Survey of Indiana Products Liability Cases: 1987-88

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I. INTRODUCTION

This Article surveys state and federal cases that affected or discussed Indiana's products liability tort law. Although the authors were not bound to a particular survey period, the cases included in this article were decided during the period between June 1987 and August 1988. The Article discusses Indiana Supreme Court[1] and Indiana Court of Appeals[2] decisions as well as Seventh Circuit Court of Appeals[3] and federal district court[4] cases that have applied Indiana law. In addition, the Article discusses a recent United States Supreme Court case that will affect Indiana products liability law.[5]

II. THE CASES

A. A New Choice of Law Rule

In *Hubbard Manufacturing Co. v. Greeson*,[6] the Supreme Court of Indiana overruled one hundred years of precedent and adopted a two-

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Ronald V. Weisenberger passed away suddenly on March 25, 1989. From working with Ron, I knew his intelligence, his good humor, and his zest for the challenges of litigation. His large contribution to this Article is only one example of Ron's ability and capacity for hard work. The Indiana bar will be poorer because Ron was deprived of the opportunity to pursue his profession.—Michael Rosiello

1. Hinkle v. Niehaus Lumber Co., 535 N.E.2d 1243 (Ind. 1988); Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071 (Ind. 1987).

2. Koske v. Townsend Eng'g Co., 526 N.E.2d 985 (Ind. Ct. App. 1988); Miller v. Todd, 518 N.E.2d 1124 (Ind. Ct. App. 1988); Kroger Co. Sav-On Store v. Presnell, 515 N.E.2d 538 (Ind. Ct. App. 1987); Wixom v. Gledhill Road Mach. Co., 514 N.E.2d 306 (Ind. Ct. App. 1987); Hinkle v. Niehaus Lumber Co., 510 N.E.2d 198 (Ind. Ct. App. 1987), *vacated* 525 N.E.2d 1243 (Ind. 1988).

3. Hager v. National Union Elec. Co., 854 F.2d 259 (7th Cir. 1988); Phelps v. Sherwood Medical Indus., 836 F.2d 296 (7th Cir. 1987).

4. Knox v. AC & S, Inc., 690 F. Supp. 752 (S.D. Ind. 1988); Reed v. Ford Motor Co., 679 F. Supp. 873 (S.D. Ind. 1988); Covalt v. Carey-Canada, Inc., 672 F. Supp. 367 (S.D. Ind. 1987); McDowell v. Johns-Manville Sales Corp., 662 F. Supp. 934 (S.D. Ind. 1987); Groce v. Johns-Manville Sales Corp., 662 F. Supp. 936 (S.D. Ind. 1987).

5. Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988).

6. 515 N.E.2d 1071 (Ind. 1987).

step choice of law rule for products liability and other tort actions that permits trial courts to apply Indiana law even if the place of injury is another state. As the court itself noted, this new rule is not merely academic; the differences between Indiana's substantive products liability law and that of some other states "are important enough to affect the outcome of the litigation."[7]

1. Background.—"The traditional rule in conflict of law cases involving multistate torts has been to apply the substantive law of the place of tort—the *lex loci delicti* rule."[8] The place of the tort is "the state where the last event necessary to make an actor liable for the alleged wrong takes place."[9] Generally, this is the place where the injury or death occurs. Proponents of the rule claimed that the rule "promote[s] certainty, predictability, uniformity of result, and [is] easy to apply."[10] Others thought that is was too mechanical and often led to unjust results.[11] In *Babcock v. Jackson*,[12] the Court of Appeals of New York adopted what has been called the "modern" or the "most significant relationship" rule:

> Justice, fairness and "the best practical result" may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that "it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context" and thereby allows the forum to apply "the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation.'"[13]

For years Indiana has applied the *lex loci* rule.[14] In *Witherspoon v. Salm*,[15] the Indiana Court of Appeals attempted to reject the rule: "We believe the more logical basis for a choice of conflicting law, could be stated: *Given a factual and legal situation, involving an actual conflict*

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7. *Id.* at 1073.

8. Maroon v. Department of Mental Health, 411 N.E.2d 404, 417 (Ind. Ct. App. 1980) (Ratliff, J., concurring).

9. *Greeson*, 515 N.E.2d at 1073.

10. *Maroon*, 411 N.E.2d at 418 (Ratliff, J., concurring).

11. *Id.*

12. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

13. *Id.* at 481-82, 191 N.E.2d at 283, 240 N.Y.S.2d at 749, (citations omitted).

14. *See* cases cited in Hubbard Mfg. Co. v. Greeson, 487 N.E.2d 825, 827 (Ind. Ct. App. 1986), *vacated*, 515 N.E.2d 1071 (Ind. 1987).

15. 142 Ind. App. 655, 237 N.E.2d 116 (1968), *rev'd*, 251 Ind. 575, 243 N.E.2d 876 (1969).

of law, which state has the greater interest in having its law applied?"[16] The Indiana Supreme Court reversed the appellate court's opinion[17] and found no conflict of law issue in the case.[18] A number of federal court decisions, applying Indiana law, had concluded that the Indiana Supreme Court would adopt the modern, most significant relationship rule.[19]

2. The Greeson Case.—In *Greeson*, plaintiff's decedent, an Indiana resident, was an employee of a company that cleaned, repaired and replaced streetlights. The defendant, an Indiana corporation, built custom lift units for the employer and attached them to the employer's trucks. The decedent was killed while he was working on street lights in Illinois and while using a lift unit that defendant had manufactured and that was licensed and housed in Illinois.[20]

Plaintiff filed a wrongful death action in Indiana in which she sought to recover under negligence and strict liability theories. On the choice of law issue, "[t]he trial court found that Indiana had more significant contacts with the litigation but felt constrained to apply Illinois substantive law because the decedent's injury had been sustained there."[21] The court of appeals affirmed on the ground that this result was required by Indiana law:

> Although many states have adopted a more flexible modern choice of law approach in these cases, Indiana has not. As the trial court properly concluded, for suits based on tort principles, the applicable choice of law rule in Indiana remains *lex loci delicti*. In this case, [decedent] was killed in Illinois. Therefore, Illinois will control all substantive issues which arise during the trial of this cause.[22]

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16. *Id.* at 670, 237 N.E.2d at 124.

17. 251 Ind. 575, 243 N.E.2d 876 (1969).

18. *Id.* at 580, 243 N.E.2d at 878.

19. *See* Gianni v. Fort Wayne Air Serv., Inc., 342 F.2d 621 (7th Cir. 1965); Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965). *But see* Bowen v. United States, 570 F.2d 1311, 1319 n.18 (7th Cir. 1978) (stating that Indiana apparently follows the *lex loci* rule).

20. 515 N.E.2d 1071, 1072 (Ind. 1987).

21. *Id.*

22. Hubbard Mfg. Co. v. Greeson, 487 N.E.2d 825, 827 (Ind. Ct. App. 1986), *vacated*, 515 N.E.2d 1071 (Ind. 1987) (footnotes and citations omitted). Judge Ratliff, writing for the court of appeals, made clear his disagreement with the controlling authority:

> This writer continues to adhere to his belief . . . that the better rule in these cases is the so-called "modern rule" or "most significant relationship approach" . . . . Given the opportunity, our supreme court may likewise adopt the "most significant relationship approach." However, until it does so, this court is bound to apply those legal principles announced by the highest court of this state including the doctrine of *lex loci delicti*.

Hubbard, 487 N.E.2d at 827 n.1.

The supreme court reversed and adopted a two-step choice of law rule for tort claims. "The first step . . . is to consider whether the place of the tort 'bears little connection' to th[e] legal action."[23] If it is "determined that the place of the tort bears little connection to the legal action, the second step is to apply the additional factors."[24] The additional factors, which "should be evaluated according to their relative importance to the particular issues being litigated,"[25] are those listed in the Restatement (Second) of Conflict of Laws.[26] They include: "1) the place where the conduct causing the injury occurred; 2) the residence or place of business of the parties; and 3) the place where the relationship is centered."[27] The *Greeson* court applied the new analytical framework as follows:

> [Step 1:] The last event necessary to make [defendant] liable for the alleged tort took place in Illinois. The decedent was working in Illinois at the time of his death and the vehicle involved in the fatal injuries was in Illinois. The coroner's inquest was held in Illinois, and the decedent's wife and son are receiving benefits under the Illinois Workmen's Compensation Laws. None of these facts relates to the wrongful death action filed against [defendant]. The place of the tort is insignificant to this suit. . . .
> [Step 2:] Indiana has the more significant relationship and contacts. The plaintiff's two theories of recovery relate to the manufacture of the lift in Indiana. Both parties are from Indiana; plaintiff Elizabeth Greeson is a resident of Indiana and defendant Hubbard is an Indiana corporation with its principal place of business in Indiana. The relationship between the deceased and Hubbard centered in Indiana. The deceased frequently visited defendant's plant in Indiana to discuss the repair and maintenance of the lift. Indiana law applies.[28]

Although *Greeson* plainly announced a change in Indiana conflict of law doctrine, it is unclear whether (a) Indiana has abandoned *lex loci delicti* for the modern "most significant contacts" rule, or (b) Indiana has retained *lex loci delicti* but adopted an exception under which the "additional factors" can be considered in some cases. In *Hager v. National Union Electric Co.*,[29] the Seventh Circuit took the latter position.

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23. 515 N.E.2d at 1074.
24. *Id.*
25. *Id.*
26. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).
27. 515 N.E.2d at 1073-74 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971)).
28. *Id.* at 1074.
29. 854 F.2d 259 (7th Cir. 1988).

There, addressing the choice of law issue in a retaliatory discharge case, the court stated that *Greeson* "adhered to the language contained in section 377 of the original Restatement of Conflicts,"[30] but "the [*Greeson*] court also created a 'safety valve' for those cases where the application of the basic rule would lead to application of the law of a state that would have little connection with the underlying cause of action. . . ."[31]

The authors of this Article disagree and believe that *Greeson* in essence adopted the modern choice of law rule as set forth in the Restatement (Second) of Conflict of Laws.[32] In most personal injury actions, "the last event necessary to make an actor liable for the alleged wrong" determines the place of injury. Under the *lex loci delicti* rule, the substantive law of the place where the injury occurs governs, but the *Greeson* court held that the place of injury alone cannot be used to determine the controlling law.[33] Consequently, after *Greeson* there is little or nothing left of the *lex loci* rule as such, and the "additional factors" will have to be considered in virtually every case. Furthermore, modern authorities retain a preference for the law of the state where the injury occurred,[34] which is consistent with the two-step analysis of the *Greeson* opinion.[35] Finally, if *Greeson* is read as embracing the

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30. *Id.* at 262. "The place of the wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 377 (1934). This definition was then used to state the general principles of *lex loci delicti*. *Id.*, §§ 378-97.

31. 854 F.2d at 262.

32. The Restatement (Second) of Conflict of Laws provides:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
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> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
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> (a) the place where the injury occurred,
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> (b) the place where the conduct causing the injury occurred,
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> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
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> (d) the place where the relationship, if any, between the parties is centered.
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> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

33. *Greeson*, 515 N.E.2d at 1074.

34. "In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties. . . ." RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 146 (1971). *See also id.* §§ 156-174 (stating choice of law rules for particular tort issues).

35. *See id.* § 146 comment c.

modern choice of law rules for torts, the extensive authorities and analysis under those rules will be available to assist Indiana courts and attorneys. This will promote the choice of law values of "certainty, predictability, and uniformity of result. . . ."[36]

B. Warnings and Instructions

1. Duty to Warn About Dangers Associated with Unforeseeable Uses.—In *Hinkle v. Niehaus Lumber Co.*,[37] the Indiana Supreme Court held that a supplier has no duty to warn a purchaser about dangers unknown to the purchaser unless "the supplier knew or had reason to know that the product was likely to be dangerous when used in a foreseeable manner."[38]

In *Hinkle*, plaintiff's employer, Alumax, wanted to replace the roof over a shed in which the employer stored corrosive materials. A contractor submitted a bid to replace the roof with fiberglass, a material that does not corrode. The employer rejected the bid because it wanted to do the job more cheaply. Instead, the employer decided to furnish the roofing material and to hire the contractor to provide the labor to install it. Even though the employer's maintenance supervisor told the employer that sheet metal would be more expensive in the long run because it would deteriorate faster than fiberglass, the employer purchased twenty-eight gauge sheet metal roofing from the defendant, Niehaus. A heavier gauge sheet metal would have been more suitable for the job, but the roofing material would support a man's weight under normal use. Apparently, the employer thought that the roof would be stronger if the sheet metal was installed so that there was an eighteen-inch overlap. In fact, this causes the roof to corrode more rapidly.[39]

The employer decided to use the twenty-eight gauge sheet metal and to overlap it without consulting the supplier, who simply provided the material requested by the employer. The supplier did not know how the employer intended to use the sheet metal roofing. The supplier provided no warnings or instructions with the sheet metal roofing. Six months after the roof was installed, the employer ordered the plaintiff to repair the roof. While the plaintiff was walking on the roof, it collapsed because of excessive corrosion, and plaintiff was injured severely.[40]

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36. Maroon v. Department of Mental Health, 411 N.E.2d 404, 418 (Ind. Ct. App. 1980) (Ratliff, J., concurring).

37. 525 N.E.2d 1243 (Ind. 1988).

38. *Id.* at 1245.

39. *Id.* at 1244.

40. *Id.*

The trial court granted the supplier's motion for summary judgment, and the court of appeals reversed.[41] According to the court of appeals, the issue was whether the supplier had a duty to warn the employer that the sheet metal would corrode and weaken in the corrosive environment, that it would corrode more rapidly when overlapped excessively, and that it was too thin to support a man's weight without additional support.[42]

> The answer turns upon whether Alumax as a purchaser having common understanding knew or should have known of these dangerous propensities at the time it purchased this roofing material, or whether any one or all such propensities were unreasonable dangers known to Alumax at that time. If Alumax because of its common understanding knew or should have known of all of these propensities, no duty to warn or instruct arose. If, on the other hand, any one or more of these propensities were unreasonable dangers unknown to Alumax, a duty to warn or instruct Alumax at the time of sale arose as to Niehaus.[43]

The court of appeals held that the record was insufficient to determine what the employer, as purchaser, knew or should have known about the dangers to the plaintiff and, therefore, summary judgment was improper.[44]

The supreme court disagreed and stated that "the extent of a purchaser's knowledge is not the sole criteria giving rise to a duty to warn."[45] The supreme court affirmed summary judgment for defendant because plaintiff "presented no evidence to show that [defendant] knew or should have had any reasonable expectation that the metal roofing sheets were to be used in an unusually corrosive environment,"[46] and because there was "no evidence in the record that the roofing sheets were unreasonably dangerous when used in 'reasonably expectable handling and consumption.'"[47] Thus, even if the purchaser is not aware of the dangers associated with a particular use of a product, a supplier has no duty to warn about those dangers if: (1) the product is not unreasonably dangerous when used in a "reasonably expectable" way; (2) the purchaser intends to use the product in a way that is not

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41. Hinkle v. Niehaus Lumber Co., 510 N.E.2d 198 (Ind. Ct. App. 1987), *vacated*, 525 N.E.2d 1243 (Ind. 1988).
42. *Id.* at 202.
43. *Id.* (citations omitted).
44. *Id.*
45. *Hinkle*, 525 N.E.2d at 1245.
46. *Id.*
47. *Id.* at 1246 (quoting IND. CODE § 33-1-1.5-2.5(c) (1988)).

"reasonably expectable;" and (3) the supplier has no reason to know that the purchaser intends to use the product in a way that is not "reasonably expectable."[48] Indiana's products liability statute provides: "If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under this chapter."[49] *Hinkle* is consistent with that provision.

A notable feature of this case is Justice Givan's concurring opinion, which Justice Pivarnik joined. Justice Givan concurred in the result but could not agree with the majority's statement that "Indiana's Product Liability Act imposes strict liability in tort upon sellers of a product in a defective condition unreasonably dangerous to any user or consumer."[50] In Justice Givan's view, "The use of the term 'strict liability' in [the products liability] statute is a misnomer and a corruption of the term, for what follows in the statute is actually legislative statement of what constitutes liability under certain acts of negligence. . . ."[51] Justice Given concluded that, "[i]n *all* instances, both under the case law and the statutory law of this state, some act of negligence is required to impose liability. The result in this case does not transcend that principle."[52]

2. When Does the "Open and Obvious Danger" Rule Preclude a Duty to Provide Instructions About the Proper Use of a Product?—In *Kroger Co. Sav-On Store v. Presnell*,[53] the court of appeals held that a seller has a duty to instruct the buyer about the proper use of a product to avoid dangers about which consumers are generally aware if (a) consumers are also generally aware that there is a safe way to use the product, and (b) the product is unreasonably dangerous if used in this way.[54]

In *Presnell*, plaintiff purchased an outdoor lounge chair from defendant. Defendant provided no instructions about proper use of the

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48. 525 N.E.2d at 1245-46.

49. IND. CODE § 33-1-1.5-2.5(c) (1988).

50. 525 N.E.2d at 1244.

51. *Id.* at 1246 (Givan, J., concurring).

52. *Id.* (emphasis added). The identity of negligence and strict liability theories is widely acknowledged in the context of warnings. Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 50, 388 N.E.2d 541, 553 (1979) ("[a]s a practical matter, [whether a product is defective due to inadequate warnings] is determined by application of negligence theory"). Generally, there is little or no difference between a negligent failure to warn and an improper warning under a strict products liability theory. *See id.* at 44-47, 388 N.E.2d at 549-51. In a claim of defective design or manufacture, however, the concept of "reasonableness" is addressed to the plaintiff's expectations about the use and safety of the product, not (as in a negligence case) the defendant's actions. *See, e.g.*, IND. CODE §§ 33-1-1.5-2.5(a), -3(b)(1) (1988).

53. 515 N.E.2d 538 (Ind. Ct. App. 1987).

54. *Id.* at 544.

chair. The first time plaintiff attempted to use the chair, she opened the chair legs until they were vertical and resisted further opening. She was injured when she sat in the chair, it collapsed, and she fell onto a concrete patio.[55]

Plaintiff alleged that the chair was defective and unreasonably dangerous because defendant "fail[ed] to give any instruction or warnings specifically about how to open the lounge chair to ensure that the locking devices were properly engaged . . . ."[56] Defendant argued, among other things, that "the danger of the chair's collapse and the manner and method of opening the chair, were open and obvious and therefore Kroger was under no duty to warn or instruct Presnell how to open the chair."[57]

At trial, plaintiff testified that she knew that there were no warnings or instructions about how to open the chair and that she did not think that it was necessary to ask the defendant how to open the chair.[58] Plaintiff's expert, Professor Cole, testified "that instructions were needed with this chair because it differs from the ordinary folding chair . . . [and] the user would be led to believe that when the legs are vertical and resistance is encountered, the chair is properly opened and ready for use."[59] He also testified that defendant should have instructed users the chair would not lock until the legs were pushed against the resistance and past the vertical position.[60]

Defendant argued that the trial court erred by denying defendant's motion for judgment on the evidence.[61] The court of appeals disagreed:

> One of the critical points of Professor Cole's testimony is that even though users are generally aware of the dangers of failing to properly open and secure the support legs of a lounge chair, they believe there is a safe way to do it, namely, by unfolding the legs to a vertical position until resistance is encountered. If people do in fact generally hold such a belief, then it cannot be said, as a matter of law, that the risk of back and neck injury or epilepsy from the collapse of a lounge chair

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55. *Id.* at 539.
56. *Id.*
57. *Id.* at 540.
58. *Id.* at 542.
59. *Id.* at 544.
60. *Id.*
61. *Id.* at 543. Kroger also argued that any failure to warn claim was barred because the absence of a warning was "open and obvious." *Id.* The court summarily rejected that claim. "[I]t is the *danger* posed to the user that must be open and obvious to the consumer . . . , not the absence of a warning of the danger." *Id.* (emphasis in original).

> and a fall to the cement patio is open and obvious. . . .
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> "Whether a danger is open and obvious depends not just on what people can see with their eyes but also what they know and believe about what they see. In particular, if people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious."
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> Both Cole and Presnell testified that the chair legs, when pushed into a 90 degree vertical position, then encountered resistance. We find this testimony was sufficient to make the following issues questions of fact for the jury to resolve: (1) whether Kroger had a duty to warn prospective users of the danger inherent in the failure to properly set up the chair for use; (2) whether the danger inherent in the failure to properly engage and secure the support legs of the chair in a locked position before use was open and obvious; and (3) whether the chair's design or mechanical condition was defective and unreasonably dangerous.[62]

Accordingly, the court held that the trial court properly denied defendant's motion for judgment on the evidence.[63] Thus, *Presnell* stands for the proposition that a seller has a duty to instruct the buyer how to use the product safely if the method for doing so differs from the method people generally believe is safe.

3. Continuing Duty to Warn.—In *Reed v. Ford Motor Co.*,[64] Ford moved to dismiss the plaintiff's claim that Ford had a continuing duty to warn of alleged defects in a vehicle. The court denied the motion. The court reasoned that the statute that defines "defective condition," which includes the limiting phrase "at the time [the product] is conveyed by the seller to another party," does not relate to a failure to warn.[65] The warning provision is in a separate subpart that contains no language limiting the time when warnings should be given.[66] The court concluded

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62. *Id.* at 544 (quoting Corbin v. Coleco Indus., Inc., 748 F.2d 411, 417-18 (7th Cir. 1984)) (citations omitted).

63. *Id.* Summary judgment in favor of a manufacturer is proper if the plaintiff states that she used a product in a way she believed was safe but presents no expert or other users who testify that plaintiff's method was *generally* considered safe. Koske v. Townsend Eng'g Co., 526 N.E.2d 985, 993 (Ind. Ct. App. 1988).

64. 679 F. Supp. 873 (S.D. Ind. 1988).

65. *Id.* at 879 (quoting IND. CODE §§ 33-1-1.5-2.5(a), (b) (1988)).

66. *Id.*

that "the Indiana legislature intended [the two subsections] to be distinct and did not intend to have the time of sale restriction applicable to 'reasonable warnings.'"[67] The court also denied a motion to dismiss on the theory that the time a warning must be given is limited to the time of sale by Indiana common law.[68]

C. Second Collision Cases: Will Indiana Recognize the "Crashworthiness" Doctrine?

Twelve years ago, the Seventh Circuit Court of Appeals predicted that, if given an opportunity to do so, the Supreme Court of Indiana would adopt the "crashworthiness" theory of liability.[69] According to the leading case on the crashworthiness doctrine, *Larsen v. General Motors Corp.*,[70] a crashworthiness or "second collision" case is one in which "[t]he plaintiff does not contend that the design caused the accident but that because of the design he received injuries he would not have otherwise received or, in the alternative, his injuries would not have been as severe."[71] A fundamental rationale underlying the crashworthiness doctrine is that automobile accidents are foreseeable.[72] Consequently, the argument runs, the manufacturer should be held to a duty of reasonable care to design the automobile "consonant with the state of the art to minimize the effect of accident."[73]

Unlike most tort actions, in a crashworthiness case someone other that the defendant causes the accident—the first collision—that leads to the plaintiff's injuries. Thus, in order to accept the crashworthiness theory one must accept the proposition that the plaintiff can separate the cause of the first collision and its resulting harm from the cause of the second collision and its resulting harm.[74]

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67. *Id.*
68. *Id.* at 879-80.
69. Huff v. White Motor Corp., 565 F.2d 104, 109 (7th Cir. 1977).
70. 391 F.2d 495 (8th Cir. 1968).
71. *Id.* at 497.
72. *Id.* at 502.
73. *Id.* at 503.
74. In *Larsen*, the leading crashworthiness case, the court noted:

> Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.

Id. at 503. This apportionment-of-harm issue is the subject of one of the major debates among the courts. *Compare* Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976) *with* Mitchell v. Volkswagenwerk, AG, 669 F.2d 1199 (8th Cir. 1982). The *Huddell* court held, "[T]he plaintiff must offer some method of establishing the extent of enhanced injuries attributable

In *Miller v. Todd*,[75] plaintiff requested the court of appeals to recognize the crashworthiness doctrine, but the court did not decide the issue.[76] In *Miller*, plaintiff was injured in a motorcycle accident. She alleged that the motorcycle was defective—*i.e.*, not crashworthy—because it did not have crash bars. Defendants argued that the absence of crash bars is open and obvious.[77]

The court declined the opportunity to recognize the crashworthiness doctrine:

> The critical inquiry is whether the manufacturer has provided a product in a defective condition unreasonably dangerous to

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to the defective design." 537 F.2d at 738. The *Mitchell* court found that *Huddell* was asking the plaintiff to bear an impossible burden: "A rule of law which requires a plaintiff to prove what portion of indivisible harm was caused by each party and what might have happened in lieu of what did happen requires obvious speculation and proof of the impossible." 669 F.2d at 1205.

The counter-argument was well-stated in *Huddell*:

> It was plaintiff, not G.M., who introduced divisibility into the litigation by arguing that the accident was survivable but for the defect in the design of the head restraint. Plaintiff cannot have the argument both ways. Plaintiff may not argue that the ultimate fact of death is divisible for purposes of establishing G.M.'s liability and then assert that it is indivisible in order to deny to G.M. the opportunity of limiting damages. . . . We simply do not accept the G.M. the opportunity of limiting damages. . . . We simply do not accept the proposition that suing for wrongful death suffices to convert limited, second collision, enhanced injuries liability into plenary liability for the entire consequences of an accident which the automobile manufacturer played no part in precipitating.

537 F.2d at 739.

Those who refuse to follow *Huddell* usually reason that the law should require the defendant rather than the faultless plaintiff to prove which portion of plaintiff's injuries were caused by the uncrashworthy design and which portion would have occurred despite the design. *See, e.g.*, *Huddell*, 537 F.2d at 746 (Rosenn, J., concurring). As a matter of policy, the defendant should bear this burden. This rationale disintegrates, and should not apply, if the plaintiff sues on a strict liability theory under which the defendant is liable without fault. *See, e.g.*, IND. CODE § 33-1-1.5-3(b)(1) (1988). This rationale makes even less sense if the plaintiff's fault caused or contributed to the cause of the accident. Even if it is improper to consider the plaintiff's conduct when determining whether a design is defective, it is proper to consider the plaintiff's conduct when deciding whether, as a matter of policy, the plaintiff or the defendant must prove the causal relationship between the design and plaintiff's injuries.

In a case decided after the survey period, Masterman v. Veldman's Equip., Inc., 530 N.E.2d 312 (Ind. Ct. App. 1988), the court of appeals sided with those courts following the *Huddell* case. The court cited two reasons for imposing the burden of proof on the plaintiff. First, plaintiff must prove the "specific injuries *caused* by the defective product." *Id.* at 317 (emphasis added). Second, the rule apportions liability for damages in accordance with the fault of the manufacturer or seller. *Id.* at 318. —*Ed.*

75. 518 N.E.2d 1124 (Ind. Ct. App. 1988).

76. *Id.* at 1125-26.

77. *Id.* at 1125.

> the user. . . . The plaintiff must establish a *latent defect* before the focus narrows on whether the hidden danger created an unreasonable risk of harm. Only then do we consider the extent of a manufacturer's duty to design and produce a crashworthy vehicle.
>
> . . . .
>
> As a matter of law, the absence of crash bars on a motorcycle is an open and obvious danger to the ordinary user.[78]

Accordingly, the court affirmed the summary judgment in favor of defendants.[79]

The court, however, did discuss the crashworthiness doctrine:

> The crashworthiness doctrine recognizes that the intended use of a vehicle encompasses the inevitability of collisions and requires the manufacturer to design a vehicle reasonably safe for those foreseeable risks. . . . [T]here is no Indiana caselaw or statutory authority recognizing the doctrine. However, our resolution of this appeal does not depend upon whether Indiana adheres to the crashworthiness doctrine. The crashworthiness doctrine is merely a variation of the strict liability theory, extending a manufacturer's liability to situations in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury.[80]

In *Wixom v. Gledhill Road Machinery Co.*,[81] plaintiffs argued for precisely this theory of liability. In *Wixom*, plaintiff's decedent had been driving on an icy road when another car, driven by Waltz, struck the rear of decedent's car. The collision caused decedent's car to skid out of control, across the median, and into the path of a snowplow. The blade of the snowplow penetrated the passenger compartment of the car, killed the decedent, and injured another occupant, also a plaintiff.[82]

Plaintiffs sued the blade manufacturer. They alleged that, because the accident was foreseeable, the manufacturer should have provided torus segments on the blade to reduce the risk that the blade would penetrate the passenger compartment. Consequently, they alleged, the blade was defective and the defective condition became "operative" when the car struck the blade.[83] The trial court granted the manufacturer's

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78. *Id.* at 1126 (citations omitted) (emphasis in original).
79. *Id.* at 1125.
80. *Id.* at 1125-26 (citations omitted).
81. 514 N.E.2d 306 (Ind. Ct. App. 1987).
82. *Id.* at 307.
83. *Id.*

motion for summary judgment, and the court of appeals affirmed.[84]

The court affirmed the judgment on two grounds. First:

> Gledhill's liability, if any, could only have become "operative" at the time it placed such product into the stream of commerce, not afterward. Gledhill was not in actual or constructive possession or control of its snowplow blade at the time the accident . . . occurred. Thus, the trial court correctly determined Waltz's negligent rear-ending of the Wixom vehicle was an act intervening between Gledhill's allegedly wrongful act and the Wixom's injuries and death.[85]

Second, the alleged defect merely created a condition that made the injuries possible because of Waltz's negligent act; when the defendant merely creates a condition that makes subsequent injury-producing negligent acts possible, those negligent acts are not foreseeable, as a matter of law, and the condition cannot be the proximate cause of the injuries.[86]

Unless motor vehicle manufacturers are singled out as a special class of defendants,[87] there is no legally sound basis for distinguishing *Wixom* from an automobile crashworthiness case.[88] As a matter of common sense, if not common law, it is no more foreseeable that automobile accidents will occur than that snowplows will be used on icy roads and that a car may slide across any icy road into the path of the snowplow. If *Wixom* is the law, it is difficult to see how the crashworthiness doctrine can be.[89]

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84. *Id.* at 306.

85. *Id.* at 308.

86. *Id.* at 308-09.

87. The *Larsen* court noted, "We think the duty of the use of reasonable care in design to protect against foreseeable injury to the user of a product . . . should be and is equally applicable to all manufacturers." Larsen v. General Motors Corp., 391 F.2d 495, 504 (8th Cir. 1968). The court expressly rejected the idea that the "crashworthiness doctrine should apply only to automobile manufacturers." *Id.*

88. The crashworthiness doctrine has been applied to vehicle manufacturers where the plaintiff was not a passenger. *See* Knippen v. Ford Motor Co., 546 F.2d 993 (D.C. Cir. 1976); Green v. Volkswagen of Am., Inc., 485 F.2d 430 (6th Cir. 1973); Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972). Thus, *Wixom* cannot be distinguished on the ground that plaintiffs were not passengers in the manufacturer's allegedly defective product.

89. It is likely that *Wixom* is not the law. In Masterman v. Veldman's Equip., Inc., 530 N.E.2d 312 (Ind. Ct. App. 1988), the court of appeals, apparently oblivious to *Wixom*, specifically held, in reversing the grant of summary judgment to the seller and manufacturer of the snowplow mount which allegedly enhanced the Mastermans' injuries, that the Mastermans did have a cause of action for those injuries. *Id.* at 315.—*Ed.*

D. Design Defects: The Open and Obvious Danger Rule Does Not Preclude Liability if the Manufacturer's Conduct Is Willful and Wanton

In *Koske v. Townsend Engineering Co.*,[90] a divided court of appeals held that the open and obvious danger rule "does not necessarily preclude a manufacturer's liability for claims of willful or wanton misconduct asserted by the injured plaintiff."[91] In *Koske*, the plaintiff worked in a meat processing plant. Her primary job station was adjacent to a skinner/slasher machine manufactured by the defendant. The skinner/slasher processed pork jowls. Ordinarily a conveyor moved the jowls into the machine's rotating blades. The machine had no safety guards.[92]

Sometimes the machine became a production bottleneck. When that happened, plaintiff assisted on the machine. One day the machine had been shut down and sanitized. Because the machine had been sanitized, the conveyor was slick. In addition, the jowls that were being processed were frozen and stiff, so it was necessary to push the jowls into the blades. Consequently, plaintiff used one jowl to push another into the machine. She had used this procedure often. This time the jowl that she was using to push slid over the other jowl, and plaintiff's hand was caught in the machine.[93]

Defendant advertised that the machine had "improved operator safety" because the operator's hands would be at least eighteen inches from the blades. Nevertheless, defendant knew that under certain conditions the conveyor would not automatically feed jowls into the blades. Defendant was aware of several similar accidents in other meat processing plants. In a letter to a meat processing company written ten months before plaintiff's accident, defendant acknowledged the potential safety hazard and urged that the machine be removed as soon as possible. Less than a month after plaintiff's accident, defendant recalled the machine and stated that it was aware of "several instances" where the machine had caused or was thought to have caused hand or arm injuries.[94] Experts agreed that the machine was not adequately guarded. Defendant replaced the model plaintiff had used with a new model that had guards and safety switches. The new model also had a warning sign.[95]

Plaintiff sought recovery "under a theory of strict liability for a defective design resulting in an unreasonably dangerous product and

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90. 526 N.E.2d 985 (Ind. Ct. App. 1988).
91. *Id.* at 990.
92. *Id.* at 987.
93. *Id.*
94. *Id.* at 987-88.
95. *Id.* at 988.

under a theory of willful and wanton misconduct."[96] Plaintiff argued that the open and obvious danger rule should not bar claims based on blameworthy conduct. Defendant argued that a product with an open and obvious danger is not defective or unreasonably dangerous. Thus, it did not willfully or wantonly provide a product that was defective.[97] The trial court concluded that the open and obvious danger rule barred plaintiff's claim and granted defendant's motion for summary judgment.[98]

The court of appeals reversed. The court, reasoning by analogy to *Bridgewater v. Economy Engineering Co.*,[99] found: "the defenses of contributory willful or wanton misconduct and incurred risk adequately cover a claim of willful or wanton misconduct without borrowing other doctrines."[100] Consequently, "if the injured person was reckless with regard to his or her own safety, recovery against even a reckless manufacturer will be barred. . . ."[101] The court noted that the open and obvious danger rule announced in *Bemis Co. v. Rubush*[102] expressly applied only to product liability actions based on negligence or strict liability.[103] The court reasoned:

> *A fortiori*, consistent limitation of the principle would entail application of the open and obvious danger rule to product liability claims involving only negligence and strict liability actions.
>
> The rationale for precluding the open and obvious danger rule as an automatic bar to recovery for a plaintiff in claims of willful and wanton misconduct is not hard to find. The focus of willful misconduct is not on the product but on the culpability of the manufacturer. When a manufacturer acts recklessly, reflecting a callous sacrifice of consumer safety for the benefit of the enterprise, the scope of a manufacturer's legal responsibility for injuries from its defective products should reflect that measure of its culpability. The manufacturer maintains a powerful position of control over product safety and has the opportunity to consider the potential legal consequences flowing from its conduct.[104]

The court stated that "[t]he obviousness of the danger is but one factor."[105] In order to recover under a wanton and willful conduct

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96. *Id.*
97. *Id.* at 990.
98. *Id.* at 988.
99. 486 N.E.2d 484 (Ind. 1985).
100. *Koske*, 526 N.E.2d at 991.
101. *Id.*
102. 427 N.E.2d 1058 (Ind. 1981).
103. *Koske*, 526 N.E.2d at 991.
104. *Id.* (citations omitted) (emphasis in original).
105. *Id.*

theory, "the defendant must have knowledge of facts sufficient to imply that he knew the plaintiff would not extricate himself from the peril."[106] According to the court, whether plaintiff acted unreasonably and whether defendant knew that plaintiff would not be able to extricate herself from a danger known to defendant were genuine issues of material fact that precluded summary judgment.[107]

> There was some evidence for a factfinder to conclude that Townsend knew that an unacceptable number of serious injuries were caused by its machine, knew that the machine was a safety hazard, and yet resisted recalling the machine in reckless disregard of the known probable consequences.[108]

Judge Neal dissented. He found no evidence to support plaintiff's claim that defendant's conduct was willful and wanton[109] and also wrote:

> I fail to perceive any connection between the mental state of the manufacturer, a necessary element where wanton and willful conduct is alleged, and the open and obvious rule. Before liability can be impressed upon a manufacturer the defect must be hidden and not normally observable, thus creating a latent danger in the use of the product. . . . [T]he open and obvious concept is addressed to the knowledge and mental processes of the user. When he perceives the danger and continues to use the product, the original act of the manufacturer, or his mental state, is no longer a causative factor.[110]

E. The "Learned Intermediary" Doctrine Applies to Medical Devices

In *Phelps v. Sherwood Medical Industries*,[111] the Seventh Circuit Court of Appeals, applying Indiana law, extended the "learned intermediary" doctrine to medical devices.[112] Previously, the Court of Appeals

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106. *Id.*
107. *Id.* at 991-92.
108. *Id.* at 992.
109. *Id.* at 993 (Neal, J., dissenting).
110. *Id.*
111. 836 F.2d 296 (7th Cir. 1987).
112. The court relied on the definition of medical "device" in the Food, Drug and Cosmetic Act, Pub. L. No. 717, 52 Stat. 1048 (codified as amended at 21 U.S.C. §§ 301 to 392 (1982)). 836 F.2d at 298-99. The act as amended defines medical "device" as

> an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is—
>
> (1) recognized in the official National Formulary, or in the United States

of Indiana had held, in *Ortho Pharmaceutical Corp. v. Chapman*,[113] that the doctrine applies to an oral contraceptive available only with a prescription.[114] According to the *Chapman* court:

> Where a product is available only on prescription or through the services of a physician, the physician acts as a "learned intermediary" between the manufacturer or seller and the patient. . . . [I]f the product is properly labeled and carries the necessary instructions and warnings to apprise the physician of the proper procedures for use and the dangers involved, the manufacturer may reasonably assume that the physician will exercise the informed judgment thereby gained in conjunction with his own independent learning, in the best interest of the patient.[115]

Accordingly, a prescription drug "manufacturers [sic] duty to warn extends only to the medical profession, and not the ultimate users."[116] The rationale for the rule is that

> Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative.[117]

Pharmacopeia, or any supplement to them,

(2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or

(3) intended to affect the structure or any function of the body of man or other animals, and which does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

21 U.S.C. § 321(h) (1982).

113. 180 Ind. App. 33, 388 N.E.2d 541 (1979).

114. Some courts have not applied the learned intermediary doctrine to oral contraceptives and have extended the manufacturer's duty to warn beyond the doctor to the consumer. *See* cases cited in *Phelps*, 836 F.2d at 299. "[S]ince the dispenser of those products may not be a physician (as in a clinic), the careful balancing of risks to the individual patient may not occur, and therefore an extended warning is appropriate." *Id.*

115. *Chapman*, 180 Ind. App. at 44, 388 N.E.2d at 549 (quoting Terhune v. A.H. Robins Co., 90 Wash. 2d 9, ____, 577 P.2d 975, 978 (1978)).

116. *Chapman*, 180 Ind. App. at 43, 388 N.E.2d at 548.

117. *Id.* at 44, 388 N.E.2d at 549 (quoting Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264, 1276 (5th Cir.), *cert. denied sub nom.* Wyeth Laboratories v. Reyes, 419 U.S. 1096 (1974)).

In *Phelps*, a surgeon, Rubush, inserted a catheter into Phelp's heart that defendant, Sherwood, had manufactured. The surgeon attached the catheter with a "purse-string" suture. Later, while a nurse attempted to remove the catheter, it broke, and part of it remained in plaintiff's heart. The nurse testified that she would not have attempted to remove the catheter had she known that it was sutured to plaintiff's heart.[118] Rubush testified that he was aware that the catheter had broken in similar situations and that suturing the catheter as he had done would prevent its removal.[119] Only doctors could lawfully purchase the catheter.[120]

Plaintiff alleged that the catheter was defective because, instead of stretching before separating, it broke. Defendant had provided a warning to the surgeon. Plaintiff did not argue that this warning was inadequate, but he claimed that defendant had a duty to warn plaintiff, or at least to warn the nurse.[121] Defendant argued that its duty to warn extended only to the surgeon, who should have passed the warning on to the nurse and plaintiff.[122]

A jury returned a verdict for defendant. On appeal, plaintiff argued that the trial court erred when it instructed the jury on the defendant's duty to warn.[123] The trial court instructed the jury that the surgeon was the user of the catheter, and

> If you find from the evidence in this case that Doctor Rubush had knowledge, in his intended use of this Defendants' [sic] catheter, that there was danger of breaking of said catheter upon attempted removal because of the route and obstructions existent in the application of this catheter, then you are instructed that the Defendants had no duty to warn with respect to such potential properties since they were already known *to the user, the operating surgeon*.[124]

The Seventh Circuit affirmed. First, the court determined that the surgeon was a "user or consumer."[125] The court noted that, under the statute,[126] a "user or consumer" includes "*any other person who, while acting for or on behalf of the injured party*, was in possession and

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118. *Phelps*, 836 F.2d at 299.
119. *Id.*
120. *Id.* at 302.
121. *Id.* at 300.
122. *Id.*
123. *Id.*
124. *Id.* (emphasis in original).
125. *Id.* at 301-03.
126. Ind. Code § 33-1-1.5-2 (1988).

control of the product in question . . . ."[127] The court also noted that the term "consumers" includes "not only those who in fact consume the product, *but also who prepare it for consumption* . . . ,"[128] and that "user" includes "*those who are utilizing [the product] for the purpose of doing work upon it* . . . ."[129] The court reasoned:

> [The surgeon] received the label warning from Sherwood and thus should certainly be considered as a "user" of the catheter. [The surgeon] also fits into the Restatement's definition of "consumer" since he prepared and employed the catheter for ultimate "consumption" by Phelps. Even more significantly, he utilized the catheter for the purpose of surgery.[130]

Second, relying on *Chapman* and *Ingram v. Hook's Drugs, Inc.*,[131] the court determined that the "learned intermediary" doctrine applies to medical devices:[132]

> In *Chapman*, the prescription drug manufacturer discharged its duty to warn by warning a patient's physician. The physician then had a duty to inform himself of the drug's propensities before using it on his patients. This "learned intermediary" exception has equal application to those cases concerning medical devices. Phelps tries here to distinguish the Indiana law regarding prescription drugs from situations involving medical devices. Yet this Court can find no principled basis for such a distinction. Applying *Chapman* and *Ingram* to this field, it was up to Dr. Rubush, the heart surgeon who, according to the evidence, knew the risks and benefits of this kind of catheter usage, to warn Phelps.[133]

Because "medical devices" includes a broad variety of products, *Phelps* is an important extension of the learned intermediary doctrine. The term "medical devices" includes products that persons other than

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127. *Phelps*, 836 F.2d at 301 (emphasis in original) (citing IND. CODE § 33-1-1.5-2 Supp. 1983).

128. *Phelps*, 836 F.2d at 302 (emphasis in original) (citing RESTATEMENT (SECOND) OF TORTS § 402A comment 1 (1977)).

129. *Phelps*, 836 F.2d at 302 (emphasis in original) (citing RESTATEMENT (SECOND) OF TORTS § 402A comment 1 (1977)). *Cf.* Thiele v. Faygo Beverage, Inc., 489 N.E.2d 562 (Ind. Ct. App.) ("user or consumer" does not include seller's employee who handles the product before the consumer buys it).

130. *Phelps*, 836 F.2d at 302-03.

131. 476 N.E.2d 881 (Ind. Ct. App. 1985).

132. *Phelps*, 836 F.2d at 303.

133. *Id.* (citations omitted).

doctors may lawfully obtain.[134] *Phelps* seems to include those products, but plaintiffs may argue that the "learned intermediary" doctrine should apply to products that only a doctor may lawfully obtain. Because Indiana law limits the conditions under which a doctor is liable for failing to warn[135] and limits a plaintiff's damages even if the doctor is liable,[136] both plaintiffs and defendants are likely to test the scope of the *Phelps* holding.

F. Split Authority in the Southern District: Does the Discovery Rule Apply to the Statute of Repose?

Section five of the Indiana Product Liability Act[137] continues to be the subject of several published opinions.[138] That section provides:

> [A]ny 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 the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.[139]

Recently, judges in the Southern District of Indiana have considered whether the statute of repose bars a plaintiff's action if the product, asbestos, caused injuries that did not manifest themselves within the

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134. For example, water treatment devices that are generally available to the public are an integral part of hemodialysis treatment for some persons with end-stage renal disease. These devices treat the water that is mixed, in a dialysis machine, with a concentrated solution. The diluted solution passes through an artificial kidney, which removes, from the patient's blood, the wastes that the natural kidneys are unable to remove. A more or less ordinary water treatment device, when used for such purposes, is a "machine . . . intended for use in the . . . treatment . . . of disease, in man . . . ." 21 U.S.C. § 321(h) (1982). Consequently, it would be a medical device, at least when used for the medical purpose.

135. *See* Kranda v. Houser-Norborg Medical Corp., 419 N.E.2d 1024 (Ind. Ct. App.) (1981), *reh'g denied* 424 N.E.2d 1064 (1981), *appeal dismissed* 459 U.S. 802 (1982); Revord v. Russell, 401 N.E.2d 763 (Ind. Ct. App. 1980).

136. *See* IND. CODE § 16-9.5-2-2 (1988).

137. Act approved March 10, 1978, Pub. L. 141, § 28, 1978 Ind. Acts 1298, 1308-10 (codified as amended at IND. CODE §§ 33-1-1.5-1 to -5 (1988)).

138. Among the published opinions that have considered section five are: Barnes v. A.H. Robins Co., 476 N.E.2d 84 (Ind. 1985); Dague v. Piper Aircraft Corp., 275 Ind. 520, 418 N.E.2d 207 (1981); Orr v. Turco Mfg. Co., 484 N.E.2d 1300 (Ind. Ct. App. 1985); Whittaker v. Federal Cartridge Corp., 466 N.E.2d 480 (Ind. Ct. App. 1984); Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. Ct. App. 1983).

139. IND. CODE § 33-1.5-1-5 (1988).

statutory period of repose. One judge held that the statute did not bar plaintiff's action;[140] the other judge held that it did.[141]

1. Background.—The leading case dealing with the statute of repose provision is *Dague v. Piper Aircraft Corp.*[142] In *Dague*, the Indiana Supreme Court held: "the action must be brought within two years after it accrues, but in any event within ten years after the product is first delivered to the initial user or consumer, unless the action accrues more than eight but less than ten years after the product's introduction into the stream of commerce."[143] The product was an airplane that the defendant, the manufacturer, first had sold on March 26, 1965. The airplane crashed on July 7, 1978, and plaintiff's decedent died on September 5, 1978. Plaintiff filed her wrongful death action on October 1, 1979.[144] Although plaintiff filed her action within two years after the crash, the court held "that section five of the Product Liability Act bars plaintiff's action in this cause, inasmuch as the damages incurred by plaintiff occurred more than ten years after the product was first placed in commerce."[145] The court also held that plaintiff did not have a vested common law right in her cause of action and that the legislature did not exceed its constitutional authority when it enacted the statute of repose and effectively precluded any action against product manufacturers for injuries that occur more than ten years after the product is delivered to the first user or consumer.[146]

In *Barnes v. A.H. Robins Co.*,[147] the supreme court held that a cause of action accrues and the two-year personal injury statute of limitations[148] begins to run on the date that the plaintiff knew or should

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140. Covalt v. Carey-Canada, Inc., 672 F. Supp. 367 (S.D. Ind. 1987), *question certified to Indiana Supreme Court*, 860 F.2d 1434 (7th Cir. 1988); *accord* Blaker v. U.S. Mineral Prods. Co., 688 F. Supp. 1300 (S.D. Ind. 1987).

141. Knox v. AC & S, Inc., 690 F. Supp. 752 (S.D. Ind. 1988); *accord* England v. Asbestos Corp., No. IP 81-163-C (S.D. Ind. Feb. 13, 1987).

142. 275 Ind. 520, 418 N.E.2d 207 (1981).

143. *Id.* at 525, 418 N.E.2d at 210.

144. *Id.* at 522, 418 N.E.2d at 209.

145. *Id.* at 526, 418 N.E.2d at 211.

146. *Id.* at 528-30, 418 N.E.2d at 212-13.

147. 476 N.E.2d 84 (Ind. 1985).

148. IND. CODE § 34-1-2-2 (1988). *Barnes* was based upon a certified question from the Seventh Circuit:

> "When does a cause of action accrue within the meaning of the Indiana Statute of Limitations for personal injury accidents, IND. CODE § 34-1-2-2, and the Indiana Statute of Limitations for Products Liability actions, IND. CODE § 33-1-1.5-5, when the injury to the plaintiff is caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance?"

Barnes, 476 N.E.2d at 85. The supreme court's discussion appeared to be limited to the two-year limitations statute. *See, e.g.*, 476 N.E.2d at 87 ("[W]e find that . . . the statute

have discovered the causal connection between her injuries and the defective product or negligent act, if the injuries are the result of protracted exposure to a seemingly innocent, foreign substance that "causes changes so subtle and latent that they are not discoverable to the plaintiff until they manifest themselves many years later."[149] In *Barnes*, plaintiffs had filed their actions more than two years after the product had caused the harm, less than two years after the plaintiffs actually discovered the causal connection between the product and their injuries, and less than ten years after the product had been delivered to the initial user.[150]

In *Walters v. Owens-Corning Fiberglass Corp.*,[151] the Seventh Circuit held that the *Barnes* discovery rule applies to actions based on protracted exposure to asbestos products. In *Walters*, the plaintiff, who had worked as an asbestos insulation applicator from 1950 to 1975, learned in February 1978 that he had an asbestos-related disease. He filed his complaint approximately two years later.[152] The court rejected defendants' argument that the *Barnes* rule does not apply to asbestos and held that, "exposure to asbestos products over a period of twenty-five years (and presumably lesser periods) constitutes 'protracted exposure to a foreign substance.'"[153]

2. The Facts and Arguments.—In *Covalt v. Carey-Canada, Inc.*[154] and *Knox v. AC & S, Inc.*,[155] the defendants moved for summary judgment on the ground that the plaintiffs filed their complaints more than ten years after the last delivery of asbestos insulation to their employers.[156] The defendants contended that the statute of repose pro-

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of limitations in such causes commences to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement. . . ."). The facts stated in *Barnes* indicate that the statute of repose did not bar plaintiffs' claims under any reading of the statute; each plaintiff had sued within ten years of the initial insertion of her Dalkon shield. 476 N.E.2d at 84-85.

149. *Barnes*, at 86.

150. *Id.* at 84-85.

151. 781 F.2d 570 (7th Cir. 1986).

152. *Id.* at 571.

153. *Id.* at 572.

154. 672 F. Supp. 367 (S.D. Ind. 1987).

155. 690 F. Supp. 752 (S.D. Ind. 1988).

156. In *Knox*, the plaintiff presented evidence that there had been some asbestos deliveries within the period of repose, and the defendants submitted affidavits that indicated that all asbestos deliveries ceased outside the repose period. *Id.* at 759. Consequently, the court held that "a question of fact remains concerning whether the plaintiff can prove delivery and exposure to any of the defendants' products during the period of repose, so as to avoid the effect of the statute of repose and its absolute bar to plaintiff's cause of action." *Id.*

vision is an absolute bar to actions that are filed outside the repose period.

Both the plaintiffs and the defendants presented persuasive arguments for their respective positions. The plaintiffs relied on *Barnes* and *Walters* and argued that the *Dague* statute of repose rule does not apply in asbestos cases because their injuries were not discoverable within the repose period. Indeed, there is language in the *Barnes* opinion that seems to support this position:

> The [discovery] rule is based on the reasoning that it is inconsistent with our system of jurisprudence to require a claimant to bring his cause of action in a limited period in which, even with due diligence, he could not be aware a cause of action exists. In the typical tort claim, injury occurs at the time the negligent act is done and the claimant is either aware of the injury, or at least the cause of the injury, and is put on notice to determine the extent of that injury. The claimant, therefore, has the whole statutory time provided for in the limitations statutes to make his determinations and bring his cause of action. The problem comes about when the act, seemingly innocent, causes changes so subtle and latent that they are not discoverable to the plaintiff until they manifest themselves many years later.[157]

In addition, the *Barnes* court expressly stated that the legislature's authority to limit the time in which a plaintiff can file an action is not so broad that the legislature can provide for a period that "is so manifestly insufficient that it represents denial of justice."[158] Finally, in *Dague* the statute of repose barred plaintiff's action because "damages incurred by plaintiff occurred more than ten years after the product was first placed in commerce."[159] In the asbestos cases, the damages incurred by the plaintiff occur, or at least the effects may begin to occur, within the repose period, but they are not discoverable until after the repose period expires. In such cases, plaintiffs argued, *Dague* does not apply,[160] and *Barnes* applies by analogy, if not directly.

The defendants relying on *Dague*, argued that the statute of repose absolutely precludes any action that is filed outside the repose period,

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157. Barnes v. A.H. Robins Co., 476 N.E.2d 84, 86 (Ind. 1985).

158. *Id.*

159. 275 Ind. at 526, 418 N.E.2d at 211.

160. That is, plaintiffs may argue, these asbestos cases are distinguishable from *Dague*. In *Dague*, the harm occurred after the repose period; in the asbestos cases the harm occurred, or may have occurred, during the repose period, but it was not discoverable until the repose period expired. Of course, the question is whether this distinction has any legal significance.

and noted that in both *Barnes* and *Walters* the courts considered only the time that plaintiff's cause of action accrued and the statute of limitations began to run. Neither court considered the statute of repose. In both cases, plaintiffs had filed their complaints within the repose period. In addition, the language of the statute expressly provides only one exception to the general rule that the plaintiff must commence the action within ten years after the product is delivered to the first user or consumer: where the cause of action accrues more than eight but less than ten years after the product is delivered to the first user or consumer. If, as in *Dague*, the cause of action accrues after the ten year period, the plaintiff simply has no cause of action. This is the legislature's statement of policy—no manufacturer can be exposed to liability more than twelve years after it places a product in the stream of commerce in Indiana. As the *Dague* court held, a plaintiff has no vested interest in a common law rule, and the legislature has the power and authority to limit the time when plaintiff may commence a cause of action.[161]

3. The Opinions.—In *Covalt*,[162] Judge McKinney denied defendants' motion for summary judgment. The court relied on *Barnes* and distinguished *Dague*:

> Here we are not concerned with introduction of a product into the market place [as in *Dague*]. Here we are concerned with exposure of a foreign substance causing disease. The *Barnes* case discusses the *Dague* case and concludes that in disease cases "[t]he problem comes about when the act, seemingly innocent, causes changes so subtle and latent that they are not discoverable to the plaintiff until they manifest themselves many years later." Responding to that concern and seeming unfairness and in recognition of the difference between injury and disease, the *Barnes* case set a discovery rule to apply in protracted exposure to hazardous substance cases. To do otherwise is to exclude latent disease victims from our system of jurisprudence. No such intent should be ascribed to the Indiana Legislature or the Indiana Supreme Court. . . .
>
> [T]he *Barnes* Court's opinion clearly sets a standard in disease cases and makes disease cases different than cases caused by products which injure individuals. In other words, it is this Court's opinion that in the State of Indiana the ten (10) year statute of repose still applies to cases like *Dague* or in any case

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161. 275 Ind. at 529, 418 N.E.2d at 213.

162. Covalt v. Carey-Canada, Inc., 672 F. Supp. 367 (S.D. Ind. 1987), *question certified to Indiana Supreme Court*, 860 F.2d 1434 (7th Cir. 1988).

> in which the injury to the plaintiff resulted from a product that was introduced into the stream of commerce ten years prior to the injury. The exception carved to that rule by *Barnes* is an exception that deals only with diseases from protracted exposure to foreign substances. That is, protracted exposure as opposed to a one-time injury causing event.[163]

In *Knox*,[164] Judge Tinder granted defendants' motion for summary judgment "with respect to any initial delivery and exposure that occurred more than twelve years prior to the filing of this action."[165] The court rejected plaintiff's argument that *Barnes* creates an exception to the statute of repose:

> *Barnes* should not be read so expansively. In *Barnes*, both of the claims resulted from exposure to the hazardous substance within the period of repose and thus, the precise question in this case simply was not addressed. In addition, *Dague Corp.*, has clearly established that the statute of repose places an outside limit on liability of twelve (12) years for a products liability cause of action in Indiana. *Dague* is still the law in Indiana and it dictates that the statute of repose bars an action for damages "incurred by the plaintiff more than . . . ten years after the product was first placed in commerce." There is no language in the statute of repose which permits this court to infer that treatment under *Dague* would differ from the absolute bar to plaintiff's claim for an injury-inflicting defect occurring outside the period of repose in a case where the product causes disease with a long latency period prior to manifestation.[166]

Nevertheless, Judge Tinder was concerned about the rule he believed he was duty-bound to apply:

> [T]he primary purpose of the statute of repose, that of recognizing the improvements of product design and safety that come

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163. *Id.* at 368 (quoting *Barnes*, 476 N.E.2d at 86 (citation omitted)).

164. Knox v. AC & S, Inc., 690 F. Supp. 752 (S.D. Ind. 1988).

165. *Id.* at 759. The *Knox* court's reference to a 12-year time period was based upon the exception in the statute of repose that:

> [I]f the cause of action accrues more than eight (8) years but not more than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

IND. CODE § 33-1-1.5-5 (1988). If there was no delivery of the product within 12 years of the filing of the action, the claim is barred even assuming the remote theoretical possibility that the cause of action was first discovered, and so accrued, on the last day of the ten-year period.

166. 690 F. Supp. at 759 (quoting *Dague*, 275 Ind. at 526, 418 N.E.2d at 211 (citation omitted)).

with time, is not served in cases such as this one. The statute of repose essentially protects a manufacturer from being forever liable for its products, in essence rewarding a manufacturer for ongoing improvements. However, asbestos and substances like it are not subject to design and safety improvements. Asbestos will not and most probably can not improve and [sic] with time. In fact, the evidence suggests that asbestos always will be a dangerous product. As a result, it does not appear in any way to fall within the rationale of the rule; thus, the application of the statute in these types of cases creates a harsh result without advancing the countervailing policy interests underlying the adoption of the statute of repose.

The court also recognizes that the severity of the ruling in this case is magnified in light of the long latency period between exposure and manifestation in an asbestos case. Asbestosis is believed to have a manifestation period of between ten (10) to twenty-five (25) years or longer. Thus, in many, if not most instances, the plaintiff's cause of action will be time-barred before he knew or reasonably could have known that such cause of action existed. This result seems wholly inconsistent with our system of jurisprudence. In essence, the decision to adopt a discovery statute of limitations has little practical effect, because where as here, there is a long latency period of disease, the plaintiff is denied his day in court. Essentially, with the adoption of the discovery statute of limitations the plaintiff is given something with one hand, but it is immediately taken away with the other by the operation of the statute of repose. The statute of repose functions to bar the claim even though the plaintiff neither knew nor reasonably could have known that the claim existed at the time it became time-barred.

It is possible that the Indiana courts in interpreting the legislative intent with respect to the statute of repose would find that the repose period in an asbestos case was "so manifestly insufficient that it represents a denial of justice," and thus, the Indiana court might adopt the interpretation advanced by the plaintiff in this case. However, as a court sitting in diversity with the guidance of *Barnes* and *Dague*, this court cannot presume to do so.[167]

4. *Postscript*—On November 7, 1988, the Seventh Circuit Court of Appeals certified the following question to the Supreme Court of Indiana:

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167. *Id.* at 760 (quoting *Barnes*, 476 N.E.2d at 86 (citation omitted)).

"Whether a plaintiff may bring suit within two years after discovering a disease and its cause, notwithstanding that the discovery was made more than ten years after the last exposure to the product that caused the disease."[168]

G. The Federal Statute of Limitations in the Superfund Amendments of 1986 Does Not Preempt Indiana's Statute of Repose in an Asbestos Worker's Action Against His Former Employer's Asbestos Supplier

Section 309(a)(1) of the Superfund Amendments and Reauthorization Act of 1986[169] (SARA) amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[170] (CERCLA) to add a federal exception to some state statutes of limitations.

> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.[171]

The "federally required commencement date" is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[172]

In the district court, the plaintiffs in *Covalt* and *Knox* argued that SARA preempted Indiana's products liability statute of repose.[173] The *Knox* court held that SARA did not preempt the statute in a wrongful death action brought by the wife of a deceased asbestos worker against asbestos manufacturers.[174] Because, in the district court, the *Covalt* court held that the statute of repose did not preclude plaintiffs' similar action,

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168. Covalt v. Carey Canada, Inc., 860 F.2d 1434, 1441 (7th Cir. 1988).

169. Pub. L. No. 99-499, 100 Stat. 1615 (codified as amended at 42 U.S.C.A. §§ 9601-9675 (West Supp. 1988)).

170. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C.A. §§ 9601-9675 (West Supp. 1988)).

171. 42 U.S.C. § 9658(a)(1) (Supp. IV 1986).

172. *Id.* at § 9658(b)(4)(A).

173. IND. CODE § 33-1-1.5-5 (1988).

174. Knox v. AC & S, Inc., 690 F. Supp. 752, 754-58 (S.D. Ind. 1988).

the court did not reach the preemption issue.[175] The court did certify an interlocutory appeal to the Seventh Circuit.

In *Covalt v. Carey Canada, Inc.*,[176] the Seventh Circuit held that SARA did not preempt the statute of repose in an asbestos worker's action against the manufacturers that supplied raw asbestos to the plaintiff's former employer.[177] The court reasoned that neither SARA nor CERCLA applied to the claim because, "[a]sbestos encountered at work is not a toxic waste, and the Superfund Act is about inactive hazardous waste sites."[178]

The Seventh Circuit relied heavily on legislative reports.[179] These reports indicate that CERCLA focuses on "abandoned and inactive hazardous waste disposal sites."[180] Other reports indicate that "SARA . . . does not change the focus or structure of CERCLA."[181] The court therefore concluded:

> The Superfund Act regulates waste dumps and other leakages "into the environment". The interior of a place of employment is not "the environment" for purposes of CERCLA—at least to the extent employees are the injured persons—and 309(a)(1) therefore does not apply to Covalt's claim. Covalt could not have taken advantage of 309(a)(1) had he developed asbestosis while on the job, and there is no reason why the statute should apply to him because he quit before becoming ill and sued Carey

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175. Covalt v. Carey-Canada, Inc., 672 F. Supp. 367, 368 (S.D. Ind. 1987), *question certified to Indiana Supreme Court*, 860 F.2d 1434 (7th Cir. 1988).

176. 860 F.2d 1434 (7th Cir. 1988).

177. *Id.* at 1436.

178. *Id.* at 1437.

179. *Id.* at 1437-38. In particular the court relied on a Senate Committee on Environment and Public Works report: SUPERFUND SECTION 301(E) STUDY GROUP, 97TH CONG., 2D SESS., INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES: A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (P.L. 96-510) (Comm. Print 1982) [hereinafter *Section 301(e) Study*]. *Covalt*, 860 F.2d at 1438. That report indicates that actions such as the one in *Covalt* are excluded from CERCLA:

> Instances when hazardous substances may be released in other than waste form . . . are expressly exempted from the enforcement provisions of the Act. Thus, the emphasis of this report, similar to the emphasis of CERCLA, is on remedying the adverse consequences of improper disposal, improper transportation, spills, and improperly maintained or closed disposal sites.

Section 301(e) Study, *supra*, at 41, *quoted in Covalt*, 860 F.2d at 1438.

180. H. REP. No. 9,601,016, 96th Cong., 2d Sess. 22, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125, *quoted in Covalt*, 860 F.2d at 1437.

181. *Covalt*, 860 F.2d at 1437.

> Canada instead of [his former employer] Proko. The Superfund Act does not preempt Indiana's statute of repose.[182]

H. The Statute of Repose Does Not Limit a Manufacturer's Liability if Some, But Not All, of Plaintiff's Injuries Occurred Within the Repose Period

In *McDowell v. Johns-Manville Sales Corp.*[183] and a companion case decided the same day, *Groce v. Johns-Manville Sales Corp.*,[184] the court held that a plaintiff could recover for harm that occurred outside the repose period if some of plaintiff's injuries occurred within the repose period.[185]

In *McDowell* and *Groce*, plaintiffs had worked with asbestos from 1966 to 1975 and from 1959 to 1974 respectively. The defendant had delivered no asbestos to plaintiff's employer after 1976. In *McDowell*, doctors diagnosed plaintiff's asbestos related disease in June of 1980, and in *Groce* the diagnosis was made on February 15, 1980. Each plaintiff filed negligence and strict liability claims within two years after the diagnosis.[186]

In each case, defendant moved for summary judgment and argued that "to the extent plaintiff's claims are based upon exposure to asbestos delivered by [defendant] to plaintiff's employer more than ten years before this action was commenced, [defendant] is entitled to judgment on those claims."[187] Defendant argued that plaintiffs could only recover damages for harm that was caused by exposure to asbestos within the ten-year repose period.

The court denied summary judgment in both cases:

> [Defendant's] attempt to divide liability finds no support in the case law and this argument has been rejected by other courts. The court finds that [plaintiff's] claim is timely under IND. CODE 33-1-1.5-5 in that [defendant] last delivered asbestos to her employer in 1976 which falls within the ten-year cutoff date.[188]

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182. *Id.* at 1439.
183. 662 F. Supp. 934 (S.D. Ind. 1987).
184. 662 F. Supp. 936 (S.D. Ind. 1987).
185. *McDowell*, 662 F. Supp. at 936; *Groce*, 662 F. Supp. at 938.
186. *McDowell*, 662 F. Supp. at 935; *Groce*, 662 F. Supp. at 937.
187. *McDowell*, 662 F. Supp. at 936; *see also Groce*, 662 F. Supp. at 937.
188. *McDowell*, 662 F. Supp. at 936 (citations omitted); *see also Groce*, 662 F. Supp. at 938. The court relied on two unpublished opinions: Troxell v. Johns-Manville Sales Corp., No. 81-C-307 (S.D. Ind. Oct. 7, 1986) and Thurston v. Johns-Manville Sales Corp., No. 81-C-243 (S.D. Ind. Sept. 5, 1986).

Consequently, if the allegedly defective product is one that causes "a disease which may have been contracted as a result of protracted exposure to a foreign substance,"[189] and if plaintiff was exposed to the product within the repose period, then plaintiff may recover damages for the harm caused by exposure to the product even if some of the exposure and some of the harm occurred outside the repose period.[190]

I. The Government Contractor Defense

In *Boyle v. United Technologies Corp.*,[191] the United States Supreme Court held that federal law pre-empts state tort actions against federal military contractors in some instances and held:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[192]

In *Boyle*, a Marine helicopter pilot was killed when his helicopter crashed into the waters off the coast of Virginia. He survived the crash but drowned because he was unable to escape from the helicopter. The pilot's father brought a diversity action against the helicopter manufacturer. He alleged that the defendant improperly repaired the helicopter's automatic flight control system and that the defendant had designed the escape hatch defectively. For example, plaintiff alleged that the escape hatch was designed improperly to open out of, instead of into, the helicopter. Consequently, the water pressure on the submerged helicopter prevented the hatch from opening.[193]

The Fourth Circuit Court of Appeals reversed a jury verdict in favor of the plaintiff and held, among other things, that liability for the allegedly defective design of the escape hatch was barred as a matter

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189. *McDowell*, 662 F. Supp. at 935; *see also Groce*, 662 F. Supp. at 937.

190. The statute of repose does not deal with this issue; it merely limits the time in which a plaintiff must commence an action. IND. CODE § 33-1-1.5-5 (1988). If *McDowell* and *Groce* are read together with Covalt v. Carey-Canada, Inc., 672 F. Supp. 367 (S.D. Ind. 1987), then a plaintiff may commence an action against, for example, an asbestos manufacturer more than 12 years after he was last exposed to the asbestos and also recover damages for exposure to the asbestos that occurs several years before that. If so, the statute of repose does not provide the safe harbor that it appeared to provide for manufacturers of products that cause latent disease after prolonged exposure.

191. 108 S. Ct. 2510 (1988).

192. *Id.* at 2518.

193. *Id.* at 2513.

of federal law because the defendant was a military contractor.[194] The Supreme Court granted certiorari.[195]

1. The Pre-Emption Issue.—The Court determined that *Boyle* presented facts that affected uniquely federal interests and that the conflict between the federal interests and state law was substantial enough to declare that federal law pre-empted state law even though there was no legislation granting immunity to government contractors.[196]

> In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription or a direct conflict between federal and state law. But we have held that a few areas, involving "uniquely federal interests" are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law."
>
> The dispute in the present case borders upon two areas that we have found to involve such "uniquely federal interests."[197]

Those areas are (a) federal obligations and rights under contracts and (b) the civil liability of federal officials for acts committed in the course of their duties.[198] The Court found that the first area was significant even though "[t]he present case does not involve an obligation to the United States under its contract, but rather liability to third persons,"[199] and found that even though "[t]hat liability may be styled one in tort, . . . it arises out of performance of the contract."[200] The Court found that the second area was significant even though "[t]he present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee."[201]

> We think the reasons for considering these closely related areas to be of "uniquely federal" interest apply as well to the civil liabilities arising out of the performance of federal procurement contracts. . . .

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194. Boyle v. United Technologies Corp., 792 F.2d 413, 414-15 (4th Cir. 1986), *vacated*, 108 S. Ct. 2510 (1988).

195. 479 U.S. 1029 (1986).

196. 108 S. Ct. at 2513-16.

197. *Id.* at 2513-14 (citations omitted).

198. *Id.* at 2514.

199. *Id.*

200. *Id.*

201. *Id.*

> Moreover, it is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one—even though the dispute is between private parties. . . . The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.[202]

The Court also determined that the conflict between the federal interests and state law was significant enough to require pre-emption of state law.

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).[203]

2. The Boyle *Federal Common Law Rule.*—Having decided that federal law pre-empted state law, the Court then had to determine the applicable federal law.

The Fourth Circuit had reasoned by analogy from the rule of *Feres v. United States*,[204] which held that the Federal Tort Claims Act does not cover injuries that members of the military receive in the course of military service. In a companion case to *Boyle*, the Fourth Circuit stated that if military contractors are liable, they will pass the cost of this liability on to the government and "[s]uch pass-through costs would, of course, defeat the purpose of the immunity for military accidents conferred upon the government itself."[205] The Supreme Court rejected this rationale because "the *Feres* doctrine, in its application to the present problem, logically produces results that are in some respects too broad and in some respects too narrow."[206] The rule is too broad because it would grant immunity to a government contractor even if the product that caused the injury was purchased from stock and had a particular design feature in which the government had no significant interest.[207]

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202. *Id.* at 2514-15 (citations omitted).
203. *Id.* at 2516.
204. 340 U.S. 135, 146 (1950).
205. Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 108 S.Ct. 2897 (1988).
206. 108 S. Ct. at 2517.
207. *Id.*

The rule is too narrow because *Feres* applies only to injuries to persons in the military and "it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines."[208]

Instead of relying on *Feres*, the Court reasoned by analogy from the provision in the Federal Tort Claims Act that precludes suits against the government "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty.[209]

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.
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> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would

208. *Id.*

209. *Id.* (quoting 28 U.S.C. § 2680(a) (1982)).

> be frustrated—*i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability.[210]

3. Effect on Indiana Products Liability Law.—If *Boyle* applies only to military equipment, then it will have only a limited direct effect on Indiana's products liability law. On the other hand, if, as the dissent fears,[211] the contractor's defense applies to products other than military equipment, then it will have more far-reaching effects. The government may specify and purchase virtually any product, and the discretionary function rationale applies as well to escape exits in government buildings as it does to escape hatches in government helicopters. In *Boyle*, the Court assumed an activist's role and approved the contractor's defense even though Congress has been silent on the issue[212] and even though the issues in *Boyle* merely bordered upon uniquely federal interests.[213] Consequently, firms that supply non-military equipment to the government have reason to expect that the Court will extend *Boyle* to their products. In addition, *Boyle*'s rationale may apply by analogy to Indiana's discretionary functions provision.[214] If so, *Boyle*'s scope may indeed be "breathtakingly sweeping."[215]

III. Conclusion

Both the statute of repose provision[216] and the "open and obvious danger" rule[217] continued to produce significant litigation as parties explored subtle distinctions or asked the courts to consider new and difficult situations. Although *Greeson*[218] will certainly change the outcome

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210. *Id.* at 2517-18 (citations and footnotes omitted).

211. *Id.* at 2520 (Brennan, J., dissenting) ("the Court's newly discovered Government contractor defense . . . applies not only to military equipment . . . but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans—from NASA's Challenger space shuttle to the Postal Service's old mail cars").

212. The dissent wrote that Congress had been "conspicuously" silent, "having resisted a sustained campaign by Government contractors to legislate for them some defense." *Id.* at 2519-20 (Brennan, J., dissenting).

213. 108 S. Ct. at 2514.

214. Ind. Code § 34-4-16.5-3(6) (1988).

215. *See Boyle*, 108 S. Ct. at 2520 (Brennan, J., dissenting).

216. *See supra* text accompanying notes 137-90.

217. *See supra* text accompanying notes 53-63, 90-110.

218. *See supra* text accompanying notes 6-36.

of some products liability actions and *Boyle*[219] will certainly effect at least a limited class of cases, the impact of the other cases discussed in this Article is not certain. Many of the cases raised as many questions as they answered, such as, whether the statute of repose is a "discovery" statute[220] and whether the "government contractor's defense" will apply to non-military contractors or to state government contracts.[221] Federal courts continued to influence Indiana's products liability law because litigants continued to ask them to decide important questions about Indiana law. As *Boyle* shows, federal courts can influence Indiana's products liability law in other ways as well.

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219. *See supra* text accompanying notes 191-215.
220. *See supra* text accompanying notes 137-68.
221. *See supra* text accompanying notes 204-10.