

# SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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## INTRODUCTION

The last year of the Twentieth Century was an important one in the further development of Indiana product liability law.<sup>1</sup> During the 2000 survey period,<sup>2</sup> Indiana courts made some landmark pronouncements, answered some questions, and raised some new ones.

This Article does not attempt to provide a survey of all cases involving Indiana product liability law decided during the survey period. Rather, it addresses selected cases that are representative of the seminal product liability issues courts applying Indiana law have handled during the survey period.<sup>3</sup> The

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1. Although many commentators and courts use the term "products liability" when referring to actions alleging damages as a result of defective and/or unreasonably dangerous consumer products, the applicable Indiana statutes utilize the term "product liability" (no "s"). This Article follows the lead of the Indiana General Assembly and likewise employs the term "product liability."

2. The survey period for this Article is October 1, 1999 to September 30, 2000. Some cases on the periphery of those dates are included.

3. There are at least two cases worthy of special mention here that this Article does not address in detail. The first is *Guerrero v. Allison Engine Co.*, 725 N.E.2d 479 (Ind. Ct. App. 2000). Although *Guerrero* is a case involving an allegedly defective helicopter engine, the case focuses upon Indiana law as it relates to corporate successor liability. The plaintiffs were a passenger injured in helicopter accident and the administrator of the estate of another passenger killed in the accident. The plaintiffs sued the successor corporation that purchased all the assets of a division of the company that manufactured the engines. At issue was whether a corporation that purchases the assets of another assumes the debts and liabilities of the seller. *See id.* at 480-81. The court first recognized the general rule that the successor corporation does not assume such liability unless the predecessor corporation no longer exists and one of the following four conditions exist: (1) an express or implied agreement to assume liability; (2) fraud to escape liability; (3) a *de facto* consolidation; or (4) the buyer's continuation of the seller's business. *See id.* at 483. Because the predecessor still existed and because the successor did not manufacture the engine, there was no cause of action against the successor. *See id.* at 487.

The second case, *Bloemker v. Detroit Diesel Corp.*, 720 N.E.2d 753 (Ind. Ct. App. 1999), is worthy of mention but is not discussed in detail in this Article because it is based upon Indiana law before the 1995 Indiana Product Liability Act ("IPLA") amendments. In *Bloemker*, a pattern maker, injured while modifying a pattern, sued the pattern owner and the owner of the premises

Article also provides some background information and context where appropriate.

### I. STATUTE OF REPOSE

Indiana Code section 34-20-3-1(b) provides, in relevant part, that "a product liability action must be commenced: (1) within two (2) years after the cause of action accrues; or (2) within ten (10) years after the delivery of the product to the initial user or consumer."<sup>4</sup> Practitioners generally refer to the latter of those clauses as the product liability statute of repose.

In light of the Indiana Supreme Court's decisions in *Martin v. Richey*<sup>5</sup> and *Van Dusen v. Stotts*,<sup>6</sup> product liability practitioners in Indiana anxiously awaited word from the court about the fate of the product liability statute of repose.<sup>7</sup> On

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(foundry) where the pattern was being used for negligence. The trial court entered summary judgment for the defendant. *See id.* at 754-55. At issue on appeal was whether the pattern owner and foundry owed duties of reasonable care to the plaintiff in his capacity as a supplier of a chattel. *See* RESTATEMENT (SECOND) OF TORTS §§ 388, 392. Section 388 imposes a duty on a supplier who knows or has reason to know that chattel is or is likely to be dangerous, has no reason to think those using the chattel will realize it is dangerous and fails to inform them of the dangerous condition. *See Bloemker*, 720 N.E.2d at 757. Section 392 is similar and adds a requirement that the supplier exercise reasonable care to make the chattel safe for the use for which it is supplied. *See id.*

4. IND. CODE § 34-20-3-1 (2001). Indiana Code section 34-20-3-1(b) also provides that "if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues." *Id.* § 34-20-3-1(b). As the statute makes clear, a claimant must bring a product liability action in Indiana within two years after it accrues, but in any event, not longer than ten years after the product is first delivered to the initial user or consumer. Such is true unless the action accrues in the ninth or tenth year after delivery, in which case the full two-year period is preserved, commencing on the date of accrual. *See id.* Accordingly, the longest possible time period in which a claimant may have to file a product liability claim in Indiana is twelve years after delivery to the initial user or consumer, assuming accrual at some point in the twelve months immediately before the tenth anniversary of delivery.

5. 711 N.E.2d 1273 (Ind. 1999).

6. 712 N.E.2d 491 (Ind. 1999).

7. The *Martin* case involved an alleged claim of medical malpractice against a physician for failure to appropriately diagnose and treat her breast cancer. *See Martin*, 711 N.E.2d at 1276-77. *Martin* did not discover her condition until more than two years from the occurrence of the alleged malpractice and, therefore, beyond the act's two-year limitation period. *See id.* The *Martin* court determined under these facts that application of the two-year occurrence-based statute of limitations is unconstitutional under article I, section 23 of the Indiana Constitution because it is not "uniformly applicable" to all medical malpractice victims given that victims such as *Martin* are precluded from pursuing a claim in light of the prolonged period of time between the alleged act of malpractice and the discovery of their condition. *Id.* at 1279. According to the court, the statute of limitations, as applied to *Martin*, was also unconstitutional under article I, section 12 of the Indiana Constitution because it required her to file a claim before she was able to discover the

May 26, 2000, practitioners received their answer. In *McIntosh v. Melroe Co.*,<sup>8</sup> the Indiana Supreme Court, in a 3-2 decision, held that Indiana's ten-year product liability statute of repose does not violate either sections 12 or 23 of article I of the Indiana Constitution. The decision affirmed earlier decisions of both the court of appeals<sup>9</sup> and the trial court. Justice Boehm wrote the majority opinion, which Chief Justice Shepard joined. Justice Sullivan's concurring opinion provided the three vote majority.<sup>10</sup>

James McIntosh was injured in a 1993 accident involving a Clark Bobcat skid steer loader Melroe manufactured. McIntosh and his wife sued Melroe, claiming that a defect in the loader caused their injuries. Because it was undisputed that the loader was delivered to its initial user in 1980, some thirteen years before the incident involving McIntosh, Melroe filed a motion for summary judgment based upon the ten-year product liability statute of repose. The trial court granted summary judgment and the court of appeals affirmed.

Just as they did at the court of appeals, the McIntoshes and their *amici*<sup>11</sup> offered the supreme court a spirited and well-articulated attack on the product liability statute of repose. With respect to article 1, section 12 of the Indiana Constitution, the McIntoshes argued that the statute of repose impermissibly "abrogates all of the tort protections provided by the common law."<sup>12</sup> After initially recognizing that its earlier decision in *Dague v. Piper Aircraft Corp.*<sup>13</sup> might not have completely resolved the issue and that there is "no unique Indiana history surrounding the adoption" of section 12 in either 1816 or in its redrafting in 1851,<sup>14</sup> Justice Boehm's opinion made it clear that the statute of repose is consistent with each of Indiana's "differing lines" of section 12 doctrine:

In terms of pure civil procedural due process analysis, there is no issue. The bar of the statute of repose in the [IPLA] does not purport to regulate the procedure in the courts. Nor is the open courts requirement violated because, as *Dague* held, it remains the province of the General Assembly to identify legally cognizable claims for relief. If the law provides no remedy, denying a remedy is consistent with due course of law. Finally, there is no state constitutional 'substantive' due course of law violation because this legislation has been held to be, and we again hold it to be, rationally related to a legitimate legislative objective. It is

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alleged malpractice and her resulting injury. *See id.* at 1282-85.

8. 729 N.E.2d 972 (Ind. 2000).

9. *McIntosh v. Melroe Co.*, 682 N.E.2d 822 (Ind. Ct. App. 1997).

10. *See McIntosh*, 729 N.E.2d at 984.

11. Several prominent members of the Bar prepared an *amicus curiae* brief for the Indiana Trial Lawyers Association in support of the McIntoshes' arguments. The Indiana Defense Lawyers Association and the Product Liability Advisory Counsel prepared *amicus curiae* briefs in support of Melroe's arguments. *See id.* at 972.

12. *Id.* at 974.

13. 418 N.E.2d 207 (Ind. 1981).

14. *McIntosh*, 729 N.E.2d at 974.

debatable whether the [IPLA] eliminated a common law remedy, but even if it did, there is no substantive constitutional requirement that bars a statute from accomplishing that.<sup>15</sup>

The court rejected the McIntoshes' argument "that they have a constitutional right to a remedy for their injuries because the framers of the 1851 Constitution 'decided not to give the General Assembly broad powers to abolish the common law.'"<sup>16</sup> In essence, such an argument amounts to a "claim that common law remedies may not be abolished," a premise that the supreme court has "strongly" rejected.<sup>17</sup> Citing several Indiana cases including *Martin*,<sup>18</sup> *Dague*,<sup>19</sup> *Sidle v. Majors*,<sup>20</sup> and *Pennington v. Stewart*,<sup>21</sup> Justice Boehm wrote that the "Court has long recognized the ability of the General Assembly to modify or abrogate the common law."<sup>22</sup> In further elaborating, Justice Boehm noted:

[T]he legislature has the authority to determine what constitutes a legally cognizable injury." . . . [T]here is no "fundamental right" to bring a particular cause of action to remedy an asserted wrong. . . . Rather, because individuals have "no vested or property right in any rule of common law," the General Assembly can make substantial changes to the existing law without infringing on citizen rights. . . . Because no citizen has a protectable interest in the state of product liability law as it existed before the [IPLA], the General Assembly's abrogation of the common law of product liability through the statute of repose does not run afoul of the "substantive" due course of law provision of Article I, Section 12.<sup>23</sup>

Justice Boehm's opinion makes it clear that if article I, section 12 does not provide a remedy, the Indiana Constitution does not require one. Because the General Assembly earlier determined that injuries occurring ten years after the product was delivered to a user are not legally cognizable claims for relief, the McIntoshes were not entitled to a "remedy" under section 12. As such, the statute of repose

does not bar a cause of action; its effect, rather is to prevent what might otherwise be a cause of action from ever arising . . . . The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.<sup>24</sup>

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15. *Id.* at 976.

16. *Id.* at 976-77.

17. *Id.* at 977.

18. *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

19. *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981).

20. 341 N.E.2d 763, 775 (Ind. 1976).

21. 10 N.E.2d 619 (Ind. 1937).

22. *McIntosh*, 729 N.E.2d at 977.

23. *Id.* at 977-78 (internal citations omitted).

24. *Id.* at 978 (quoting *Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868, 880 (N.C. 1983)).

In contrast to the Medical Malpractice Act as applied in *Martin*, Justice Boehm recognized that in applying the IPLA to the case before the court, no one who has an accrued claim is foreclosed from asserting it. Foreclosing accrual of claims after a product has been in use for ten years is not an unreasonable exercise of legislative power, particularly in light of the fact that claims accruing in the last two years of the ten-year period may be brought within two years after accrual.<sup>25</sup> Accordingly, although the Indiana Constitution requires courts to be open to provide a remedy by due course of law, "legislation by rational classification to abolish a remedy is consonant with due course of law. If the law provides no remedy, Section 12 does not require that there be one."<sup>26</sup>

Although the court rejected the McIntoshes' argument that the Indiana Constitution precludes the legislature from modifying or eliminating a common law tort, the court's opinion nevertheless recognizes that the General Assembly's authority is not without limits. Thus, the final section 12 issue that Justice Boehm's opinion addresses is whether the product liability statute of repose is a rational means of achieving a legitimate legislative goal. After first recognizing that "Section 12 requires that legislation that deprives a person of a complete tort remedy must be a rational means to achieve a legitimate legislative goal[.]"<sup>27</sup>

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25. *See id.*

26. *Id.* at 979. Commenting about the dissent's conclusion that article I, section 12 guarantees to each citizen a substantive right to remedy for injuries suffered, Justice Boehm wrote that such a conclusion confuses "injury" with "wrong":

There is not and never has been a right to redress for every injury, as victims of natural disasters or faultless accidents can attest. Nor is there any constitutional right to any particular remedy. Indeed, as we have pointed out, some forms of "wrong" recognized at common law have long since been abolished by the legislature without conflict with the Indiana Constitution. . . . Ironically, the wrong the dissent contends in this case to be preserved by the constitution against legislative interference, strict liability for product flaws, did not exist in 1851; it was adopted as part of the [IPLA] in 1978. . . . This further underscores the point that the common law was not frozen in 1851 and is not chiseled in stone today. The dissent would imply that any judicially created tort remedy, even if non-existent until over 100 years after the adoption of the Indiana Constitution, cannot be abolished. Under this view, the door swings only one way: causes of action may be created at common law and by statute, but no cause of action, once it is created, may be eliminated.

As we observed in another context, the power to create is the power to destroy. . . . There is a fundamental difference between finding in the Indiana Constitution a requirement to preserve a specific substantive rule of law (which is the net effect of the dissent's position), and requiring that our courts be open to entertain claims based on established rules of law.

*Id.*

27. *Id.* Justice Boehm recognized that the "rational means" test is a variation on the substantive due process theme and imposes an overall test of rationality very similar to section 23's rational relationship requirement. *See id.* at 980.

Justice Boehm determined that the product liability statute of repose is such a rational means. Citing *Estate of Shebel v. Yaskawa Electric America, Inc.*,<sup>28</sup> the court reaffirmed its earlier pronouncement that the statute of repose "represents a determination by the General Assembly that an injury occurring ten years after the product had been in use is not a legally cognizable 'injury' that is to be remedied by the courts."<sup>29</sup> Such a decision is based on the legislature's "apparent conclusion that after a decade of use, product failures are 'due to reasons not fairly laid at the manufacturer's door.'"<sup>30</sup> Justice Boehm's section 12 analysis continued:

The statute also serves the public policy concerns of reliability and availability of evidence after long periods of time, and the ability of manufacturers to plan their affairs without the potential for unknown liability. The statute of repose is rationally related to meeting these legitimate legislative goals. It provides certainty and finality with a bright line bar to liability ten years after a product's first use. It is also rationally related to the General Assembly's reasonable determination that, in the vast majority of the cases, failure of products over ten years old is due to wear and tear or other causes not the fault of the manufacturer, and the substantial interest already identified warrant establishing a bright line after which no claim is created.<sup>31</sup>

Justice Boehm next turned his attention to the McIntoshes' claim that the product liability statute of repose violates article I, section 23<sup>32</sup> of the Indiana Constitution because it creates an impermissible distinction between tort victims injured by products more than ten years old and those injured by products less than ten years old. The McIntoshes also argued that the product liability statute of repose impermissibly grants a privilege to manufacturers of durable goods that

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28. 713 N.E.2d 275 (Ind. 1999).

29. *McIntosh*, 729 N.E.2d at 780.

30. *Id.* (quoting *Shebel*, 713 N.E.2d at 278). Only a few months before the *McIntosh* decision, Justice Sullivan articulated the policy underlying the Indiana General Assembly's enactment of the product liability statute of repose:

The policies underlying [the statute of repose] have been described as both a concern for the lack of reliability and availability of evidence after long periods of time and a public policy to allow manufacturers, after a lapse of a reasonable amount of time, to plan their affairs with a degree of certainty, free from unknown potential liability. Presumably there is also an underlying assumption that after ten years a product failure is due to reasons not fairly laid at the manufacturer's door. In any event, the legislature has determined that a product in use for ten years is no longer to be the source of its manufacturer's liability. The wisdom of this policy is for the legislature.

*Shebel*, 713 N.E.2d at 278 (internal citations omitted).

31. *McIntosh*, 729 N.E.2d at 980 (internal citations omitted).

32. The Indiana Constitution provides that "[t]he 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." IND. CONST. art. I, § 23.

is not available to manufacturers of non-durable goods.

After first pointing out that the "classification" in the product liability statute of repose is similar to most statutory classifications in that it "do[es] not define a group of persons by some innate characteristic," but rather "consequences to specified sequences of events that could touch anyone,"<sup>33</sup> Justice Boehm briefly reviewed the court's seminal section 23 decision, *Collins v. Day*.<sup>34</sup>

In applying *Collins*, the court first asked whether the product liability statute of repose is reasonably related to the inherent characteristics that define the distinction. The court answered the question in the affirmative. Justice Boehm pointed out that there is no statutory classification of claimants because "[a]nyone can present a claim and anyone can be barred by the statute, depending on what product is the source of the claim."<sup>35</sup> In that connection, Justice Boehm reiterated the policy basis supporting the statute of repose, namely the legislative determination that product failures occurring more than ten years after delivery to the first user are not fairly laid at the door of the manufacturer. Justice Boehm also cited the certainty and finality that a statute of repose provides by limiting the exposure of manufacturers to ten years after a product is first used. Accordingly, the distinction "between persons injured by products less than ten years old and those injured by products more than ten years old is rationally related to serving these legislative goals and is a permissible balancing of the competing interests involved."<sup>36</sup>

The second prong of the *Collins* section 23 analysis "requires that the preferential treatment provided by the statute of repose be uniformly applicable to all similarly situated persons."<sup>37</sup> The *McIntosh* majority agreed that the product liability statute of repose satisfies that requirement. "Unlike the plaintiff in *Martin* who had an otherwise valid tort claim but was unable to discover it within the statute of limitations," Justice Boehm explained, "the McIntoshes have never had a legally cognizable injury" because, on its face, the product liability statute of repose applies to everyone.<sup>38</sup> According to Justice Boehm, the statute prevents all citizens from accruing claims based on products in use longer than a decade and the McIntoshes are, therefore, treated no differently from any other

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33. *Id.* at 980-81.

34. 644 N.E.2d 72 (Ind. 1994).

35. *McIntosh*, 729 N.E.2d at 981. In responding to Justice Dickson's dissenting opinion, Justice Boehm took issue with Justice Dickson's belief that "'inherent characteristics of the people' differentiate the statutory treatments." *Id.* at 982. On that score, Justice Boehm wrote:

It is the characteristic, inherent or not, of the underlying products with which the 'people' come into contact that produce the differentiated result. To take *Collins* as an example, an agricultural worker and an industrial worker have no inherent characteristics. The industry in which they are employed is the basis of the distinction.

*Id.*

36. *Id.* at 981.

37. *Id.* at 982 (citing *Martin v. Richey*, 711 N.E.2d 1273, 1280 (Ind. 1999); *Collins*, 644 N.E.2d at 80).

38. *Id.* at 983.

person injured more than ten years after a product is first used or consumed.<sup>39</sup>

In an opinion that concurred in part and concurred in result in part, Justice Sullivan agreed that the product liability statute of repose does not violate sections 12 and 23, but he did so because, in his view, *Dague v. Piper Aircraft Corp.*<sup>40</sup> and *Beecher v. White*<sup>41</sup> are precedent worthy of adherence. He acknowledged that the court cited *Dague* approvingly in a section 12 context in the case of *State v. Rendleman*,<sup>42</sup> and that *Beecher* upheld the constitutionality under section 23 of a ten-year statute of repose for claims arising from architectural deficiencies.<sup>43</sup>

The salient question for Justice Sullivan was whether the court's 1999 decisions in *Martin* and its two related cases<sup>44</sup> would produce a result different from those in *Dague*, *Rendleman*, and *Beecher*. The answer, according to Justice Sullivan, is "no." With respect to section 12, *Martin* "requires that the plaintiff have 'an otherwise valid tort claim'" and reiterates "an important point made in *Rendleman* that 'the legislature has the authority to modify or abrogate common law rights provided that such change does not interfere with constitutional rights.'"<sup>45</sup> Because there is no valid product liability tort claim for a physical injury occurring after ten years from date of delivery to the initial user or consumer and because the harm allegedly suffered by the McIntoshes occurred outside of that period, Justice Sullivan agreed that the McIntoshes did not have the "otherwise valid tort claim" that *Martin* requires.<sup>46</sup>

With respect to section 23, Justice Sullivan's answer was also "no" because *Martin* recognizes that section 23 allows the legislature to create a statute of limitations in the Medical Malpractice Act so long as it is uniformly applicable to all medical malpractice victims.<sup>47</sup> From that, Justice Sullivan concluded that section 23 "is no impediment to the legislature creating a statute of repose in the [IPLA] so long as it is uniformly applicable to all products victims" and that the McIntoshes were treated no differently under the IPLA than "any other product victim whose injury occurs more than ten years after delivery of the product to an initial user or consumer."<sup>48</sup>

Justice Dickson, in a dissenting opinion joined by Justice Rucker, believed that the court should have held that the product liability statute of repose violates both sections 12 and 23. Justice Dickson's dissent began with his view of section

39. *See id.*

40. 418 N.E.2d 207 (Ind. 1981).

41. 447 N.E.2d 622, 627 (Ind. Ct. App. 1983).

42. 603 N.E.2d 1333 (Ind. 1992).

43. *See McIntosh*, 729 N.E.2d at 984 (Sullivan, J., concurring).

44. *See Harris v. Raymond*, 715 N.E.2d 388 (Ind. 1999); *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999).

45. *McIntosh*, 729 N.E.2d at 984-85 (Sullivan, J., concurring) (quoting *Martin v. Richey*, 711 N.E.2d 1273, 1283 (Ind. 1999)).

46. *Id.* at 984.

47. *See id.* at 985.

48. *Id.*



12: "In choosing the language of [section 12, the framers of the Indiana Constitution] did not say that every person might have whatever remedy the common law or the legislature may allow from time to time, nor did they merely reiterate the language of the then-existing federal Due Process Clause."<sup>49</sup> Moreover, according to Justice Dickson, the framers did not craft section 12 merely to provide "due process."<sup>50</sup> Instead, the framers "unequivocally enhanced the protections" the Indiana Constitution affords, "expressly establishing the additional right to remedy for injuries suffered."<sup>51</sup>

After a brief history of section 12, which included references to other states' "remedies" provisions, the Magna Carta, and Chief Justice Marshall's opinion in *Marbury v. Madison*,<sup>52</sup> Justice Dickson concluded that the right to a remedy for injury is a "core value" that "the legislature may qualify but not alienate."<sup>53</sup> According to Justice Dickson:

While legislative qualifications of [the right to a remedy] may be enacted under the police power, the total abrogation of an injured person's right to remedy is an unacceptable material burden. The statute of repose provision in the [IPLA] is no mere qualification. It does not merely limit the time within which to assert a remedy, nor does it merely modify the procedure for enforcing the remedy. Nor is it a narrow, limited immunity necessitated by police power. On the contrary, the repose provision completely bars the courthouse doors to all persons injured by products over ten years old, even for claims alleging negligence, and even where the products were designed, built, sold, and purchased with the expectation of decades of continued use. Although this provision denies all Indiana citizens access to justice ensured by the Right to Remedy Clause, it is especially pernicious to those economically disadvantaged citizens who must rely on older or used products rather than new ones.<sup>54</sup>

Justice Dickson began his section 23 analysis just as did Justice Boehm, by citing *Collins* and its two-part test. Justice Dickson concluded, however, that the product liability statute of repose violates the first *Collins* requirement "[b]y artificially distinguishing as a separate class those citizens injured by defective products more than ten years old, and by forbidding them access to legal recourse for their injuries."<sup>55</sup> Justice Dickson believed that the majority's misapplication

49. *Id.* at 986 (Dickson, J., dissenting).

50. *Id.*

51. *Id.*

52. 5 U.S. (1 Cranch) 137 (1803).

53. *McIntosh*, 729 N.E.2d at 987-88 (citing *Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993) (Dickson, J., dissenting)).

54. *Id.* at 989-90 (citations omitted).

55. *Id.* at 991. The problem, according to Justice Dickson, was with the first of the two *Collins* sub-elements, which requires that classification be "based upon distinctive, inherent characteristics that rationally distinguish the unequally treated classes." *Id.*

of *Collins* “beg[an] with its focus upon unequal treatment of different classes of *products*, rather than upon unequally treated classes of *people*.”<sup>56</sup> On that point, Justice Dickson wrote:

When a statute is challenged as violating Section 23, we must evaluate the disparate treatment afforded to the benefited or burdened class. Products are not sued; they do not receive immunity from suit under the statute; and thus, they receive neither a benefit nor a burden. It is *people* who receive unequal treatment under the statute.

Perhaps because it focuses upon products rather than people, the majority bypasses the required threshold question as to whether the legislative classification is based upon distinctive, inherent characteristics that rationally distinguish the unequally treated classes. This is sub-element (1) of the first of the two *Collins* requirements. The majority fails to consider this prerequisite question. It is only when the classification is based upon inherent distinctions that the analysis can proceed to evaluate whether the disparate treatment is reasonably related to the characteristics distinguishing the classifications.<sup>57</sup>

After explaining why “the Indiana Constitution demands more than simply a rational relationship between the legislative goal and the classification,”<sup>58</sup> Justice Dickson concluded as follows:

The unequal treatment provided by the repose provision of the [IPLA] is wholly unrelated to any distinctive, inherent characteristics that rationally distinguish the unequally treated classes of people. In other words, there is nothing that naturally inheres in the group of people designated for unequal treatment that separates them into distinctive classes. The *parties* who are injured by defective products more than ten years old do not necessarily differ from the *parties* who are injured by such products that are only nine years old. The ten-year product age line does not distinguish classes of people based upon their inherent characteristics. Using such a line as a basis to treat unequally different classes of people clearly violates both the language and the spirit of Section 23.

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[The product liability statute of repose] takes a natural class of persons (users or consumers of a product), splits that class in two, designates the dissevered factions of the original unit as two classes (persons injured by a product within ten years of its delivery and persons

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56. *Id.* at 991-92 (emphasis in original).

57. *Id.* at 992 (footnote omitted).

58. *Id.*

injured by products more than ten years after its delivery), and enacts different rules unequally governing each. Such discrimination is unconstitutional.<sup>59</sup>

In the wake of *McIntosh*, practitioners are calling upon Indiana courts to resolve the applicability of the ten-year product liability statute of repose in the context of product liability cases alleging exposure to asbestos-containing products. The issue is pending before the Indiana Court of Appeals in several cases.

Indiana practitioners continue to argue about the applicable limitations and repose periods in asbestos cases. The genesis of the controversy is the statute now codified as Indiana Code section 34-20-3-2, which provides that “[a] product liability action that is based on (1) property damage resulting from asbestos; or (2) personal injury, disability, disease, or death resulting from exposure to asbestos must be commenced within two (2) years after the cause of action accrues.”<sup>60</sup> That exception applies, however, “only to product liability actions against: (1) persons who mined and sold commercial asbestos; and (2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.”<sup>61</sup>

The crux of the debate concerns the phrase “persons who mined and sold commercial asbestos.” Plaintiffs argue that the “and” should be read as an “or,” while defendants contend that the statute applies to create an exception to the limitations and repose periods only for claims against those entities that both mined *and* sold commercial asbestos. Two years ago, in *Sears Roebuck & Co. v. Noppert*,<sup>62</sup> the court of appeals addressed the applicability of the ten-year product liability statute of repose in the context of a claim for alleged exposure to asbestos. The *Noppert* court did so as part of a larger discussion about the timeliness of a motion to correct errors pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure.<sup>63</sup>

The second prong of the court of appeals’ analysis focused upon the propriety of the Nopperts’ defense at trial because Indiana law required them to show that they had a “meritorious defense” to Sears’ summary judgment motion if the court was to consider their motion to correct errors to be a Trial Rule 60(B) motion.<sup>64</sup> The *Noppert* court concluded that, as a matter of law, the Nopperts did not have a meritorious defense because the exception to the ten-year product

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59. *Id.* at 993-94.

60. IND. CODE § 34-20-3-2 (1998) (formerly IND. CODE § 33-1-1.5-5.5). The statute further provides that an action accrues “on the date when the injured person knows that the person has an asbestos related disease or injury” and that the “subsequent development of an additional asbestos related disease or injury is a separate cause of action.” *Id.*

61. *Id.*

62. 705 N.E.2d 1065 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 300 (Ind. 1999).

63. *See id.* at 1066-67.

64. *Id.* at 1067.

liability statute of repose contained in Indiana Code section 34-20-3-2 applies only to claims against persons who mined and sold commercial asbestos and against funds described in that section.<sup>65</sup> With respect to the first category of defendants (miners and sellers), the court made it clear that the entities to which the statute applies are entities that both mined *and* sold commercial asbestos: “[W]hile courts in Indiana have on occasion construed an ‘and’ in a statute to be an ‘or,’ we find that there is no ambiguity in this statute requiring such an interpretation.”<sup>66</sup> Because the court determined that Sears did not fall into either category, the “discovery” exception did not apply to it.<sup>67</sup>

Because of the procedural context in which the court of appeals addressed the substantive issue, asbestos plaintiffs and their counsel have since argued that the substantive discussion in the court’s opinion is merely *obiter dicta*. Whether the ten-year product liability statute of repose applies to claims alleging asbestos-related injuries is an intriguing question in light of the Indiana Supreme Court’s decisions in *McIntosh*, *Covalt*, *Martin*, and *Van Dusen*, and in light of the fact that some asbestos-related injuries can take years to develop. Practitioners await the court’s decisions in several pending cases and further guidance in this area.

## II. CASES INTERPRETING STATUTORY DEFINITIONS

In Indiana, all claims filed by users or consumers<sup>68</sup> against manufacturers<sup>69</sup>

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65. *See id.* The Nopperts argued that the asbestos “discovery” statute is an exception to the application of the ten-year statute of repose in asbestos cases. In doing so, the Nopperts relied, in part, on the Indiana Supreme Court’s decision in *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989). *See Noppert*, 705 N.E.2d at 1067.

66. *Id.* at 1068 (footnote omitted).

67. *See id.* On petition to transfer to the Indiana Supreme Court, the Nopperts argued, in part, that the court of appeals’ interpretation of Indiana Code section 33-1-1.5-5.5 violated article I, sections 12 and 23 of the Indiana Constitution. The Indiana Supreme Court denied transfer on August 18, 1999, without issuing an opinion. *See Sears Roebuck & Co. v. Noppert*, 726 N.E.2d 300 (Ind. 1999).

68. The IPLA defines “consumer” as:

(1) a purchaser; (2) any individual who uses or consumes the product; (3) 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 (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.

IND. CODE § 34-6-2-29 (1998). “User” has the same meaning as “consumer.” *See id.* § 34-6-2-147.

69. “Manufacturer” is defined as “a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.” *Id.* § 34-6-2-77(a). “Manufacturer” also includes a seller who:

(1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the

and sellers<sup>70</sup> for physical harm<sup>71</sup> caused by a product<sup>72</sup> are statutory. The IPLA governs all such claims “regardless of the substantive legal theory or theories upon which the action is brought.”<sup>73</sup> The 1995 amendments to the IPLA incorporated negligence principles in cases in which claimants base their theory of liability upon either defective design or inadequate warnings.<sup>74</sup> “Strict liability” remains only in cases in which the theory of liability is a manufacturing defect.<sup>75</sup> The 1995 amendments also limited actions against sellers,<sup>76</sup> more specifically defined the circumstances under which a distributor or seller could be deemed a manufacturer,<sup>77</sup> converted the traditional state of the art defense into a rebuttable presumption,<sup>78</sup> and injected comparative fault principles into product

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manufacturing process; (3) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the manufacturer.

*Id.* § 34-6-2-77(a).

70. “Seller” is defined as “a person engaged in the business of selling or leasing a product for resale, use, or consumption.” *Id.* § 34-6-2-136.

71. “Physical harm” is defined as “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.” *Id.* § 34-6-2-105(a). It does not include “gradually evolving damage to property or economic losses from such damage.” *Id.* § 34-6-2-105(b).

72. “Product” is defined as “any item or good that is personalty at the time it is conveyed by the seller to another party.” *Id.* § 34-6-2-114(a). “The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.” *Id.* § 34-6-2-114(b).

73. *Id.* § 34-20-1-1.

74. *See id.* § 34-20-2-2.

75. *See id.* The editors of *Burns Indiana Statutes Annotated* have included a title that could be misleading to their readers. The short title the editors have chosen for section 34-20-2-2 is “Strict Liability—Design Defect.” *See* IND. CODE § 34-20-2-2 (2000). The juxtaposition of the terms in that title might cause a reader to incorrectly assume that the statute provides for strict liability in design defect cases.

76. *See* IND. CODE § 34-20-2-3 (1998).

77. *See id.* § 34-20-2-4.

78. *See id.* § 34-20-5-1. The presumption is that the product causing the physical harm is not defective and that the product’s manufacturer is not negligent. *See id.* The IPLA entitles a manufacturer or seller to such a presumption if,

before the sale by the manufacturer, the product: (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.

*Id.*

liability cases.<sup>79</sup>

For these reasons, cases interpreting the IPLA are of the utmost importance. The following cases decided during the survey period define and interpret terms to which the IPLA refers.

#### A. User or Consumer

In *Butler v. City of Peru*,<sup>80</sup> the Indiana Supreme Court granted transfer specifically "to clarify the phrase 'user or consumer' in the [IPLA]."<sup>81</sup> James Butler, a maintenance worker for Peru Community School Corporation, was electrocuted in September 1993 while trying to restore power to an electrical outlet near the Peru High School baseball field. The baseball field's electrical equipment was installed around 1970.

James Butler's wife and estate sued the City of Peru and Peru Municipal Utilities, alleging ten counts of negligence. The trial court granted summary judgment for the defendants, and the court of appeals affirmed.<sup>82</sup>

79. The 1995 amendments changed Indiana law with respect to fault allocation and distribution in product liability cases. *See id.* at § 34-20-7-1. The Indiana General Assembly made it clear that "a defendant is not liable for more than the amount of fault . . . directly attributable to that defendant," as determined pursuant to section 34-20-8, nor can a defendant "be held jointly liable for damages attributable to the fault of another defendant." *Id.* § 34-20-7-1.

The 1995 amendments now require the trier of fact to compare "the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm." *Id.* § 34-20-8-1(a). The statute requires that the trier of fact compare such fault "in accordance with IC 34-57-2-7, IC 34-57-2-8, or IC 34-57-2-9." Those references appear to be incorrect cross-references. Article 51 of Title 34 contains Indiana's Comparative Fault Act. Sections 34-51-2-7 to -9 of the Indiana Code are, therefore, most likely the statutory provisions to which the statute intends to refer. The IPLA mandates that:

[i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.

*Id.* § 34-20-8-1(b).

Practitioners also should recognize that the definition of "fault" for purposes of the IPLA is not the same as the definition of "fault" applicable in actions governed by the Comparative Fault Act. *Compare* IND. CODE § 34-6-2-45(a) (1998), *with* IND. CODE § 34-6-2-45(b) (1998). For purposes of the IPLA, the definition of "fault" does not include the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." *Id.* § 34-6-2-45(b).

80. 733 N.E.2d 912 (Ind. 2000).

81. *Id.* at 914. The court also granted transfer to "reiterate the correct standard for summary judgment under Trial Rule 56." *Id.*

82. *See id.* at 914-15. The theory of negligence was based upon "the close proximity of high power lines to low power lines and the lack of any proper warning regarding, or insulation of, the high power lines." *Id.* at 914.

The supreme court's opinion focused first on Indiana's summary judgment standard in the context of negligence and duty issues.<sup>83</sup> The court next turned its attention to the IPLA. Indiana Code section 34-20-2-1 provides, in relevant part:

[A] person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition . . . .<sup>84</sup>

The trial and appellate courts both concluded that James Butler was not a "user or consumer" of a product under the IPLA because he simply did not fit within any of the foregoing definitions.<sup>85</sup> The court of appeals reasoned that James Butler was not a purchaser of the product, that he did not consume the product, that he did not possess it while acting on behalf of an injured party, and that he was not a bystander. Thus, the only definition of consumer that conceivably could apply to James Butler was "any individual who uses . . . the product."<sup>86</sup> Quoting *Thiele v. Faygo Beverage, Inc.*,<sup>87</sup> the court of appeals reiterated that the "legislature intended 'user or consumer' to characterize those who might foreseeably be harmed by a product at or after the point of its retail sale or equivalent transaction with a member of the consuming public."<sup>88</sup> In light of *Thiele*, the court determined that James Butler was not a "user" of the electricity product, and that the trial court did not err in determining that the

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83. See *id.* at 915-18.

84. IND. CODE § 34-20-2-1 (1998).

85. See *supra* note 68 for a discussion of "user" and "consumer." The court of appeals rather narrowly phrased the product liability issue as whether the IPLA applies "when an electrical utility customer's employee is injured on the customer's premises by a defect in an electrical installation" the utility did not perform. *Butler v. City of Peru*, 714 N.E.2d 264, 265 (Ind. Ct. App. 1999), *vacated by* 733 N.E.2d 912 (Ind. 2000). The court of appeals agreed with the trial court that the IPLA did not apply because "James Butler was not a 'consumer'" of electricity. *Id.* at 267. In doing so, the court was quick to point out that "electricity can be a 'product' within the meaning of the [IPLA]," and that "[d]etermining whether a plaintiff is a consumer within the meaning of the [IPLA] is a pure question of law." *Id.* at 267 (citing *Pub. Serv. of Ind., Inc. v. Nichols*, 494 N.E.2d 349 (Ind. Ct. App. 1986)). According to the court of appeals,

of all of the potential plaintiffs who might be injured by a defective product, those that have been granted the protection of the [IPLA] has been doubly limited to (1) users and consumers (2) whom the seller should reasonably foresee as being subject to the harm caused by the product's defective condition.

*Id.*

86. *Id.* at 268.

87. 489 N.E.2d 562 (Ind. Ct. App. 1986).

88. *Butler*, 714 N.E.2d at 268 (quoting *Theile*, 489 N.E.2d at 586).

IPLA did not apply.<sup>89</sup>

Although the Butlers did not technically present a claim governed by the post-1995 IPLA, the supreme court nevertheless took the opportunity to address the IPLA issue.<sup>90</sup> The supreme court agreed that the Butlers had no viable claim under the IPLA, but not because James Butler was not a “user or consumer.” According to the supreme court, “the [s]chool was the ultimate user of the electrical transmission system and the electricity. As an employee of a ‘consuming entity,’ Butler falls under the definition of ‘user or consumer’ established in *Thiele*.”<sup>91</sup>

The court then concluded as follows:

We do not suggest that Peru had any exposure under the [IPLA]. Although Peru obviously furnished the electricity within the [IPLA]’s period of limitations, the same is not true of the electrical equipment regardless of Peru’s role in its manufacture, design, or construction. Peru is correct that the baseball field electrical equipment was installed in approximately 1970—well over the ten-year statute of repose for the [IPLA]. Accordingly, no claim may be brought under the [IPLA] on the basis of defects in that equipment.<sup>92</sup>

Practitioners may recall that the Indiana Supreme Court recently addressed the issue of who qualifies as a “user or consumer” for purposes of applying the ten-year product liability statute of repose. In *Estate of Shebel v. Yaskawa Electric America, Inc.*,<sup>93</sup> the court held “that a ‘user or consumer’ under [the IPLA] includes a distributor who uses the product extensively for demonstration purposes” and that the repose period commences with delivery for such a use.<sup>94</sup>

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89. *See id.*

90. *See Butler v. City of Peru*, 733 N.E.2d 912, 918 (Ind. 2000). The Butlers filed their complaint on January 13, 1995. *See id.* The applicable law was, therefore, the pre-1995 version of the IPLA, which governed only those “actions in which the theory of liability is strict liability in tort.” IND. CODE § 33-1-1.5-1 (1993). None of the Butlers’ claims was based upon strict liability. Indeed, the Butlers apparently conceded in their briefs to the trial court and to the court of appeals that the IPLA did not apply because there was no “product” involved. *Butler*, 733 N.E.2d at 918 n.3. The Butlers “changed tactics” and argued to the supreme court that the IPLA “did apply because electricity was a product although the wiring was not.” *Id.*

91. *Butler*, 733 N.E.2d at 919.

92. *Id.* (citing *McIntosh v. Melroe*, 729 N.E.2d 972 (Ind. 2000)). Although the *Butler* court recognized that electricity might be considered a “product” under the IPLA, the Butlers did not offer any theory about “why the electricity—as distinct from the configuration of the equipment—was defective or unreasonably dangerous.” *Id.* Accordingly, there simply was no evidence that the electricity at issue could be considered a “product in a defective condition unreasonably dangerous to any user or consumer.” *Id.* (citing IND. CODE § 34-20-2-1 (1998)).

93. 713 N.E.2d 275 (Ind. 1999).

94. *Id.* at 276.



### B. The Property Damage Cases

Four cases decided by the court of appeals during the survey period, *Interstate Cold Storage, Inc. v. General Motors Corp.*,<sup>95</sup> *I/N Tek v. Hitachi, Ltd.*,<sup>96</sup> *Progressive Insurance Co. v. General Motors Corp.*,<sup>97</sup> and *Hitachi Construction Machinery Co. v. Amax Coal Co.*,<sup>98</sup> all confirmed that the IPLA does not allow a claimant to recover for damages to the defective product itself.

In *Interstate*, a General Motors (GM) vehicle caught fire and was declared a total loss. The Interstate employee driving the vehicle at the time was not injured and no other property was damaged as a result of the fire. Interstate sued GM, alleging strict liability, negligence, and breach of warranty.<sup>99</sup> GM moved for summary judgment, arguing that the IPLA does not permit recovery when the only damage suffered is to the allegedly defective product itself. The trial court agreed and granted summary judgment to GM with respect to the strict liability and negligence claims.<sup>100</sup> In doing so, the trial court found that the IPLA's "physical harm" requirement "means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden major damage to property other than to the product itself."<sup>101</sup> Interstate appealed. "Physical harm" for purposes of the IPLA means "bodily injury, death, loss of services, and rights arising from any such injuries as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic loss from such damage."<sup>102</sup>

After recognizing that the parties did not dispute that the damage to the vehicle involved was "sudden" and "major," the *Interstate* court turned to the case of *Martin Rispens & Son v. Hall Farms, Inc.*,<sup>103</sup> for guidance. There, the Indiana Supreme Court held that "[e]conomic losses are not recoverable in a negligence action premised on the failure of a product to perform as expected unless such failure causes personal injury or physical harm to property other than the product itself."<sup>104</sup>

In the *Martin Rispens* case, the plaintiff's loss was a gradually evolving damage, which Interstate noted is specifically excluded from the IPLA's

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95. 720 N.E.2d 727 (Ind. Ct. App. 1999).

96. 734 N.E.2d 584 (Ind. Ct. App. 2000).

97. 730 N.E.2d 218 (Ind. Ct. App. 2000).

98. 737 N.E.2d 460 (Ind. Ct. App. 2000).

99. See *Interstate Cold Storage, Inc.*, 720 N.E.2d at 729.

100. See *id.* GM moved for summary judgment on the breach of warranty claim as well. GM withdrew that part of the summary judgment motion at the hearing. After the trial court granted summary judgment on the two other counts, the parties jointly stipulated to dismiss with prejudice the breach of warranty count. See *id.* at 729 n.1.

101. *Id.* at 730 (emphasis in original).

102. IND. CODE § 34-6-2-105 (1998).

103. 621 N.E.2d 1078 (Ind. 1993).

104. *Id.* at 1091.

definition of "physical harm."<sup>105</sup> Accordingly, Interstate argued that application of the "economic loss" rule articulated in *Martin Rispens* should be limited to the facts of that case and should be read to mean only that the IPLA is inapplicable to claims of gradually evolving damage to the product itself.<sup>106</sup> The court of appeals disagreed:

It may well be that the supreme court intended its statements in *Martin Rispens* to encompass only the gradually evolving damage found in that case, although they are not by their express terms so limited. However, the language of the [IPLA] supports an extension of that statement to even the "sudden, major damage" we have here. The [IPLA] states that the manufacturer of a *product* is liable for physical harm caused by that *product* to the user's *property*. Thus, although it is possible in general terms for the product to also be the property of the user, the [IPLA] does not use the terms "product" and "property" interchangeably. The language of the [IPLA] contemplates the defective product action on some other property causing some harm to it. Accordingly, we must disagree with Interstate's contention that "the [IPLA] does not draw any distinction between the product itself and other property owned by the user or consumer . . . ." The trial court did not err in granting summary judgment as a matter of law for GMC on Interstate's claims under the [IPLA].<sup>107</sup>

A short time after *Interstate*, another panel of the court of appeals faced essentially the same issue in *I/N Tek v. Hitachi, Ltd.*<sup>108</sup> In that case, Hitachi supplied equipment that comprised a tandem steel mill operated by I/N Tek. The tandem mill consisted of four internal chambers or "stands," through which steel passed during processing. Each stand contained several work rolls, which the court described as cylindrical parts that move the steel through the mill. Attached to the back of the housing was a reel, onto which the steel was wound after passing through all four stands. The four internal stands and the reel were component parts that were not severable from the mill and unable to function in a stand-alone capacity. In February of 1995, a shaft attached to a pinion gear in one of the stands failed, causing damage to the tandem mill and its component parts. No person was injured.<sup>109</sup>

As a result of the incident, I/N Tek sued Hitachi, alleging product liability and negligence. Hitachi moved for summary judgment, arguing that the IPLA precluded I/N Tek from recovering because it suffered no damage other than to the tandem mill itself.<sup>110</sup> The trial court agreed with Hitachi, finding that I/N Tek

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105. See *Interstate Cold Storage, Inc.*, 720 N.E.2d at 731.

106. See *id.*

107. *Id.* (emphasis added) (internal citations omitted).

108. 734 N.E.2d 584 (Ind. Ct. App. 2000).

109. See *id.* at 585-86. Although no one suffered personal injuries, a steel coil owned by Inland Steel Company was in process at the time of the incident and was damaged. See *id.* at 586.

110. See *id.*

did not suffer any damage to real or personal property separate and apart from damage to the mill itself. According to the trial court, the fact that some of the damaged component parts were replacement parts not manufactured by Hitachi did not "alter the undisputed fact that they were part and parcel of the 'product,' the Number 1 Mill Stand."<sup>111</sup>

On appeal, I/N Tek argued that when damage is "sudden and major" the IPLA allows recovery regardless of whether only the product itself or the product in addition to other property is damaged.<sup>112</sup> The court of appeals first acknowledged that the essential issue for the trial court was whether the IPLA applies to damage to the defective article itself, which ultimately led to its conclusion that "property" is separate from the "product."<sup>113</sup> Just as was the case in *Interstate*, the *I/N Tek* court examined the IPLA definitions of "physical harm" and "product," in addition to Indiana Code section 34-20-2-1.<sup>114</sup> The court quickly pointed out that I/N Tek's argument was the same as the one that failed in *Interstate*. The *I/N Tek* court reasoned that the language of the IPLA itself, together with the *Martin Rispens* holding, compelled the same decision as the one reached in *Interstate*: the IPLA requires damage to property other than the product itself.<sup>115</sup>

Moving beyond the threshold question, the *I/N Tek* court recognized that there was an "other property" issue to be resolved.<sup>116</sup> In *Interstate*, the only property damaged was the allegedly defective property itself. In the case before it, however, I/N Tek designated evidence that some of the damaged component parts of the tandem mill were replacement parts not manufactured by Hitachi. I/N Tek argued that those parts should be viewed as "other property." The court of appeals disagreed, citing the U.S. Supreme Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*<sup>117</sup> as compelling authority.<sup>118</sup> The court ultimately concluded as follows:

Although the parts were not originally part of the tandem mill and were not manufactured by Hitachi, they were integral to the mill. None of the component parts of the mill, including the replacement parts, were able to stand alone. We consider "other property" to be that which is wholly outside and apart from the product itself. Thus, the damage caused to the replacement parts of the tandem mill is not sufficient to constitute physical harm to I/N Tek's property within the meaning of [the IPLA], and the trial court did not err in granting Hitachi's motion for summary

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111. *Id.*

112. *Id.* at 587.

113. *Id.*

114. *See id.*

115. *See id.*

116. *Id.* at 588.

117. 476 U.S. 858 (1986).

118. *See I/N Tek*, 734 N.E.2d at 588.

judgment.<sup>119</sup>

A little more than a month after the decision in *I/N Tek*, the court of appeals revisited the property damage issue. In *Progressive Insurance Co. v. General Motors Corp.*,<sup>120</sup> three insurance companies sued automobile manufacturers General Motors and Ford in subrogation in five separate cases after vehicles were destroyed in fires. In each instance, the vehicles themselves were the only property damaged in the fires. The trial court granted some of the motions for summary judgment and denied some others. A consolidated appeal ensued.<sup>121</sup>

The question before the court of appeals was "whether the insurance companies, by subrogation, may recover in tort under theories of strict liability and negligence for damage sustained by the vehicles after they caught fire. Specifically, the issue was whether the [IPLA] allows recovery for this type of loss."<sup>122</sup> As in *Interstate*, the defendants argued that because the damage was "sudden and major," they were entitled to summary judgment for claims based upon the IPLA because the insurance companies could not recover for a purely economic loss to the property (vehicles) themselves.<sup>123</sup>

As did the courts in *Interstate* and *I/N Tek*, the *Progressive* court first cited both Indiana Code section 34-20-2-1 and the definition of "physical harm."<sup>124</sup> The *Progressive* court next discussed *Martin Rispens*, recognizing as follows:

Barring recovery under the [IPLA] when only the product itself is damaged is founded upon the core separation between tort law and contract law. The distinction is based upon a manufacturer's differing responsibilities in placing its product into the stream of commerce and the balancing of risks. While a manufacturer should be held liable if its product causes physical harm to a person or other property, it should not be held accountable if its product does not perform to the consumer's economic expectations unless the manufacturer guarantees the product's performance. If the manufacturer guarantees performance, then it undertakes the risk of loss, and that allocation of risk is best handled by contract principles including warranty law.<sup>125</sup>

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119. *Id.*

120. 730 N.E.2d 218 (Ind. Ct. App. 2000).

121. *See id.* at 219. The three insurers were Progressive Insurance Co., United Farm Bureau Insurance Co., and Foremost Insurance Co. The vehicles involved included a 1994 GMC Jimmy, a 1992 Ford F450, a Chevrolet C1500 Suburban, a Newmar Motor Home containing a Ford chassis and engine, and a 1995 Ford F600. In four of the five situations, defective wiring allegedly caused the fires. In the other case, a defective fuel line allegedly caused the fire. In one of the defective wiring cases, the insurer also alleged defects in the fuel line and transmission line. *See id.*

122. *Id.* at 219-20 (footnote omitted).

123. *Id.* at 220.

124. *See id.*

125. *Id.* (internal citations omitted). The court also cited secondary sources in further support of its reasoning. *See* Jay M. Zitter, Annotation, *Strict Products Liability: Recovery for Damage to Product Alone*, 72 A.L.R. 4th 12 (1989 & Supp. 1999); 63B AM. JUR. 2D *Products Liability* §§

Although acknowledging *Interstate* and recognizing Justice Krahulik's decisions in *Martin Rispens*, and *Reed v. Central Soya Co.*,<sup>126</sup> the *Progressive* court nevertheless seemed troubled by "the proposition that a consumer may not recover under the [IPLA] for damage caused by a defective product unless the product also damages other property or injures a person."<sup>127</sup> Because, as the court wrote, it was not "at liberty to recast [Justice Krahulik's] opinions," it was constrained to affirm the trial court's entry of summary judgment for GM in two of the cases and to reverse the denials of summary judgment in the other three.<sup>128</sup>

The *Progressive* court continued, however, acknowledging that the IPLA "seems to allow more than one interpretation" and that the statute's use of the terms "product" and "property" is probably meaningless to consumers, most of whom consider all of their belongings to be property.<sup>129</sup> The court also recognized that barring recovery for damage to the product itself leaves both remote users and original purchasers without a remedy. While conceding that consumers have other ways to recover, such as a manufacturer's warranty, the court was concerned about the "practical reality" that some remote users who do not purchase the vehicle directly from the manufacturer might not have recourse.<sup>130</sup> The court was equally concerned about original purchasers who may "find themselves without a remedy if they do not comport with strict warranty requirements. It may be considered inequitable to leave such a large number of consumers without a remedy, while allowing manufacturers who have placed a defective product in the market to remain free from liability."<sup>131</sup>

Openly troubled by what it called the "illogical" justification underlying the economic damage rule—"that consumers have other options of recourse when the product itself is damaged"—the *Progressive* court pointed out that when "other property" is damaged by a defective product, "consumers do not have any other method by which to recover for their loss."<sup>132</sup> To illustrate its point, the court posed the following "practical situation":

[A] consumer who owns two vehicles, one Ford and one GM, stores them beside each other in his garage. The Ford begins smoking due to defective wiring, and the resulting fire destroys both the Ford and the GM and causes damage to the garage. Under current law, this consumer could recover under the [IPLA] for the damage caused to his GM and his garage, but he could not recover for the Ford, which originated the fire. After putting the [IPLA]'s seemingly bright line rule into practice, it seems incongruous that if one had two cars parked beside each other,

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1912-30 (1997 & Supp. 1999).

126. 621 N.E.2d 1069 (Ind. 1993), *modified on other grounds* by 644 N.E.2d 84 (Ind. 1994).

127. *Progressive Ins. Co.*, 730 N.E.2d at 221.

128. *Id.*

129. *Id.*

130. *See id.* at 221-22.

131. *Id.* at 222.

132. *Id.*

that he could recover for one and not the other.<sup>133</sup>

In yet another pronouncement on the property damage issue, the court of appeals in *Hitachi Construction Machinery Co., v. AMAX Coal Co.*,<sup>134</sup> joined *Interstate, I/N Tek*, and *Progressive* in holding that the IPLA provides recovery only for damage to property other than the defective product itself.<sup>135</sup> AMAX purchased an excavator manufactured by Hitachi. One of Hitachi's authorized dealers equipped the excavator with a custom-fitted fire suppression system before delivery. The excavator sustained heavy damage from a fire when the fire suppression system activated, but failed to extinguish the fire.<sup>136</sup>

Both AMAX's and Hitachi's experts agreed that the fire began in the rear of the excavator where the fan sprayed hydraulic fluid onto the hot engine turbochargers. AMAX sued Hitachi, claiming that design defects in the excavator caused the fire.<sup>137</sup> Hitachi tried mightily to dispose of the case before trial. Hitachi first filed a motion to dismiss and later a motion for summary judgment, both of which the trial court denied. Hitachi then twice filed motions for judgment on the evidence during the jury trial. Hitachi appealed after a jury verdict against it.<sup>138</sup>

On appeal, Hitachi argued, as it had in the trial court, that AMAX could not recover under the IPLA for a strictly economic loss to its excavator and that the fire suppression system did not constitute "other property." The court of appeals agreed, reversing the trial court's decision not to dispose of the case to the extent that AMAX's claims were based upon the IPLA.<sup>139</sup> As did the previous panels deciding the issue, the *Hitachi* court began its analysis by examining Indiana Code section 34-20-2-1, the IPLA's definition of "physical harm," and the case law definition of "sudden, major damage."<sup>140</sup> Citing *Progressive* and *Martin Rispens*, the *Hitachi* court recognized that "a person may not recover for 'sudden, major damage[,] 'caused by a defective product unless the product also damages *other property* or injures a person."<sup>141</sup> Citing both *I/N Tek* and *Interstate*, the court reiterated that "other property" is that which is "wholly outside and apart from the product itself" and that the IPLA "does not use the terms 'product' and 'property' interchangeably [because it] 'contemplates the defective product

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133. *Id.*

134. 737 N.E.2d 460 (Ind. Ct. App. 2000).

135. *See id.* at 463-64.

136. *See id.* at 462.

137. *See id.* Specifically, AMAX argued that Hitachi's excavator was designed defectively because of, "(1) insufficient turbocharger shielding, (2) improper routing of hydraulic lines, and (3) failure to include a check valve on the fast fill line which allowed the fuel tank to feed the fire." *Id.*

138. *See id.*

139. *See id.* at 462, 465-66.

140. *Id.* at 463. Compare *Progressive Ins. Co.*, 730 N.E.2d at 219-20, and *Interstate Cold Storage, Inc. v. Gen. Motors Corp.*, 720 N.E.2d 727, 730 (Ind. Ct. App. 1999).

141. *Hitachi Constr. Mach. Co.*, 737 N.E.2d at 463.

acting on some other property causing some harm to it.”<sup>142</sup>

After a brief analysis of *I/N Tek*<sup>143</sup> and the U.S. Supreme Court’s decision in *Saratoga Fishing Co. v. J.M. Martinac & Co.*,<sup>144</sup> the *Hitachi* court noted that AMAX extensively negotiated with Hitachi’s dealer for an excavator with a custom-fitted fire suppression system and received a “bargained for” product equipped with such a fire suppression system.<sup>145</sup> In addition, the fire suppression system’s very nature and manner of function revealed that it was an integrated component of the excavator AMAX purchased. It was, therefore, “wholly outside and apart from” the excavator itself.<sup>146</sup> Thus, according to the *Hitachi* court, the excavator and the fire suppression system “constitute one bargained for product, the damage to which is not recoverable under [the IPLA].”<sup>147</sup>

### III. DEFENSES AND COMPARATIVE FAULT ISSUES

The IPLA includes specifically enumerated defenses to product liability actions in Indiana.<sup>148</sup> Practitioners know those defenses as the incurred risk defense,<sup>149</sup> the misuse defense,<sup>150</sup> and the modification or alteration defense.<sup>151</sup> A few of the cases decided during the survey period help to illustrate how Indiana courts are applying some of those defenses.

142. *Id.* at 463-64 (quoting *Interstate Cold Storage, Inc.*, 720 N.E.2d at 730).

143. According to the *Hitachi* court, *I/N Tek* “squarely addressed whether ‘sudden and major’ damage to a product itself is sufficient to recover under the [IPLA].” *Id.* at 464.

144. 520 U.S. 875 (1997).

145. *Hitachi Constr. Mach. Co.*, 737 N.E.2d at 464. In doing so, the *Hitachi* court analogized the fire suppression system to the vessel and hydraulic system received by the owner in the *Saratoga Fishing* case. *See id.*

146. *Id.* at 464.

147. *Id.* at 465. After making it clear that the IPLA and the Uniform Commercial Code provide separate, alternative remedies, the *Hitachi* court determined that AMAX’s failure to state a valid claim under the IPLA did not necessarily preclude it from recovery under an implied warranty theory. *See id.* at 465-66. Because, however, one of the trial court’s pretrial orders precluded warranty issues “from being fully litigated at trial,” the court remanded the breach of warranty count to the trial court for further proceedings. *See id.* at 465.

148. *See* IND. CODE § 34-20-6-1 (1998).

149. “It is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured.” *Id.* § 34-20-6-3.

150. “It is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.” *Id.* § 34-20-6-4.

151. “It is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product’s delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.” *Id.* § 34-20-6-5.

In *Smock Materials Handling Co. v. Kerr*,<sup>152</sup> the Indiana Court of Appeals affirmed a jury verdict in favor of the plaintiff against a scissors lift manufacturer in the amount of \$775,000.<sup>153</sup> Challenging the trial court's denial of its motions for judgment on the evidence,<sup>154</sup> the manufacturer raised the following issues: (1) whether a change in the lift design rendered it defective; (2) whether the plaintiff incurred the risk of harm in using the lift; (3) whether the trial court erred in denying the manufacturer's proposed jury instruction on the sophisticated user doctrine; and (4) whether the trial court improperly used the term "strict liability" in its jury instructions.<sup>155</sup>

Turning first to the issue of incurred risk, Judge Baker, writing the opinion in which Judge Garrard and Judge Sullivan joined, noted that the defense of incurred risk operates under both strict liability and negligence theories.<sup>156</sup> "Incurred risk involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk."<sup>157</sup> The *Smock* court noted that incurred risk will bar a strict liability claim where the plaintiff had actual knowledge of the specific risk and understood and appreciated the risk, but in a negligence action, incurred risk will eliminate a plaintiff's recovery if the plaintiff's contributory fault is greater than fifty percent.<sup>158</sup>

The *Smock* court found no basis for the incurred risk defense. The court pointed out that the plaintiff was unaware of the fact that the manufacturer had changed the design of the lift by eliminating pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform. The court also recognized that the plaintiff followed the manufacturer's safety instructions prior to positioning himself under the lift to inspect it.<sup>159</sup>

The court then turned to the manufacturer's argument that the trial court erred in refusing to deliver to the jury the sophisticated user instruction.<sup>160</sup> The sophisticated user exception to the duty to warn in product liability applies when

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152. 719 N.E.2d 396 (Ind. Ct. App. 1999).

153. *See id.* at 399.

154. *See* IND. TRIAL RULE 50(A).

155. *See Smock*, 719 N.E.2d at 399-400.

156. *See id.* at 402; *see also* IND. CODE § 34-20-6-3 (2000).

157. *Smock*, 719 N.E.2d at 402 (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 940 (Ind. Ct. App. 1994)).

158. *See id.*

159. *See id.* The evidence showed that the design was changed to eliminate the pins because the manufacturer had problems with the pins shearing off. *See id.* at 400.

160. *See id.* at 403. The manufacturer identified its proposed jury instruction as the "learned intermediary" defense. *Id.* at 404. As Judge Baker noted, the learned intermediary exception to a defective warning claim has been limited to cases involving prescription drugs and medical devices, and it is related to other defenses variously known as the sophisticated user or sophisticated intermediary defenses. *See id.* at 403 n.4. Following Judge Baker's lead, the authors also refer to the defense as the sophisticated user defense. *See id.*



the dangers posed by the product are already known to the user.<sup>161</sup> A manufacturer's reliance upon an intermediary's or a user's knowledge of danger is only reasonable "if the intermediary or the user knows or should know of the product's dangers."<sup>162</sup> The reasonableness of the manufacturer's reliance upon the intermediary's or user's sophistication depends upon the "product's nature, complexity and associated dangers, the likelihood that the intermediary [or user] will communicate warnings to the ultimate consumer, the dangers posed to the ultimate consumer by an inadequate or non-existent warning, and the feasibility of requiring the manufacturer to directly warn the product's ultimate consumers."<sup>163</sup>

The sophisticated user defense does not provide solace to a manufacturer of a product with a latent design or manufacturing defect because it is essential that intermediaries or users know or be in a position where they should know of the risk of danger.<sup>164</sup> A manufacturer cannot delegate or otherwise avoid the duty to warn of a latent defect that becomes dangerous when a product malfunctioned or was operated in an unexpected manner.<sup>165</sup>

The manufacturer also argued that the trial court erred in refusing the proposed instruction on the defense of alteration or modification.<sup>166</sup> The defense is only applicable in a product liability case if the modification or alteration is the proximate cause of physical harm and the seller would not reasonably expect the modification or alteration.<sup>167</sup> Moreover, the modification or alteration of the product must be independent of the expected and intended use of the product.<sup>168</sup>

Based on the facts of the *Smock* case, the court of appeals concluded that there was no error in denying the requested alteration or modification jury instruction. The manufacturer alleged the lift was altered or modified by the plaintiff relocating a sensor on the machine. However, the manufacturer's manual for the lift provided for adjustment of the sensor. The modification or alteration therefore was foreseeable to the manufacturer and provided no basis for the defense.<sup>169</sup>

Finally, the manufacturer argued that the trial court erred in using the term strict liability in its instructions to the jury.<sup>170</sup> The court of appeals determined that the trial court's use of the term was acceptable because the term is appropriate under Indiana law.<sup>171</sup> Although the court's finding on the use of the

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161. *See id.* at 403.

162. *Id.*

163. *Id.*

164. *See id.*

165. *See id.* (citing *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277, 286 (Ind. 1983)).

166. *See* IND. CODE § 34-20-6-5 (2000).

167. *See id.*

168. *See id.*

169. *See Smock*, 719 N.E.2d at 404.

170. *See id.* at 404-05.

171. *See id.* (citing IND. CODE § 34-20-2-3 (2000) ("[a] product liability action based on the doctrine of strict liability in tort may not be commenced [against a seller of a product unless the

term strict liability is relegated to a brief section at the end of the opinion, its import may be more significant upon careful contemplation given the context of the *Smock* decision and the recent revision of the IPLA. Under the IPLA, strict liability remains a viable theory for recovery only in claims for manufacturing defects.<sup>172</sup> Strict liability is no longer available to plaintiffs seeking recovery for defective design or warning claims. Thus, the term "strict liability" is only appropriate under Indiana law in manufacturing defect claims brought against the manufacturer of the product or a domestic principal distributor of a foreign manufacturer.<sup>173</sup>

In November 2000, the court of appeals in *Rogers v. Cosco, Inc.*,<sup>174</sup> tackled three issues that are important to Indiana product liability practitioners: federal preemption; Indiana's state-of-the-art and governmental compliance rebuttable presumption; and the quantum of evidence necessary to establish the existence of a safer alternative product. This case involved Shelette Rogers' infant daughter who was injured in a traffic accident. Rogers' daughter suffered two cervical fractures that led to partial paralysis. At the time of the accident, Rogers' daughter was restrained in a child booster seat manufactured by defendant Cosco. The restraint seat did not extend to provide a separate support for a child's back or head; rather, it utilized the vehicle's own upright seat cushion for such a function. The restraint seat also employed a forward barrier, called a shield, to restrain forward motion of a child's upper torso in the event of a collision.<sup>175</sup>

Rogers' complaint alleged that Cosco violated its duty of reasonable care when it designed, manufactured, distributed, and sold the booster seat for use by children who weigh less than forty pounds. Rogers also contended that Cosco violated its duty by not warning purchasers that there was no testing to substantiate Cosco's claim that the seat could be used safely by children who weigh between thirty and sixty pounds.<sup>176</sup>

Cosco filed a motion for summary judgment on three grounds: (1) the Federal National Traffic and Motor Vehicle Safety Act ("Safety Act") preempted Rogers' state law claims; (2) Rogers failed to set forth sufficient evidence to overcome the rebuttable presumption in Indiana Code section 34-20-5-1; and (3) no safer alternative design existed, which must result in a finding that the seat's design was not deficient.<sup>177</sup> The trial court granted summary judgment to Cosco,

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seller is a manufacturer of the product]"); *Marshall v. Clark Equip. Co.*, 680 N.E.2d 1102, 1104 (Ind. Ct. App. 1997)).

172. See IND. CODE § 34-20-2-3 (1998).

173. See IND. CODE § 34-20-2-4 (2000) (stating "[i]f a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this chapter, the manufacturer of the product").

174. 737 N.E.2d 1158 (Ind. Ct. App. 2000).

175. See *id.* at 1162.

176. See *id.*

177. See *id.* at 1162-63.

and Rogers appealed.<sup>178</sup> The first of the three issues on appeal was federal preemption. The court's handling of that issue is discussed later.<sup>179</sup> The latter two issues are addressed here.

After determining that the Safety Act does not preempt Rogers' claims, the court focused on whether Rogers' designated admissible evidence was sufficient to rebut the IPLA's statutory state-of-the-art and governmental compliance presumption, which provides as follows:

In a product liability action, there is a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product:

(1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or

(2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or Indiana.<sup>180</sup>

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178. See *id.* at 1163.

179. See *infra* notes 389-459 and accompanying text.

180. IND. CODE § 34-20-5-1 (2000). The Indiana General Assembly enacted the rebuttable presumption as section 5 of Public Law 278-1995, which initially was codified as Indiana Code section 33-1-1.5-4.5 and later recodified as Indiana Code section 34-20-5-1. Before the 1995 amendments to the IPLA, practitioners and courts alike treated a product's conformity with the state-of-the-art as a defense to the action and a product's compliance with applicable standards as a factor to consider when determining whether a defendant's product was defective and unreasonably dangerous and whether a defendant was negligent. However, with the enactment of the 1995 amendments, a manufacturer or seller is now entitled to a rebuttable presumption that the product at issue is not defective and that the manufacturer is not negligent if, before the manufacturer's sale of the product, the product conformed to the generally recognized state-of-the-art and/or with applicable standards. See *id.*

Historically, a defense based upon conformity with the state-of-the-art required proof of more than just compliance with industry custom and practice. See *Montgomery Ward & Co. v. Gregg*, 555 N.E.2d 1145, 1155-56 (Ind. Ct. App. 1990). Before the 1995 amendments to the IPLA, a panel of the court of appeals approved of a jury instruction defining state-of-the-art as follows: "The state of the art with respect to a particular product refers to the generally recognized technological environment at the time of its manufacture. This technological environment includes the scientific knowledge, economic feasibility and the practicalities of implementation when the product was manufactured." *Weller v. Mack Trucks, Inc.*, 570 N.E.2d 1341, 1342 (Ind. Ct. App. 1991).

A defense theory based upon conformity with industry standards may now carry more weight than it once did, so long as the standards have been adopted or approved by state or federal government. In addition, defense practitioners may continue to defend cases by properly asserting that industry standards and/or custom and practice, even if not formally adopted or approved at the

According to the *Rogers* court, a showing that the seat met the requirements of the Safety Act "made it incumbent upon Rogers to designate admissible evidence to rebut the statutory presumption."<sup>181</sup> Rogers designated certain portions of depositions and articles in support of her claim that there was a genuine issue of material fact as to whether Cosco met either the requirements of the Safety Act or the state-of-the-art. According to Rogers, Cosco "failed to perform failure mode and effect safety engineering analysis of its child safety seat, which would have been reasonably necessary to make [the] recommendation' [required by the Safety Act] as to the maximum mass and height of children 'who can safely occupy the system.'"<sup>182</sup>

However, the trial court did not specifically address whether Rogers had designated evidence sufficient to rebut the presumption that federal compliance proves that the seat is not defective and that Cosco is not negligent because it granted summary judgment on the basis of federal preemption. By the same token, the trial court did not specifically address whether there was sufficient designated evidence to establish that the seat conformed to the generally recognized state-of-the-art or whether Rogers had designated evidence sufficient to rebut the presumption that a state-of-the-art product is not defective and that Cosco is not negligent in producing and selling a state-of-the-art product. Thus, because the "crucial question of whether Rogers met her burden rests upon the issue of whether her designated evidence met the designation requirements of Indiana Trial Rule 56," the court remanded with instructions that the trial court rule upon Cosco's objection to the admissibility of Rogers' designated evidence.<sup>183</sup>

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time of manufacture, truly embodied the appropriate and applicable state-of-the-art. Furthermore, an Indiana product liability plaintiff, before 1995, could effectively counter a state-of-the-art defense by proving that the state-of-the-art of a product, as defined by a defendant, was not the actual state-of-the-art. Now, in light of the IPLA's adoption of negligence principles in design and warning cases, defendants may be entitled to argue that Indiana law requires plaintiffs to show that the manufacturer's perceived definition of state-of-the-art is incorrect and that the manufacturer's reliance on its perceived state-of-the-art and failure to design and sell a product that exceeded any applicable standards at the time of manufacture was unreasonable.

181. *Rogers*, 737 N.E.2d at 1166-67.

182. *Id.* at 1166.

183. *Id.* at 1167. The court of appeals in *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*, 709 N.E.2d 1070 (Ind. Ct. App. 1999), addressed a state-of-the-art jury instruction. There, the plaintiff argued that giving a state-of-the-art instruction is inconsistent with a claim that a manufacturing defect caused physical harm, which is a strict liability claim. The *IAC* court concluded that the state-of-the-art defense applied to plaintiff's manufacturing defect claim, and was not restricted to design defect theories. *See id.* at 1074-75.

As stated in last year's product liability survey Article:

Although the IPLA now provides that "state of the art" is no longer a "defense" in product liability cases, the *Indianapolis Athletic Club* opinion should nevertheless be helpful for practitioners who are searching for some explanation about what "state of

With respect to the "safer alternative" issue, Cosco argued that Rogers' crashworthiness claim hinged on the existence of known neck loading tolerances for young children. Cosco also argued that proof of the existence of a safer alternative (a five-point convertible seat with tether that would have limited accident-related neck loading forces) also hinges on the existence of data pertaining to tolerances. According to Cosco, it is impossible to show the existence of a safer alternative because at the time the seat was manufactured there was no meaningful data showing the neck loading tolerances of small children.<sup>184</sup>

The evidence Cosco designated, which included portions of depositions of Rogers' experts, revealed to the court that there was "no scientific basis upon which to determine the existence of a safer alternative child restraint."<sup>185</sup> According to the court, such evidence,

coupled with designated evidence that [Cosco's seat] was of a sufficient design to meet the federal requirements which allowed it to be sold for use by children under forty pounds, is prima facie evidence that there is no genuine issue of material fact as to whether a safer alternative child restraint system is in existence.<sup>186</sup>

Accordingly, the court concluded that the summary judgment burden passed to Rogers to establish that a genuine issue of material fact exists.<sup>187</sup>

Following a discussion of Rule 702 of the Indiana Rules of Evidence and the court's evidentiary gatekeeper function with respect to expert witnesses, the *Rogers* court recognized that it could not make a definitive determination on appeal because the trial court did not rule on Cosco's motion to strike the portions of the expert depositions discussed above:

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the art" means. After all, the court found that the instruction at issue correctly stated the law. Practitioners also may read *Indianapolis Athletic Club* as confirmation that the "state of the art" presumption should apply in product liability regardless whether the underlying theories sound in strict liability (manufacturing defects) or negligence (design and warning defects).

Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1348 (2000) (footnotes omitted).

184. See *Rogers*, 737 N.E.2d at 1167.

185. *Id.*

186. *Id.*

187. See *id.* The court did, however, initially recognize that if the case had been pending in federal court, Cosco would be entitled to summary judgment upon showing that Rogers failed to make a showing of an essential element of her crashworthiness claim. Rogers' failure "to designate admissible evidence to establish the presence of a safer alternative" to the seat manufactured by Cosco would entitle Cosco to summary judgment. *Id.* In Indiana, however, because of the different summary judgment standard for state court cases established by *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994), "Rogers is not required to establish the presence of a safer alternative until Cosco shows the absence of any genuine issue of material fact as to that presence." *Rogers*, 737 N.E.2d at 1167.

The question of whether the disputed portions of [the purported experts'] statements are admissible has a direct bearing on whether the presumptions set forth in Ind. Code § 34-20-5-1 have been rebutted and whether there is a genuine issue of material fact on the "safer alternative" element of Rogers's crashworthiness claim. The trial court's failure to rule on the admissibility of the evidence requires us to remand to the trial court for such proceedings as may be necessary to determine whether the statements of [the purported experts] meet the requirements of Evid.R. 702.<sup>188</sup>

The remaining survey period case important to practitioners is *Chapman v. Maytag*.<sup>189</sup> Although *Chapman* is a federal decision that Magistrate Judge Foster circulated for electronic publication only, it is one about which practitioners should be aware because it contains a wealth of material for discussion in the context of product liability defenses. In this case, Kyle Chapman was electrocuted when he came into contact with ductwork in the crawl space of a home in which family members were sustaining minor electrical shocks. The special representative of Chapman's estate sued Maytag, the manufacturer of a stove that allegedly contained a defective wire. According to the plaintiff, the stove contained a wire that had become pinched between a metal housing cover and the metal back of the stove during the assembly process.<sup>190</sup>

During the course of pretrial proceedings, the court ruled upon a motion for summary judgment, and, in doing so, made the following assumption for purposes of resolving the motion:

[A] manufacturer may defend on the basis of an adequate warning even if an injury results from a defect or dangerous condition which was unanticipated and against which the warning was not intended to protect but against which compliance with the warning would have protected. Therefore, if Maytag's warnings were adequate, it may assert those warnings as a defense even against manufacturing defects.<sup>191</sup>

As the case neared trial, the court revisited its earlier assumption in the context of the parties' proposed final jury instructions and other trial filings.<sup>192</sup> The electronically published opinion is the court's second pretrial order, which addresses that and other related issues.

The court began its discussion of relevant issues by reciting some common ground. In its summary judgment order, the court determined that Maytag had

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188. *Id.* at 1169.

189. No. IP999-39-C-FID, 2000 U.S. Dist. LEXIS 10502, at \*1 (S.D. Ind. July 27, 2000).

190. *See id.* at \*2. The parties did not dispute that the stove was the source of the fatal current. *See id.* at \*2 - \*3.

191. *Id.* at \*1.

192. *See id.* The court "made the assumption at the time [of its summary judgment ruling] because neither party had raised or briefed the question directly as an issue in this case and the assumption allowed the summary judgment rulings to be made." *Id.*

a duty to warn Chapman of the risk of shock from ungrounded installations and to instruct him to use a grounded receptacle.<sup>193</sup> Although Maytag supplied warnings and instructions with the stove regarding the need to use a grounded receptacle, Chapman did not do so. Beyond that matter, however, the parties' "descriptions of the posture of, and the burdens in, th[e] case diverge[d]."<sup>194</sup>

Chapman's representative argued that because she was asserting only a manufacturing defect theory and not a failure to warn theory, evidence regarding the adequacy of Maytag's warning should relate only to the assessment of comparative fault under Indiana Code section 34-20-8-1. Maytag countered that if the jury found its warnings and instructions adequately warned and instructed Chapman to use a grounded plug, then, as a matter of law, the stove was not in a defective condition unreasonably dangerous to Chapman, and Maytag could not be held liable.<sup>195</sup> In other words, Maytag contended that its adequate warnings rendered the stove non-defective or not unreasonably dangerous and Chapman's failure to heed those warnings constituted misuse, which, under Indiana Code section 34-20-6-4 is a complete defense.<sup>196</sup>

The *Chapman* court first concluded that the defense of misuse provided in Indiana Code section 34-20-6-4 is not a complete defense. Rather, according to Magistrate Foster, it shall be compared with all other fault in the case. In doing so, the court first cited Indiana Code section 34-20-8-1, which reads:

(a) In a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with IC 34-51-2-7, IC 34-51-2-8, or IC 34-51-2-9 [sections of the comparative fault act].

(b) In assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.<sup>197</sup>

The court also recognized that, for purposes of the IPLA, the legislature defined "fault" to mean:

an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes

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193. See *id.* at \*3-\*4. The court so determined because it found that "there is a significant potential for short circuits not caused by manufacturing or design defects to energize Maytag's stoves, thereby becoming unreasonably dangerous to its expected users or consumers when used in reasonably expectable ways of handling." *Id.*

194. *Id.* at \*4.

195. See *id.* According to the court, Maytag's position was "more difficult to discern and at times seem[ed] inconsistent." *Id.* at \*5.

196. See *id.* at \*5 n.2.

197. IND. CODE § 34-20-8-1 (Supp. 1999).

the following:

- (1) Unreasonable failure to avoid an injury or to mitigate damages.
- (2) A finding under IC 34-20-2 . . . that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.<sup>198</sup>

By specifically directing that the jury compare all fault in a case, Magistrate Foster concluded that the General Assembly intended that the defense, or fault, of misuse be compared as well.

It might be argued that, because the definition of "misuse" considers only the objective reasonableness of the foreseeability of the misuse and not the character of the misuser's conduct, misuse is not "fault." However, the legislature did not indicate that it intended to exempt misuse from the scope of the comparative fault requirement and a plaintiff's (mis)use does fall within the statute's definition of fault as an "act . . . that is . . . intentional toward the . . . property of others," regardless of the reasonableness of the act.<sup>199</sup>

Magistrate Foster also concluded that the cases on which Maytag relied for its contention that misuse is a complete defense "each involve incidents that occurred before comparative fault was added to the product liability statute and thus were decided under contributory negligence principles."<sup>200</sup>

After finding that the defense of misuse is not a complete one, the *Chapman* court next "conclude[d] that Maytag's warnings did not prevent its stove from being defective and Mr. Chapman's failure to comply with those warnings (if adequate) did not constitute misuse."<sup>201</sup> On that point, Magistrate Foster wrote:

Although we have found no Indiana cases on point, we conclude that adequate warnings will not render a product with a manufacturing defect non-defective, even if a duty to warn exists because of inherent dangers in a product and compliance with the warnings would have prevented the alleged injury. Our review of Indiana law persuades us that warnings are required and will save a product from being deemed "defective" only when a product is without manufacturing or design defects but nonetheless presents residual or inherent hazards that render it unreasonably dangerous. We believe that an Indiana court would follow a policy that emphasizes deterring and compensating injuries resulting from manufacturing defects (the last vestige of strict product liability in

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198. *Chapman*, 2000 U.S. Dist. LEXIS at \*6-\*7 (citing IND. CODE § 34-6-2-45(a) (1998)).

199. *Id.* at \*7-\*8 (internal citation omitted).

200. *Id.* at \*8 -\*9.

201. *Id.* at \*9. In doing so, the court recognized the three ways a product could be determined to be in a defective condition in Indiana: (1) manufacturing defect; (2) design defect; or (3) warning defect (the manufacturer could have failed to warn or could have inadequately warned of the product's dangers). *See id.* at \*9-\*10.



the state) over providing a warnings defense to manufacturers.

. . . Maytag concedes that the pinched wire was a manufacturing defect in the product. Therefore, although Maytag had a duty to provide grounding warnings because of the risk of defect-free short-circuits and compliance with adequate grounding warnings might have prevented Mr. Chapman's death, adequate warnings will not render Maytag's stove non-defective or not unreasonably dangerous under I.C. §§ 34-20-2-1, 34-20-4-1, or 34-20-4-3.<sup>202</sup>

Finally, the court concluded that Chapman's failure to heed Maytag's warnings, even if assumed to be adequate, would not constitute misuse pursuant to Indiana Code section 34-20-6-4. The *Chapman* court believed that an Indiana court would interpret the statute and make the policy decision to not allow Maytag to assert the defense of misuse on the basis of Chapman's failure to comply with its warnings.<sup>203</sup>

If the plaintiff establishes that the stove with this pinched wire was in a condition not contemplated by reasonable persons among those considered expected users or consumers of the stove and that was unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption, then Maytag will be strictly liable for the stove's defective condition and the plaintiff need not prove Maytag's negligence.<sup>204</sup>

Thus, Magistrate Foster concluded that

Maytag may not assert, prove, or argue that its warnings or Mr. Chapman's failure to comply therewith rendered the stove non-defective or constituted misuse. It may assert, prove, or argue, however, that his failure to heed its warnings constitutes fault that the jury must compare and apportion along with Maytag's own.<sup>205</sup>

The *Chapman* case raises interesting points for debate in connection with the misuse defense and its application. Indeed, the IPLA tort reform amendments of 1995 present some potentially confusing issues involving the allocation of fault among responsible parties in a product liability action. Indiana Pattern Jury Instruction 7.04(B), for example, sets forth the statutory defenses available in Indiana in product liability cases. The official comment to Instruction 7.04(B) states that it may be less confusing to substitute Instruction No. 5.61 (incurred risk) to avoid separate defense instructions in trials that involve strict liability and other negligence issues. The official comment also recognizes parenthetically that a comparative fault analysis applies to claims based upon Indiana Code section 34-20-2. These comments could lead to some confusion and certainly

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202. *Id.* at \*10-\*12 (internal citations omitted).

203. *See id.* at \*12.

204. *Id.* at \*14.

205. *Id.*

have fueled discussion. Indeed, in the years since 1995, some practitioners have been heard to make the blanket assertion that all comparative fault principles now apply "lock, stock, and barrel" to product liability cases. Several sources suggest that this is not, nor should it be, the case.

As the *Chapman* court recognized, there is an issue about whether the IPLA's enumerated defenses remain complete defenses in Indiana after 1995. Misuse, alteration/modification, incurred risk, and conformance with state-of-the-art were complete defenses to IPLA claims before the 1995 amendments because they served to relieve a defendant of liability, if the defendant were able to plead and prove any one of them.<sup>206</sup> In light of the introduction of fault allocation principles into product liability cases in Indiana in 1995, some creative and persuasive counsel have argued that misuse, alteration/modification, and incurred risk are simply arguments that affect the level or percentage of fault to be placed upon a particular claimant under the allocation. Indeed, that was the argument in *Chapman*.

Although its discussion focused upon the misuse defense, the *Chapman* court certainly was careful to point out that incurred risk likely remains a complete defense. In that connection, there are some considerations about which courts and practitioners might want to be sensitive when addressing whether incurred risk is a complete defense in future cases. First, it is important to understand that the General Assembly amended Indiana Code section 34-20-6-3, the incurred risk defense, to eliminate the word "unreasonably" from the phrase that previously read "nevertheless proceeded 'unreasonably' to make use of the product."<sup>207</sup> The language used is significant because it lends support for the proposition that incurred risk is not subject to fault apportionment.<sup>208</sup>

In addition, the definition of fault for purposes of Indiana's Comparative Fault Act,<sup>209</sup> includes incurred risk, whereas the definition of fault for purposes of the IPLA does not.<sup>210</sup> It is the Comparative Fault Act's specific incorporation of incurred risk within its definition of fault that enables a trier of fact to allocate fault to a plaintiff for incurring the risk. In stark contrast, the IPLA does not include incurred risk within the definition of fault quoted by the *Chapman* court, Indiana Code section 34-6-2-45(a). While it is clear that the General Assembly

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206. See, e.g., *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218 (7th Cir. 1984) (finding nonforeseeable misuse is a complete defense to product liability claim); *Foley v. Case Corp.*, 884 F. Supp. 313 (S.D. Ind. 1994) (holding modification or alteration is a complete defense to certain product liability actions); *Perdue Farms, Inc. v. Pryor*, 646 N.E.2d 715 (Ind. Ct. App. 1995) (holding incurred risk is a complete defense to strict product liability claims).

207. IND. CODE § 34-20-6-3(3) (1998).

208. See Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979, 1000 (1996).

209. IND. CODE § 34-51-2.

210. See *id.* § 34-6-2-45. In addition to "incurred risk," "fault" for purposes of the Comparative Fault Act includes "unreasonable assumption of risk not constituting an enforceable express consent" and "unreasonable failure to avoid an injury or to mitigate damages." *Id.* § 34-6-2-45(b).

was aware of the Comparative Fault Act's definition of fault, it appears to have borrowed selectively from that definition. The references to assumption of risk and incurred risk that are contained in the Comparative Fault Act definition of fault are conspicuously absent from the IPLA fault definition.

On this point, at least one Indiana appellate decision may provide support for the proposition that incurred risk remains a complete defense in Indiana. In *Hopper v. Carey*,<sup>211</sup> the court of appeals recognized that IPLA claims are subject to specifically enumerated defenses, including the incurred risk defense embodied in Indiana Code section 34-20-6-3. The *Hopper* court pointed out that "even if a product is sold in a defective condition [is] unreasonably dangerous, recovery will be denied an injured plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily accepted [incurred] the risk."<sup>212</sup> The court makes no mention of comparing fault if there is a determination that the plaintiff had actual knowledge and appreciated the specific danger involved.

Beyond the incurred risk context, it does not seem insignificant that the General Assembly chose to eliminate the language limiting application of the traditionally complete defenses only to actions involving "strict liability in tort." Now, the defenses apply to all actions brought under the IPLA, and, therefore, all defective product cases in this state accruing after June 30, 1995. In addition, and as Magistrate Foster adeptly recognized in *Chapman*, the definition of misuse considers only the objective reasonableness of the foreseeability of the misuse and not the character of the misuser's conduct. Accordingly, there is a credible argument that misuse is not fault. That the General Assembly did not overtly indicate that it intended to exempt misuse from the scope of the comparative fault requirement does not necessarily mean that it is exempted. After all, it would seem more likely that the legislature's silence on the matter would indicate at least an implicit recognition that the complete nature of the pre-1995 product liability defenses was to remain that way notwithstanding the introduction of some comparative fault principles *vis-a-vis* defendants and non-parties. Thus it appears a debatable issue whether it is appropriate to utilize a traditional comparative fault instruction in a case in which the applicability of a misuse and alteration/modification defense may be an issue.

#### IV. EXPERT WITNESS EVIDENTIARY ISSUES

With its landmark decision of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>213</sup> the U.S. Supreme Court altered and clarified the approach for qualifying and admitting into evidence expert testimony under the Federal Rules of Evidence.<sup>214</sup> More recently, the Supreme Court provided further guidance on the

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211. 716 N.E.2d 566 (Ind. Ct. App. 1999).

212. *Id.* at 576 (quoting *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437, 441 (Ind. 1990) (emphasis added)).

213. 509 U.S. 579 (1993).

214. See FED. R. EVID. 702.

trial court's task in considering whether proffered expert testimony should be brought before the jury in *Kumho Tire Co. v. Carmichael*.<sup>215</sup> During the survey period, both the Seventh Circuit and the U.S. District Courts for the Northern and Southern Districts of Indiana revisited these issues.

In the case of *Minisan v. Danek Medical, Inc.*,<sup>216</sup> the plaintiff brought a medical device product liability action against the manufacturer of a spinal fixation device.<sup>217</sup> The plaintiff was a patient who underwent spinal fusion surgery to alleviate pain in her back. As part of the spine fusion surgery, a device was implanted on her spine and affixed to the pedicles of her vertebrae for the purpose of immobilizing that area of her back to promote the bone grafts that would complete the spine fusion. The device was affixed to her spine by screws. When her pain recurred, it was discovered that the screws had broken, and a second surgery was done with a device again being affixed to her spine with screws. However, the screws anchoring the second implant also broke.<sup>218</sup> The patient claimed that the manufacturer of the implant device "was negligent in designing, manufacturing, promoting and providing warnings about the device, and that the negligence proximately caused her continued pain and injury."<sup>219</sup>

The device manufacturer sought summary judgment on the plaintiff's claims, arguing that the plaintiff could not establish with expert testimony that the device or its alleged failure caused her injury.<sup>220</sup> The manufacturer also sought summary judgment on the grounds that the plaintiff could not establish that the product was defective and that the plaintiff's failure to warn claim was precluded by the learned intermediary doctrine.<sup>221</sup> The U.S. District Court focused its analysis on the qualifications of the plaintiff's expert testimony.<sup>222</sup>

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215. 526 U.S. 137 (1999).

216. 79 F. Supp. 2d 970 (N.D. Ind. 1999).

217. *See id.* at 971. This case had been transferred pursuant to 28 U.S.C. § 1407 by the Judicial Panel on Multi-district Litigation to the U.S. District Court for the Eastern District of Pennsylvania, for consolidated proceedings as one of more than two thousand products liability actions filed by plaintiffs claiming injuries from defective "pedicle screw fixation devices" that were surgically attached to the pedicles of the spines during spine fusion surgery. *Id.* The case was remanded to the Northern District of Indiana after the pre-trial proceedings were sufficiently completed, primarily with only case and fact specific issues remaining. *See id.*

218. *See id.* at 973-74.

219. *Id.* at 974.

220. *See id.*

221. *See id.*

222. The plaintiff did not file a brief in response to the manufacturer's motion for summary judgment. *See id.* at 971. The district court discussed and rejected the plaintiff's position with regard to her claim that the product was defective and that the manufacturer failed to warn the plaintiff in a relatively perfunctory fashion. Noting prior decisions in similar cases holding that the mere fact that a screw broke shortly after implantation did not itself evidence a defect, the court found that the plaintiff's claim of defect failed because "she made no attempt to rule out any other cause for her pain and the alleged injury." *Id.* at 977. The court also noted that the mere failure of a device standing alone will not render a manufacturer liable, and that it is "a known fact in the

Particularly in medical device product liability cases, proof of legal causation must be presented by expert testimony, "and the expert's opinion must be stated in terms of reasonable probability."<sup>223</sup> The expert's degree of certainty is irrelevant if the opinion is unsupported.<sup>224</sup> The expert testimony's proponent must show by a preponderance of the evidence that the expert witness is qualified to provide the opinion.<sup>225</sup>

However, after surpassing the first qualification hurdle, the proponent of expert testimony must show that, in addition to the expert having sufficient knowledge and training, the expert's testimony is reliable.<sup>226</sup> An expert cannot offer merely conclusory opinions, should address other factors that may have caused the alleged damages, and must provide an explanation as to how or why the expert arrived at his conclusions.<sup>227</sup> The expert must provide the trial court with a sufficient explanation and understanding of how the expert developed his conclusions or opinions so that the court can evaluate the reliability of the testimony.

In this respect, the proffered expert in the *Minisan* case failed to pass muster. Although the expert physician certainly was qualified—an Osteopath with board certification in orthopedic surgery and pain management and training in spine surgery—his expert conclusions were based solely on an examination of the plaintiff's medical records. The physician never examined the plaintiff, met with her or even spoke with her. The physician never examined or tested the medical device in question. Finally, the physician failed to provide any explanation as to how he reached his conclusions. The trial judge found the expert's testimony unreliable.<sup>228</sup>

The trial court judge acts as the gatekeeper to ensure that expert testimony and evidence "is not only relevant, but reliable."<sup>229</sup> In the decision of *Owens v.*

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medical community that bone screws may break due to a number of factors unrelated to any defect." *Id.* The court also discussed the requirement that the defective product must be "unreasonably dangerous." *See id.* Noting prior case law in which the court held that use of a medical device in a manner not approved by the FDA does not mean that the device is defective, the court found no evidence of a defect in the physician's "off label" application of the implant device. *See id.* at 978. The court finally rejected the plaintiff's failure to warn claim, noting that "manufacturers of prescription medical products have a duty only to warn physicians, rather than patients, of the risks associated with the use of the product." *Id.* Furthermore, the court noted that, "even if the manufacturer failed to warn or advise the physician, the manufacturer would not be liable if the plaintiff's physician independently knew of the risks and failed to advise the plaintiff." *Id.* The plaintiff failed to produce any evidence supporting this allegation. *See id.* at 979.

223. *Id.* at 975.

224. *See id.*

225. *See id.*

226. *See id.* at 976.

227. *See id.*

228. *See id.*

229. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

*Amtrol, Inc.*,<sup>230</sup> Judge Miller discussed the trial court's role in assessing the reliability of expert testimony. "This inquiry focuses, not only [on] the witness's qualifications as an expert in the field, but rather on the methodology the expert used to reach the proffered opinion."<sup>231</sup> The expert must substantiate the basis of his opinion to the trial court.<sup>232</sup>

The trial court's inquiry into the reliability of an expert's testimony is "a flexible one," designed to assure that the expert employs in the courtroom the same level of "intellectual rigor" practiced in the field.<sup>233</sup> Although there is no defined standard under which the trial court is to assess the reliability of an expert's testimony, among the factors the court may consider is "(1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) whether the theory or technique has a known or potential rate of error; and (4) whether the theory or technique is generally accepted."<sup>234</sup> Speculative testimony, even offered by an expert of the highest credentials, is inadmissible.<sup>235</sup>

In the *Owens* case, the estate of a deceased pressure tank technician brought an action against the tank's manufacturer for damages incurred when a pressure tank that the deceased was repairing exploded, causing his death.<sup>236</sup> The plaintiff engaged a qualified expert to inspect the tank and offer an opinion on defective design or manufacture.<sup>237</sup> The plaintiff's expert viewed the tank after the explosion and compared it to similar tanks and to alternatively designed tanks. The expert noted that similar tanks with different weldings did not show the corrosion around the base that the manufacturer's tank did, and that other tanks manufactured by the defendant showed the same indications of rust. The expert then opined that the tank suffered of defective manufacture, resulting in the development of rust that "reduced the wall thickness [of the tank] to practically nothing," and was also defectively attached to its base cylinder.<sup>238</sup>

However, the expert provided nothing to the trial court explaining how he reached his conclusions, and the trial court agreed with the manufacturer that the

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230. 94 F. Supp. 2d 952 (N.D. Ind. 2000).

231. *Id.* at 955 (citing *Clark v. Takata Corp.*, 192 F.3d 750, 756 (7th Cir. 1999)).

232. *See id.*

233. *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

234. *Id.* (quoting *United States v. Vitek Supply Corp.*, 144 F.3d 476, 484-85 (7th Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999)).

235. *See id.*

236. *See id.* at 954.

237. *See id.* The plaintiff's expert was experienced in the design of pressure vessels, held a Bachelor's degree in mechanical engineering, worked as an instructor in a university engineering department, and had extensive employment in the field of applied engineering. *See id.* at 955. The manufacturer challenged the qualifications of the plaintiff's expert, arguing that the expert had no experience with water pressure vessels. This was summarily rejected by the trial court, which noted that the manufacturer offered nothing to indicate that experience with pressure vessels is different from that with water vessels. *See id.*

238. *Id.* at 956.

expert's opinion was merely observational without analysis.<sup>239</sup> The court noted that, while reliable engineering principles may exist that would support the expert's reasoning, no such principles or other foundation providing the basis of the expert's conclusions were provided to the court.<sup>240</sup> The court "must evaluate the reliability of the bridge the expert takes to an opinion, not the opinion itself."<sup>241</sup> The court went on to assert that "[c]ertainly, when the asserted cause of the patient's condition is a phenomenon that requires specialized scientific knowledge, 'an insightful, even an inspired, hunch' will not suffice."<sup>242</sup> Since the plaintiff offered no explanation of how the expert went from his observations to his conclusions, the court rejected his testimony as unreliable.

Practitioners preparing for summary judgment or trial in matters that inherently require the assistance of expert opinion testimony must work with caution to assure not only that the expert is qualified to provide the propounded testimony and that the expert's opinion is founded upon sound principles under the guidelines of *Daubert* and *Kuhmo Tire Co.*, but also that the expert's methodology for deriving an opinion and the substantial basis for that opinion is made part of the record and brought before the trial court for consideration.

In the decision of *Smith v. Ford Motor Co.*,<sup>243</sup> the Seventh Circuit considered the exclusion of the testimony of two expert witnesses offered on the issue of whether a steering gear box in a vehicle was defectively designed or manufactured. The U.S. District Court for the Southern District of Indiana ruled on the day of trial that the plaintiff's two expert witnesses could not testify as proposed and then dismissed the action with prejudice because the plaintiff had no other expert witnesses to substantiate his claim. The court excluded the witness' testimony on the basis that the experts were not qualified to testify and that their testimony would not be helpful to the jury.<sup>244</sup>

The Seventh Circuit noted that an expert may be qualified by "knowledge, skill, experience, training or education."<sup>245</sup> Rule 702 of the Federal Rules of Evidence contemplates the admission of testimony by experts whose knowledge is based on experience, as well as those who gain their qualifications through "academic and practical expertise."<sup>246</sup> The court considers the "full range of [an expert's] practical experience as well as his or her academic or technical training when determining whether an expert is qualified to render an opinion in a given area."<sup>247</sup>

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239. See *id.* The court noted that "[h]ands-on testing and review of experimental, statistical, or other scientific data gathered by others are examples of reasonable methodologies upon which opinion may reliably rest." *Id.* at 955.

240. See *id.* at 956.

241. *Id.*

242. *Id.* (quoting *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1020 (7th Cir. 2000)).

243. 215 F.3d 713 (7th Cir. 2000).

244. See *id.* at 717.

245. *Id.* at 718 (quoting FED. R. EVID. 702).

246. *Id.* (quoting *Bryant v. City of Chicago*, 200 F.3d 1092, 1098 (7th Cir. 2000)).

247. *Id.*

The plaintiff in *Smith* alleged that the steering gear box failed due to a defect, causing him to be unable to gain control of his vehicle, resulting in a single vehicle collision from which he sustained injuries.<sup>248</sup> To support his position, the plaintiff presented two expert witnesses: a mechanical engineer, who had previously worked for General Motors performing accident reconstruction analysis, and a metallurgical engineer, who worked for General Motors for an extended period of time before leaving to form his own engineering firm.<sup>249</sup>

The mechanical engineer examined the plaintiff's vehicle twice and based upon his analysis, determined "that there was an internal failure in the steering gearbox, that the failure occurred while the vehicle was in use before it left the road," and that the failure was due to a defect in the parts inside the gearbox, although he was unable to determine whether the defect was due to the design or the manufacture of the affected parts.<sup>250</sup> The metallurgical engineer removed and opened the gearbox in the presence of the manufacturer's technician, inspected the mechanisms inside the gearbox, and "determined that the steering had failed due to the overloading of the torsion bar and that the specific parts were manufactured according to the manufacturer's specifications."<sup>251</sup> Like the mechanical engineer, however, he was unable to determine whether the defect was due to design or manufacture. He offered several hypothetical explanations for the failure and stated that, in his opinion, using a different metal for the torsion bar would have been a better choice.<sup>252</sup>

The manufacturer argued, and the district court agreed, that plaintiff's two experts were not qualified to render their proffered opinions because neither were qualified as automotive engineers.<sup>253</sup> Although the Seventh Circuit concurred that neither of plaintiff's experts were qualified as automotive engineers, it noted that plaintiff did not seek to qualify either as an expert in automotive design or manufacture.<sup>254</sup> The court explained that "expert testimony need only be relevant to evaluating a factual matter in the case. . . . [and] need not relate directly to the ultimate issue that is to be resolved by the trier of fact."<sup>255</sup> The Seventh Circuit held that the trial court "erred in concluding that [the two experts] were not qualified as experts in a relevant field solely because their expertise related to an area other than the one concerning the ultimate issue" in the case.<sup>256</sup>

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248. *See id.* at 716. The plaintiff fell asleep while driving his vehicle, causing his vehicle to cross over the grassy median and opposing travel lanes, at which time the plaintiff awakened and attempted to steer the vehicle back to the proper side of the road. The plaintiff contended that the steering mechanism then failed due to the defect and he was unable to steer the vehicle, causing his vehicle to exit the traveling surface and strike a concrete culvert. *See id.*

249. *See id.*

250. *Id.*

251. *Id.* at 716-17.

252. *See id.* at 717.

253. *See id.* at 719-20.

254. *See id.* at 720.

255. *Id.*

256. *Id.*



The appellate court then addressed the district court's finding that the testimony of the two expert witnesses was unreliable because its contents had not been "peer reviewed."<sup>257</sup> The court noted that "no single factor among the traditional *Daubert* list is conclusive in determining whether the methodology relied upon by a proposed expert is reliable."<sup>258</sup> The Seventh Circuit noted that the reliability test under Federal Rules of Evidence Rule 702 is individualized and dependent upon the type of expertise at issue in a given case.<sup>259</sup> The court went so far as to opine that the "lack of peer review will rarely, if ever, be the single dispositive factor that determines the reliability of expert testimony."<sup>260</sup>

The Seventh Circuit then turned to the district court's conclusion that the testimony of the two experts would not be helpful to the jury.<sup>261</sup> The appellate court found that the district court's reasoning requires a scope of relevancy more narrow than that contemplated under the Federal Rules of Evidence. "In order for an expert's testimony to qualify as 'relevant' under Rule 702 it must assist the jury in determining *any* fact at issue in the case."<sup>262</sup> Although Rule 704(a) of the Federal Rules of Evidence permits an expert to testify to the ultimate issue in a case, "the expert's testimony need not relate to the ultimate issue in order to be relevant."<sup>263</sup>

The Seventh Circuit made a notable observation in dicta. In a footnote, the court advised that

it would be appropriate for a district court to apply Rule 702's requirements to individual pieces of proposed testimony, so that if the district court found a particular part of that testimony irrelevant or unreliable, it could exclude that portion of the testimony without striking the proposed evidence in its entirety.<sup>264</sup>

This observation creates minimal disruption to the analysis of witness testimony under the traditional relevancy considerations, as courts and litigants have routinely sought to confine the testimony of lay and expert witnesses alike to the scope of evidence relevant to the issues at trial.

However, under the principles of *Daubert* and *Kumho Tire Co.*, testing the reliability of portions of an expert's testimony, rather than the expert's testimony as a whole, creates a sea of pitfalls and opportunities for litigants and judges alike. Upon determining that a portion of the expert's methodology is unreliable, the court will then be required to determine what portion of the expert's opinion is derived from unreliable methods. Opponents of the expert's testimony will push to include the majority of the expert's opinion within the realm of the

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257. *Id.*

258. *Id.*

259. *See id.*

260. *Id.*

261. *See id.* at 721.

262. *Id.* (emphasis in original).

263. *Id.*

264. *Id.* at 721 n.3.

unreliable methodology, whereas proponents of the testimony will seek to dissect the smallest (and perhaps most insignificant) portions of the expert's testimony derived from unreliable methods from other proper testimony.

Courts must observe the overriding principle that the trial judge, standing as gatekeeper, is only to evaluate the methodology the expert used in forming the opinion, and not the opinion itself. In assessing whether the proffered testimony exceeds the bounds of the expert's reliable methodology, the trial court will have to consider not only the methodology employed, but the results and conclusions that the expert asserts to have gained from the process. The trial judge must then assess whether the substance of the proposed conclusion could have been reasonably derived from the process without considering whether the proposed conclusion is correct or even believable.

It was this balancing of the *Daubert* principles that the U.S. District Court for the Northern District of Indiana considered in the case of *Dartey v. Ford Motor Co.*<sup>265</sup> In *Dartey*, the plaintiff claimed injuries when the tailgate of his Ford pickup truck fell after the support cables on the tailgate snapped.<sup>266</sup> The plaintiff claimed that the plastic casings surrounding the metal support cables had deteriorated over time, allowing moisture to corrode the metal cables.<sup>267</sup>

To support his position, plaintiff offered the testimony of two expert witnesses, a metallurgical engineer and a plastics expert.<sup>268</sup> The metallurgical engineer testified during the evidentiary hearing and also in deposition that "the metal wires supporting the tailgate on the [Dartey's] truck fractured due to metal fatigue brought on by the long-term opening and closing of the tailgate, further aggravated by corrosion."<sup>269</sup> He concluded that the metal used to support the tailgate was unsuitable for long-term use and the design of the tailgate, which required the metal cables to rest in a confined space over the long-term, created a scenario in which the metal wires were bound to fail.<sup>270</sup> He proposed an alternative design involving metal hinges.<sup>271</sup>

The plastics expert testified that the material covering the cables was made of a thin, flexible nylon material, which was cracked and hard along the entire expanse of the cable.<sup>272</sup> The material, in this condition, permitted moisture to corrode the metal wires.<sup>273</sup> He opined that the material "was not capable of withstanding long-term use and, therefore, the nylon would not remain intact for the life of the truck."<sup>274</sup> The expert suggested that a better material, called thermoplastic elastimer (TPE) was available at the time the truck in question was

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265. 104 F. Supp. 2d 1017 (N.D. Ind. 2000).

266. *See id.* at 1019-20.

267. *See id.* at 1026.

268. *See id.* at 1020.

269. *Id.*

270. *See id.*

271. *See id.* at 1020-21.

272. *See id.* at 1021.

273. *See id.*

274. *Id.*

produced and would have been a better alternative.<sup>275</sup>

Ford moved to exclude the testimony of the two experts, contending that the experts lacked experience designing tailgates or tailgate support components.<sup>276</sup> Chief Judge Lee, turning to the U.S. Supreme Court's decision in *Kumho Tire Co. v. Carmichael*,<sup>277</sup> and the Seventh Circuit's opinion in *Smith v. Ford Motor Co.*,<sup>278</sup> rejected Ford's argument on the basis that the experts' proffered testimony was within their realm of expertise.

The district court noted that the metallurgical engineer had sufficient credentials to establish himself as an expert metallurgist.<sup>279</sup> As to Ford's assertion that the metallurgist was not qualified as an expert in the field of design engineering, the district court determined that this factor alone did not automatically negate all of the expert's testimony.<sup>280</sup>

The district court determined that the metallurgical engineer's proposed testimony related to an area other than the one concerning the ultimate issue at trial—whether there existed a design defect in the metal cables—and encompassed materials not readily understandable by laymen on the jury, making the expert's testimony helpful to the factfinder.<sup>281</sup> The plaintiff offered the witness only as an expert in metallurgy, and the expert could confine his proposed testimony to the his field of expertise.<sup>282</sup>

The court further rejected Ford's argument that the expert's methodology was unsound under the principles of *Daubert* because the witness had not: (1) done any testing of his own theory, (2) subjected his opinions to peer review; and (3) inquired about the load that plaintiff placed on the tailgate throughout the life of the truck.<sup>283</sup> The court noted that "no single factor among the traditional *Daubert* factors [was] conclusive in determining whether the methodology relied upon by a proposed expert is reliable."<sup>284</sup> Here, the expert's testimony regarding how the cable fell was "elementary in nature" and the scientific principles underpinning his opinion were "obvious" and based on well-established scientific principles, thereby alleviating the need to test the theory further or to submit the opinion for peer review.<sup>285</sup>

The district court addressed the issue pertaining to the plastics expert in similar fashion. Ford challenged the qualifications of the plastics expert due to his inexperience and unfamiliarity with design engineering.<sup>286</sup> The court, noting

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275. *See id.*

276. *See id.*

277. 526 U.S. 137 (1999).

278. 215 F.3d 713 (7th Cir. 2000).

279. *See Dartey*, 104 F. Supp. 2d at 1023.

280. *See id.*

281. *See id.* at 1024.

282. *See id.*

283. *See id.*

284. *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,150 (1999)).

285. *Id.*

286. *See id.* at 1025.

that the expert was certainly qualified in his proffered field of testimony, found that he need not be qualified as to the ultimate issue for trial in order to testify on other issues relevant to the case.<sup>287</sup> Chief Judge Lee determined that the plastics engineer could testify as to the condition of the plastic sheathing and, due to the condition, that it had permitted moisture to seep through and corrode the metal wires.<sup>288</sup>

However, with regard to both witnesses, the court specifically ordered that neither witness could testify outside his respective field of expertise.<sup>289</sup> Applying the *Daubert* standards to the various areas of proposed testimony, the court directed that the plaintiff's witnesses would be required to confine their testimony to only their respective topics.<sup>290</sup> For example, while the plastics expert was permitted to testify as to his opinion that TPE was a better choice for the metal cables casings, he would not be permitted to offer an opinion as to whether Ford's failure to use TPE made the design of the tailgate defective.<sup>291</sup>

Ford also attacked the testimony of the plastics expert on the grounds of relevancy. Ford argued that the expert (1) had not tested the TPE plastic; (2) had not designed a tailgate using TPE plastic; (3) could not confirm that any automobile manufacturer ever used TPE at the time the pickup truck was designed; and (4) did not have evidence to dispute that nylon casings were state-of-the-art at the time of the design.<sup>292</sup> Although the court noted that all these charges may be true, it held that such would be left for cross-examination and did not affect the overall admissibility of the proposed expert testimony on the grounds of relevancy.<sup>293</sup>

The Seventh Circuit Court of Appeals further discussed the admissibility of expert testimony in product liability cases in the matter of *Weir v. Crown Equipment Corp.*<sup>294</sup> In *Weir*, a forklift operator injured her foot when the lift collided with a parked forklift.<sup>295</sup> The facts indicated that the forklift on which the plaintiff was riding was equipped with a "deadman brake," which would stop the forklift upon the operator lifting her foot off the depressed brake pedal, and a "plugging" brake, which would bring the forklift to a stop upon moving the forklift's control lever to a reverse position.<sup>296</sup> The plaintiff brought an action against the forklift manufacturer, claiming her foot was injured when the

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287. *See id.*

288. *See id.*

289. *See id.* at 1025-26.

290. *See id.*

291. *See id.* at 1025.

292. *See id.* at 1026.

293. *See id.* "[T]he Seventh Circuit has recently re-emphasized *Daubert*'s admonition that, 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Id.* (citing *Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 586 (7th Cir. 2000)).

294. 217 F.3d 453 (7th Cir. 2000).

295. *See id.* at 455-56.

296. *Id.* at 454-55.

“deadman” brake and the “plugging” mechanism failed, causing her to collide with a parked forklift.<sup>297</sup> The U.S. District Court for the Southern District of Indiana entered judgment for the manufacturer.

On appeal, the plaintiff claimed that the trial court erred in excluding evidence and the testimony of her expert witness. Plaintiff first argued that the trial court erred in excluding a large portion of accident report documents that the manufacturer turned over to plaintiff during discovery.<sup>298</sup> The manufacturer turned over more than a thousand accident reports pertaining to accidents involving its forklifts.<sup>299</sup> The district court excluded all of the reports except those that pertained to forklift accidents substantially similar to one that the plaintiff claimed to have experienced.<sup>300</sup> The district court allowed into evidence reports “which involved a failure of both the plugging mechanism and the deadman brake together with pre- and post-accident testing showing both brakes to be working.”<sup>301</sup> This reduced the number of accident reports admitted to only twenty-seven.<sup>302</sup>

In affirming the district court’s ruling, the Seventh Circuit noted that “[e]vidence of other accidents in products liability cases is relevant to show notice to the defendant of the danger, to show existence of the danger, and to show the cause of the accident.”<sup>303</sup> However, before evidence of prior accidents is admitted, “the proponent must show that the . . . accidents occurred under substantially similar circumstances.”<sup>304</sup>

In determining what constitutes “substantial similarity” the Seventh Circuit turned to the decision *Nachtsheim v. Beech Aircraft Corp.*, in which the court held:

“The foundational requirement that the proponent of similar accidents evidence must establish substantial similarity before the evidence will be admitted is especially important in cases such as this where the evidence is proffered to show the existence of a dangerous condition or causation. The rationale for this rule is simple. In such cases, the jury is invited to infer from the presence of other accidents (1) that a dangerous condition existed (2) which caused the accident. As the circumstances and conditions of the other accidents become less similar to the accident under consideration, the probative force of such evidence decreases. At the same time, the danger that the evidence will be unfairly prejudicial remains. The jury might infer from evidence of the

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297. *See id.*

298. *See id.* at 457.

299. *See id.*

300. *See id.*

301. *Id.*

302. *See id.*

303. *See id.* (quoting *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1268 (7th Cir. 1988)).

304. *Id.* (quoting *Nachtsheim*, 847 F.2d at 1268).

prior accident alone that ultra-hazardous conditions existed . . . and were the cause of the later accident without those issues ever having been proved. In addition, the costs—in terms of time, distraction and, possibly, prejudice—resulting from such evidence also may weigh against admissibility.”<sup>305</sup>

Here, all of the accident reports turned over to the plaintiff did not involve incidents substantially similar to the plaintiff’s accident. The plaintiff argued “that the district court misapplied the substantial similarity test by adding additional criteria beyond mere brake failure.”<sup>306</sup> The Seventh Circuit disagreed, noting that under the plaintiff’s theory of the case, the forklift was unreasonably dangerous because of a design defect which resulted in brake failure in cases of a specific nature which therefore permitted the additional criteria.<sup>307</sup>

The court then turned to the issue of excluding the plaintiff’s expert testimony. The plaintiff argued that she should have been permitted, through her expert, to offer evidence that the manufacturer should have incorporated a door or barrier across the open side of the forklift and that such a mechanism was a cost-effective remedy that would have prevented her injury.<sup>308</sup> In ruling to exclude the testimony, the district court found the proposed evidence irrelevant and inadmissible because it showed that the plaintiff’s foot was outside of the running lines of the machine before the collision and was not forced outside the machine by the impact.<sup>309</sup>

The plaintiff’s expert offered two alternative design theories, one involving a door across the open side of the operator’s compartment and another involving a wedge-shaped barrier that the plaintiff’s expert had designed. In an offer of proof, the expert testified that the manufacturer had sold over 300 doors for its forklifts and, upon studying accident reports, none of the accidents involving forklifts with doors resulted in lower limb injury.<sup>310</sup>

In affirming the trial court’s exclusion of the expert’s testimony, the Seventh Circuit noted that, under the plaintiff’s own account of the accident, the presence of doors may not have prevented her injury.<sup>311</sup> The plaintiff testified that there was “no swerving, acceleration, bumping or rough floor to traverse” before the collision that could have forced her foot outside the operator’s compartment.<sup>312</sup>

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305. *Id.* at 457-58 (quoting *Nachtsheim*, 847 F.2d at 1268-69) (internal quotations and citations omitted)).

306. *Id.* at 458.

307. *See id.* The plaintiff contended that the design of the forklift would permit the vehicle to continue to move if the “deadman” brake pedal was slightly lifted by the operator crossing over her feet, which would disengage the “plugging” mechanism without engaging the braking mechanism. *See id.*

308. *See id.* at 459.

309. *See id.*

310. *See id.*

311. *See id.* at 460.

312. *Id.*

The plaintiff had been trained to keep her feet inside the operator's compartment when operating the forklift, and the plaintiff's expert testified that he knew of nothing that occurred to force the plaintiff's foot outside the forklift.<sup>313</sup>

The Seventh Circuit affirmed the exclusion of the expert's alternative door design theory even under the "doctrine of crashworthiness."<sup>314</sup> Under the doctrine of crashworthiness, "a manufacturer may be held liable for injuries sustained in an accident where a manufacturing or design defect, although not the cause of the accident, caused or enhanced a plaintiff's injuries."<sup>315</sup> The court held:

A product is not considered to be defective under a crashworthiness analysis merely because the product failed and caused injury. Instead, a finding of defectiveness is based on the conclusion "that the product failed to provide the consumer with reasonable protection under the circumstances surrounding a particular accident. Therefore, "a claimant should be able to demonstrate that a feasible, safer, and more practical design would have afforded better protection."<sup>316</sup>

Again, the Seventh Circuit emphasized the fact that no evidence was presented showing that the circumstances surrounding the accident caused the plaintiff's foot to leave the operator's compartment.<sup>317</sup> The court reasoned that "the operator's compartment, even without a door, provided reasonable protection under the circumstances."<sup>318</sup>

The Indiana Court of Appeals considered two cases during the survey period that undertook the state counterpart to the federal *Daubert* analysis. In the case of *Hannan v. Pest Control Services, Inc.*,<sup>319</sup> the court considered whether the testimony of any of the plaintiffs' several expert witnesses was admissible in claims for personal injuries arising from the application of a pesticide in their home. The defendant was engaged by the plaintiffs to spray their home to combat an infestation of ants. The plaintiffs claimed that shortly after their home was sprayed, they began to exhibit symptoms of the flu. The defendant moved for summary judgment, arguing that no genuine issue of material fact existed regarding the plaintiffs' claims that exposure to chemicals caused their injuries, and also moved to exclude the plaintiffs' medical causation expert witnesses. The trial court found that the plaintiffs' expert testimony on the issue of medical causation was inadmissible under Indiana Evidence Rule 702 and common law.<sup>320</sup> The trial court further determined that establishing medical causation was an essential element and that the plaintiffs' failure to submit competent and

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313. *See id.*

314. *Id.*

315. *Id.* at 460-61 (citing *Miller v. Todd*, 551 N.E.2d 1139, 1140 (Ind. 1990)).

316. *Id.* at 461 (quoting *Miller*, 551 N.E.2d at 1143).

317. *See id.*

318. *Id.*

319. 734 N.E.2d 674 (Ind. Ct. App. 2000).

320. *See id.* at 678.

admissible evidence on the issue entitled the defendant to summary judgment.<sup>321</sup>

In reviewing the exclusion of the plaintiffs' expert witnesses, the court of appeals recited Indiana's two-prong standard: "(1) the subject matter [must be] distinctly related to some scientific field, business or profession beyond the knowledge of the average lay person; and (2) the witness [must be] shown to have sufficient skill, knowledge or experience in that area so that the opinion will aid the trier of fact."<sup>322</sup> The court noted that the first prong of this test was clearly established in this case because medical causation questions "are questions of science necessarily dependent on the testimony of physicians and surgeons learned in such matters."<sup>323</sup>

Turning then to the second prong of the test, the court noted that Rule 702 of the Indiana Rules of Evidence requires that the expert "have sufficient skill in the particular area of expert testimony before the expert can offer opinions in that area."<sup>324</sup> The court found that "[a]n expert in one field of expertise cannot offer opinions in other fields absent a requisite showing of competency in that other field."<sup>325</sup>

The trial court, acting in the capacity of gatekeeper under Rule 702, "must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid" and whether it can be applied properly to the facts in issue.<sup>326</sup> The expert's testimony must be supported by "good grounds" based upon what is known establishing a standard of evidentiary reliability.<sup>327</sup> In determining whether a theory or technique is scientific knowledge that will assist the trier of fact, courts consider whether the theory can be empirically tested, whether the theory has been subjected to peer review or publication, and whether it enjoys widespread support.<sup>328</sup>

The plaintiffs offered the testimony of three experts to support medical causation. The first, Dr. Johnson, sought to testify that the plaintiffs' exposure to the chemicals triggered a condition known as Multiple Chemical Sensitivity.<sup>329</sup> The court of appeals noted that several jurisdictions have rejected the multiple chemical sensitivity theory, and that in order to testify on the subject, Dr.

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321. *See id.* at 677-78. The defendant contended that the expert witnesses failed to use generally accepted toxicological cause-and-effect methodology, their methods and opinions were not generally accepted in the scientific medical community, their opinions did not constitute scientific knowledge and were inherently unreliable, and the experts failed to negate other potential causes of the plaintiffs' alleged illnesses. *See id.* at 677.

322. *Id.* at 679 (quoting *Bacher v. State*, 686 N.E.2d 791, 800 (Ind. 1997)).

323. *Id.* (citing *Brown v. Terre Haute Reg'l Hosp.*, 537 N.E.2d 54, 61 (Ind. Ct. App. 1989)).

324. *Id.* (citing *Harlan Sprague Dawley v. S.E. Lab Group*, 644 N.E.2d 615, 621 (Ind. Ct. App. 1994)).

325. *Id.* (citing *Hegerfeld v. Hegerfeld*, 555 N.E.2d 853, 855-56 (Ind. Ct. App. 1990)).

326. *Id.* (citing *Hottinger v. Trugreen Corp.*, 655 N.E.2d 593, 596 (Ind. Ct. App. 1996)).

327. *Id.* (citing *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995)).

328. *See id.* (citations omitted).

329. *See id.* at 680.



Johnson would have to be versed in a number of medical specialties.<sup>330</sup>

Dr. Johnson was an osteopathic physician.<sup>331</sup> He was not board certified in internal medicine, had never taken the allergy or immunology board examinations, and was not certified in allergy, immunology, preventive medicine, occupational medicine, public health, epidemiology, neurology, toxicology, immuno-toxicology or psychiatry.<sup>332</sup> Furthermore, the court found that Dr. Johnson's method for developing his opinion consisted of a physical examination of the patient followed by an interview.<sup>333</sup> Dr. Johnson did not perform any testing on the patient, did not examine the exposure levels or dose of the chemical received by the patient, and he had no information regarding the exposure level. Dr. Johnson never visited the plaintiffs' residence, had not examined any photographs or diagrams of the home or its ventilation system, and was unaware of the size of the home.<sup>334</sup> Dr. Johnson admitted that he had only made a "presumptive diagnosis" of chemical sensitivity. He did not preclude other possible bases for the patient's ailments, and conceded that the plaintiffs' symptoms could have been caused by other ailments.<sup>335</sup>

The plaintiffs' second expert witness, Dr. Evans, sought to testify that the plaintiffs' symptoms were caused by organophosphate exposure.<sup>336</sup> While Dr. Evans held a doctorate degree in toxicology, he did not have a medical degree and was not qualified to examine patients or define human medical diagnoses.<sup>337</sup> "Dr. Evans conceded that he [was] not qualified to testify regarding medical causation."<sup>338</sup>

Dr. Evans developed his opinion without information regarding the plaintiffs' exposure level to the chemicals, without consideration of residential or occupational exposure guidelines, and without inspecting the plaintiffs' home or having any information pertaining to its size or ventilation. Dr. Evans conceded that all of this information was relevant to the question of exposure level.<sup>339</sup>

"Dr. Evans agreed that if the chemicals had been properly applied, the plaintiff would not have suffered any medical effects from them."<sup>340</sup> Dr. Evans acknowledged that the application of the chemicals in the plaintiffs' home appeared to be within the recommended levels, and that without evidence that the chemical was misapplied, there could be no cause-and-effect basis to conclude

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330. *See id.* at 680 n.3.

331. *See id.*

332. *See id.*

333. *See id.* at 680. The diagnosis was offered for only one of the several plaintiffs claiming injuries.

334. *See id.* at 681.

335. *See id.*

336. *See id.*

337. *See id.*

338. *Id.*

339. *See id.*

340. *Id.*

that the plaintiffs were overexposed to the chemicals.<sup>341</sup>

The third expert offered by the plaintiffs was Dr. Kelly, whose proposed testimony would have been that two of the plaintiffs acquired immunologic abnormalities as a result of the chemicals. Dr. Kelly reached this conclusion after relying upon blood tests that had been taken five years after the exposure, which he did not receive until after he made his diagnosis. Dr. Kelly conceded that his diagnosis of RADS was only tentative and equivocal and that the symptoms and alleged exposure did not satisfy "the generally accepted and required criteria for diagnosing RADS."<sup>342</sup>

The court found that Dr. Kelly's diagnosis of a causal connection between the pesticide application and the plaintiffs' alleged symptoms was devoid of (1) any analysis of the exposure levels plaintiffs received, which Dr. Kelly admitted were relevant, (2) any inspection of the plaintiffs' residence or blueprints of their home, and (3) any knowledge of the duration to which the plaintiffs' were exposed to the chemicals.<sup>343</sup> Dr. Kelly conceded that he was simply making an assumption regarding the dose level received by the plaintiffs.<sup>344</sup> Dr. Kelly was also unaware that one of the plaintiffs had previous exposures to chemicals that could cause a person to experience many of the same symptoms of which the plaintiffs complained.<sup>345</sup>

Dr. Kelly had never published any literature regarding organophosphate chemicals or immunological disorders and could not point to any peer-reviewed authority to support his medical causation conclusions.<sup>346</sup> In addition, Dr. Kelly did not offer any explanation that would exclude other possible causes of the plaintiffs' alleged symptoms, but acknowledged, however, that there were numerous causes for each of the symptoms but made no effort to investigate them.<sup>347</sup>

The court summarized the proposed testimony of the plaintiffs' medical causation experts as relying on "mere temporal coincidence of the pesticide application" and the plaintiffs' alleged illnesses.<sup>348</sup> The court found such a relationship insufficient to establish the element of causation.<sup>349</sup>

The plaintiffs attempted to overcome the failure of their expert witnesses by citing *Femco v. Colman*,<sup>350</sup> in which the Indiana Court of Appeals held that under the specific circumstances the trial court did not err in not striking the affidavit of a treating physician which, along with other materials, created a triable issue

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341. *See id.*

342. *Id.* "There is no medical or scientific literature which supports the conclusion that the chemicals can cause RADS at any dose." *Id.*

343. *See id.* at 681-82.

344. *See id.* at 682.

345. *See id.*

346. *See id.*

347. *See id.*

348. *Id.*

349. *See id.* (citing *Turner v. Davis*, 699 N.E.2d 1217, 1220 (Ind. Ct. App. 1998)).

350. 651 N.E.2d 790 (Ind. Ct. App. 1995).

of fact sufficient to survive summary judgment.<sup>351</sup> The court distinguished the *Femco* decision by noting that, in that case, it was established that the plaintiff, in fact, had been exposed to the substance at issue, whereas in the present case, there was no credible evidence that the plaintiffs were exposed to any level of the chemicals in question.<sup>352</sup> Therefore, while it may have been appropriate for the physician in *Femco* to assume, without personal knowledge, that the plaintiff had suffered exposure to the chemical, there was nothing within the record in the present case to allow the experts to assume such an exposure.<sup>353</sup>

In *U-Haul International, Inc. v. Nulls Machinery & Manufacturing Shop*,<sup>354</sup> a U-Haul truck collided with decedent's car when a valve in the U-Haul's breaking system allegedly failed. The decedent's estate sued both U-Haul the producers of the brake valve component ("Valve Defendants").<sup>355</sup>

Each Valve Defendant filed a separate motion for summary judgment, claiming that the plaintiff's product liability action failed because the plaintiff could not designate evidence demonstrating that the brake valve was defective and was a cause of the accident.<sup>356</sup> The trial court granted the Valve Defendants' motions, essentially leaving U-Haul, the truck's owner, as the remaining defendant. U-Haul filed a motion to correct error, which was denied, and then appealed.<sup>357</sup>

In a unanimous decision, the Indiana Court of Appeals first considered whether co-defendant U-Haul had standing to appeal the trial court's grant of summary judgment in favor of the Valve Defendants. U-Haul argued that it was prejudiced by the summary dismissal of the Valve Defendants because, under Indiana's Comparative Fault Act, the jury would be required to allocate fault among all culpable parties and non-parties.<sup>358</sup> A dismissed party may not be named as a non-party.<sup>359</sup> Because the jury could not apportion fault against the dismissed Valve Defendants, U-Haul contended that it suffered an exposure to greater liability for the plaintiff's damages.<sup>360</sup>

Finding this issue to be one of first impression, Judge Friedlander turned to authority from other jurisdictions for guidance. The court examined the decisions in *Hammond v. North American Asbestos Corp.*,<sup>361</sup> *Koller v. Liberty*

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351. See *id.* at 794.

352. See *id.*

353. See *id.*

354. 736 N.E.2d 271 (Ind. Ct. App. 2000).

355. See *id.* at 273.

356. See *id.* at 274.

357. See *id.*

358. See *id.* at 275.

359. See *id.* (citing *Handrow v. Cox*, 575 N.E.2d 611 (Ind. 1991); *Rausch v. Reinhold*, 716 N.E.2d 993 (Ind. Ct. App. 1999)).

360. See *id.*

361. 565 N.E.2d 1343 (Ill. Ct. App. 1991).

*Mutual Insurance Co.*,<sup>362</sup> and *Tinker v. Kent Gypsum Supply, Inc.*<sup>363</sup> The court found that these three decisions shared common principles in determining whether a co-defendant had standing to appeal the dismissal of another defendant from an action.<sup>364</sup> All three cases start with the proposition that, in order to have standing to challenge a co-defendant's dismissal, a remaining defendant must demonstrate that it is aggrieved by the co-defendant's exit from the action.<sup>365</sup>

The courts diverged, however, on whether the party claiming prejudice as a result of the dismissal is required to take affirmative action in the trial court proceeding to establish standing to challenge the matter on appeal.<sup>366</sup> The Illinois and Wisconsin courts of appeal, upon determining that the appellant had suffered prejudice by the dismissal of a co-defendant, proceeded directly to an analysis of whether the appellant's interests warranted a finding of standing.<sup>367</sup> Upon finding prejudice, the Washington Court of Appeals, however, took the additional step of assessing whether the appellant had acted to preserve its right to appeal the ruling.<sup>368</sup> Thus, the Indiana Court of Appeals determined it could adopt one of two distinct analyses: the first permitting a party to challenge the dismissal of a co-defendant upon demonstrating the dismissal negatively affected the appellant's interests in the litigation; the second permitting appeal if the remaining defendant can show prejudice and took steps to preserve the issue.<sup>369</sup>

In selecting which rule to apply, the court then turned to guidance from prior Indiana decisions. In particular, the court examined the Indiana Supreme Court's reasoning in *Bloemker v. Detroit Diesel Corp.*<sup>370</sup> In *Bloemker*, a plaintiff sued three defendants. The trial court granted plaintiff's motion to dismiss one of the defendants. The remaining two defendants moved for summary judgment, which the trial court also granted. The Indiana Supreme Court subsequently overturned the grants of summary judgment in favor of the two defendants. On cross-appeal, the two defendants argued that the dismissal of the first defendant should likewise be set aside.

Finding that the remaining two defendants had not preserved the issue on appeal, the court stated:

In cases where motions at the conclusion of the plaintiff's evidence threaten to remove a party that a remaining defendant claims should remain a party [or] non-party for purposes of allocation of fault, such remaining defendant may and should oppose the motion [or] request that any ruling be delayed until the remaining defendant has an opportunity

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362. 526 N.W.2d 799 (Wis. Ct. App. 1994).

363. 977 P.2d 627 (Wash. Ct. App. 1999).

364. *U-Haul*, 736 N.E.2d at 277-78.

365. *See id.* at 278.

366. *See id.*

367. *See id.*

368. *See id.*

369. *See id.*

370. 687 N.E.2d 358 (Ind. 1997).

to present his evidence. In such event, the nature and purpose of the Indiana Comparative Fault Act, together with the efficient administration of justice, would normally result in a trial court's refusal to prematurely dismiss and discharge such parties. In the present case, [the remaining defendant] did not object to the dismissals or otherwise assert any claim that [the other parties] should remain for purposes of allocation of fault. Because the statutory burden of proof is upon the defendant with respect to the nonparty defense, failure to timely present such an objection waives the defense as to the dismissed parties.<sup>371</sup>

The *Bloemker* court found the rationale justifying application of these principles to dismissals at the conclusion of the plaintiff's case applied also to defendants dismissed before trial by summary judgment.<sup>372</sup>

The Indiana Court of Appeals determined that in order to establish standing to appeal the dismissal of a co-defendant from an action, the remaining defendant must resist the dismissal of the co-defendant at the trial court.<sup>373</sup>

[A] defendant may not sit idly by as its interests are subjected to possible prejudice when other co-defendants seek dismissal from the case, and then, at a later stage in the proceedings, seek to protect that interest after dismissal has occurred. In such cases, the court will examine the actions undertaken to protect its interest at the stage where the co-defendant sought dismissal, in order to determine whether the issue was preserved.<sup>374</sup>

The failure of defendant to articulate to the trial court any claim it would later assert upon appeal concerning the prejudicial effect of the dismissal of one of its co-defendants waives the claim for purposes of appeal.<sup>375</sup>

Having determined the test and standard for establishing a co-defendant's standing to challenge on appeal the dismissal of a co-defendant, the Indiana Court of Appeals determined that U-Haul had adequately taken steps to oppose the dismissal of the Valve Defendants and therefore preserved its right to raise the issue on appeal.<sup>376</sup>

Having determined that U-Haul had standing to challenge the dismissal of the Valve Defendants from the action, the court then turned to U-Haul's contention that the grant of summary judgment was inappropriate. The court noted that, in order to establish a *prima facie* case of strict liability under the IPLA, the plaintiff and for purposes of the appeal, U-Haul were required to demonstrate that "(1) the valve was defective and unreasonably dangerous, (2) said defective

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371. *Id.* at 360 (quoting *Bowles v. Tatom*, 546 N.E.2d 1188, 1190 (Ind. 1989)).

372. *See U-Haul*, 736 N.E.2d at 279.

373. *See id.*

374. *Id.* at 279-80.

375. *See id.* at 280.

376. *See id.* U-Haul filed a brief in opposition to the Valve Defendants' motions for summary judgment, and filed a motion to correct error following the ruling. *See id.*

condition existed at the time the product left the Valve Defendants' control, and (3) the defective condition was a proximate cause of the accident.<sup>377</sup> The Valve Defendants sought summary judgment contending that the plaintiff could not establish that the valve in question was defective and, alternatively, that if it was defective, it was not the proximate cause of the collision.<sup>378</sup>

The Valve Defendants pointed to plaintiff's interrogatory responses, in which it advised the Valve Defendants that the plaintiff's contention that the valve was defective was based upon a post-accident inspection conducted by U-Haul. However, in responding to similar interrogatories, U-Haul advised the Valve Defendants that it did not believe the valve was defective. The Valve Defendants further designated expert witness testimony stating that the valve in question was not defective. The court of appeals found that the Valve Defendants' designated evidence specifically refuted the allegations that the valve was defective and was a cause of the accident, and were sufficient to shift the burden to U-haul to demonstrate the existence of a genuine issue of fact on the elements of defective condition and proximate cause.<sup>379</sup>

In response to the Valve Defendant's motions for summary judgment, U-Haul designated testimony from three expert witnesses. The first testified that he had concluded that there was a leak somewhere in the brake system that caused the master cylinder to empty.<sup>380</sup> The second expert testified by affidavit that, during his examination of the brake assembly, he observed manufacturing and design defects, which caused leakage of brake fluid from the brake assembly. The witness concluded that the defects were present at the time of manufacture and design. The third witness testified by affidavit that the collision would not have occurred had the auto transport trailer had operable trailer brakes.<sup>381</sup>

Reviewing the designated materials, the Indiana Court of Appeals concluded that there remained a question of fact with respect to whether the valve was defective.<sup>382</sup> While the Valve Defendants' expert opined that the valve was not defective, all of the other experts agreed that the valve was defective in some respect. Thus, it could not be said that there was no genuine issue of material fact regarding the question of whether the valve was defective.<sup>383</sup>

However, this did not preclude the grant of summary judgment in favor of the Valve Defendants. Considering the designated materials, the court of appeals determined that none of the four experts testified both that the brake valve leaked and that the leak was a proximate cause of the accident.<sup>384</sup> The court found that only one expert offered an opinion that supported U-Haul's claim of proximate cause by stating generally that the collision would not have occurred if the brakes

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377. *Id.* at 281.

378. *See id.*

379. *See id.* at 281-82.

380. *See id.* at 283.

381. *See id.*

382. *See id.* at 284.

383. *See id.*

384. *See id.*

were operable. The expert did not state that the brakes were rendered inoperable as a result of a leak caused by a defective valve, and in fact was not qualified to render an opinion on the defective condition of the valve.<sup>385</sup>

The court of appeals determined that, while the basic purpose of a vehicle brake system is within the comprehension of lay persons, the design and manufacture of the components of a brake system are not.<sup>386</sup> For this reason, it was incumbent upon the parties opposing the Valve Defendants' motion for summary judgment to designate expert evidence refuting the Valve Defendants' evidence regarding proximate cause.<sup>387</sup> Because U-Haul was unable to do so, it could not successfully challenge the grant of summary judgment in favor of its co-defendants.<sup>388</sup>

## V. PREEMPTION

During the survey period, Indiana courts twice managed forays into the semi-esoteric world of federal preemption in a product liability context. In the first of the two cases, *Dow Chemical Co. v. Ebling*,<sup>389</sup> Christina and Alex Ebling began experiencing seizures shortly after they and their parents moved into the Prestwick Square Apartments in February 1994. In April 1993, Prestwick Square had entered into a pest control service agreement with Affordable Pest Control, which obligated Affordable to provide regular pest control for roaches, ants, silverfish, mice, and rats. Affordable applied a pesticide commonly known as "Dursban" in the apartment units on a preventive basis. In April 1994, Prestwick Square canceled its service agreement with Affordable and began using its own maintenance personnel to apply Creal-O, a ready-to-use pesticide.<sup>390</sup>

DowElanco, now known as Dow AgroSciences, manufactured and distributed Dursban pesticide products pursuant to registrations with the Environmental Protection Agency (EPA).<sup>391</sup> As part of the registration process, the EPA provided Dow Chemical Company<sup>392</sup> with stamped and accepted labels for its Dursban pesticide products, which the EPA authorized for use in and around residential structures, including apartments and apartment complexes.<sup>393</sup>

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385. *See id.*

386. *See id.* at 285.

387. *See id.*

388. *See id.*

389. 723 N.E.2d 881 (Ind. Ct. App.), *vacated by* 741 N.E.2d 1249 (Ind. 2000).

390. *See id.* at 888-89.

391. *See id.* at 889. "Dursban" is a trademark of Dow AgroSciences LLC. Dursban 2E was registered with the EPA in 1982. Dursban L.O. was registered with the EPA in 1984. *See id.*

392. Dow AgroSciences was known as DowElanco from 1989 until 1998. Dow AgroSciences is now an indirect, wholly-owned subsidiary of The Dow Chemical Company. In the interest of consistency, this survey Article refers to DowElanco by its current name, Dow AgroSciences. The Dow Chemical Company received the initial EPA registration approvals for Dursban.

393. *See Ebling*, 723 N.E.2d at 889. The active ingredient in Dursban is chlorpyrifos. In

Louisville Chemical Company formulated a ready-to-use pesticide known as Creal-O. As part of the registration process for Creal-O, the EPA permitted Louisville Chemical to adopt and incorporate the safety and toxicological data submitted by the manufacturers of Creal-O's active and inert ingredients. The EPA registered and authorized Creal-O's use in and around apartments and apartment complexes.<sup>394</sup>

Affordable did not provide the Eblings or Prestwick Square with any of Dursban's EPA-approved warnings and labeling information. Although Louisville Chemical provided Prestwick Square with the EPA-approved labeling for Creal-O, it did not provide the Eblings with the label until after their exposure to it.<sup>395</sup>

The Eblings sued Dow AgroSciences, Louisville Chemical, Affordable Pest Control and others, claiming that their children developed seizures and other health conditions as a result of their exposure to Dursban and Creal-O.<sup>396</sup> After the trial court denied their motions for summary judgment, Dow AgroSciences, Louisville Chemical, and Affordable appealed. On appeal, the court of appeals faced five separate issues.<sup>397</sup> This survey Article will examine only the first of those issues: whether federal law preempts the Eblings' state law product liability claims.

The court of appeals began its lengthy and thorough analysis of federal preemption by reciting a history of the federal preemption doctrine, culminating in the court's recognition that the critical question in any preemption analysis is "whether Congress intended that federal regulation supersede state law."<sup>398</sup> In making such a determination, the *Ebling* court pointed out that "any understanding of the scope of a preemption statute must rest primarily on 'a fair understanding of congressional purpose,' as discerned from language of the preemption statute and the 'statutory framework' surrounding it."<sup>399</sup>

Having first acknowledged the relevant analysis, the court next conducted a detailed review of the extensive nature of federal oversight of pesticide

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November of 1994, Dow AgroSciences voluntarily submitted to the EPA reports of allegations of adverse effects resulting from exposure to pesticide products containing chlorpyrifos. The EPA and Dow AgroSciences disputed whether such reports were timely submitted. The parties eventually entered into a consent decree in the summer of 1995, whereby Dow AgroSciences paid a civil penalty and the EPA did not withdraw or alter its registrations for Dursban L.O. or Dursban 2E. *See id.*

394. *See id.*

395. *See id.* at 890.

396. *See id.* at 888.

397. *See id.*

398. *Id.* at 891.

399. *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (emphasis in original)). The *Ebling* court added, "[a]lso relevant to the analysis is the 'structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" *Id.* (quoting *Medtronic*, 518 U.S. at 470 (citation omitted)).



registration mandated both by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the EPA.<sup>400</sup>

Pesticides such as Dursban and Creal-O sold or distributed in the United States must be registered with the EPA in accordance with the requirements of FIFRA and its associated regulations. The purpose of the registration process is to prevent unreasonable adverse effects on the environment, which includes not only land, air and water, but also humans and animals.<sup>401</sup>

The court's discussion of FIFRA regulation culminated in its quotation of the express preemption language found in section 136v(b) of FIFRA:

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.<sup>402</sup>

The *Ebling* court next traced the relatively recent refinement of preemption law from *Ferebee v. Chevron Chemical Co.*,<sup>403</sup> through *Papas v. Upjohn Co.*,<sup>404</sup> and *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*,<sup>405</sup> to *Cipollone v. Liggett Group, Inc.*<sup>406</sup> In tracking the decisions after *Cipollone*, the *Ebling* court cited the Supreme Court's vacation and remand of two federal circuit court judgments, *Papas v. Zoecon Corp.*<sup>407</sup> and *Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*,<sup>408</sup> as an indication that the Supreme Court's *Cipollone* preemption analysis should apply in FIFRA preemption determinations.<sup>409</sup> On remand, the federal circuits in both *Papas* and *Arkansas-Platte* held that FIFRA expressly preempts state law failure to warn claims based upon inadequate labeling.<sup>410</sup> The *Ebling* court pointed out that thereafter, all of

400. *See id.* at 891-92.

401. *Id.* at 891 (citing 7 U.S.C. § 136a(a) (2000)).

402. *Id.* at 892 (quoting 7 U.S.C. § 136v (2000)).

403. 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

404. 926 F.2d 1019 (11th Cir. 1991) [hereinafter *Papas I*].

405. 959 F.2d 158 (10th Cir. 1992) [hereinafter *Arkansas-Platte I*].

406. 505 U.S. 504 (1992).

407. 505 U.S. 1215 (1992) (vacating and remanding *Papas I*).

408. 506 U.S. 910 (1992) (vacating and remanding *Arkansas-Platte I*).

409. *Ebling*, 723 N.E.2d 881, 894 (Ind. Ct. App.), *vacated by* 741 N.E.2d 1249 (Ind. 2000).

410. *See id.* (citing *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir.), *cert. denied sub nom. Papas v. Zoecon Corp.*, 510 U.S. 913 (1993) [hereinafter *Papas II*]; *Arkansas-Platte & Gulf Partnership v. Van Waters, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), *cert. denied sub nom. Arkansas-Platte & Gulf*

the federal circuits that have addressed the issue, as well as an "overwhelming majority of state supreme and appellate courts," have concluded that FIFRA "expressly preempts state common law claims for damages that are based on an alleged failure to warn or convey information about a product through its EPA-approved labeling."<sup>411</sup> Thus, the *Ebling* court concluded that FIFRA expressly preempts all state labeling or packaging requirements that are "in addition to or different from" those required by FIFRA.<sup>412</sup>

Having decided the scope and extent of FIFRA express preemption, the *Ebling* court turned its attention to whether the legal duty forming the basis of each of the Eblings' common law claims constituted "'a requirement[] for labeling or packaging different in addition to or different from' the EPA regulations."<sup>413</sup>

In an effort to avoid preemption, the Eblings put forward what the court called a "broader label dissemination theory," by which they argued that Dow AgroSciences and Louisville Chemical failed to provide the Eblings with the EPA-approved labeling information for Dursban and Creal-O.<sup>414</sup> The "predicate duty" underlying the Eblings' novel argument would be "a state common law duty imposed on pesticide registrants to provide additional copies of EPA-approved labeling information to purchasers/users . . . with instructions that these purchasers/users disseminate this labeling information to the end customers and/or bystanders who might be exposed to the pesticides."<sup>415</sup> The court responded to the broader label dissemination theory by finding that it necessarily challenged the product's labeling and was, therefore, preempted:

[A]ny written information that a pesticide registrant disseminates with a pesticide is considered "labeling" under FIFRA, and any obligation placed upon a registrant in this regard is necessarily a labeling requirement. From this language, it is clear that Congress intended to preempt state common law actions that would impose requirements on a registrant to disseminate additional written matter with its product, regardless of whether this matter was identical to the EPA-approved labeling information.

Therefore, any supplemental materials or instructions to end-users/applicators at a particular time would constitute "labeling" as the term is defined by FIFRA. In essence, the Eblings challenge the adequacy of the scope of the warnings on the Dursban and Creal-O labels. If the Eblings prevailed on their claims of failure to warn under such a theory, a state imposed labeling requirement not included in FIFRA would be established. This additional state regulation is

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v. Dow Chem. Co, 510 U.S. 813 (1993) [hereinafter *Arkansas-Platte II*]).

411. *Id.* at 894-95.

412. *Id.* at 895.

413. *Id.* at 896 (quoting 7 U.S.C. § 136v(b)).

414. *Id.*

415. *Id.*

precisely what Congress precluded.<sup>416</sup>

The Eblings also alleged that Louisville Chemical negligently failed to warn, instruct, and train the apartment complex employees to ventilate the apartments before and after pesticide application and not to apply pesticides when tenants were present. The court rejected the Eblings' attempts to avoid preemption of labeling claims because, according to the court, their claims "essentially challenge the adequacy of instructions and warnings contained in the EPA-approved Creal-O labeling."<sup>417</sup> The legal duties that the Eblings sought to impose "constitute requirements for labeling in addition to or different from those required by the EPA regulations, and therefore, are equally preempted by FIFRA."<sup>418</sup>

The court next examined whether FIFRA preempted the Eblings' regulatory non-compliance claim against Dow AgroSciences, which claimed negligence *per se* arising out of Dow AgroSciences' alleged violation of EPA reporting obligations. The Eblings' discovery responses charged that if Dow AgroSciences had not allegedly violated EPA reporting obligations and "had more promptly reported to the EPA claims and allegations of adverse effects associated with exposure to Dursban, the EPA would have imposed 'major changes to the product labels, to the material safety data sheets and other items' prior to the Eblings' exposure to Dursban."<sup>419</sup> Dow AgroSciences argued that the Eblings' "noncompliance theory" was merely a "disguised challenge to the legal sufficiency of the warnings on the EPA-approved product labeling."<sup>420</sup> The court agreed with Dow AgroSciences. Based upon the Eblings' discovery responses, the court wrote that "it seems quite clear that the nature of the Eblings' regulatory noncompliance claim as disclosed by the record is inextricably related to the adequacy of the warnings and precautions on the EPA-approved Dursban label."<sup>421</sup> Indeed, the court recognized that the Eblings would be required to prove that the information on the EPA-approved label was insufficient and that a different label would have been forthcoming. Accordingly, the court held that FIFRA expressly preempts the regulatory noncompliance claim "to the extent that it relies on a state-law 'requirement[] for labeling . . . in addition to or different from' those required by the EPA."<sup>422</sup>

When it came to the Eblings' design defect claims, however, the court did

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416. *Id.* at 897 (footnote omitted). The court added that its conclusion is consistent with the "majority of cases in other jurisdictions which have generally concluded that FIFRA preempts failure to warn or convey information claims against pesticide manufacturers that are not directly based on the language on the pesticide label." *Id.*

417. *Id.* at 898.

418. *Id.* The court also rejected similar failure to warn claims the Eblings asserted against Affordable Pest Control. *See id.*

419. *Id.* at 899 (emphasis in original).

420. *Id.*

421. *Id.*

422. *Id.* (citation omitted).

not believe that those claims were preempted. After a brief discussion about Indiana Code section 34-20-2-1 and relevant authorities from other jurisdictions, the court concluded that FIFRA does not preempt the Eblings' design defect claim because they are not predicated on failure to warn or convey information through the products' labeling and packaging.<sup>423</sup> In doing so, the court noted that a product liability claim premised on a design defect pursuant to the IPLA focuses upon the dangerous propensities of a product "due to its inherent properties and is not predicated on the adequacy of warnings on a product's labeling or packaging."<sup>424</sup> In the final analysis, the court "fail[ed] to see how our state-imposed standard of care relating to product design and manufacturing can constitute a labeling requirement under FIFRA."<sup>425</sup>

Relying on cases such as *Lescs v. Dow Chemical Co.*,<sup>426</sup> *Papike v. Tambrands, Inc.*,<sup>427</sup> and *Haddix v. Playtex Family Products Corp.*,<sup>428</sup> Dow AgroSciences countered that FIFRA expressly preempts design defect claims because Indiana employs a consumer expectations test for determining liability in defect claims and "consumers may not expect more than the FIFRA-mandated labeling provides."<sup>429</sup> In rejecting Dow AgroSciences' argument, the majority reiterated that by recognizing the Eblings' design defect claims, it was not requiring information on the Dursban or the Creal-O labeling to be "different from' or 'in addition to'" the information FIFRA requires.<sup>430</sup> The court wrote, "To the contrary, we are merely recognizing a duty of manufacturers of potentially dangerous products to guard against design defects. This requirement does not frustrate the will of Congress or interfere with FIFRA's purpose of establishing a uniform standard for labeling and packaging."<sup>431</sup>

Chief Judge Sharpnack wrote an opinion concurring in part and dissenting in part.<sup>432</sup> Judge Robb wrote a separate opinion concurring in part and concurring in result in part.<sup>433</sup> The differences in opinion among the judges all were related to the preemption analysis. Chief Judge Sharpnack concurred with respect to the handling of each of the Eblings' failure to warn claims, but disagreed with the majority about how to handle their design defect claim.<sup>434</sup> Chief Judge Sharpnack concluded that FIFRA preempts the Ebling's product liability claims against Dow AgroSciences and Louisville Chemical, even the design defect claim, to the extent that those claims are based upon consumer

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423. *See id.* at 900.

424. *Id.* at 901.

425. *Id.* at 901.

426. 976 F. Supp. 393 (W.D. Va. 1997), *aff'd*, 168 F.3d 482 (4th Cir. 1999).

427. 107 F.3d 737 (9th Cir. 1997).

428. 138 F.3d 681 (7th Cir. 1998).

429. *Ebling*, 723 N.E.2d at 901 (citation omitted).

430. *Id.* at 902 (citation omitted).

431. *Id.*

432. *See id.* at 910 (Sharpnack, C.J., concurring in part and dissenting in part).

433. *See id.* (Robb, J., concurring).

434. *See id.* at 913 (Sharpnack, C.J., concurring in part and dissenting in part)..

expectations.<sup>435</sup> Permitting recovery based upon consumer expectations different from those supported by the information FIFRA requires on its labels is, according to Chief Judge Sharpnack, in effect no different from allowing recovery for failure to make warnings different from, or in addition to, those set forth on the label.<sup>436</sup> Accordingly, he dissented to the extent that the majority opinion would permit recovery on a design defect claim based upon consumer expectations.<sup>437</sup> However, Chief Judge Sharpnack did not believe FIFRA would preempt a "claim based upon negligence in design where it can be shown that an alternative design was reasonably available that would have eliminated or significantly reduced the risk of harm that was caused to the plaintiff."<sup>438</sup> Thus, Chief Judge Sharpnack concurred with the majority "[t]o the extent that the majority would permit a design defect claim based upon alternative design."<sup>439</sup>

Judge Robb disagreed with the majority's holding that the EPA-approved written information accompanying a pesticide constitutes "labeling" pursuant to section 136v(b) of FIFRA.<sup>440</sup> Rather, she was convinced that the dissemination of such information comprises "packaging" pursuant to the foregoing section.<sup>441</sup> Regardless, whether the Eblings' state common law failure to warn claim is characterized as falling under the term "labeling" or "packaging," Judge Robb concluded that FIFRA preempts it.<sup>442</sup>

On August 15, 2000, the Indiana Supreme Court accepted transfer of the *Ebling* case.<sup>443</sup> At the time of this writing, the court has not yet issued a decision.

A few months after the *Ebling* decision, the court of appeals revisited express preemption in the case of *Rogers v. Cosco, Inc.*<sup>444</sup> The case involved Shelette Rogers' infant daughter who injured her cervical vertebrae in a traffic accident. At the time of the accident, Rogers' daughter was riding in a child restraint seat manufactured by defendant Cosco. Rogers argued that Cosco improperly designed the seat apparently because it did not offer sufficient head and neck support to a child the size of Rogers' thirty-two pound daughter. The trial court

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435. See *id.* In reaching that conclusion, Chief Judge Sharpnack agreed with the analysis of the court in *Lescs v. Dow Chemical Co.*, 974 F. Supp. 393 (W.D. Va. 1997).

436. See *Ebling*, 723 N.E.2d at 911.

437. See *id.*

438. *Id.* Chief Judge Sharpnack so determined because such a claim "would not be based upon inadequacy of warnings or consumer expectations about the product that were in addition to the information concerning the product required by FIFRA." *Id.*

439. *Id.*

440. *Id.* at 912 (Robb, J., concurring).

441. *Id.* Judge Robb noted that neither the text nor the legislative history of FIFRA provides a definition of the term "packaging." She believed the term to refer to the dissemination of the written information that accompanies a pesticide. Therefore, she reasoned that "'packaging' entails the dissemination of the EPA approved written information that accompanies a pesticide, referred to as 'labeling' under section 136v(b) of FIFRA." *Id.*

442. See *id.* at 913.

443. 741 N.E.2d 1249 (Ind. 2000)

444. 737 N.E.2d 1158 (Ind. Ct. App. 2000).

granted Cosco's motion for summary judgment after deciding that the Federal National Traffic and Motor Vehicle Safety Act ("Safety Act") preempted Rogers' state law claims.<sup>445</sup>

On appeal, the first of the three issues was whether the Safety Act expressly preempts Rogers' state court action. The purpose of the Safety Act is "to reduce traffic accidents and death and injuries to persons resulting from traffic accidents."<sup>446</sup> The Safety Act's preemption clause reads, in relevant part:

When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of the State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.<sup>447</sup>

The Safety Act also contains a so-called "savings clause" providing that "compliance with a motor vehicle safety standard under this chapter does not exempt a person from liability at common law."<sup>448</sup>

The applicable federal safety standard, Federal Motor Vehicle Safety Standard 213 (Standard 213), "allows a manufacturer to meet its performance criteria regarding child restraint systems through the use of booster seats, and it contains both minimum performance and specific design requirements for child booster seats."<sup>449</sup> Standard 213 also allows a manufacturer to meet upper torso child restraint standards by using a forward barrier, such as the shield placed on Cosco's seat. In addition, Standard 213 allows manufacturers to sell booster seats for use by children under forty pounds.<sup>450</sup>

After addressing some preliminary precepts about federal preemption, the court recognized that congressional intent is a threshold concept in preemption analysis and that "[t]he intent of Congress may be 'express,' i.e., expressly stated in the statute, or 'implied,' i.e., implicitly stated in the statute's structure and purpose."<sup>451</sup> The court first examined express preemption. Cosco argued that the legislature's decision to include product liability common law negligence actions within the framework of the IPLA renders the Safety Act's savings clause inapplicable because product liability claims in Indiana are statutory, not common law claims.<sup>452</sup> In assessing Cosco's argument, the *Rogers* court examined the intent of the Safety Act, the language of the IPLA, and Cosco's arguments about Rogers' crashworthiness claim. On the first score, congressional intent, the court's review of House and Senate reports led it to the following conclusion:

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445. *See id.* at 1162-63.

446. *Id.* (citing 49 U.S.C. § 30101 (2000)).

447. *Id.* (citing 49 U.S.C. § 30103(b)(1)).

448. *Id.* (citing 49 U.S.C. § 30103(e)).

449. *Id.*

450. *See id.* (citing Standard 213, § 5.5.2(f)).

451. *Id.* at 1164 (citation omitted).

452. *See id.*

Allowing common law tort remedies, while at the same time preempting particular safety standards found in motor vehicle statutes or administrative regulations, appears to be a congressional compromise between the interest of Congress in uniformity and its interest in permitting States to compensate accident victims upon the basis of general common law tort standards. It is also apparent that the application of tort standards can sometimes complement the purposes of the Safety Act and attendant regulations setting forth minimum safety standards by supplying manufacturers with an additional incentive to design a safe product.

The intent of the Safety Act is to pre-empt state statutes and administrative regulations promulgated with the specific purpose of regulating motor vehicle safety in a manner different from that found in the Safety Act and federal regulations. We conclude, however, that Congress did not intend that the application of a state's general common law standards should be "rendered inapplicable" by the codification of that state's common law as it applies to product liability actions. Indeed, we conclude that Congress specifically intended that the general standards of the common law should assist in reducing "death and injuries to persons resulting from traffic accidents."<sup>453</sup>

In response to Cosco's argument that the governing product liability doctrine in Indiana is statutory, the *Rogers* court pointed out that, although the IPLA now governs product liability actions, it is "legal theory derived from the common law, albeit within the procedural framework of the [IPLA]."<sup>454</sup> Although Cosco cited portions of the IPLA that seem to derogate common law, the *Rogers* court responded that those provisions were not at issue in the case and that "the presence of such provisions in derogation of the common law has not prevented us from recognizing that the [IPLA], as it applies to strict liability claims, is a codification of the common law of products liability."<sup>455</sup> In its final analysis on the point, the court wrote:

The upshot is that although certain procedural portions of the [IPLA] are to be strictly construed as in derogation of common law, the viability of tort claims made under the [IPLA], whether sounding in negligence or strict liability, is to be determined by reference to the common law from which the claims originated. This is so because the common law of products liability negligence is simply restated in the [IPLA]. *Rogers*'s claims in the present case arise from the general common law, and it is these types of claims that are the subject of the Safety Act's saving clause.<sup>456</sup>

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453. *Id.* at 1165.

454. *Id.*

455. *Id.*

456. *Id.*

The *Rogers* court next focused on implied conflict preemption, having earlier in the opinion explained the doctrine as follows:

Implied pre-emption is manifested when a state law conflicts with federal law. This "implied conflict pre-emption" occurs either where it is impossible to comply with both federal and state or local law, or where state law stands as an obstacle to the accomplishment and execution of federal purposes and objectives.<sup>457</sup>

After a brief discussion about *Geier v. American Honda Motor Co.*,<sup>458</sup> the most recent U.S. Supreme Court pronouncement on the subject, the court cited evidence designated by both parties that Standard 213 allows but does not require the use of a booster seat such as Cosco's in protecting children from injuries. The court also cited evidence that further convinced it that Standard 213 is intended to establish only minimum safety standards for child restraint systems. Citing *Geier* for the proposition that a state may impose a stricter standard through the agency of its general common law of torts, the *Rogers* court concluded that there is no conflict between Rogers' proposed tort remedy and the minimum standards of Standard 213.<sup>459</sup> Thus, according to the court, "Rogers's attempt to impose a greater safety standard through the prohibition of booster seats such as [Cosco's] for children under forty pounds is not pre-empted by the Safety Act."<sup>460</sup>

#### CONCLUSION

The 2000 survey period once again proved that Indiana courts and practitioners are actively defining, re-defining, developing, and refining Indiana product liability law. The quality of scholarship and advocacy developed by these decisions recommends our state's judiciary and counselors at bar. Product liability, perhaps more than any other substantive area of Indiana law, continues to be fertile ground for lawyers and judges looking for opportunities to be creative, insightful, and innovative.

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457. *Id.* at 1164 (citing *In re Guardianship of Wade*, 711 N.E.2d 851, 854 (Ind. Ct. App. 1999)).

458. 529 U.S. 861 (2000).

459. *See Rogers*, 737 N.E.2d at 1166.

460. *Id.*