RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCT LIABILITY

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INTRODUCTION

Although the Indiana courts issued few product liability decisions during this survey period (October 1996 to October 1997), the courts clarified the definition of a user or consumer, established further guidelines for the proof of causation and product identification, addressed the issue of disclaimers in the context of strict product liability, and considered a number of important defenses to product liability claims.

I. DEFINITION OF "USER"/"CONSUMER"

In *Estate of Shebel v. Yaskawa Electric America, Inc.*,[1] the Indiana Court of Appeals further interpreted who is a "user or consumer" under the Indiana Product Liability Act (the "Act").[2] The Act provides that a "user or consumer" is:

> [A] purchaser, any individual who uses or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, or any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.[3]

In contrast, the court pointed to a provision defining a "seller" as "a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor."[4]

To gain the benefit of the statute of repose,[5] the defendant manufacturer argued that one of the product's distributors became a "user or consumer" when it took delivery of the product and "used" it as a demonstrator model. The Indiana Court of Appeals held that the statutory scheme does not contemplate an entity engaged in the business of product sales becoming a "user or consumer,"

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1. 676 N.E.2d 1091 (Ind. Ct. App. 1997).
2. IND. CODE §§ 33-1-1.5-1 to -10 (1993 & Supp. 1997).
3. *Id.* § 33-1-1.5-2(1).
4. IND. CODE § 33-1-1.5-2 (1993). The definition of "seller" was changed in 1995 to read "'seller' means a person engaged in the business of selling or leasing a product for resale, use, or consumption." IND. CODE § 33-1-1.5-2(5) (Supp. 1997).
5. IND. CODE § 33-1-1.5-5 (1993).

even though the product may have been "used" during demonstrations.[6] The court cited its decision in *Whittaker v. Federal Cartridge Corp.*[7] in which it held that the statute of repose did not begin to run until delivery to a retail customer—not a retailer—even though the products in issue had been delivered to the retailer thirty-four and thirteen years before suit was filed.[8] The *Whittaker* court considered the term "seller" and the terms "user and consumer" to be mutually exclusive.[9]

The *Shebel* court also reviewed its decision in *Thiele v. Faygo Beverage, Inc.*[10] In that case, the definition of "user or consumer" was held to exclude intermediaries in the distributive chain.[11] In *Shebel*, the court found Indiana precedent clear: the simple delivery of a product to a distributor for resale will not qualify that distributor or retailer as an "initial user or consumer."[12] Furthermore, "a distributor does not become an 'initial user or consumer' by receiving delivery of the product for resale or by using the product in a demonstration."[13] The court reasoned that the distributor who had used the product as a demonstration model only did so for the "obvious purpose" of demonstrating the product to encourage potential buyers.[14] Thus, the "use" of the product "was for purposes consistent with and in furtherance of activities of a dealer or distributor interested in . . . sales, not a user or consumer interested in using [a product] in a manufacturing or other similar setting."[15]

II. Causation and Product Identification

In *Harris v. Owens-Corning Fiberglas Corp.*,[16] the Seventh Circuit reviewed a district court's grant of summary judgment to the defendant in an asbestos wrongful death case. The plaintiff alleged that her husband died from lung cancer caused by exposure to the defendant's airborne asbestos.[17] The district court found the plaintiff had "failed to produce evidence to support a reasonable inference that [the defendant's] products caused her husband's lung cancer."[18] The evidence against the defendant came principally from two men who had worked with the plaintiff's husband, neither of whom knew the decedent nor could distinguish the generic asbestos product manufactured by any number of

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6. *Estate of Shebel*, 676 N.E.2d at 1091.
7. 466 N.E.2d 480 (Ind. Ct. App. 1984).
8. *Id.* at 481-82.
9. *Id.* at 482.
10. 489 N.E.2d 562 (Ind. Ct. App. 1986).
11. *Id.* at 588.
12. *Estate of Shebel*, 676 N.E.2d at 1093.
13. *Id.*
14. *Id.*
15. *Id.* at 1093-94.
16. 102 F.3d 1429 (7th Cir. 1996).
17. *Id.* at 1431.
18. *Id.*

companies from the defendant's asbestos product. As a result, the court held that the plaintiff failed to meet the burden of producing sufficient evidence of causation.[19] The court of appeals noted that the plaintiff "actually proved it is no more likely and perhaps less likely that [the defendant's asbestos] product caused her husband's illness as opposed to any of the many other asbestos products" at the site.[20] "When at best, the possibilities are evenly balanced, the court should enter judgment for the defendant on the ground that causation cannot be proved."[21]

The Indiana Court of Appeals addressed issues of proximate cause, intervening causes, and superseding causes in *Wolfe v. Stork RMS-Protecon, Inc.*[22] In a prior case, the court held that the doctrine of intervening cause was incorporated into Indiana's comparative fault system.[23] But the court in *Wolfe* affirmed summary judgment for the defense on the basis that an intervening cause served to break the causal chain.[24]

In *Wolfe*, the plaintiff was injured when her smock became caught in a turning bolt that protruded from a conveyor at which she was working. The defendant, Stork, had sold the conveyor and the conveyor's motor to the plaintiff's employer. Originally, the motor had been mounted directly onto the shaft of the conveyor pulley, and no coupler was required. Sometime after the original installation, however, the plaintiff's employer requested that the motor be replaced. The replacement motor was ordered directly from another supplier. "Stork was not involved in any way with the manufacturing, ordering, sale, delivery, or installation of the new motor."[25]

The new motor and the manner in which it was installed differed substantially from the original. The replacement motor was not directly mounted onto the conveyor but required the use of a coupler. The motor and the coupler were connected by a bolt that turned as the motor turned. The coupler also had several different-sized bolts sticking out of it. One of these bolts caught Wolfe's sleeve and pulled her into the machinery. The original configuration, as supplied by Stork, had no coupler, nor did it have any protruding turning bolts.

None of Stork's representatives had any knowledge of the modification to the conveyor. As the only remaining defendant, Stork moved for summary judgment, arguing its conduct was not the proximate cause of the plaintiff's injuries. The trial court granted the summary judgment motion, and the court of

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19. *Id.* at 1433.

20. *Id.*

21. *Id.* (citations omitted).

22. 683 N.E.2d 264 (Ind. Ct. App. 1997).

23. *See* L.K.I. Holdings, Inc. v. Tyner, 658 N.E.2d 111, 119 (Ind. Ct. App. 1995) ("Intervening cause . . . acknowledges a defendant's negligence, yet absolves the defendant of liability when the negligence is deemed remote. The adoption of comparative negligence, with its apportionment of fault, renders the protection of a remote actor unnecessary.").

24. *Wolfe*, 683 N.E.2d at 268-69.

25. *Id.* at 266.

appeals affirmed.[26]

Based on Stork's lack of involvement in the replacement of the conveyor motor, the *Wolfe* court held that it was not reasonably foreseeable that the conveyor system sold by Stork would undergo substantial alterations.[27] Consequently, the court concluded that the replacement of the conveyor motor with the addition of the protruding, turning bolts constituted the sole proximate cause of the plaintiff's injury and served to cut off Stork's liability.[28] In reaching this decision, the court attempted to distinguish its prior decision in *L.K.I. Holdings, Inc. v. Tyner*,[29] where it was decided that the doctrine of intervening cause had been incorporated into Indiana's comparative fault system.[30] The *Wolfe* court reasoned that the situation before it differed in that the plaintiff failed to establish that her injuries were proximately caused, even remotely, by Stork.[31] While this distinction makes some sense, it is unclear why the court would have couched its decision in intervening cause language if it never considered Stork to be a causative force. To maintain consistency, it seems the decision could have focused on the defense that the cause of the harm was a post-delivery modification or alteration of the product.[32]

III. Federal Preemption

In *Chambers v. Osteonics Corp.*,[33] the Seventh Circuit addressed whether an artificial hip recipient's claims against the hip manufacturer were preempted by the Medical Device Amendments ("MDA") of 1996 to the Food Drug and Cosmetics Act ("FDA").[34] The hip prosthesis was manufactured as a Class III medical device under an FDA investigational device exemption.[35] As part of its

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26. *Id.* at 269.
27. *Id.* at 268-69.
28. *Id.* at 269.
29. 658 N.E.2d 111 (Ind. Ct. App. 1995).
30. *Id.* at 119.
31. *Wolfe*, 683 N.E.2d at 269 n.1.
32. *See* IND. CODE § 33-1-1.5-4(b)(3) (Supp. 1997).
33. 109 F.3d 1243 (7th Cir. 1997).
34. The court applied the Supremacy Clause, U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding") to a conflict that arose between 21 U.S.C. § 360k (1994) and sections 26-1-2-314 (1993) and 33-1-1.5-3(a) (Supp. 1997) of the Indiana Code. *See Chambers*, 109 F.3d at 1246.
35. *See* 21 U.S.C. § 360(a)(1)(C) (1994).

> Class III medical devices are those which operate to sustain human life, are of substantial importance in preventing impairment of human health, or pose a potential unreasonable risk of illness or injury. The [investigational device exemption] process allows a manufacturer with an experimental device to obtain FDA approval for the device with a less rigorous review process than usual. The purpose of the exemption is to encourage experimentation that would lead to new developments.

application for the investigational device exemption, Osteonics represented to the FDA that the prosthesis would need certain metallurgical hardness specifications and that each device would be x-rayed for metallurgical defects. The plaintiff sued Osteonics on the theories of strict liability, breach of implied warranties, and negligent manufacturing. The negligent manufacturing claims were based on evidence that the device did not meet the requisite hardness specifications and that the device contained metallurgical flaws.[36]

The court held that the plaintiff's strict liability and breach of implied warranty claims were preempted because both imposed greater requirements on the product manufacturer than the applicable FDA requirements.[37] The negligent manufacturing claim of the plaintiff, however, was not preempted.[38] The court reasoned that the negligent manufacturing claim would not impose any greater requirements on the product manufacturer than the FDA imposed.[39] According to the court, such a claim should not be preempted because "there is no reason to protect a manufacturer who fails to follow the proscribed requirements and procedures for producing a device."[40] The court further noted that there was no reason to read the MDA as preempting state negligence law when it seeks only to enforce the standards and procedures set out by the FDA:

> [W]e do not think that allowing a negligence claim that seeks to enforce FDA standards will discourage experimentation in the medical device field. Rather we think it will encourage manufacturers to conduct these experiments pursuant to FDA requirements, taking care not to expose consumers to unnecessary risk. Although some risk is necessary when experimenting with new medical devices, the FDA has set the level of acceptable risk for each device. We see no reason to protect a manufacturer who fails to heed FDA requirements.[41]

In another MDA preemption case decided by the Seventh Circuit, the court provided a defacto checklist of product liability claims that are and are not preempted by the MDA. In *Mitchell v. Collagen Corp.*,[42] the plaintiff asserted claims of strict liability, negligence, mislabeling, misbranding, adulteration, fraud through misrepresentation and false advertising, and breach of express and implied warranties over a Class III medical device for which Collagen had obtained pre-market approval.[43]

After initially granting summary judgment for Collagen, the Seventh Circuit reconsidered the case in light of the Supreme Court's decision in *Medtronic, Inc.*

Chambers, 109 F.3d at 1245 (citations omitted); *see also* 21 U.S.C. § 360j(g) (1994).

36. *Chambers*, 109 F.3d at 1245.
37. *Id.* at 1248.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. 126 F.3d 902 (7th Cir. 1997).
43. *Id.* at 913-14.

v. Lohr.[44] Relying on the Supreme Court's analysis in *Medtronic*, the Seventh Circuit decided that the pre-market approval process constitutes the sort of federal regulation of a product that can have preemptive effect.[45] Then, after reviewing its decision in *Chambers v. Osteonics*[46] and similar decisions from other federal circuits, the *Mitchell* court reached several conclusions. In order to determine whether a common law cause of action is preempted by FDA regulations, the state law cause of action must be examined "to determine whether the final judgment of the state court would impose on the manufacturer a burden incompatible with the requirements imposed by the FDA."[47] If the plaintiff alleges that the manufacturer departed from the FDA-imposed standards, those claims would not be preempted because they would not impose different or additional requirements from the FDA.[48] If the state law claims "attempt to substitute a reasonableness analysis, characteristic of negligence claims, for the judgment of the FDA in approving [the product] in the course of the pre-market approval [("PMA")] process,"[49] those claims would be preempted.[50]

Applying this analysis to the state law claims asserted by the plaintiff in *Mitchell*, the Seventh Circuit held that the defect claims were preempted; that the negligence claims were preempted to the extent that they alleged Collagen was negligent despite its adherence to FDA standards; that the mislabeling, misbranding, and adulteration claims were preempted to the extent that they claimed Collagen was liable despite its conformity to the requirements of the PMA; and, that the misrepresentation claim was preempted to the extent that it was based on the labeling of the product in conformity with the PMA requirements.[51] The court also found that the implied warranty claim was based on the accepted standards of design and manufacture of the product as approved in the PMA process and thus was preempted.[52] The plaintiff's express warranty claim, however, was not preempted. Since express warranties arise from the representations of the parties and are made as the basis of the bargain between them, express warranties do not interfere with the PMA process.[53]

IV. Disclaimers in the Product Liability Context

The Indiana Supreme Court addressed whether parties may disclaim liability with respect to a product covered under the Indiana Product Liability Act.[54] In

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44. 116 S. Ct. 2240 (1996).
45. *Mitchell*, 126 F.3d at 911.
46. 109 F.3d 1243 (7th Cir. 1997).
47. *Mitchell*, 126 F.3d at 912.
48. *Id.*
49. *Id.* at 913.
50. *Id.*
51. *Id.* at 913-14.
52. *Id.* at 914.
53. *Id.*
54. McGraw-Edison Co. v. Northeastern Rural Elec. Membership Corp., 678 N.E.2d 1120

1978, Northeastern Rural Electric Membership Corporation ("Northeastern") purchased electrical power station equipment from McGraw-Edison for about $71,000.[55] The purchase agreement included a limitation of liability among its "Standard Terms and Conditions." This limitation of liability purported to disclaim Northeastern's liability for any claim arising out of the contract or the design, manufacture, sale, delivery, resale, installation, repair, and operation of any equipment furnished under the contract.[56] Four years later, a fire broke out at the Northeastern substation resulting in property damage and other losses in excess of $750,000.[57] Northeastern claimed that the fire was caused by an electric surge that the McGraw-Edison equipment failed to block from the transformer. Northeastern sued McGraw-Edison under Indiana's Product Liability Act, alleging that the equipment had been defectively designed.[58]

McGraw-Edison moved for partial summary judgment based upon its contractual limitation of liability.[59] The appellate court affirmed a denial of summary judgment, holding that the limitation of liability was unenforceable under Indiana law.[60]

Before the Indiana Supreme Court, McGraw-Edison argued that freedom of contract and the Uniform Commercial Code prohibited sophisticated parties from invoking the Indiana Product Liability Act.[61] The court noted that other jurisdictions had reached varying conclusions as to the effect of a disclaimer of liability in a commercial transaction.[62]

The Indiana Supreme Court held that the Indiana General Assembly contemplated that the Act would apply to commercial transactions as well as to consumer products.[63] While noting that Indiana law generally supports the proposition that contracts should be enforced, the court emphasized that the Product Liability Act does not identify as a defense the seller's inclusion of a liability limitation in its sales documents.[64]

McGraw-Edison argued that, if the court permitted the Act to trump its disclaimer, no product liability issue could be settled by agreement. The Indiana Supreme Court disagreed, reasoning that Indiana law contemplated "knowing waivers before or after a claim has arisen."[65] The court, in an opinion by Justice Boehm, held:

(Ind. 1997).

55. *Id.* at 1121.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 1122; *see also* IND. CODE § 26-1-2-719 (1993).
62. *McGraw-Edison Co.*, 678 N.E.2d at 1122.
63. *Id.* at 1123.
64. *Id.*
65. *Id.* at 1123-24.

> If a true negotiation over risk allocation occurs, and specific language is used, or proof of knowing assumption of risk is offered, it may be that even a strict liability statute may be waived. But that does not appear in the record here, and we are not faced with that issue today. This record does not establish even a conspicuous and explicit provision barring strict liability claims. At least that much is required to establish waiver or "acceptance of risk," . . . even by a commercial buyer.[66]

The court concluded that "the legislature has chosen to override the considerations of freedom of contract in the interest of encouraging safety of products and responsibility for products that are defective under the standards imposed by the statute."[67]

Justice Sullivan strongly dissented from the majority opinion.[68] Justice Sullivan agreed that, in appropriate circumstances, Indiana courts will enforce private agreements between sophisticated business entities that allocate the economic risk of products liability.[69] He disagreed, however, on the definition of these circumstances.[70] Justice Sullivan criticized the majority opinion for announcing a rule of law mandating that any disclaimer as to product liability constitutes a knowing waiver of the purchaser's rights.[71] He argued that the Act would permit a seller to be relieved of product liability when "the total circumstances of the transaction indicate the buyer's awareness of defects or acceptance of risk."[72] In Justice Sullivan's opinion, the majority "transforms this 'total circumstances' test into a 'knowing waiver' test."[73] He writes:

> Justice Boehm would find a knowing waiver only where (i) the underlying transaction was between "truly large and 'sophisticated' organizations," (ii) "the amount of money involved . . . was very large," and (iii) "the parties did not simply trade printed forms, but rather entered into true negotiations over all the terms and conditions, including the allocation of risks from product defects and the contract exclusively waives strict liability claims."[74]

This definition of the total circumstances exception was a pure "policy choice by this court, not . . . mandated by the legislature,"[75] admonished Justice Sullivan. He said that the total circumstances exception should not be limited "to only 'truly large organizations,' to deals where the amount of money involved is 'very

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66. *Id.* at 1124.
67. *Id.* at 1125.
68. *Id.* at 1125-27 (Sullivan, J., dissenting).
69. *Id.* at 1125.
70. *Id.*
71. *Id.*
72. *Id.* (quoting Greeno v. Clark Equip. Co., 237 F. Supp. 427, 431 (N.D. Ind. 1965)).
73. *Id.* (quotations in original).
74. *Id.* (quotations in original).
75. *Id.* at 1126.

large,' or to contracts where the parties use 'printed forms;'"[76] only the requirement that the buyer be sophisticated should be imposed.[77] Justice Sullivan concluded on this sound observation: "Freedom of contract permits a corporate purchaser to exercise its business judgment to forego claims for liability in exchange for a lower price. As a general matter, it should be for the marketplace, and not the courts, to decide whether such business judgments are correct."[78]

V. DEFENSES TO STRICT PRODUCT LIABILITY

A. Sophisticated Intermediary Exception

In *Natural Gas Odorizing, Inc. v. Downs*,[79] a family whose house exploded following an undetected natural gas leak sued the natural gas supplier and the supplier of the odorant used in the natural gas. The supplier of the odorant moved for summary judgment, and the trial court granted the motion in part and denied it in part.[80] The defendant appealed, and the plaintiffs cross-appealed.

One of the several issues addressed on appeal was whether the odorant supplier's duty to warn extended to the plaintiffs.[81] The odorant supplier argued that it had a duty to warn only the natural gas supplier.[82] The Indiana Court of Appeals disagreed, stating: "[T]he duty to warn extends to 'any user or consumer' in the 'class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.'"[83] The manufacturer, seller, or distributor of a product "has a duty to warn those persons it should reasonably foresee would be likely to use its product or who are likely to come into contact with the danger inherent in the product's use."[84] Therefore, the manufacturer has a duty to warn the ultimate user of a product when the ultimate user is "a party the manufacturer should expect to use the product."[85] Because the plaintiffs were among the class of persons that the odorant supplier could have reasonably foreseen as being subject to the dangers associated with the odorant, the court held that the odorant supplier's duty to warn extended to the plaintiffs.[86]

The odorant supplier next contended that its duty to warn was satisfied even though the plaintiffs did not receive any warnings about the dangerous characteristics of the odorant. The odorant supplier argued that, because the

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76. *Id.*
77. *Id.*
78. *Id.* (citations omitted).
79. 685 N.E.2d 155 (Ind. Ct. App. 1997).
80. *Id.* at 158.
81. *Id.*
82. *Id.* at 162.
83. *Id.* (quoting IND. CODE § 33-1-1.5-3(a) (Supp. 1997)).
84. *Id.*
85. *Id.*
86. *Id.*

natural gas company was a "sophisticated intermediary," the odorant supplier's duty to warn the plaintiffs had been discharged.[87] The court noted that "warnings generally must be given to the ultimate user or consumer."[88] Thus, "the duty to warn is non-delegable."[89] Several exceptions permitting delegation of one's duty to warn, however, have been articulated.[90] Under the sophisticated user exception, for instance, the duty to warn is limited by the fact that the dangers about the product are already known to the user.[91] Under the sophisticated intermediary exception, the manufacturer may be considered to have satisfied its duty to warn by relying upon an intermediary to inform the ultimate users or consumers.[92] Several factors are to be considered in determining whether a manufacturer has satisfied its duty to warn by relying on a sophisticated intermediary:

> [T]he likelihood or unlikelihood that harm will occur if the [intermediary] does not pass on the warning to the ultimate user, the trivial nature of the probable harm, the probability or improbability that the particular [intermediary] will not pass on the warning and the ease or burden of the giving of the warning by the manufacturer to the ultimate user.[93]

In order for a manufacturer to rely on a "sophisticated intermediary, the intermediary must have knowledge or sophistication equal to that of the manufacturer or supplier, and the manufacturer must be able to rely reasonably on the intermediary to warn the ultimate consumer. Reliance is only reasonable if the intermediary knows or should know of the product's dangers."[94] According to the court, the question of "[w]hether a manufacturer has discharged its duty under the sophisticated intermediary doctrine is almost always a question for the trier of fact."[95] The *Downs* case was remanded so that the trier of fact could determine whether the odorant supplier had satisfied its duty to warn by providing cautionary information to a sophisticated intermediary.[96]

A recent federal district court decision, *Baker v. Monsanto Co.*,[97] is noteworthy for its consideration of the sophisticated user exception to the Indiana Product Liability Act. In *Baker*, the plaintiffs claimed that they were injured as a result of their exposure to polychlorinated biphenyls ("PCBs") manufactured

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87. *Id.*
88. *Id.* at 163.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* (alteration in original) (citing Dole Food Co. v. North Carolina Foam Indus. Inc., 935 P.2d 876, 881 (Ariz. Ct. App. 1996)).
94. *Id.* at 164.
95. *Id.*
96. *Id.* at 164-65.
97. 962 F. Supp. 1143 (S.D. Ind. 1997).

by the defendant and present at the plaintiffs' work sites. The plaintiffs maintained that the defendant had a duty to warn them of PCBs present in the products it supplied to plaintiffs' employer. The plaintiffs first argued that the duty to warn was non-delegable and that the defendant breached its duty by failing to inform them of the known dangers posed by PCBs.[98] The plaintiffs next argued that, even if the duty was delegable, the defendant "failed to discharge that duty by failing to inform [the plaintiffs' employer] of the known dangers PCBs posed to humans."[99]

In contrast, the defendant contended the plaintiffs' employer was a knowledgeable and sophisticated bulk purchaser of the defendant's products containing PCBs and knew of the dangers posed by PCBs.[100] The defendant relied on several facts: that it sold its products to the employer in fifty-five gallon barrels bearing labels warning of the dangers associated with using the fluids; that it could not possibly label the liquids directly; and, that it could neither control the use of its products within the employer's plant nor control the instructions the employer gave employees handling the fluids.[101] The defendant argued that courts in other jurisdictions have expressly applied the doctrine of the sophisticated and knowledgeable bulk purchaser as a defense to failure to warn claims.[102]

To counter the defendant's arguments, the plaintiffs relied on the Indiana Court of Appeals decision in *Jarrell v. Monsanto Co.*[103] In that case, the manufacturer supplied fifty pound bags of sulphur to the plaintiff's employer with labels warning against "creating dust in handling" and informing the user that "sulphur dust suspended in the air ignites easily."[104] The sulphur ignited when the plaintiff emptied the bag into a storage bin at his employer's plant causing the plaintiff to suffer extensive burns. The court in *Jarrell* declared that the duty to warn is non-delegable.[105] Nonetheless, the *Baker* court considered the *Jarrell* holding to be an incorrect application of Indiana law.[106] The *Jarrell* court cited the Indiana Supreme Court's decision in *Hoffman v. E.W. Bliss Co.*[107] for the proposition that a manufacturer may not delegate its duty to warn.[108] However, as the *Baker* court noticed, the *Hoffman* decision expressly provides that, under appropriate circumstances, a manufacturer's duty to warn ultimate users may be delegated.[109]

98. *Id.* at 1147.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. 528 N.E.2d 1158 (Ind. Ct. App. 1988).
104. *Id.* at 1161.
105. *Id.* at 1164.
106. *Baker*, 962 F. Supp. at 1148.
107. 448 N.E.2d 277 (Ind. 1993).
108. *Jarrell*, 528 N.E.2d at 1164, 1165.
109. *Baker*, 962 F. Supp. at 1148 (discussing *Hoffman*, 448 N.E.2d at 286).

The district court further noted that Indiana courts "have consistently held that a manufacturer's duty to warn the ultimate user of its product may be delegated by adequately warning a third party."[110] Moreover, the *Baker* court declined to adopt the *Jarrell* holding because the *Jarrell* court discussed whether the manufacturer's warnings to the plaintiff's employer were adequate, despite its declaration that a manufacturer's duty to warn is not delegable to a third party such as an employer.[111] The *Jarrell* court drew upon factors outlined in the Restatement (Second) of Torts[112] such as "the dangerous nature of the product, the form in which the product is used, the intensity and form of the warnings given, the burdens to be imposed by requiring warnings, and the likelihood that the particular warning will be adequately communicated to those who will foreseeably use the product."[113] In *Jarrell*, since the manufacturer had access to the handlers of the bags through warning labels, the court recognized an issue with respect to whether the bags of sulphur were adequately labeled.[114] The *Jarrell* court found significant the "lack of specificity of the warning in comparison to the nature of the harm."[115] That court held it was unreasonable for the manufacurer to rely on a third-party employer to warn ultimate users of the danger of its product when its ability to warn them directly of the significant harm was unrestricted.[116]

Consequently, the *Baker* court held that, "[u]nder some circumstances, Indiana law permits a manufacturer to discharge its duty to warn by relying upon a third party to warn ultimate users, such as where the purchaser of a product is a 'knowledgeable and sophisticated bulk purchaser.'"[117] The *Baker* court reviewed a number of significant Indiana cases permitting manufacturers to discharge their duty to warn by relying on third parties to determine whether Indiana courts would apply the knowledgeable, sophisticated bulk purchaser defense if they were presented with the issue.[118] The court concluded:

> [I]t is clear that where Indiana courts, and courts applying Indiana law, have found that a manufacturer's duty to warn the ultimate user of the

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110. *Id.* (citing Burton v. L.O. Smith Foundry Prods., 529 F.2d 108, 111 (7th Cir. 1976) (applying Indiana law); Hoffman v. E.W. Bliss, Co., 448 N.E.2d 277, 286 (Ind. 1993); Shanks v. A.F.E. Indus., 416 N.E.2d 833, 837-38 (Ind. 1981)). The court noted, however, that Indiana courts have never completely relieved the manufacturer of a duty to warn. *Id.* at 1147 n.1. In other words, a manufacturer may not delegate its duty to warn a third party in such a way that relieves it altogether of its duty.

111. *Id.* at 1149.

112. RESTATEMENT (SECOND) OF TORTS § 338 cmt. n (1965).

113. *Jarrell*, 528 N.E.2d at 1164 (quoting Dougherty v. Hooker Chem. Corp., 540 F.2d 174, 179 (3d Cir. 1976)).

114. *Id.* at 1162-63.

115. *Id.* at 1163.

116. *Id.* at 1164.

117. *Baker*, 962 F. Supp. at 1149.

118. *Id.* at 1149-51.

> harms associated with that product may be discharged by relying on a third party, they have emphasized the third party's knowledge, control over the environment in which the product is used, and the extent to which the manufacturer could have labeled the product to warn of the danger. These are all considerations invoked in the "knowledgeable and sophisticated bulk purchaser" defense.[119]

The court considered it logical to hold that an Indiana court would apply the knowledgeable, sophisticated bulk purchaser defense, if it were given the opportunity.[120]

Nevertheless, the *Baker* court declined to hold that the manufacturer's reliance on a knowledgeable, sophisticated bulk purchaser would automatically insulate the manufacturer from liability.[121] Instead of considering the exception as an absolute bar to liability under all circumstances, the court noted that the balancing of factors required under the defense necessarily would involve an examination of each case on its own terms.[122]

The *Baker* plaintiffs' employer was considered a knowledgeable and sophisticated purchaser of the PCB products.[123] It had long standing and extensive knowledge of the dangers associated with the products.[124] It supplied detailed specifications for the products; developed similar products after years of conducting its own research; and maintained medical, engineering, and environmental departments dedicated to exploring the effects of the products.[125] Furthermore, the plaintiffs' employer was considered to be in a superior position to assess the hazards and to determine the safeguards for the employees handling the products.[126] The PCBs were delivered in railroad cars, tank trucks, and fifty-five gallon drums.[127] There was no way for the product to be labeled directly. Furthermore, it was impossible for the manufacturer to anticipate and to access all of the employees who would come into contact with its products.[128] The plaintiffs' employer, therefore, was considered to be a sophisticated and knowledgeable bulk purchaser.[129] Based on these facts, the district court granted the defendant's motion for summary judgment on the plaintiffs' claim for failure to warn.[130]

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119. *Id.* at 1150.
120. *Id.* at 1151.
121. *Id.*
122. *Id.* at 1151-52.
123. *Id.* at 1152.
124. *Id.*
125. *Id.*
126. *Id.* at 1153.
127. *Id.*
128. *Id.*
129. *Id.* at 1156.
130. *Id.* at 1161.

B. Statute of Repose

In *Johnson v. Kempler Industries, Inc.*,[131] the court addressed Indiana's statute of repose for product liability actions and the question of when the statute commences to run.[132] The court reiterated the well-established principle that the statute of repose begins to run upon the delivery of a product to the initial user or consumer.[133] "The defects to which the statute applies are those present at the time [the product] is conveyed by the seller to another party."[134] In general, any party who was an essential part of the stream of commerce that resulted in the delivery of the product to the initial user or consumer may claim the statute of repose defense.[135] However, if the action is based upon a defect that did not exist at the time of delivery to the initial user, no party may assert the statute of repose as a defense.[136] Actions involving post-sale or post-initial-delivery negligence are not subject to the ten-year statute of repose, which begins to run at the time of delivery.[137]

In *Johnson*, the plaintiff argued that the rebuilding or reconditioning of the subject machinery commenced a statute of repose period.[138] The seller of the machinery in *Johnson* had resold a shear that was originally manufactured in 1963. Before resale, the defendant installed a guard on the shear and affixed a warning label to it. The Indiana Court of Appeals reviewed *Denu v. Western Gear Corp.*[139] in which the District Court for the Southern District of Indiana determined that Indiana's statute of repose would recommence "when a product has been reconditioned, altered, or modified to the extent that a new product has been introduced into the stream of commerce."[140] Nonetheless, the *Johnson* court concluded that the plaintiff was mischaracterizing the alterations made to the product in question.[141] According to the court, the product "never underwent any substantial overhaul or reconditioning."[142] While the Indiana Court of Appeals did not adopt the holding of *Denu*, the opinion suggests that the statute of repose might recommence upon a substantial overhaul or reconditioning of a ten-year-old product.

The plaintiff next argued that the statute of repose should be extended because the safety guard and warning label were defective. Relying on the

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131. 677 N.E.2d 531 (Ind. Ct. App. 1997).
132. *Id.* at 536 (ruling on IND. CODE § 33-1-1.5-5 (1993)).
133. *Id.* (citing Stump v. Indiana Equip. Co., 601 N.E.2d 398, 401 (Ind. Ct. App. 1992)).
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. 581 F. Supp. 7 (S.D. Ind. 1983).
140. *Johnson*, 677 N.E.2d at 536-37 (citing *Denu*, 581 F. Supp. at 8).
141. *Id.* at 537.
142. *Id.*

Seventh Circuit's decision in *Black v. Henry Pratt Co.*,[143] the *Johnson* court adopted the rule that liability can be imposed on the manufacturer of a product's component where the component was in fact defective and was the cause of the injury.[144] The *Johnson* court resolved this issue in favor of the defendant by finding that the safety guard and warning labels were not defective.[145]

This decision confirms two fact scenarios for recommencing the ten-year statute of limitations under Indiana's Product Liability Statutes: (1) reconditioning or substantially overhauling an old product, and (2) adding defective components or warnings to an old product.

In *McIntosh v. Melroe Co.*,[146] the Indiana Court of Appeals was asked to consider a constitutional challenge to Indiana's ten-year statute of repose under the Product Liability Act. The plaintiff complained that the statute of repose denied him a remedy by due course of law as guaranteed by the Indiana Constitution.[147] The plaintiff argued that the right to recover for tortious injuries has existed in common law for centuries, that the statute of repose impermissively stripped him of this right, and that the framers of the Indiana Constitution did not intend to grant the general assembly the power to limit the common law right to recover for injuries in tort.[148] In rejecting these arguments, the *McIntosh* court found the Indiana Supreme Court's decision in *Dague v. Piper Aircraft Corp.*[149] to be controlling. In *Dague*, the Indiana Supreme Court addressed identical arguments and found that the state of repose did not violate the Indiana Constitution as a whole.[150]

The plaintiff further argued that the statute of repose violates the Indiana Constitution[151] because it grants a special privilege and imposes a special burden upon two sets of individual classes. First, the plaintiff argued that "the statute only applies to manufacturers of durable goods because only durable goods remain in use long enough to satisfy the ten-year statute of repose."[152] Thus, section 23 "denies the privilege of immunity to non-durable goods manufacturers."[153] Second, the plaintiff argued that the statute of repose creates

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143. 778 F.2d 1278 (7th Cir. 1985).

144. *Johnson*, 677 N.E.2d at 537.

145. *Id.* at 538.

146. 682 N.E.2d 822 (Ind. Ct. App. 1997).

147. IND. CONST. art. I, § 12. "All courts shall be open; and every person, for injury done to him in his person, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." *Id.*

148. *McIntosh*, 682 N.E.2d at 824-25.

149. 418 N.E.2d 207 (Ind. 1981).

150. *McIntosh*, 682 N.E.2d at 825 (citing *Dague*, 418 N.E.2d at 213).

151. IND. CONST. art. 1, § 23. "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." *Id.*

152. *McIntosh*, 682 N.E.2d at 825.

153. *Id.*

two classes of victims: tort victims injured by products less than ten years old, and tort victims injured by products more than ten years old.[154]

The court analyzed the plaintiff's arguments by applying the two-pronged test for challenges under article 1, section 23 of the Indiana Constitution as set forth in *Collins v. Day*:[155] (1) whether the disparate treatment accorded by the legislation is reasonably related to inherent characteristics which distinguish the unequally treated classes, and (2) whether the preferential treatment is uniformly applicable and equally available to all persons similarly situated.[156] The court stated that, before these tests can be applied, "the statute must grant unequal privileges or immunities to differing classes of persons."[157] The statue applies equally to all manufacturers; therefore, the plaintiff's claim that the statute of repose creates different classes of manufacturers did not pass the threshold.[158] For example, if a non-durable good survived to be consumed or used more than ten years after it was first delivered, the statute of repose would apply to ban a product liability action[159]

The court agreed that the statute treats classes of tort victims differently, but, applying the *Collins* test, found that the disparate treatment was reasonably related to the inherent characteristic which distinguishes the two classes: the age of the product.[160] The age of the product created the costs and dangers the Indiana General Assembly sought to avoid by enacting the statute.[161] The second prong of the *Collins* test was also satisfied because the statute of repose applies equally to all persons within a class of tort victims.[162]

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154. *Id.*
155. 644 N.E.2d 72, 80 (Ind. 1994).
156. *McIntosh*, 682 N.E.2d at 826.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 826-27.
162. *Id.* at 827.