from circumstantial evidence, concluded that the plaintiff had failed to detach the hoist from the casting he was about to turn in his lathe. This resulted in either the hook or the bar, components of the hoist, being jerked loose from the casting when Weidenhamer began to rotate it under power. According to this version, the swinging hook or bar must have delivered the blow to the plaintiff's eye. Weidenhamer's pretrial state-

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[8]457 N.E.2d 181 (Ind. 1983).

[9]Conder v. Hull Lift Truck, Inc., 435 N.E.2d 10 (Ind. 1982) (vacating 405 N.E.2d 538 (Ind. Ct. App. 1980)); Bemis Co. v. Rubush, 427 N.E.2d 1058 (Ind. 1981) (vacating 401 N.E.2d 48 (Ind. Ct. App. 1980)), *cert. denied*, 459 U.S. 825 (1982); Shanks v. A.F.E. Indus. Inc., 416 N.E.2d 833 (Ind. 1981) (vacating 403 N.E.2d 849 (Ind. Ct. App. 1980)). The acceptance of transfer of a case by the supreme court completely vacates the lower appellate court decision, and the supreme court's failure to comment negatively on grounds relied on by the court of appeals suggests, by implication, that those principles may in the future prove persuasive in other factual settings. For example, in Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538 (Ind. Ct. App. 1980), *vacated*, 435 N.E.2d 10 (Ind. 1982), the court of appeals relied on the principle that a product manufacturer could be held liable for failing to warn users of, or guard users from, foreseeable product misuses—a principle not at all clear under prior Indiana law. *See* 405 N.E.2d at 546. The supreme court cautioned that many misuses were reasonably unforeseeable but if changes or modifications "could be reasonably foreseen by the manufacturer to be a safety hazard and would not be apparent to the consumer or user that there could be liability of the manufacturer." 435 N.E.2d at 17. Note that the court reiterates the open and obvious danger rule in this quotation with the phrase: "would not be apparent to the consumer or user."

[10]457 N.E.2d 181.

[11]American Optical Co. v. Weidenhamer, 404 N.E.2d 606, 618 (Ind. Ct. App. 1980) (quoting Spruill v. Boyle-Midway Inc., 308 F.2d 79, 87 (4th Cir. 1965)), *vacated*, 457 N.E.2d 181 (Ind. 1983).

[12]The facts of the case are found at 457 N.E.2d at 182-86.

ments to the doctor and his workers' compensation forms were also consistent with this account of the accident.[13]

Neither the plaintiff, the lens manufacturers, nor the employer could say for certain whose lenses Weidenhamer was wearing at the time of the accident. However, the necessity for turning this case into one of alternative liability was avoided when the court of appeals noted that Weidenhamer had testified he was wearing American Optical lenses.[14] The court of appeals ruled that Weidenhamer must be bound by his testimony, and therefore granted the other manufacturer's motion for judgment on the evidence.[15]

The final issue in dispute was whether or not the American Optical lenses were defective, and if they were, whether or not the defect caused the plaintiff's injury. The plaintiff was unable to prove the existence of either a manufacturing or a design defect; the lens design apparently conformed to industry standards,[16] and the pieces of glass that remained after the shattering were too small to test if their manufactured quality conformed to the specified design standard.[17]

The gist of American Optical's defense was that no safety lens could withstand unlimited force, and an ordinary user should expect no greater protection. The court even noted that industry standards were not so stringent that they required safety lenses to be strong enough to withstand unlimited forces. Heavy blows of the type that allegedly broke the plaintiff's lens were well beyond both the product's and the industry's design standards.[18]

The plaintiff responded, however, that he had not been made aware that this limitation existed. Had he known that the glasses could break and shatter under forces that might be encountered on the job, he would have been more careful.[19] The plaintiff argued that the seller's failure

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[13]*Id.* at 183-84.

[14]The issue of alternative liability, in the event the actual defendant in *Weidenhamer* could not have been identified, is discussed in Leibman, *Products Liability, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 1, 35 n.213 (1981).

[15]457 N.E.2d at 183. The supreme court stated it "would be hard pressed to agree that [Weidenhamer's] testimony was 'clear and unequivocal' that he was wearing American glasses and lenses at that time." *Id.* But because the court found for defendants on causation grounds, the identity of the manufacturer issue did not have to be reached.

[16]*Id.* at 186-87.

[17]*Id.* at 185. Even if it could be shown that the actual lens plaintiff was wearing did not measure up to the manufacturer's design standards, the resulting manufacturing defect would not be a cause in fact of the injury because the blow to the lens far exceeded the capability of even a nondefectively manufactured lens.

[18]*Id.* at 186. The court did not rely on this unrefuted evidence as the jury was not bound by it. *Id.*

[19]"'I don't believe they would stand a bullet or things like this, but within the job, well, like I said there was no warning, there was nobody said watch out, you got to be careful, this was never said.'" *Id.* at 185 (quoting the plaintiff's testimony).

to warn of the glasses' inherent dangers[20] caused the lenses to be defective, and that defect was the proximate cause of his injury.[21]

The trial court denied defendant American Optical's motion for judgment on the evidence, thus allowing the failure to warn issue to go before the jury.[22] The jury found for the plaintiff, and the court of appeals affirmed.[23] The primary issue on appeal from the trial court was whether or not the manufacturer had adequately warned of the dangers of shattering. There were warning messages attached to the nosepiece of each pair of glasses delivered by American Optical to the employer.[24] Those printed warnings, however, never reached ultimate users such as the plaintiff because they were routinely removed from the glasses by the tool crib attendant prior to distribution.[25] The court of appeals never addressed the issue whether American Optical had the ultimate responsibility to deliver its warning to the employee if it had delivered the warning to the employer. Instead, it held that American Optical would be liable in any event because the warning lacked sufficient intensity in both content and form to overcome the attestations of safety that also accompanied the product.[26]

On transfer, the supreme court criticized the adequacy of the warning principle relied on by the court of appeals.[27] "[D]isagree[ing] with that court's entire analysis in this regard," the supreme court referred to the appellate court's finding of an inadequate warning as "debatable."[28] Although the case was decided on other grounds,[29] in dicta the court stated:

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[20]*See* American Optical Co. v. Weidenhamer, 404 N.E.2d 606, 620 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983) ("Weidenhamer's Instruction Defining a Defect"). Plaintiff brought his action under the "multiple theories of negligence, breach of implied warranty of merchantability and fitness for a particular purpose, breach of express warranty and strict liability in tort." 457 N.E.2d at 183.

[21]*See* American Optical Co. v. Weidenhamer, 404 N.E.2d 606, 621 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983) ("Weidenhamer's Instruction Concerning Strict Liability").

[22]The trial court denied U.S. Safety's motion as well, but the judgment against U.S. Safety was reversed. 404 N.E.2d at 609.

[23]*Id.*

[24]Plaintiff contested this evidence because the tool crib attendant testified he had never read the nosepiece warning although he testified he had seen the nosepiece tabs many times. Inasmuch as the court of appeals assumed that the alleged warning did in fact accompany the glasses, *id.* at 617, that allegation will be considered proved for the purposes of this analysis.

[25]457 N.E.2d at 185.

[26]American Optical Co. v. Weidenhamer, 404 N.E.2d 606, 617-19 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983).

[27]457 N.E.2d at 187.

[28]*Id.*

[29]The court found that the danger threatening Weidenhamer was open and obvious; it therefore held there was no duty to warn. *See infra* note 38 and accompanying text.

> It [seems] to us that it requires speculation beyond lawful limits to say that had the warning been in place when the product was delivered to the consumer, it would, nevertheless, have been to no avail, because it was printed in type much smaller than the trade name and promotional matter printed upon the box which contained it.[30]

Arguably, this gratuitous reference to warning adequacy suggests strongly that, in the future, users and consumers will be held far more responsible for reading and heeding warnings in Indiana than they would have been under the court of appeals' holding.[31]

When a product seller, or any other seller dealing with the public, sets about to create an impression in the purchaser's mind of safety, quality, authenticity, or any other positive aspect of the goods or services being marketed, that seller should not then be able to disclaim responsibility for the failure of that item to live up to the impression created. Only in cases when the disclaimer or warning is issued in sufficiently emphatic terms to overcome the effect of the original sales pitch should the product seller be allowed to disclaim responsibility.[32] To convince the consumer or user on the one hand with fortissimo protestations of performance and then to disclaim liability for nonperformance in pianissimo tones is to act in bad faith. It is a practice that harkens back to the worst abuses of caveat emptor. With regard to product safety, the twentieth century rejection of caveat emptor is nearly absolute.[33] The Indiana Supreme Court's overly broad criticism of the court of appeals findings is, therefore, regrettable.

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[30]457 N.E.2d at 187.

[31]In the court of appeals, American Optical challenged Weidenhamer's instruction, claiming it was incomplete in that it failed "to inform the jury that a manufacturer can assume its warning will be read and heeded." American Optical Co. v. Weidenhamer, 404 N.E.2d 606, 620 (Ind. Ct. App.. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983). The court of appeals rejected this challenge on the technical ground that the objection was raised for the first time on appeal. *Id.* at 620-21. Elsewhere, however, the appellate court stated: "Where there is a reasonable basis for a jury to find the alleged warning to be inadequate or non-existent, we find a manufacturer or supplier cannot rely upon such defective warning, and its removal or destruction by a third party before reaching the ultimate consumer is of no consequence." *Id.* at 619. The supreme court's attack on this analysis would appear to shift from supplier to user much of the responsibility for alerting to the product danger.

[32]A classic case illustrating this principle in a context other than product safety is Weisz v. Parke-Bernet Galleries, Inc., 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1971), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (N.Y. Sup. Ct. 1974), in which the court held that even where the purchaser of a forged painting had read and understood the seller's disclaimer of responsibility for authenticity, the seller would not be permitted to rely on that disclaimer because of the image of expertise the seller had carefully erected to impress buyers.

[33]With respect to consumer products, the ineffectiveness of such disclaimers is statutorily recognized in the Uniform Commercial Code. *See* U.C.C. § 2-719(3) (1976).

On the other hand, holding that an inadequate warning is equivalent to no warning at all is an overly broad interpretation of a useful principle. The idea behind such a rule is that warnings should be given in a manner so that they work. Many courts, however, use an all or nothing approach, whereby some absolute threshold of intensity for a warning statement is determined: if it is exceeded, the warning has legal validity; if it falls short, it will be treated as if it were invisible.

Certainly, the adequacy of a safety warning is fact sensitive.[34] For the court of appeals in *Weidenhamer* to find the warning printed on the safety glasses' nosepiece tabs was equivalent to no warning at all simply because it was in smaller type than the words SURE-GUARD SAFETY GLASS on the box, or because the trade name Super Armorplate was used in reference to the glasses, or because it failed to state that the lens might shatter, goes too far.[35] The adequacy of a warning should be a question for the jury under proper instructions, and is an appropriate factor for analysis under comparative fault principles as well.[36] But when even an "adequate" warning is highly unlikely to have averted the injury, perhaps the adequacy issue should be withheld from the jury.[37]

For its actual holding in *Weidenhamer*, the supreme court majority finessed the adequacy of warning issue found crucial by the court of appeals and, like the latter, took no position on whether the manufacturer has a duty to warn the ultimate user, the employee, in an employment situation. Instead, the supreme court held that there was no duty at all to warn in the circumstances at bar because, as a matter of law, the danger facing the plaintiff was, or should have been, open and obvious to him.[38]

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[34]For example, the poison label placed on a herbicide that is printed in English may be inadequate where the field workers are Hispanic, but it should be found valid where the users are Purdue graduates.

[35]American Optical Co. v. Weidenhamer, 404 N.E.2d 606, 617-18 (Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983).

[36]Given that there has been a warning that has failed to avert the accident, the fault may be with the party that had warned (the warning wasn't sufficiently powerful), or it may be with the party that was warned (the warning was ignored or was unreasonably misunderstood), or the fault may be with both parties (the warning by the seller could have been stronger, but it might have been effective if the product user had been more alert). In the latter case, under most comparative fault systems, the jury would be instructed to apportion liability. In Indiana, unfortunately, under the 1984 amendments to the Comparative Fault Act, apportionment of fault will not apply to strict laibility actions. Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § l, 1984 Ind. Acts 1468 (codified at IND. CODE § 34-4-33-2 (Supp. 1984)).

[37]*See infra* notes 41-47 and accompanying text.

[38]457 N.E.2d at 182, 187-88. The court relied on its decision in Bemis Co. v. Rubush, 427 N.E.2d 1058 (Ind. 1981), *cited at*, 457 N.E.2d at 182, which it had decided after the court of appeals' decision in American Optical Co. v. Weidenhamer, 404 N.E.2d 606

(Ind. Ct. App. 1980), *vacated*, 457 N.E.2d 181 (Ind. 1983). In *Bemis*, the supreme court reversed the court of appeals' affirmance of a jury verdict and entered judgment for the defendant, finding as a matter of law that the harm-causing instrumentality was both open and obvious. This aspect of *Bemis* is discussed in Leibman, *Products Liability, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 241, 258-60 (1983). For other discussions of *Bemis*, see Leibman & Sandy, *Can the Open and Obvious Danger Rule Coexist with Strict Tort Product Liability?: A Legal and Economic Analysis*, 20 AM. BUS. L.J. 299 (1982); Phillips, *Product Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982). In *Bemis*, the plaintiff had argued that, although the instrumentality which had struck him was open, and its functioning was obvious, the combination of events which led to the actual injury was not reasonably foreseeable and therefore the *danger*, as opposed to the instrumentality itself, was less than obvious. Rejecting this factual theory, the court's decision not to remand for a trial was a signal that Indiana would henceforth follow a broad interpretation of the open and obvious rule.

One commentator has suggested that the supreme court may have pulled back from the advanced *Bemis* position in Hoffman v. E.W. Bliss Co., 448 N.E.2d 277 (Ind. 1983). *See* Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 263-65 (1984). In *Hoffman*, the plaintiff was injured when a punch press allegedly cycled by itself while the plaintiff's hand was still between the punch and die. Again, the instrumentality (the press' ram) and its potential to smash fingers was open and obvious. The primary issue on appeal from a verdict for the defendants was whether or not an instruction which stated that the employer's failure to instruct the ultimate user that he should use available safety devices constituted intervening product misuse was an error. 448 N.E.2d at 281. The supreme court reversed the trial court and remanded, holding that there was a nondelegable duty to warn and instruct employees with respect to latent defects. Only when the user or consumer "'*uses a product in contravention of a legally sufficient warning*'" is the product misused. *Id.* at 283 (quoting Perfection Paint v. Konduris, 147 Ind. App. 106, 119, 258 N.E.2d 681, 689 (1970)) (emphasis added by the *Hoffman* court). The appellant manufacturer responded, however, that even if the instruction were in error, it was harmless because no warnings or instructions are necessary when the danger is open and obvious. *Id.* at 284-85. The court distinguished the everyday dangers posed by punch press rams which descend when the operator or some human agency activates the machine, from the extraordinary event of the machine activating itself because of "some internal malfunction or defect in the operating mechanisms of the press." *Id.* at 285. In the latter case, the danger is neither open nor obvious.

It might be argued, however, that if the point in the press where punch and die come together is recognized as a source of potential harm, the user should be on guard against the extraordinary as well as the ordinary event. If wearing pull-back cables will protect against the latter case, it will protect as well against the former. The answer to this argument is that the open and obvious danger rule is often looked upon as assumption of risk as a matter of law. *See* Micallef v. Miehle Co., 39 N.Y.2d 376, 384, 348 N.E.2d 571, 576, 384 N.Y.S.2d 115, 120 (1976); Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 541 (1974). Product users' knowledge, understanding, appreciation, and voluntariness is imputed to them when the risks are open and obvious. The user will be held to have knowledge of patent dangers he should have had even though, subjectively, he may be ignorant of them. But if the information is truly *unknowable*, courts will not then impute it to the user. Although the test for knowledge of danger under the rule is an objective one, even objective analysis would require the "reasonable user" to have knowledge and appreciation of the danger. If the actual user eschews safety devices either willfully or through ignorance, he can only be held contributorily responsible for awareness of the sorts of harm that a reasonable and prudent user might anticipate. A punch press operator, therefore, would not be expected

Despite the serious objection there might be to removing the obviousness of danger issue from the jury, the final determination of no liability in *Weidenhamer* was probably justified. The small typeface, together with the incomplete content of the message, should not have been ruled, as a matter of law, to have reduced the value of the warning to zero given the intervention of the tool crib attendant.[39] Even the concurring opinion followed the reasoning that if the warning had been delivered to the ultimate user, it may have proven adequate under the circumstances.[40]

Upon the defendant's motion for judgment on the evidence, Weidenhamer, in effect, argued that had he been warned that his lens might break and shatter under the enormous impact to which it was in fact subjected, he would have behaved differently by acting more carefully.[41] But for the lack of warning, he argued, the accident would not have occurred. Given the undisputed facts surrounding the accident, however, the claim that an adequate warning would have, or even might have, averted this injury was simply insufficient to establish that the inadequacy of the warning was a cause in fact of the harm.

Finally, it remains to be seen what effect the intervention of the tool crib attendant had on the adequacy of warning issue. In *Burton v. L.O. Smith Foundry Products Co.*,[42] the Seventh Circuit Court of Appeals, applying Indiana law, ruled that the duty of the workplace product manufacturer to warn the ultimate user depends on the manufacturer's control of events in the workplace.[43] Likewise, the Indiana Supreme Court, in *Hoffman v. E.W. Bliss Co.*,[44] held that where there is limited or no control over the workplace, it is sufficient to warn the

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to have knowledge that his machine might activate itself. The *Hoffman* case does not appear to be much of a retreat from the *Bemis* holding on this count.

Where the *Bemis* case went much too far was in its taking from the jury the determination of what sorts of harm the reasonable user should be expected to anticipate. The scope of extraordinary events which a reasonable user does not expect to happen goes beyond the merely freaky and those caused by malfunctioning devices. The reasonable machine user may be on constant guard against moving parts; but like the plaintiff in *Bemis*, his or her concentration may be broken by unexpected and frightening breaks in the work rhythm. Under those circumstances, the plaintiff should be entitled to a jury trial on the issue of obviousness. *See* Liebman & Sandy, *supra*, at 306-06 (discussing this argument in *Bemis*).

[39]Justice DeBruler concluded that issuing the lenses with no warning made them defective, but if there had been no detachment of the warning by the tool crib attendant, "[there would have been] insufficient evidence that the glasses were defective because of inadequate warnings by the manufacturer." 457 N.E.2d at 189 (DeBruler, J., concurring).

[40]*Id.* at 188-89 (DeBruler, J., concurring). *See supra* notes 35-42 and accompanying text.

[41]*See supra* note 19 and accompanying text.

[42]529 F.2d 108 (7th Cir. 1976).

[43]*Id.* at 111.

[44]448 N.E.2d 277 (Ind. 1983).

employer of product dangers.[45] The *Hoffman* court stated that "the manufacturer has a duty to warn of potential dangers associated with the use of the product that is otherwise free from latent design or manufacturing defects only where he has some control over the manner in which the employer incorporates the product into his operation."[46] Clearly, the manufacturer must reach out to the user with his warning message if at all possible, but he will be absolved of responsibility if no control over the workplace is available to him. Thus, it may have been necessary, under Indiana law, to impute to Weidenhamer the receiving of the warning as originally printed on the nosepiece tab, yet in *Weidenhamer* neither appellate court sought to resolve the delivery of warning question.

Under a cause in fact analysis, however, this could be an issue. If it were found that American Optical had done what it reasonably could to deliver its warning, the plaintiff would have to show that, if he had received an "adequate" warning, he would have conducted himself differently than he would have had he merely received the nosepiece tab with its purportedly inadequate warning. Even if the warning then had been determined inadequate, so that American Optical would not have received the benefit of a "read and heed" presumption that goes with an adequate warning,[47] the plaintiff would still be expected to present some credible cause in fact evidence to escape a directed verdict. The plaintiff's naked assertion that his conduct as a lathe operator would

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[45]*Id.* at 281. In the *Hoffman* case, the court ruled that the following two paragraphs, from separate instructions, when taken together, properly stated the law:

> "If you find that the plaintiff was either inadequately instructed and/or failed to use available safety devices which was [sic] the proximate cause of his injury, then I instruct you that this would constitute a misuse of the equipment and be a complete defense to the allegations against E.W. Bliss Company."
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> . . . .
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> "You are instructed that where warnings or instructions are required to make a product nondefective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risk and inherent limits of the product. The duty to provide a nondefective product is nondelegable."

*Id.* at 281-82.

[46]*Id.* at 283 (citation omitted).

[47]*See* RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965) ("Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."). In Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976), the court prefaced the word warning with the modifier "adequate," 332 N.E.2d at 826. If a warning is given but found to be inadequate, the seller does not obtain the benefit of the presumption. But even without the presumption, the plaintiff must produce some credible evidence that, but for the absence of an adequate warning, the injury would not have occurred.

have been positively affected by a lens manufacturer's warning of shatterability is in this writer's view insufficient evidence to establish the prima facie element of cause in fact.

*2. Failure to Guard.*—If the open and obvious danger rule retains any general validity, it is in the area of duty to warn. Warning of a patent danger is not only redundant, it can prove counterproductive.[48] However, relieving a product seller from a duty to *physically guard* users from open hazards when feasible to do so is an anachranistic interpretation of the rule rejected by most jurisdictions, which have recently considered the question.[49] Such a broad holding actively discourages the deployment of essential safety devices.

In *Bryant-Poff, Inc. v. Hahn*,[50] the plaintiff was severely injured when his arm was caught in an elevator leg manufactured by the defendant. The leg was activated by a person on the ground while the eighteen-year-old plaintiff was painting the mechanism from a platform ninety feet above the ground. When first delivered, the leg had a disconnect by which one ascending the machine could deactivate the mechanism before working on it. At the time of the accident the disconnect may have been inoperative; but in any event, the plaintiff had not been made aware of its existence, nor had he been warned of the danger of placing his hand in a position where it could be trapped if the mechanism was started up from below. There was also conflicting

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[48]*See* A. WEINSTEIN, A. TWERSKI, H. PIEHLER & W. DONAHER, PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT 64-68 (1978). "The overuse of warnings invites consumer disregard and ultimate contempt for the warning process." *Id.* at 68.

[49]*See* Franchetti v. Intercole Automation, Inc., 523 F. Supp. 454 (Del. 1981). In this diversity case the district court was required to predict how the Delaware Supreme Court would rule on the patent danger rule. The court cited Darling, *The Patent Danger Rule: An Analysis and a Survey of Its Vitality*, 29 MERCER L. REV. 583 (1978), and noted "that while the rule appears viable in some seventeen jurisdictions, it has been rejected in eighteen and has been neither accepted nor rejected in sixteen." 529 F. Supp. at 536-37. The court noted the heavy criticism the rule has sustained in recent years and concluded "some courts have taken a different view, but to the extent that there is a trend in recent opinion, it would seem to be away from the rule. *See Darling* at 606-09 (which notes, inter alia, that virtually all decisions repudiating the rule have been made since 1970)." 529 F. Supp. at 537. The court predicted Delaware would follow this trend. *Id.* at 538.

*See also* Auburn Mach. Works Co. v. Jones, 366 So. 2d 1167 (Fla. 1979).

> The modern trend in the nation is to abandon the strict patent danger doctrine as an exception to liability and to find that the obviousness of the defect is only a factor to be considered as a mitigating defense in determining whether a defect is unreasonably dangerous and whether plaintiff used that degree of reasonable care required by the cirucmstances.

*Id.* at 1169. *But see* Pressley v. Sears-Roebuck & Co., PROD. LIAB. REP. (CCH) ¶ 10,164 (N.D. Ga. Aug. 13, 1984) (predicting Georgia would continue to follow a broad interpretation of the open and obvious danger rule).

[50]454 N.E.2d 1223 (Ind. Ct. App. 1982), *transfer denied*, 453 N.E.2d 1171 (Ind. 1983), *cert. denied*, 104 S. Ct. 1433 (1984).

testimony as to whether or not the manufacturer had provided the purchaser with instructions concerning the switches.

The plaintiff brought suit under negligence and strict liability theories,[51] alleging that Bryant-Poff had failed to warn of the danger[52] and had failed to provide a barrier guard which was called for by industry standards as early as 1957.[53] The jury found for the plaintiff but the court of appeals reversed,[54] citing *Bemis Co. v. Rubush*.[55] The court of appeals read *Bemis* to hold that even if the lack of a guard makes the product "unreasonably dangerous," no liability can attach if the injury-causing defect is open and obvious to the injured party.[56] Yet this interpretation goes further than the defendant's argument in *Bemis*. There, the defendant sought to reconcile strict liability theory with the open and obvious danger rule by asserting that an obvious danger is not, by definition, unreasonable.[57] At least the court of appeals eschewed that bit of circular reasoning.

The Indiana Supreme Court denied transfer of *Hahn*, to which Justice Hunter wrote a strong dissent in which Justice DeBruler concurred.[58] Justice Hunter noted the dissonance in finding "something unreasonably dangerous but also open and obvious."[59] Although preferring the treatment of obviousness of danger as but one factor in determining whether the danger is beyond the contemplation of the ordinary user, he argued that the case at bar was incorrectly decided even under the *Bemis* holding.[60] Relying on *Hoffman v. E.W. Bliss Co.*,[61] he argued that the obviousness of the danger should be a jury question under which the jury could find that the elevator leg contained a latent defect.[62] For the scintilla of evidence necessary for the plaintiff

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[51]454 N.E.2d at 1224.

[52]Bryant-Poff, Inc. v. Hahn, 453 N.E.2d 1171, 1174 (Ind. 1983) (Hunter, J., dissenting) (discussing the failure to warn issue), *cert. denied*, 104 S. Ct. 1433 (1984).

[53]454 N.E.2d at 1224.

[54]*Id.* at 1224-25.

[55]427 N.E.2d 1058 (Ind. 1981).

[56]454 N.E.2d at 1225.

[57]Bryant-Poff, Inc. v. Hahn, 453 N.E.2d 1171, 1172 (Ind. 1983) (Hunter, J., dissenting), *cert. denied*, 104 S. Ct. 1433 (1984). "Under the *Bemis* rationale, the Court of Appeals' decision is inherently inconsistent because a product cannot be unreasonably dangerous if it had an open and obvious danger." 453 N.E.2d at 1172.

[58]Bryant-Poff, Inc. v. Hahn, 453 N.E.2d 1171, 1172 (Ind. 1983) (Hunter, J., dissenting), *cert. denied*, 104 S. Ct. 1433 (1984). Interestingly enough, this was the same split as in Bemis Co. v. Rubush, 427 N.E.2d 1058.

[59]Bryant-Poff, Inc. v. Hahn, 453 N.E.2d 1171, 1171-72 (Ind. 1983) (Hunter, J., dissenting), *cert. denied*, 104 S. Ct. 1433 (1984).

[60]*See supra* note 57.

[61]448 N.E.2d 277 (Ind. 1983).

[62]Bryant-Poff, Inc. v. Hahn, 453 N.E.2d 1171, 1172 (Ind. 1983) (Hunter, J., dissenting) (citing Hoffman v. E.W. Bliss Co., 448 N.E.2d 277, 285 (Ind. 1983)), *cert. denied*, 104 S. Ct. 1433 (1984).

to escape judgment on the evidence, Justice Hunter argued that a latent failure to warn defect could be found. He argued, ingeniously, that if there had been a barrier guard, a novice user such as Hahn would have been alerted to the presence of danger; therefore, the absence of the guard was a latent failure to warn defect.[63] Similarly, the fact that the power to the elevator leg was not disconnected might be found less than obvious inasmuch as a user might expect some sign or light that the power was connected.[64] Justice Hunter also observed that taking the obviousness issue from the jury encourages the manufacture and marketing of products naked of safety devices and guards because the "manufacturer may avoid liability by purposefully leaving off safety devices in order to make a danger more obvious."[65]

As a final argument, Justice Hunter asserted that a manufacturer must warn the ultimate user of "latent defects and/or possible dangers associated with the product" if the manufacturer has some control of the workplace environment.[66] He relied on confusing language from *Hoffman*,[67] which in context surely means that products may be free of latent design and manufacturing *defects*, yet may still contain latent *dangers*. To warn of these latent dangers is a nondelegable duty; thus, failure to do so creates a latent warning defect in the product. Yet *Hoffman* cannot be read to require a manufacturer to warn of patent dangers.

Although Justice Hunter may have stretched the *Hoffman* holding further than that court intended, he is on solid ground when he argues that the underlying policy of strict liability "is that the manufacturer has the primary responsibility for making a product reasonably safe for its intended and foreseeable use."[68] It is difficult to see how that responsibility can be discharged by introducing products into the stream of commerce which possess dangers, patent or not, which could be removed or reduced at costs commensurate with or less than the cost of harm threatened to the safety of users and bystanders.

*3. The Indiana Comparative Fault Act.*[69]—It was suggested in last year's products liability survey article that the open and obvious danger rule should be subsumed into the common law defenses of contributory

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[63] 453 N.E.2d at 1174.

[64] *Id.*

[65] *Id.* (citations omitted).

[66] *Id.*

[67] "Furthermore, a 'manufacturer has a duty to warn of potential dangers associated with the use of a [sic] product that is otherwise free from latent design or manufacturing defects' if he has some control over the way an employer incorporates the product into his operation." *Id.* (quoting *Hoffman*, 448 N.E.2d at 283).

[68] *Id.* at 1174 (citations omitted).

[69] IND. CODE §§ 34-4-33-1 to -13 (Supp. 1984).

negligence and assumption of risk.[70] Conceptually, however, the broad application of the rule calls for proof of a latent defect to be part of the plaintiff's case in chief. In other words, under the rule, there is *no duty* on the part of the seller to warn or guard a user, consumer, or bystander of an obvious danger. Once it is determined that the sole proximate cause of the plaintiff's injury was a patent defect, the defendant is entitled to judgment on the evidence.

Dubious policy considerations lend support to this harsh and anachronistic rule. First, in the workplace context, injured employees have access to the worker compensation system; a tort recovery against third parties which is available only to workers injured by products provides those workers with an unjustified and unnecessary windfall. Second, employees need strong incentives to take care for their own safety in the workplace when they are given the wherewithal to do so. Third, product manufacturers should not be exposed to unlimited liability; to do so puts unreasonable constraints on commerce and raises the prices of products. Fourth, litigation in the burgeoning product liability area needs more constraint and less liberalization. Fifth, the modern theory of strict liability strips sellers of their contributory negligence defense; retaining the open and obvious danger rule redresses the equitable imbalance thus caused.

A survey article does not provide the space for engaging these notions, but it is this writer's conviction that the split decision of the Indiana Supreme Court in *Bemis Co. v. Rubush*[71] was dictated primarily by these policy considerations rather than serious doctrinal analysis. Under the Indiana Comparative Fault Act, however, the effects of liberalization feared by the *Bemis* court can now be compromised if Indiana courts are willing to do so. The act of a plaintiff encountering an open and obvious danger can be treated as fault to be compared with a defendant's "fault" in permitting a reducible, albeit obvious, danger to be launched into the stream of commerce. This writer predicts that such will be the result because the present rule which holds that an open and obvious danger cannot under any circumstances be considered actionable is simply indefensible.

In applying the new statute to open and obvious dangers, there remains one problem. The legislature amended the Act in 1984 to eliminate the application of comparative fault to strict liability cases,[72] and most product cases are decided today under that theory. Thus, at first glance

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[70]*See* Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 269 (1984).

[71]427 N.E.2d 1058 (Ind. 1981) (3-2 decision), *cert. denied*, 459 U.S. 825 (1982).

[72]Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 1, 1984 Ind. Acts 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

it would appear that plaintiffs seeking to compare their fault in encountering open and obvious dangers with that of defendants will be severely constrained by the amendment, as they will have to rely on a negligence theory.

The open and obvious danger rule, however, generally arises in product cases in the context of an alleged design defect,[73] where the manufacturer incorporates into its design some hazardous product characteristic of which the ordinary user should be aware. In a case of defective design under strict liability, the plaintiff is required to show that the design characteristic is more dangerous than an ordinary user would contemplate.[74] In Indiana, this standard is very similar to that which is required in a negligent design case. Additionally in a negligent design case, the plaintiff has to prove that a reasonable manufacturer would have removed, reduced, or adequately warned of the unreasonable danger.[75]

In a strict tort case, the focus is on the condition of the product. Yet under the theory of strict liability, manufacturers are generally not held culpable if the product dangers were truly unknowable or were beyond the technological state of the art at the time they were first delivered to the ultimate user. Similarly, under a negligence theory, a manufacturer's knowledge of harmful propensities is held to be that of an expert.[76] As a result, the practical legal standards under both theories

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[73]Conceptually, there is no reason why obvious dangers cannot occur as a result of manufacturing flaws. However, flaw cases are less frequently litigated because the quality and integrity of an entire product line is not at issue, as occurs when the product design is alleged to be defective.

[74]*See* Bryant-Poff, Inc. v. Hahn, 453 N.E.2d 1171 (Ind. 1983) (Hunter, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965), first adopted in Indiana courts in Cornette v. Searjeant Metal Prod., 147 Ind. App. 46, 258 N.E.2d 652 (1970)), *cert. denied*, 104 S. Ct. 1433 (1984). Although this is the general and Indiana standard for finding a defect under strict liability, the same standard would apply to defining design defect under negligence theory.

[75]This additional element, required to prove breach of duty under negligence, is probably identical to what is required in many jurisdictions to prove that a product design is unreasonably dangerous under strict liability. Under both theories, the design is subjected to a risk utility analysis in which the probability and severity of harm is balanced against the cost of removing the risk, or else warning of it. In design cases, the test for defectiveness is generally Learned Hand's "algebra of negligence," United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), or its expanded version, Professor Wade's factor analysis. *See* Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965). *See also* Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890, 895 (1973) (stating that there is an essential similarity between negligence and strict liability in design cases).

[76]*See* Leibman, *The Manufacturer's Responsibility to Warn Product Users of Unknowable Dangers*, 21 AM BUS L.J. 403 (1984) (discussing the state of the art defense under negligence and strict liability theories). This defense has been statutorily adopted in Indiana for strict liability cases. IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1984). *See also*

tend to be quite similar in a design case, if not congruent.[77]

Another reason for pleading negligent design, rather than strict liability in tort, is the recent amendment to the Indiana Product Liability Act[78] which removes negligence from that Act's coverage, with the exception that the ten year repose provision will continue to constrain negligence actions accruing after September 1, 1983.[79] Furthermore, in some cases, Indiana common law negligence theory might be more favorable to the plaintiff than is the substantive law under the statute.[80] In summary, either the Indiana Supreme Court or the Indiana General Assembly, if it chooses to act, could classify unreasonable patent dangers introduced by a seller as a species of fault which can be compared with the user's fault in having allowed the obvious hazard to cause the injury.

### *C. Statutes of Limitation and Statutes of Repose*

A true statute of limitations begins running when the plaintiff's cause of action accrues. Before there is accrual, however, some actionable harm must have occurred. In contrast, a statute of repose begins running at some date unrelated to the occurrence of harm. Generally, the limitation period under a repose statute begins when the defendant performs the act which may or may not ultimately result in harm.

*1. Wrongful Death Claim.*—In *Pitts v. Unarco Industries, Inc.*,[81] a diversity wrongful death case, the plaintiff argued that the repose

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2 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d 153-54 (2d ed. 1974).

[77]*See* Feldman v. Lederle Laboratories, PROD. LIAB. REP. (CCH) ¶ 10,179, at 26, 535 (N.J. Jul. 30, 1984).

> The question in strict-liability-design-defect and warning cases is whether, assuming that the manufacturer knew of the defect in the product, he acted in a reasonably prudent manner in marketing the product or in providing the warning given. Thus, once the defendant's knowledge of the defect is imputed, strict liability analysis becomes almost identical to negligence analysis in its focus on the reasonableness of the defendant's conduct. In *Cepeda*, . . . we quoted approvingly Prosser's treatise on torts: "Since proper design is a matter of reasonable fitness, the strict liability adds little or nothing to negligence on the part of the manufacturer * * *."

*Id.* (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, at 659 n.72 (4th ed. 1971)).

[78]Act of Apr. 21, 1983, Pub. L. No. 297-1983, 1983 Ind. Acts 1814 (codified at IND. CODE § 33-1-1.5-1 to -5 (Supp. 1984)).

[79]*See* IND. CODE § 33-1-1.5-5 (Supp. 1984).

[80]For example, neither section 3 of the original Product Liability Act nor section 3 as amended provides for bystander recovery in a products liability action. Presumably, a bystander injured by a foreseeable latent product design defect should be able to recover under Indiana common law negligence. *See* Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 242 (1979) (discussing the bystander question raised by the original statute).

[81]712 F.2d 276 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 509 (1983).

provision of the Indiana Product Liability Act[82] was unconstitutional because it deprived her of a property interest without due process of law in violation of the fourteenth amendment. The plaintiff's decedent was an insulation mechanic who died from lung disease allegedly caused by asbestos products manufactured by the sixteen defendants. Six defendants successfully took the position that there could be no liability as to them because they had delivered their products ten years prior to the filing of the wrongful death suit. On appeal, the plaintiff argued that the enactment of the ten year repose provision prior to the filing of suit effectively barred a claim she would have had but for the enactment.[83] Denial of her claim therefore constituted a taking of property.

The court disagreed, pointing out that there is no property right in an unaccrued claim.[84] Despite the fact that a wrongful act may have been committed prior to the decedent's death that might have been actionable by him, the plaintiff's wrongful death claim could not have accrued prior to the death itself. Before the wrongful death action in *Pitts* finally did accrue however, the Indiana General Assembly passed a statute significantly limiting the plaintiff's unvested "rights." This, the court stated, the Indiana legislature had a perfect right to do.[85] The court also noted that statutes of limitation which bar claims before they can accrue had been ruled constitutional in Indiana and elsewhere with respect to due process challenges.[86]

Similarly, the provision was held not to be in violation of equal protection guarantees merely because it classified plaintiffs into two classes: those killed by ten year old or older products and those killed

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[82]IND. CODE § 33-1-1.5-5 (Supp. 1984) provides:

> This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action in which the theory of liability is negligence or strict liability in tort must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

[83]712 F.2d at 279.

[84]*Id.*

[85]"The Indiana legislature could, if it wanted, do away entirely with wrongful death actions beginning tomorrow even though there are probably some persons with living spouses who hope that the wrongful death statute . . . remains on the books in case their spouses are ever killed because of someone else's negligence." *Id.* (citation omitted).

[86]*Id.* at 279-80, (citing Bunker v. National Gypsum Co., 441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 103 S. Ct. 1761 (1983). *Bunker* involved a constitutional challenge to the three year last exposure rule of the Indiana Occupational Diseases Act. *See* Leibman, *Workers' Compensation, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 427, 428-32 (1984); Leibman & Dworkin, *A Failure of Workers' Compensation and Tort*: Bunker v. National Gypsum Co., 18 VAL. U.L. REV. 941 (1984).

by newer products.[87] The court relied on an occupational disease case, *Bunker v. National Gypsum Co.*,[88] in which a three year from last exposure statute of limitations was upheld. Although the classifications created by the statute in *Bunker* were somewhat different than in *Pitts*, the alleged injustice in both cases was caused by the delayed manifestation of asbestos-related diseases. In *Bunker*, the Indiana Supreme Court found sufficient rational basis in the repose interest for the legislature's statutory scheme to withstand equal protection challenges as well as those alleging violation of due process guarantees.[89]

The plaintiff in *Pitts* also sought to toll the repose provision by arguing that the defendants had fraudulently concealed the dangers of asbestos.[90] Because of procedural infirmities, the court was not required to rule on this issue, but in dicta the court stated that "'[p]assive silence . . . is insufficient to trigger the fraudulent concealment doctrine, absent allegations that the defendants were in a continuing fiduciary relationship with the plaintiff.'"[91]

With respect to the new product liability repose statutes, the traditional fraudulent concealment rule is in need of judicial or legislative modification. The justification for putting the product seller's exposure to liability in repose a statutory number of years after the product is first delivered to its user is that extended use of a product, without its causing harm, should in time create an irrebuttable presumption that the product is reasonably safe. Also, litigation more than ten years after delivery presumably puts an unfair defensive burden on the seller who is then in a poor position to gather evidence.[92] Repose statutes, however, unlike ordinary statutes of limitation, are not justified by the added rationale that they encourage injured parties to act promptly. This is because the victims may not yet have been injured before the statute has run, or may not have discovered the injury in time to bring suit.

For sellers to be granted the protection of repose statutes, it seems fair to require them to affirmatively disclose any latent product dangers of which they are aware or which they could readily ascertain. This is especially true in cases of delayed manifestation injuries, where the undiscovered harm does in fact occur within the statutory period.[93] Sellers should not be permitted to profit from such unconscionable silence, and jurisdictions which continue to recognize the validity of repose protection

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[87]712 F.2d at 280-81

[88]441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 103 S. Ct. 1761 (1983).

[89]441 N.E.2d at 14.

[90]712 F.2d at 278-79.

[91]*Id.* at 279 (citations omitted).

[92]*See id.* at 279-80.

[93]It may be useful to distinguish the situation where the injury takes place after the repose period has passed from the situation where harm has occurred but has not yet manifested itself. An example of the former instance is a defectively designed punch press

in delayed manifestation cases should recognize this much of a fiduciary relationship existing between sellers and users.

Tolling a repose statute or an unreasonably short statute of limitations because of a seller's failure to affirmatively disclose knowable latent dangers need not be equivalent to a finding that the seller is liable under the tort of deceit. The tolling of the statute of repose would merely permit the plaintiff to argue the merits of the underlying product liability theory rather than cutting off the claim at the threshold of the case.

*2. Personal Injury and Warranty Statutes of Limitations.*—The statute of limitations section of the Indiana Product Liability Act[94] was also challenged in *Braswell v. Flintkote Mines, Ltd.*,[95] but this time the court pointed out that Indiana's general tort statute of limitations for personal injury[96] was at issue as well.[97] In *Braswell*, the plaintiffs were asbestos workers who had been employed at the World Bestos[98] plant in New Castle, Indiana. The earliest initial exposure to asbestos of any of these plaintiffs was in 1943; the latest initial exposure was in 1964.[99]

Neither Braswell nor the other six plaintiffs filed their lawsuits within two years of their last exposure to the asbestos manufactured by the defendants. Therefore, the trial court granted the defendant's motion for summary judgment on the ground that the plaintiffs were time barred by Indiana statutes of limitation.[100]

Section 33-1-1.5-5 of the Product Liability Act contains a two year statute of limitations and a ten year repose provision;[101] either provision would have sufficed to bar these plaintiffs' claims accruing after June 1, 1978.[102] Yet the trial court ruled, and the court of appeals affirmed, that under Indiana law, personal injury claims accrue no later than the plaintiff's last exposure to the injurious hazard which caused the injury.[103] Because five of these last injurious exposures occurred prior to June 1,

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which double trips for the first time ten years after initial delivery to the user. An example of the latter is a case of asbestosis which begins to manifest itself in symptoms ten years after delivery even though irreversible and actionable harm to the lungs took place years earlier. The argument for permitting recovery in the latter instance is certainly more compelling than in the former.

[94]IND. CODE § 33-1-1.5-5 (Supp. 1984) (quoted *supra* note 82).

[95]723 F.2d 527 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2690 (1984).

[96]IND. CODE § 34-1-2-2 (1976) (amended 1981) (current version at IND. CODE § 34-1-2-2 (1982)).

[97]723 F.2d at 529.

[98]World Bestos is a division of Firestone Tire and Rubber Co. *See id.* at 528.

[99]*Id.* at 529.

[100]*Id.*

[101]*See supra* note 93.

[102]IND. CODE § 33-1-1.5-8 (1982) The effective date of the statute was June 1, 1978, and the statute does not "apply to a cause of action that accrues before June 1, 1978." *Id.*

[103]723 F.2d at 529.

1978, the Product Liability Act did not apply to them, but the general Indiana tort statute of limitations did apply.[104] With either limitation statute, however, the issue was the same: Does a tort statute of limitations meet due process requirements if it cuts off claims before the plaintiffs can discover the nature of their injury or even that they are in fact injured? Relying on *Pitts v. Unarco Industries, Inc.*[105] and *Scalf v. Berkel, Inc.*,[106] the court held that the answer clearly was yes.

However, the statutes of limitation examined in *Braswell* and the repose provision which was at issue in *Pitts* and *Scalf* are distinguishable. A repose statute does not require the accrual of a plaintiff's cause of action in order to bar that action. The clock starts running from the moment of the defendant's essential act; in Indiana, that moment is the initial delivery of the product.[107] A true statute of limitations, on the other hand, requires some actionable harm to have occurred. The question is how early can it be held that the plaintiff has suffered actionable harm.

The plaintiff in *Braswell* recognized this difference, and complained that the lower court had improperly found that his cause of action had accrued upon his last exposure to asbestos. The plaintiff's argument was that a cause of action has not accrued until the injury is ascertainable.[108] The Seventh Circuit Court of Appeals found the plaintiff's version of the proper date of accrual under Indiana law was in contradiction to the stand taken by the Indiana Supreme Court in *Shideler v. Dwyer*.[109]

In *Shideler*, the Indiana Supreme Court cited and quoted from a 1936 New York "dust" case with approval in order to rule that, because undiscovered or even undiscoverable harm is theoretically actionable, the commencement of that harm starts the limitation statute running.[110] Actually, the holding in the New York case probably went further than the *Shideler* holding,[111] for that case, *Schmidt v. Merchants Dispatch Transportation Co.*,[112] stands for the "wrongful act" or "impact" rule, which would start the statute running upon the defendant's setting in motion the forces that ultimately cause the harm. *Shideler*, on the other

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[104]*Id.*

[105]712 F.2d 276 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 509 (1983). *See supra* notes 81-93 and accompanying text.

[106]448 N.E.2d 1201 (Ind. Ct. App. 1983). *See* Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 271 (1984)

[107]*See* IND. CODE § 33-1-1.5-5 (Supp. 1984) (quoted *supra* note 82).

[108]723 F.2d at 531.

[109]417 N.E.2d 281 (Ind. 1981), *quoted in, Braswell*, 723 F.2d at 532.

[110]417 N.E.2d at 289 (quoting Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936).

[111]Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936).

[112]*Id.*

hand, held that a cause of action accrues when liability for the wrong attaches.

The reasoning behind the impact rule is clearly flawed because the unleashing of deleterious forces might not ever result in actionable harm. For example, the majority of workers exposed to asbestos never suffer health impairments. As Judge Swygert pointed out in his strong dissent in *Braswell*,[113] had the plaintiff "brought an action against manufacturers of asbestos before any manifestation of the disease . . . [he] would [have been] 'laughed out of court.'"[114] Because *Shideler* did not unequivocally adopt the impact rule,[115] Judge Swygert would have certified the time of accrual question to the Indiana Supreme Court for clarification.[116]

Under the "impact" rule, an initial exposure, which could consist of a single inhalation of deleterious dust, would be sufficient for the accrual of a personal injury cause of action. Where exposure is repeated, presumably each new exposure would lead to the accrual of a new action and, thus, the last exposure would mark the starting point for the running of the statute of limitations. Therefore, the majority in *Braswell* opined, the last exposure rule was indeed the Indiana rule.[117]

Judge Swygert argued that mere exposure without more is not actionable in Indiana. Personal injury claims accrue in Indiana when the beginning of the disease occurs. "Although it may be difficult to determine when a progressive disease such as asbestosis first occurs, the date of last exposure is clearly irrelevant to that determination. . . . Plaintiffs' asbestosis could have begun to develop any time before or after that date."[118] What would be required would be a fact finding determination based on qualified medical evidence.[119]

The essential difference between the majority's approach and the dissent's approach is that the majority would fix the time of accrual at the plaintiff's last exposure to the hazard, while the dissent would leave the time of accrual to the jury.[120] Yet regardless of whether the cause

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[113]723 F.2d at 533 (Swygert, J., dissenting).

[114]*Id.* (quoting Martinez-Ferrer v. Richardson-Merrell, Inc., 105 Cal. App. 3d 316, 323, 164 Cal. Rptr. 591, 595 (1980)).

[115]Even the majority recognized that no Indiana courts had explicity adopted the wrongful act or impact rule. 723 F.2d at 532.

[116]*Id.* at 533-34.

[117]*Id.* at 533.

[118]*Id.* at 536 (citation omitted).

[119]"Thus even if *Shideler* is deemed to govern this case, the case must be remanded to the district court for determinations of the dates on which plaintiffs' injuries occurred." *Id.* (citation omitted).

[120]The practical effect of the latter approach would be to run the statute from the time a medical abnormality is first evidenced inasmuch as no expert witness is likely to fix a specific date for the onset of disease prior to evidence of some abnormality. It could be expected in most cases that the abnormality would be evidenced by symptoms

of action is found to accrue upon impact or some other point prior to the manifestation of symptoms, the court found no constitutional infirmities under either due process[121] or equal protection principles.[122]

The accrual of a cause of action under the Indiana personal injury statute of limitations was also considered at the federal district court level in *Tolen v. A.H. Robins Co.*[123] The plaintiff claimed injury from the use of an intrauterine device known as the Dalkon Shield which was manufactured by Robins. Although the device was inserted on February 15, 1972, the plaintiff delivered a child on November 23, 1972. Following the birth, a bilateral tubal ligation was performed during which the Dalkon Shield could not be located. During the next three years, the plaintiff suffered a number of serious health problems which she later attributed to the device. The shield was ultimately found in her lower left stomach cavity. In late 1979, the plaintiff learned of problems with Dalkon Shields experienced elsewhere and filed suit on November 13, 1981 against Robins for negligence, strict liability, breach of warranty, and fraud.[124] The defendant moved for summary judgment[125] on the grounds that the tort actions were time barred two years after plaintiff's injury,[126] and the warranty actions were barred four years after sale of the product.[127] The court granted the motion.[128]

The plaintiff relied heavily on a line of Indiana cases which state "that a cause of action accrues at the time injury is produced by wrongful acts for which the law allows damages susceptible of ascertainment. . . . In essence, a cause of action accrues when the alleged negligence culminates in injury to the plaintiff and damages resulting from that injury are ascertainable."[129] Although one might suppose that the plain meaning of "susceptible of ascertainment" would translate to "discoverable," that is not the interpretation adopted by the Indiana Supreme Court: "'For a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the damages be known or ascertainable but only that damage has occurred.'"[130]

In applying the above rule, the district court found that "legal injury alleged by the plaintiff occurred on the date of insertion . . . in February 1972. The first evidence of damage appeared in July 1972 when plaintiff

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of the disease. In other cases, x-rays and other screening tests would provide the evidence.

[121]723 F.2d at 529-31.

[122]*Id.* at 531.

[123]570 F. Supp. 1146 (N.D. Ind. 1983).

[124]*Id.* at 1148.

[125]*Id.* at 1149.

[126]*See* IND. CODE § 34-1-2-2 (1982).

[127]*See* IND. CODE § 26-1-2-725 (1982).

[128]570 F. Supp. at 1156.

[129]*Id.* at 1149 (citations omitted).

[130]*Id.* at 1150 (quoting Shideler v. Dwyer, 417 N.E.2d 281, 289 (Ind. 1981)).

became pregnant and knew that the Dalkon Shield had failed in its intended purpose."[131] The court also noted that the plaintiff was put on notice that some elements of damage had occurred from 1972 to 1975. The court ruled that the statute of limitations commenced with such notice.[132] With respect to this "wrongful life" segment of the claim, the court probably misapplied the rule from *Shideler.* Surely, the plaintiff's knowledge of pregnancy is irrelevant to start the running of the statute of limitations. The critical time must either be the moment of conception or the moment of insertion of the device. The latter would be consistent with the "impact" rule[133] which can be restated as follows: If damages ultimately occur, the injury causing them will relate back to the time of the defendant's wrongful act. Hindsight analysis will define that act as actionable even though it would not be actionable if in fact damages never occur. On the other hand, choosing the moment of conception to run the statute would be consistent with the view that some damages actionable at the time they commence must occur for a tort cause of action to accrue. The *Shideler* holding strongly suggests that actionable damages must have occurred in order to start the statute. But when the *Shideler* court quoted the *Schmidt* case and its impact rule without clearly limiting it, a period of confusion in this aspect of Indiana law was ushered in.[134]

With respect to her health impairments following the birth of her child, the plaintiff argued that the "damages susceptible of ascertainment" language from earlier cases entitled her to a liberal discovery rule which would run the statute of limitations only when she became aware of the relationship of the Dalkon Shield to her health problems.[135] The court rejected the basic application of discovery principles to these cases in Indiana,[136] but noted in dicta that a due diligence standard would have found the plaintiff on reasonable notice of the origin of her ailments before she obtained actual knowledge of that origin.[137]

The plaintiff also argued that the defendant had fraudulently concealed information by misrepresenting "pregnancy rates, complications, side effects, hazards and dangers and radiopacity of the Dalkon Shield in an active manner calculated to prevent the plaintiff from ascertaining that legal injury had been done to her."[138] The court relied on *Pitts v.*

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[131]570 F. Supp. at 1150.

[132]*Id.* at 1151.

[133]*See supra* notes 110-17 and accompanying text.

[134]The majority in *Shideler* sought to establish the principle that irremediable harm had to occur in order for there to be a cause of action, 417 N.E.2d at 290-91, yet the decisions in *Braswell* and *Tolen* suggest that the court was less than successful.

[135]570 F. Supp. at 1150.

[136]*Id.* at 1151.

[137]*Id.* at 1150 n.2.

[138]*Id.* at 1152.

*Unarco Industries, Inc.*[139] to hold that affirmative acts of concealment are necessary to trigger the fraudulent concealment doctrine, which would in turn toll the statute of limitations.[140] In determining the fraudulent concealment doctrine was inapplicable, the court noted this was "not a case in which plaintiff was hindered by the action or lack of action on the part of Robins from filing a complaint during the period when she could have brought this lawsuit."[141] In addition, any possible concealment was found to have ended in 1974 when Robins informed the plaintiff's physician that the Dalkon Shield had been taken off the market.[142]

The court declined to treat the plaintiff's fraud allegations as a special cause of action for statute of limitation purposes: "It is the well established rule in Indiana that in determining what period of limitations applies the essence of the action controls rather than the form in which it is pleaded."[143] In this case, negligence, strict liability, and warranty were the essential actions brought.

With respect to the allegation of a breach of express and implied warranties, the plaintiff sought to bring her claim under an exception to the Uniform Commercial Code's statute of limitations which operates four years from the date of sale.[144] This exception provides that a breach of warranty occurs upon delivery, "except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."[145] The manufacturer had stated in its literature that the Dalkon Shield would protect women "[f]or a period of several years. Some women have been effectively protected by the same I.U.D. for five years or longer . . . ."[146]

The interpretation of this UCC provision is one of first impression in Indiana, but elsewhere courts have required there to be a specific reference to a future time in the warranty, "'even though all warranties in a sense apply to future performance of goods.'"[147] Although certain express warranties such as lifetime guarantees "have been found to extend explicitly to future performance,"[148] most courts have ruled that

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[139]712 F.2d 276, 279 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 509 (1983). *See supra* notes 90-93 and accompanying text.

[140]570 F. Supp. at 1151.

[141]*Id.* at 1152 (citations omitted).

[142]*Id.*

[143]*Id.* at 1155 (citations omitted).

[144]This provision operates in Indiana as IND. CODE § 26-1-2-725 (1982).

[145]*Id.* § 26-1-2-725(2).

[146]570 F. Supp. at 1153 (quoting *Answers to your Patients' Questions*, a brochure for patients using the Dalkon Shield).

[147]*Id.* (quoting J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 11-9, at 419 (2d ed. 1980)) (citations omitted).

[148]570 F. Supp at 1154.

implied warranties by their nature cannot provide the explicitness required to trigger the exception.[149] The representation that the Dalkon Shield would work "'[f]or a period of several years'—clearly does not meet the exception because it does not meet the requirement of a 'specific reference to a future time period.'"[150]

*3. Property Damage.*—The fact that the time of accrual of a tort action is not well-settled in Indiana courts was brought home in *Monsanto Co. v. Miller.*[151] In that case, the interior of the plaintiff's silo was coated with cumar manufactured by Monsanto. The cumar contained PCB's which contaminated the milk from the plaintiff's cows which were fed on the silage stored within the silo.

The trial court denied the defendant's motion to dismiss in which it had been argued that the Indiana Product Liability Act's statute of limitations covering property damage[152] had run two years after the Monsanto cumar had been applied to the silo. In affirming, the court of appeals ruled that injury, the wrongful act, had occurred when the cumar was applied, but as of that moment no damages were ascertainable and therefore no cause of action had accrued.[153]

Even the discovery of PCB's in the milk of the cows in 1976 would not give rise to the accrual of a cause of action if the PCB count were below the Indiana permissible level. It was only when the PCB count rose to an amount in violation of the Indiana regulation that a cause of action against Monsanto would possibly accrue.[154]

The court made clear that the plaintiff's discovery of injury was unnecessary to start the limitations statute running, rather there had to be some damages susceptible of ascertainment.[155] When those damages were actionable was a question of fact. Thus, the case was remanded for findings.[156]

*4. Product Liability Act Repose Statute.*—Although it is generally unnecessary under a repose statute to determine when the plaintiff's

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[149]*Id.*

[150]*Id.*

[151]455 N.E.2d 392 (Ind. Ct. App. 1983).

[152]IND. CODE § 33-1-1.5-5 (Supp. 1984) (quoted *supra* note 82).

[153]455 N.E.2d at 395.

[154]*Id.* at 397. If that moment occurred prior to July 28, 1976, plaintiff would be barred by the six year statute of limitations governing injuries to real property. *See* IND. CODE § 34-1-2-1 (1982). If it occurred after June 1, 1978, the effective date of the Product Liability Act, plaintiff would be barred under both the two year statute of limitations and the ten year repose provision found in section five of the Indiana Product Liability Act. IND. CODE § 33-1-1.5-5 (Supp. 1984) (quoted *supra* note 82). If the impermissible level were reached between those two dates, no Indiana statute of limitations would bar the action.

[155]455 N.E.2d at 394.

[156]*Id.* at 398.

cause of action accrues,[157] the moment of a defendant's wrongful act can be a matter for litigation. In *Bishop v. Firestone Tire & Rubber Co.*,[158] the defendants moved for summary judgment on the ground that they had delivered their products to initial users more than ten years prior to the filing of the plaintiff's claim for personal injury.

At the outset, it should be emphasized that statutes of limitation and statutes of repose are generally defenses.[159] Therefore, it is up to the defendant to prove when an allegedly defective product was launched into the stream of commerce. The task is seriously complicated by the requirement that it is the time of initial delivery which triggers the Indiana statute, not the time of manufacture.[160]

In the instant case, there was no doubt but that the rim base and side ring of a multipiece rim assembly were manufactured in 1948 and 1941 respectively.[161] The defendants offered evidence to the effect that these products had been sold to a user more than ten years prior to the plaintiff's accident which occurred on August 9, 1978. The defendant's evidence, however, was indirect. The Budd Company, purchaser of some of the assets of the original manufacturer of the rim base component, offered testimony that the strong demand for rim bases at the time of the 1948 manufacture, along with the company's no inventory of rims position during that period, made it virtually certain that a delivery had taken place in the late 1940's.[162] The other defendant, Firestone, produced sales records for the ten year potential liability period to demonstrate that there was no record of sales of any units of the type involved in the accident.[163]

In opposition to the defendant's summary judgment motion, the plaintiff's expert witness stated he had recently purchased a "new" rim assembly that was date stamped over twenty-five years earlier.[164] However, the court did not give the plaintiff's evidence any probative value because his statement was contradicted in part by an earlier admission, and the rim purchased was a type other than the one involved in the accident.[165] The defendant's summary judgment motions were granted.[166]

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[157]*See* text accompanying note 107.

[158]579 F. Supp. 397 (N.D. Ind. 1983)

[159]*See, e.g.*, FED. R. CIV. P. 8(c); IND. R. TRIAL P. 8(C).

[160]*See* IND. CODE § 33-1-1.5-5 (Supp. 1984).

[161]579 F. Supp. at 399.

[162]*Id.*

[163]*Id.* at 403.

[164]*Id.* at 407.

[165]*Id.* at 409.

[166]The *Bishop* case, 579 F. Supp. 397, reinforces the desirability of a manufacturer being able to positively trace the commercial paths of its units of production. If the recording of serial numbers is impractical, frequent cosmetic model changes may be desirable for traceability purposes alone.

As in *Pitts*[167] and *Tolen*,[168] the plaintiff in *Bishop* alleged fraudulent concealment seeking to toll the repose statute.[169] He did not present, however, any evidence in support of this allegation and it was rejected. Similar to the fraud claim in *Tolen*, the plaintiff also alleged there was a conspiracy "to continue the manufacture of multi-piece wheels . . . to withhold information regarding a different type of multi-piece wheel from certain governmental authorities."[170] As in *Tolen*, the court found that there was not an independent cause of action for conspiracy or fraud. If the statute bars the underlying action for negligence and strict liability the court reasoned, the claim should not be revivable simply by offering a new form of complaint.[171]

There is one additional issue raised by this case that was settled perhaps too summarily. Section five of the Indiana Product Liability Act refers to delivery to an "initial user."[172] "User" under the Act "shall include: a purchaser; any individual who uses or consumes the product; or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question."[173] The court apparently interpreted the term "a purchaser" to mean any and all purchasers of products from manufacturers, whether they be middlemen, retailers, or persons who actually plan to put the product to its intended use.[174]

It has been argued that the term purchaser in this context requires interpretation.[175] A literal approach would ignore the shelf life problem: where the manufacturer sells a defective product to a middleman who keeps it in inventory for a number of years.[176] It is not at all certain that the legislature intended for the repose statute to run during such an inventory period prior to the initial use of the product.[177]

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[167]712 F.2d 276 (7th Cir. 1983). *See supra* notes 90-93 and accompanying text.

[168]570 F. Supp. 1146 (N.D. Ind. 1983). *See supra* notes 138-43 and accompanying text.

[169]579 F. Supp. at 411.

[170]*Id.*

[171]*Id.*

[172]IND. CODE § 33-1-1.5-5 (1982) (amended 1983) (current version at IND. CODE § 33-1-1.5-5 (Supp. 1984)).

[173]*Id.* § 33-1-1.5-2 (Supp. 1984).

[174]579 F. Supp. at 404. "The terms 'user or consumer' are defined by the relevant statute to include 'a purchaser.' Ind. Code § 33-1-1.5-2. Therefore, wholesale distributors and original equipment manufacturers are users and consumers for purposes of the statute." *Id.*

[175]*See* Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 243 (1978).

[176]*See* RESTATEMENT (SECOND) OF TORTS § 402A comment *l* (1965). The RESTATEMENT comment notes that users and consumers can acquire the product from "intermediate dealers," thus distinguishing users and consumers from dealers.

[177]Following the survey period, this issue was joined in earnest in two cases in which opposite results were reached. In Whittaker v. Federal Cartridge Corp., 466 N.E.2d 480 (Ind. Ct. App. 1984), the Indiana Court of Appeals reversed a trial court summary

*5. Indemnity.*—In *Coca-Cola Bottling Company-Goshen, Indiana v. Vendo Co.*,[178] the lessee of a soft drink vending machine brought suit against Coca-Cola, the lessor, for damages from a fire allegedly caused by a defect in the vending machine. The lessee's suit was brought on theories of strict liability, breach of warranty, and negligence.[179] Coca-Cola filed a third party complaint against the manufacturer of the machine, Vendo, and the manufacturer of the machine's compressor, Tecumseh, seeking indemnity for any damages Coca-Cola might incur as a result of the suit. After hearings, Coca-Cola's motion for summary judgment on the strict liability claim was granted, as were the third parties' motions for summary judgment on Coca-Cola's claims against them for indemnity. Coca-Cola then appealed from the adverse summary judgment on its third party claims.[180]

On appeal, the court refused to abrogate Indiana's continued adherence to the common law rule that there should be no contribution

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judgment, holding that delivery of a product to any purchaser "regardless of whether that purchaser is a retailer, dealer, or any other intermediary along the chain of distribution," *id.* at 481-82, would suffice to begin running the Indiana Product Liability Act repose provision. IND. CODE § 33-1-1.5-5 (1978) (amended 1983) (current version at IND. CODE § 33-1-1.5-5 (Supp. 1984)). The court of appeals rejected this literal interpretation of "users or consumers," including any and all purchasers, on two principal grounds.

The first was derived from the definition of "seller" found in the statute. IND. CODE § 33-1-1.5-2 (1978) (amended 1983) (current version at IND. CODE § 33-1-1.5-2 (Supp. 1984)). Section two provides that "seller" includes wholesalers, retail dealers, and distributors; seller and user are, therefore, mutually exclusive terms. The second ground is derived from the RESTATEMENT (SECOND) OF TORTS § 402A comment *l* (1965) which notes that a user may acquire the product directly from a manufacturer or from one or more intermediate dealers. The policy of protecting users and consumers, which is behind section 402A, reveals the distinction between "the using and consuming public on the one hand, and all those entities who have marketed the product, manufacturers and otherwise, on the other hand." 466 N.E.2d at 483. Indiana has adopted section 402A, Cornette v. Searjeant Metal Prod. Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970), and the Indiana Product Liability Act purports to restate the common law of the state. *See* IND. CODE § 33-1-1.5-3 (1982).

In Wilson v. Studebaker-Worthington Inc., PROD. LIAB. REP. (CCH) ¶ 10,189 (S.D. Ind. Nov. 10, 1983), the district court confronted somewhat similar facts to *Whittaker*, but decided that it must defer to the plain language of the statute. In *Wilson*, the plaintiff argued that a defective component turbine did not reach an initial user until it was assembled as a pump and resold as a full assembly to an ultimate user. The court saw nothing in the statutory language about "ultimate" users or "final products" and held that delivery to any purchaser would be sufficient to begin the 10 year repose statute running.

There seems little doubt but that this issue is headed for resolution by the Indiana Supreme Court. It is predictable that the interpretation of sections two and five of the Act will be certified to the Indiana court if the diversity cases reach appeal first; further, with the present makeup of the supreme court, it is predictable that the literal interpretation of *Wilson*, *Bishop*, and *Whittaker* (at the trial level) will be upheld.

[178]455 N.E.2d 370 (Ind. Ct. App. 1983).

[179]*Id.* at 372.

[180]*Id.*

among joint tort-feasors despite "the fact that forty-two states now provide some system for contribution by specific statute, as part of a comparative negligence system, or by judicial decision."[181] The court noted that the prospective Indiana Comparative Fault Act will have the effect of limiting each primary tort-feasor's liability "to a percentage of the damages corresponding to that defendant's degree of fault."[182]

The court acknowledged that indemnity is permitted in Indiana in circumstances where the third "party seeking indemnity is without actual fault but has been compelled to pay damages because of the wrongful conduct of another for which he is constructively liable."[183] This exception does not operate, however, where the party seeking indemnity "is guilty of actual negligence, whether malfeasance, misfeasance or nonfeasance,"[184] or where the seller has a duty to inspect when identical warranties have been issued to the consumer by it and the manufacturer, and an "inspection would have revealed the defect."[185] In addition, there can be no claim for indemnity until the indemnity claimant's liability to the injured person has been fixed. It is only at that point that the statute of limitations on the claim for indemnity begins to run.[186]

Relying on the Indiana Products Liability Act,[187] the trial court determined that the lessor was not strictly liable to the lessee because the product had been delivered to an initial user more than ten years prior to the fire. If the lessor is considered to be a seller under the Act,[188] no indemnity claims against the two manufacturers based on tort product liability theories would stand.[189] If the lessor is not considered a seller, "any liability it incurs is upon some basis *other* than having

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[181] *Id.*

[182] *Id.* (footnote omitted). The Act, however, does not apply retrospectively.

[183] *Id.* at 373 (citation omitted).

[184] *Id.* (citations omitted).

[185] *Id.* (citation omitted).

[186] *Id.* at 374.

[187] IND. CODE § 33-1-1.5-5 (1982) (amended 1983) (current version at IND. CODE § 33-1-1.5-5 (Supp. 1984)) (quoted *supra* note 82).

[188] Under this section, product liability suits under strict liability and negligence theories are barred after the passage of ten years from initial delivery. Section six of the Act limits application of strict liability to the seller of a product. *Id.* § 33-1-1.5-3 (Supp. 1984).

[189] 455 N.E.2d at 374. Under Indiana common law, product lessors are generally considered sellers. Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 422, 357 N.E.2d 738, 742 (1976). Under the Indiana Product Liability Act, as originally enacted, "seller" was defined as "a manufacturer, a wholesaler, a retail dealer or a distributor." IND. CODE § 33-1-1.5-2 (1982) (amended 1983). The *Vendo* court pointed out that even if the lessor in this case qualified as "a distributor," the plaintiff's claim was "barred by the ten (10) year limitation provision of IC § 33-1-1.5-5." 455 N.E.2d at 374. The 1983 amendment to section two of the Act states: "'Seller' means a person engaged in business as a manufacturer, a wholesaler, a retail dealer, *a lessor*, or a distributor." Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 2, § 2, 1983 Ind. Acts 1814, 1815 (codified at IND. CODE § 33-1-1.5-2 (Supp. 1984) (emphasis added).

sold a defectively dangerous product.''[190] For example, one possible basis for liability other than the sale of a defective product would be that the lessor negligently maintained or inspected the vending machine. If this were the case, it would be barred from recovering contribution or indemnity under the common law rule regarding joint tort-feasors.[191]

With respect to the remaining theory of identical warranties, any indemnity claim by Coca-Cola against the component manufacturer, Tecumseh, was barred by Coca-Cola's lack of privity with Tecumseh.[192] However, an indemnity claim against Vendo under this theory was not automatically barred by the UCC statute of limitations, despite the passage of more than four years from the time Vendo sold the machine to Coca-Cola. The indemnity statute of limitations will begin running only when the lessor's liability to the real property owner is fixed.[193]

In summary, if Coca-Cola had become liable to the owner under a breach of implied warranty and this warranty had been held to have had the necessary identity with the implied warranty of merchantability which ran from Vendo to Coca-Cola when it originally sold the machine to Coca-Cola in 1961, Coca-Cola could have demanded indemnification by Vendo. Coca-Cola would have had to show, however, that since 1961 there had been no material alteration in the condition of the machine, that it had breached no duty to inspect for a defect which it could have discovered, and that the defect was not caused by old age beyond the contemplation of implied warranties.

The principal teaching of this case reaffirms that the UCC statute of limitations[194] is not a true repose statute. Each time the product is resold, or leased, the new seller begins a new exposure to liability. This exposure can reactivate the original seller's liability through the mechanism of indemnity, despite the passage of the four year statutory limitation period.

### *D. Economic Loss: Tort v. Warranty*

There are three types of harm that can occur as a result of using, consuming, or merely being in proximity to a defective product. These are personal injury, property damage, and economic loss. The latter includes loss of bargain as a result of the product failing to perform as expected, as well as the consequential damages of lost profits caused indirectly by the product's malfunction. It is damage to the product itself caused by the defect, however, which frequently presents a classification problem.

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[190]455 N.E.2d at 374-75.

[191]*Id.* at 375.

[192]*Id.*

[193]*Id.* at 375-76.

[194]*See* IND. CODE § 26-1-1-725 (1982) (Indiana's codification).

Suppose, for example, that a steering component of a new automobile snaps while the car is in use. At once, the product suffers diminished value. At this point, express and implied warranties of quality may have been breached by the seller. Suppose further, that because of the broken steering, the car veers suddenly to the right and crashes into someone's porch. The damage to the porch is clearly classifiable as property damage. The damage to the bystanders on the porch and to the driver and passengers in the car, users, is clearly personal injury. But what is the damage to the car itself? Is it considered property damage; or is it part of the loss of bargain suffered by the car's purchaser which would make it entirely an economic loss?

The question is important in most jurisdictions because economic damages are generally not actionable under tort theories.[195] To recover for an economic loss, plaintiffs must invoke warranty law which is subject to the UCC defenses of privity,[196] notice,[197] disclaimer,[198] and a statute of limitations running from date of sale.[199]

Privity can be a serious barrier to recovery in these cases, although generally it will be the purchaser who is seeking damages, for injury to the product itself, from his immediate seller. Notice, disclaimer, and the four year statute of limitations do, however, present formidable barriers to recovery. For this reason, the better rule distinguishes between catastrophic damage to the product and ordinary loss of bargain resulting from defective performance. The former is property damage actionable in tort; the latter requires warranty jurisprudence.

In *Sanco Inc. v. Ford Motor Co.*,[200] the federal district court predicted Indiana would make the above distinction despite there being an Indiana case which permitted recovery for consequential economic damages, lost profits, flowing indirectly from negligently performed services.[201] The *Sanco* court held that tort recovery was available in Indiana only for physical harm, a concept which embraces personal injury, damage to property other than the product, and damage to the product itself "when damage is sudden and calamitous, resulting from an occurrence hazardous to human safety."[202] The court referred as well to the amended definition

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[195]*See* cases cited in Sanco, Inc. v. Ford Motor Co., 579 F. Supp. 893, 896 (S.D. Ind. 1984).

[196]U.C.C. §2-316 (1976) (Exclusion or Modification of Warranties).

[197]U.C.C. § 2-318 (1976) (Third Party Beneficiaries of Warranties Express or Implied). This section provides three alternative limits to the common law horizontal privity barrier. Vertical privity requirements are left up to state law. *See id.* official comment 3.

[198]U.C.C. § 2-607(3)(a) (1976).

[199]U.C.C. § 2-725 (1976).

[200]579 F. Supp. 893 (S.D. Ind. 1984).

[201]*Id.* at 895 (discussing Babson Bros. Co. v. Tipstar Corp., 446 N.E.2d 11 (Ind. Ct. App. 1983)).

[202]579 F. Supp. at 898.

of physical harm found in the Indiana Product Liability Act.[203]

In the instant case, the damages alleged by a purchaser of trucks included "nonfunctioning gauges, electrical shorts, relay failures, cracking windshields, and frame movement . . . . They did not expose plaintiff to any physical hazard . . . . Such circumstances require the conclusion that the safety-insurance policy of tort law is inappropriate in this case. Plaintiff's remedy lies in the expectation-bargain protection policy of warranty law."[204] The defendant's motion for summary judgment on the tort count was granted.

In *Sanco*, the purchaser was seeking recovery from the manufacturer, not the dealer from whom the trucks had been purchased. Under the remaining implied warranty count, the defendant manufacturer raised a privity defense.[205] The plaintiff sought to invoke an exception to the privity barrier which is applicable to cases where the manufacturer's agents participate "significantly in the sale by means of advertising and personal contact with the buyer."[206] The court held there was sufficient evidence of such a relationship between Ford and the dealer to warrant a denial of Ford's motion for summary judgment on the implied warranty count.

### *E. Amendment to the Indiana Product Liability Act*

In last year's survey article several amendments to the Indiana Product Liability Act were reviewed.[207] There was one change in the law that was discussed,[208] however, that requires additional comment. The 1983 amendments introduced an "all reasonable" care limiting standard for product preparation, packaging, labeling, instructing for use, and sale[209] to replace the former "all possible" care standard from the earlier statute, a standard taken from section 402A of the Restatement (Second) of Torts.[210] One of the drafters indicated that there was no

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[203]"'Physical harm' means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic losses from such damage. (Underlined words added by amendment.)" *Id.* at 899 (quoting IND. CODE § 33-1-1.5-2 (Supp. 1984)).

[204]579 F. Supp. at 899.

[205]*Id.*

[206]*Id.*

[207]*See* Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 272-82 (1984).

[208]*Id.* at 278-79.

[209]Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 3, § 2.5, 1983 Ind. Acts 1814, 1815-16 (codified at IND. CODE § 33-1-1.5-2.5(b)(1) (Supp. 1984)).

[210]RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965) states that strict liability applies although "the seller has exercised all possible care in the preparation and sale of his product . . . ."

intent "to change the standard as it existed under the former 'all possible care' language."[211]

The drafter is probably correct in the sense that no foreseeable change is likely in Indiana judicial interpretation of the two phrases. Yet, it should be emphasized that there are courts that would find a substantial difference in these standards. The all possible care standard invites decisions such as the New Jersey Supreme Court's holding in *Beshada v. Johns-Manville Corp.*[212] That opinion held unequivocally that a product manufacturer is liable for failing to warn of unknowable dangers. The absolute liability standard of *Beshada* for warning, and by inference, design, cases is further than the vast majority of American courts have cared to go in other than defective manufacture cases.[213] Holding defendants liable for failing to carry out truly impossible duties is to cut the final link between tort law and fault. This would be a mistake because compensation for injury from genuinely blameless acts is better administered by pure insurance mechanisms. Tort law has proven to be a far too inefficient and uncertain a system to play the primary role in no fault compensation schemes.

It should be noted that the change in language does not return strict liability to a negligence standard. The statute explicitly states that the exercise of all reasonable care will *not* suffice to refute a plaintiff's prima facie case. What the change does suggest is that the boundaries of liability are set by the concept of possibility. This is a higher standard than negligence, but something less than absolute liability. The change in the Indiana law is a sensible one.

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[211] *See* Vargo, *supra* note 207, at 279 (footnote omitted).

[212] 90 N.J. 191, 447 A.2d 539 (1982).

[213] *Beshada* is analyzed in Leibman, *The Manufacturer's Responsibility to Warn Product Users of Unknowable Dangers*, 21 AM. BUS. L.J. 403 (1984). *See also* Berry, *The Implications of Beshada for Products Liability Actions: The Defense Viewpoint*, 5 DICTUM 6 (N.J.B.A. Young Law. Div., Nov. 1982); Placitella & Darnell, Beshada v. Johns-Manville Products Corp.: *Evolution or Revolution in Strict Products Liability?*, 51 FORDHAM L. REV. 801 (1983); Note, Beshada v. Johns-Manville Products Corp.: *Adding Uncertainty to Injury*, 35 RUTGERS L. REV. 982 (1983); Birnbaum & Wrubel, *The N.J. Supreme Court Breathes New Life Into State-of-Art Defense*, Nat'l. L.J., Sept. 17, 1984, at 22, col. l; Birnbaum & Wrubel, *State-of-Art Evidence After* Beshada: *The Responses Conflict*, Nat'l L.J., Aug. 15, 1983, at 24, col. 1; Birnbaum & Wrubel, *N.J. High Court Blazes New Path in Holding a Manufacturer Liable*, Nat'l. L.J., Jan. 24, 1983, at 24, col. 1; Platt & Platt, *Moving From Strict to 'Absolute' Liability*, Nat'l. L.J., Jan. 17, 1983, at 15, col. 1.