

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

JOSEPH R. ALBERTS*
JAMES M. BOYERS**

INTRODUCTION

The 2002 survey period was another busy one for Indiana judges and practitioners in the area of product liability law.¹ During the survey period, October 1, 2001, to September 30, 2002,² state and federal courts in Indiana continued to refine the scope and meaning of the Indiana Product Liability Act (“IPLA”).

This survey does not attempt to address in detail all of the cases applying Indiana product liability law that courts decided during the survey period. Rather, it examines selected, representative cases.³ This survey also provides

* Senior Litigation Attorney, Dow AgroSciences LLC, Indianapolis; B.A., *cum laude*, 1991, Hanover College; J.D., *magna cum laude*, 1994, Indiana University School of Law—Indianapolis; Chairman, Product Liability Section, Defense Trial Counsel of Indiana (1999-2001); Chairman, Corporate Counsel Section, Indiana State Bar Association (2001-2002); Chairman, In-House Counsel Section, Defense Trial Counsel of Indiana (2002-Present).

** Attorney, Wooden & McLaughlin LLP, Indianapolis; B.A., 1994, Hanover College; J.D., 1998, Indiana University School of Law—Bloomington; Vice Chairman, Product Liability Section, Defense Trial Counsel of Indiana, Courts Monitoring (2001-Present); Chairman-Elect, Product Liability Section, Defense Trial Counsel of Indiana (2002-Present).

The authors thank Brenda Ferguson, Jon Phillips, and Jeremy Johnson for their contributions.

1. This survey article follows the lead of the Indiana General Assembly and employs the term “product liability” (not “products liability”) when referring to actions governed by the Indiana Product Liability Act (“IPLA”).

2. Three important cases decided in 2002 after the survey period expired are *In re Bridgestone/Firestone, Inc.*, No. IP 000-9373-CB/S, 2002 U.S. Dist. LEXIS 24954 (S.D. Ind. Dec. 19, 2002); *Miller v. Honeywell International, Inc.*, No. IP 98-1742-CM/S, 2002 U.S. Dist. LEXIS 20478 (S.D. Ind. Oct. 15, 2002) and *Vaughn v. Daniels Co.*, 777 N.E.2d 1110 (Ind. Ct. App. 2002). All three cases should be reviewed in next year’s survey article.

3. Although they are not addressed in detail in this article, at least two additional cases are worthy of note here. The first case, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), is not discussed in detail in this article because it does not deal with substantive issues of Indiana product liability law. It is, nevertheless, a decision that Indiana practitioners may be interested in from a procedural standpoint. The case involves numerous claimants who allege liability as a result of defective tires. The Seventh Circuit Court of Appeals reversed the district court’s order certifying two nationwide class actions, holding that the claimants could not satisfy the commonality and superiority requirements of Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 1020-21.

The second case, *Holt v. Quality Motor Sales, Inc.*, 776 N.E.2d 361 (Ind. Ct. App. 2002), likewise does not deal with substantive issues of Indiana product liability law. It does, however, involve a claim alleging negligent repair of a vehicle’s brakes and a failure to warn of the alleged unsafe condition of the brakes. Indiana practitioners may be interested in this case in a general tort sense because it includes an interesting discussion about duties of care and foreseeability when an

background information and context where appropriate and addresses some important issues that the decisions raise.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978. It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended the IPLA to apply only to strict liability actions.⁴ In 1995, the General Assembly amended it to once again encompass tort theories of recovery based on both strict liability and negligence theories.⁵

In 1998, the General Assembly repealed the entire IPLA and recodified it.⁶ The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of the statutes governing civil practice.

The current version of the IPLA, Indiana Code section 34-20-1-1 to section 34-20-9-1, governs and controls all actions that are: "(1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product," regardless of the theory of liability.⁷

The IPLA imposes liability when

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 if: (1) 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; (2) the seller is engaged in the business of selling the product; and (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.⁸

This first section discusses the scope of the IPLA, and more specifically addresses what kinds of cases the IPLA governs.

A. ". . . brought by a user or consumer . . ."

As noted above, the IPLA governs all claims users or consumers file in Indiana against manufacturers and sellers for physical harm a product causes. Just who are "users" and "consumers" in Indiana? Specific statutory definitions

allegedly defective product is repaired or maintained by a person or entity that did not manufacture the product. *Id.* at 366-67.

4. IPLA, Pub. L. No. 297-1983, § 1, 1983 Ind. Acts 1815.

5. IPLA, Pub. L. No. 278-1995, § 1, 1995 Ind. Acts 4051. *See Progressive Ins. Co. v. General Motors Corp.*, 749 N.E.2d 484, 487n.2 (Ind. 2001).

6. The current version of the IPLA is found at Indiana Code sections 34-20-1-1 to -9-1 (1998).

7. IND. CODE § 34-20-1-1.

8. *Id.* § 34-20-2-1.

and recent cases help answer that question.

For purposes of the IPLA's application, "consumer" means:

- (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.⁹

For purposes of this statute, "user" has the same meaning as "consumer."¹⁰

Even if a claimant falls within one of those statutorily-defined groups, he or she also must satisfy another statutorily-defined threshold before proceeding with an IPLA claim. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires the "user" or "consumer" to be "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."

The Indiana Supreme Court decided three cases during the survey period concerning who qualifies as "users" and "consumers" for purposes of the IPLA.¹¹ Each of those three cases, *Stegemoller v. ACandS, Inc.*,¹² *Martin v. ACandS, Inc.*,¹³ and *Camplin v. ACandS, Inc.*,¹⁴ has nearly identical operative facts. In all of those cases, the plaintiffs were the wives or the estates of wives whose husbands claimed to have worked around or near asbestos-containing products. The wives claimed that asbestos dust remained on their husbands' work clothes, and that they inhaled the dust brought home from the various workplaces while laundering those work clothes. The wives claimed various illnesses, all allegedly caused by inhalation of asbestos fibers.¹⁵ Plaintiff sued several entities alleged

9. *Id.* § 34-6-2-29.

10. *Id.* § 34-6-2-147.

11. Those three cases join two other cases the Indiana Supreme Court decided during the last few years on the subject of "users" and "consumers" under the IPLA. *See, e.g.,* *Butler v. City of Peru*, 733 N.E.2d 912, 919 (Ind. 2000) (dismissing negligence claim filed before the 1995 IPLA revision, but finding that a maintenance worker could be considered a "user or consumer" of electrical transmission system because his employer was the ultimate user and he was an employee of the "consuming entity"); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 279-80 (Ind. 1999) (extending definition of "user or consumer" to include a distributor who uses the product extensively for demonstration purposes).

12. 767 N.E.2d 974 (Ind. 2002).

13. 768 N.E.2d 426 (Ind. 2002).

14. 768 N.E.2d 428 (Ind. 2002).

15. Lee Stegemoller worked for several years as a union insulator for many different companies and during the course of his career worked with asbestos products. He and his wife, Ramona, contended that some of the asbestos dust remained on his clothes when he left the various jobsites and that she inhaled the dust that he brought home from his workplace. Ramona was diagnosed with colon cancer, pulmonary fibrosis, and pleural thickening, which she alleged was caused by inhalation of asbestos fibers, specifically as the result of interacting with her husband and laundering his work uniforms. *See Stegemoller v. ACandS, Inc.*, 749 N.E.2d 1216, 1218 (Ind. Ct.

to be responsible for the wives' conditions, either because they were involved in the manufacture or sale of asbestos-containing products, they were the successors in interest to such entities, or because they had some other responsibility for the alleged physical conditions. The trial court dismissed the claims, finding that they were not "users" or "consumers" as defined by the IPLA because they were not in the vicinity of the allegedly defective products during their reasonably expected uses and, accordingly, could not be considered "bystanders."¹⁶ Thus, the trial courts held that the wives could not sustain causes of action under the IPLA or at common law.¹⁷ The appellate court affirmed.¹⁸

The Indiana Supreme Court reversed. The defendants argued that the wives who claimed exposure to asbestos dust while at home laundering clothing simply were not in the vicinity of the finished insulation products during the "reasonably expectable use" of those products as insulation material at industrial job sites.¹⁹ The *Stegemoller* court reasoned that such a view was "too narrow."²⁰ "The normal, expected use of asbestos products entails contact with its migrating and potentially harmful residue. We conclude that divorcing the underlying product from fibers or other residue it may discharge is not consistent with the [IPLA]."²¹

It is difficult to gauge just what practitioners in prospective cases should take from *Stegemoller*, *Camplin*, and *Martin*. The decisions either broaden the term "vicinity" or they broaden the term "reasonably expectable use," or perhaps they do both. On the one hand, there does not appear to be any evidence that the wives in these three cases were in the "vicinity" of the end-use insulation products as they were insulating pipes at the industrial jobsites where the husbands worked. On the other hand, it is difficult to argue with the supreme court's logic that the "reasonably expectable" use of asbestos insulation

App. 2001), *rev'd by* 767 N.E.2d 974 (Ind. 2002).

16. The Stegemollers, for example, sued several entities believed to be responsible for Ramona's condition, either because they were involved in the manufacture or sale of asbestos-containing products, they were the successors in interest to such entities, or they had some other alleged responsibility for her physical condition. Several of those entities filed motions to dismiss, asserting that Ramona was not a "user or consumer" as defined by the IPLA and, therefore, she had no cause of action. The trial court agreed and dismissed her claims because she did not fall within the IPLA and, further, because there is no common law negligence claim for a user or consumer who sues a seller or a manufacturer separate from that which the IPLA contemplates and governs. *Stegemoller*, 767 N.E.2d at 975-76. The court of appeals affirmed the trial court's decision on both grounds. *Stegemoller*, 749 N.E.2d at 1220.

17. *Stegemoller*, 767 N.E.2d at 975.

18. *Id.* The only published court of appeals opinion was *Stegemoller*, 749 N.E.2d 1216. In an unpublished opinion, the court of appeals in *Martin* followed the analysis put forth in *Stegemoller*. In *Camplin*, the court of appeals requested the supreme court to take the case directly because it had already granted transfer in *Stegemoller* and *Martin*. *Camplin*, 768 N.E.2d at 429.

19. *Stegemoller*, 767 N.E.2d at 976.

20. *Id.*

21. *Id.*

necessarily entails contact with migrating fibers and that it is sometimes difficult for purposes of liability imposition to divorce those fibers from the asbestos-containing end-use products.

The problem for practitioners in light of *Stegemoller*, *Camplin*, and *Martin* is determining how large the “vicinity” of the “reasonably expectable use” is. The supreme court aptly recognizes that maintenance may be part of a product’s reasonably expected use because many products require some amount of clean-up and maintenance attendant to their reasonably expectable use.²² However, most reasonably anticipated maintenance and clean-up associated with a reasonably expectable use is undertaken where the product is located and, thus, within the “vicinity” of the product during what both manufacturers and intended users would consider to be its “reasonably expected use.” That was not the case with the plaintiffs in *Stegemoller*, *Camplin*, and *Martin* because the wives’ residential laundry areas were nowhere near the vicinity of the reasonably expected use of the insulation products when the clean-up (washing the clothes) occurred.

Just how practitioners should interpret *Stegemoller*, *Camplin*, and *Martin* in connection with non-asbestos cases seems open to debate. The brevity of these decisions may indicate that the Indiana Supreme Court was willing to interpret the statute a certain way to apply only to the unique problems associated with asbestos exposure. Time will tell.

B. “. . . against a manufacturer or seller . . .”

As is the case with users and consumers, statutory definitions and recent cases may help practitioners understand which entities can be defendants in an action under the IPLA by virtue of their status as either “manufacturers” or “sellers.”

For purposes of the IPLA, “manufacturer” means “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.”²³ A “seller” means “a person engaged in the business of selling or leasing a product for resale, use, or consumption.”²⁴ Chapter 2 of the IPLA employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless the “seller” is “engaged in the business of selling the product.”²⁵

Sellers also can be manufacturers. The definition of “manufacturer” expressly 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 manufacturing process;
- (3)

22. *Id.* (citing *Butler v. City of Peru*, 733 N.E.2d 912, 914, 919 (Ind. 2000)).

23. IND. CODE § 34-6-2-77 (1998).

24. *Id.* § 34-6-2-136.

25. *Id.* § 34-20-2-1(2).

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 name of the actual manufacturer.²⁶

A seller also may be held liable to the same extent as a manufacturer in one other limited circumstance: if the court is "unable to hold jurisdiction over a particular manufacturer" and the seller is the "manufacturer's principal distributor or seller."²⁷

There is one other important provision about which practitioners should be aware when it comes to liability of "sellers" under the IPLA. When the theory of liability is based on "strict liability in tort,"²⁸ Indiana Code section 34-20-2-3 makes it clear that an entity that is merely a "seller" and cannot be deemed a "manufacturer" is not liable and is not a proper IPLA defendant.

In *Williams v. REP Corp.*,²⁹ plaintiff injured his hand in July 1995 while using a rubber injection molding machine.³⁰ Plaintiff sued defendant REP Corporation in state court. REP removed the case to federal court, where the district court granted summary judgment to the defendant because plaintiff failed to produce any evidence that REP Corporation ever sold, leased, or otherwise put into the stream of commerce the allegedly defective machine.³¹ Before granting summary judgment, however, the district court allowed plaintiff to amend his complaint to include a claim against REP France because evidence produced in discovery showed that REP France was the manufacturer of the molding machine.³² The caption was thereafter modified to show the proper defendant as REP International.³³ The district court ultimately dismissed REP International after determining that the court did not have personal jurisdiction over it.³⁴

On appeal, plaintiff argued that REP Corporation could be considered a "manufacturer" pursuant to what is now Indiana Code section 34-6-2-77 because it owned REP International and because REP Corporation was a principal distributor for an entity over which the court could not hold jurisdiction pursuant

26. *Id.* § 34-6-2-77(a).

27. *Id.* § 34-20-2-4.

28. The phrase "strict liability in tort," to the extent that the phrase is intended to mean "liability without regard to reasonable care," appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 makes it clear that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard and not a "strict liability" standard.

29. 302 F.3d 660 (7th Cir. 2002).

30. *Id.* at 661.

31. *Id.*

32. *Id.* at 662.

33. REP Corporation later acknowledged that REP France did not exist and that REP International was the proper entity. *Id.*

34. *Id.*

to Indiana Code section 34-20-2-4.³⁵ The Seventh Circuit rejected this argument and affirmed, recognizing that, by its own plain language, Indiana Code section 34-20-2-1 imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a “manufacturer” or “seller” of a product in Indiana.³⁶ That threshold requirement applies regardless of whether REP Corporation owned part of REP International or whether REP Corporation was a principal distributor for REP International.³⁷

In *Del Signore v. Asphalt Drum Mixers*,³⁸ defendant Asphalt Drum Mixers (“ADM”) manufactured stationary and portable asphalt plants.³⁹ Plaintiff was injured when he fell into a pond of very hot water while shooting a promotional video for ADM at an ADM designed plant in Mexico that was owned and operated by Abraham Martel. ADM’s involvement in the design and construction of Martel’s plant involved preparation of “a concrete foundation drawing for the customer and elevations depicting the layout of ADM’s equipment, together with some suggested pond dimensions.”⁴⁰ The foundation drawing is merely a footprint of ADM’s plant “so the customer will know how much space will be needed.”⁴¹ The ultimate layout of the facility and the size of the ponds are left to the owner/customer. Plaintiff sued ADM claiming that it was a “manufacturer” for purposes of liability pursuant to the IPLA because ADM was “a designer of a component part (i.e., the wetwash pond of its product (i.e., the asphalt plant)).”⁴²

Judge Cosbey granted summary judgment to ADM. After an examination of the Restatement (Third) of Torts, Judge Cosbey recognized that liability only attaches when the manufacturer “substantially participates in the integration of the component into the design of the product.”⁴³ The Restatement (Third) also states that “providing mechanical or technical services or advice concerning a component part does not, by itself, constitute substantial participation.”⁴⁴ According to Judge Cosbey:

[I]t cannot be inferred that ADM designed Martel’s pond or any part of his complex, except perhaps, providing a footprint layout for its own equipment . . . ADM had no control, and indeed very little interest in, where Martel would put his pond, how it would be constructed, or even

35. *Id.* at 664.

36. *Id.* (citing IND. CODE § 33-1-1.5-3(a) (West 1996)).

37. *Id.*

38. 182 F. Supp. 2d 730 (N.D. Ind. 2002).

39. *Id.* at 733.

40. *Id.* at 735.

41. *Id.*

42. *Id.* at 734.

43. *Id.* at 745 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5(b)(1) (1998)).

44. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5 cmt. e (1998)).

whether he was using a pond as opposed to some other water source. While ADM did provide Martel with some technical guidance or advice as to the water volume of the pond, its maximum distance from the plant, and perhaps some dimensions, this did not constitute substantial participation in the integration of the plant with the pond as a matter of law Consequently, ADM was not a 'manufacturer' of Martel's pond under the IPLA.⁴⁵

In *Kennedy v. Guess, Inc.*,⁴⁶ one of the plaintiffs was injured on May 22, 1998, by an umbrella received as a free gift with the purchase of a watch from a Lazarus Department Store.⁴⁷ The plaintiffs alleged both negligence and strict liability theories against the watch manufacturer, the umbrella and watch distributor, as well as the alleged umbrella manufacturer (a Hong Kong corporation) and its domestic affiliate.⁴⁸ Plaintiffs attempted to serve the Hong Kong address of the alleged manufacturer, but were unsuccessful. The trial court granted summary judgment to the watch manufacturer and to the distributor, apparently finding that neither of them could be considered a "manufacturer" for purposes of IPLA liability.⁴⁹

The Indiana Court of Appeals reversed, holding that none of the parties sufficiently designated evidence to establish the application of Indiana Code section 34-20-2-4.⁵⁰ Plaintiffs argued that the watch manufacturer and the distributor could be liable under the IPLA because the court could not "hold jurisdiction" over the alleged Hong Kong manufacturer and because those two entities could be considered the "principal distributor or seller" of the umbrella.⁵¹ Defendant watch manufacturer and distributor countered that neither of them was the "principal distributor or seller," and attempted to so demonstrate by designating statements based on the personal knowledge of their own employees.⁵² Citing the proof requirement for summary judgment under Trial Rule 56, the court determined that the defendants had to designate evidence showing more than just that they were not the principal distributor.⁵³ Without evidence tending to show who actually was the principal distributor, the Indiana Court of Appeals refused to apply Indiana Code section 34-20-2-4 to bar liability.⁵⁴

The Indiana Supreme Court has granted transfer in *Kennedy* and thereby vacated the decision of the court of appeals. Perhaps the Indiana Supreme Court

45. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS § 5 cmt. e (1998) (citation omitted)).

46. 765 N.E.2d 213 (Ind. Ct. App. 2002), *trans. granted, vacated by* No. 29S02-0211-CV-594, 2002 Ind. LEXIS 831 (Ind. Nov. 1, 2002).

47. *Id.* at 215.

48. *Id.* at 215-16.

49. *Id.* at 219.

50. *Id.* at 220.

51. *Id.* at 218.

52. *Id.* at 219.

53. *Id.*

54. *Id.* at 220.

will weigh in on what it means to “hold jurisdiction” for purposes of application of Indiana Code section 34-20-2-4.

In *Goines v. Federal Express Corp.*,⁵⁵ the plaintiff was injured while fabricating and installing conveyors at the Federal Express terminal in Indianapolis.⁵⁶ Plaintiff alleged that a nylon strap used to hold a section of the conveyor bed snapped causing it to fall on him, resulting in injury. The opinion does not indicate when the injury occurred. Plaintiff brought general negligence and strict liability claims against a Minnesota company (Fastenal), which was allegedly the strap manufacturer.⁵⁷ Both claims, although designated as separate, alleged warning and design defects and were based on the same underlying alleged misconduct.⁵⁸ Fastenal filed a cross-claim against a Pennsylvania company (Lift-All), which it claimed manufactured the nylon strap that was sold to Fastenal.⁵⁹

Fastenal filed a motion for summary judgment claiming that it was not liable under the IPLA because it was the manufacturer of the product, but merely a seller with no ability to be deemed liable.⁶⁰ Under the IPLA, “a mere distributor may not be held liable under either strict products liability or negligence.”⁶¹ The plaintiff responded by arguing that under the exception found at Indiana Code section 34-20-2-4, the court could hold Fastenal liable because the court could not “hold jurisdiction over” the actual manufacturer (Lift-All) and because Fastenal was the principal distributor for Lift-All.⁶² According to the court, both parties failed to demonstrate why the court would be unable to “hold jurisdiction over” Lift-All.⁶³ Plaintiff assumed that “jurisdiction . . . refers to the power [of the court] to hear a particular case.” Fastenal argued that the phrase equates to “personal jurisdiction.”⁶⁴ Because Fastenal failed to convince “the court that application of the IPLA entitles it to summary judgment,” the court refused to resolve the issue deciding instead to deny the motion for summary judgment.⁶⁵

In *Ritchie v. Glidden Co.*,⁶⁶ the plaintiff was an employee of a company that painted the inside of modular homes before assembling them. Plaintiff’s left

55. No. 99-CV-4307-JP6, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002)(applying Indiana law).

56. *Id.* at *4.

57. *Id.* at **4-5.

58. *Id.* at *5.

59. *Id.*

60. *Id.* at *6.

61. *Id.*

62. *Id.* at *9.

63. *Id.* at *12.

64. *Id.*

65. *Id.* at **14-15.

66. 242 F.3d 713 (7th Cir. 2001). The court’s decision in *Ritchie* was issued before the 2002 survey period. However, because of the significance of the case to Indiana practitioners and because issues decided in that case dovetail nicely with points made in this section, the *Ritchie* decision is discussed at length.

index finger had to be amputated after it was accidentally injected with paint while she was checking one of the spray pumps for a possible malfunction. Plaintiff sued two defendants, the manufacturer of the pump (Graco, Inc.) and the supplier of the pump (Glidden Company).⁶⁷

The trial court granted summary judgment to both defendants, and plaintiff appealed to the Seventh Circuit.⁶⁸ The court first determined that summary judgment was inappropriate with regard to the IPLA claim against the manufacturing defendant because there were genuine issues of material fact about whether the pump in question contained a warning.⁶⁹ The court next examined the IPLA claims against Glidden, the seller/supplier. In that connection, the *Ritchie* court cited what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer of the product.⁷⁰ Applying interpretation, the court held that Glidden could not be liable under the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of the alleged product defect (lack of warning labels) and because Glidden did not meet any of the other statutory requirements by which it could be deemed a manufacturer.⁷¹

There is an omission in the *Ritchie* court's citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: "A product liability action [based on the doctrine of strict liability in tort] may not be commenced or maintained . . ." ⁷² Recall that the *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. As alluded to above, and as will be discussed in more detail below, Indiana Code section 34-20-2-2 makes it clear that "strict liability in tort" now applies only to IPLA cases in which a manufacturing defect is theory supporting why the product was defective and unreasonably dangerous.⁷³ Indiana Code section 34-20-2-2 unequivocally provides that liability, regardless of the exercise of reasonable care, simply does not apply to warning or design claims, which are controlled by a negligence standard.⁷⁴ Thus, if indeed the phrase "strict liability" means "liability without

67. *Id.* at 716.

68. *Id.*

69. *Id.* at 725.

70. *Id.* (The court cites to IND. CODE § 33-1-1.5-3(c) which was later repealed and recodified as IND. CODE § 34-20-2-3).

71. *Id.* at 725-26.

72. *Id.* at 725 (emphasis added) (quoting IND. CODE § 33-1-1-5.3, *repealed by* IND. CODE § 34-20-2-2).

73. IND. CODE § 34-20-2-2 (1998).

74. *See, e.g.,* Timothy C. Caress, *Recent Developments in the Indiana Law of Products Liability*, 29 IND. L. REV. 979, 999 (1996) ("The effect of [Indiana Code § 34-20-2-3 and Indiana Code § 34-20-2-4] is to prevent the user or consumer injured by a product with a manufacturing defect from suing the local retail seller of the product on a strict liability theory unless, for some reason, the court cannot get jurisdiction over the manufacturer.") (emphasis added); *see also* Burt

regard to the exercise of reasonable care," then the only theory to which such a standard applies is a manufacturing defect theory. That principle has been recognized in several contexts since 1995. Accordingly, the *Ritchie* court seems to be applying a provision of the IPLA intended, as written, to apply only to sellers in manufacturing defect cases in a negligent failure to warn case.

At least three other decisions since *Ritchie*, involving injuries that appear to have accrued after the 1995 amendments to the IPLA became effective, have interpreted what is now Indiana Code section 34-20-2-3 in the same way as did *Ritchie*. The court in *Kennedy*⁷⁵ accepted this interpretation as correct without much discussion of the proposition that Indiana Code section 34-20-2-3 bars claims against sellers even when the allegations involve design defect theories.⁷⁶ Indeed, the *Kennedy* decision turned on application of Indiana Code section 34-20-2-4 after the court concluded that section 34-20-2-3 "generally restricts the imposition of strict product liability to the manufacturer."⁷⁷ Because *Kennedy* involved both design and manufacturing claims, one has to conclude that the court reached the same decision as *Ritchie*; namely that application of Indiana Code section 34-20-2-3 is not limited to cases involving only manufacturing defects.

The court in *Goines*⁷⁸ reached the same conclusion discussed above. There, the plaintiff alleged both negligence and strict liability claims that relied on warning and design theories.⁷⁹ Despite the "based on the doctrine of strict liability" language in Indiana Code section 34-20-2-3, the plaintiff conceded that the provision "applies, in general, to products liability *negligence* claims."⁸⁰ Interestingly, the *Goines* decision does not indicate when the injury occurred. Based upon the factual circumstances of the case, the authors assume that the injury occurred after June 30, 1995, and that the 1995 amendments to the IPLA control the case.

Although much less clear than in *Ritchie* and *Goines*, it appears as though the court in *Williams*⁸¹ may be saying something similar: "Indiana Code section 34-20-2-3 exempts sellers from liability (except when a seller is also the manufacturer)"⁸² Although that language is not quite the ringing endorsement of the position offered by the courts in *Ritchie* and *Goines*, the *Williams* court does not include any limitation to the foregoing language indicating that the seller's "exemption" applies only in manufacturing defect

v. Makita USA, Inc., 212 F. Supp. 2d 893 (N.D. Ind. 2002).

75. *Kennedy v. Guess, Inc.*, 765 N.E.2d 213, 217-18 (Ind. Ct. App. 2002). *See supra* note 46 and accompanying text.

76. *Kennedy*, 765 N.E.2d at 217-18.

77. *Id.* at 217.

78. *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JP6, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002). *See supra* note 55 and accompanying text.

79. *Goines*, 2002 U.S. Dist. LEXIS 5070 at *9.

80. *Id.* (emphasis added).

81. *Williams v. REP Corp.*, 302 F.3d 660 (7th Cir. 2002).

82. *Id.* at 664.

cases.⁸³

It is possible, of course, that the Indiana General Assembly really intended Indiana Code section 34-20-2-3 to exclude sellers who could not otherwise be deemed manufacturers from cases involving all three product defect theories. If that is true, it is certainly possible that the legislature simply did not realize that the phrase “based on the doctrine of strict liability in tort” should have been rephrased in light of the new statutory scheme. It is equally likely that the legislature intended the statute to be applied exactly as written. Either way, there are at least four recent decisions that have brought the issue to the forefront. It is now up to practitioners, judges, and, perhaps, the Indiana General Assembly to resolve the issue.

C. “. . . for physical harm . . .”

For purposes of application of the IPLA, “physical harm” means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”⁸⁴ It does not include “gradually evolving damage to property or economic losses from such damage.”⁸⁵

Research does not reveal any published opinions during the survey period concerning the “physical harm” requirement.⁸⁶

D. “. . . caused by a product . . .”

For purposes of the IPLA, “product” means “any item or good that is personalty at the time it is conveyed by the seller to another party.”⁸⁷ The term “product” does not include a “transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”⁸⁸

In this context, practitioners should be aware of one federal decision made during the survey period. In *Great Northern Insurance Co. v. Buddy Gregg Motor Homes, Inc.*,⁸⁹ the plaintiff purchased a used motor home from defendant’s

83. *Id.*

84. IND. CODE § 34-6-2-105 (1998) (internal quotes omitted).

85. *Id.*

86. In the last couple of years, courts in Indiana have issued some important rulings concerning the “physical harm” requirement. *See, e.g.*, *Progressive Ins. Co. v. General Motors Corp.*, 749 N.E.2d 484, 487 (Ind. 2001) (no recovery under the IPLA where the claim is based on damage to the defective product itself); *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 495 (Ind. 2001) (personal injury and property damage to other property caused by a defective product are actionable under the IPLA, but their presence does not create a claim for damage to the product itself); *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (in a case brought by a couple against a condom manufacturer, court denied a motion to dismiss, determining that Indiana recognizes that pregnancy, in certain instances, may be considered a “harm”).

87. IND. CODE § 34-6-2-114(a) (1998).

88. *Id.*

89. No. IP-00-1378-CH/K, 2002 U.S. Dist. LEXIS 7830 (S.D. Ind. Apr. 29, 2002).

dealership. The motor home was destroyed in a fire allegedly caused by a defective wire in the engine compartment.⁹⁰ The plaintiffs' insurance company, as subrogee, sued the dealership for the value of the motor home.⁹¹ The court denied recovery for damage to the motor home in light of the Indiana Supreme Court's decision in *Progressive Insurance Co. v. General Motors Corp.*⁹² The insurance company also attempted to state a claim for negligent inspection against the defendant that was separate and apart from the IPLA.⁹³ The court rejected the negligence claim, determining that no reasonable juror could find that the allegedly negligent inspection occurred as part of a transaction for services separate and apart from the purchase of the motor home.⁹⁴

E. "... regardless of the theory of liability . . ."

In the wake of the 1995 amendments to the IPLA, practitioners and sometimes judges have appeared to struggle with what the IPLA covers, and what it does not. Indiana Code section 34-20-1-1 provides that the IPLA governs and controls all actions brought by users and consumer against manufacturers or sellers (under the right circumstances) "for physical harm caused by a product *regardless of the substantive theory of liability.*"⁹⁵ Accordingly, theories of liability based upon breach of warranty, breach of contract, and common law negligence against entities that are outside of the IPLA's statutory definitions are not governed by the IPLA.⁹⁶

At the same time, however, the Indiana Code provides that the "[IPLA] shall

90. *Id.* at *4.

91. *Id.* at *1.

92. *Id.* at *8 (citing *Progressive Ins. Co. v. Gen'l Motors Corp.*, 749 N.E.2d 484, 487 (Ind. 2001)).

93. *Id.* at *1.

94. *Id.* at **14-15. A few other recent Indiana decisions are important in this context. *See, e.g.,* *R.R. Donnelley & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112, 122 (Ind. Ct. App. 2001), *trans. denied*, 774 N.E.2d 508 (Ind. 2002) (manufacturer of component parts of a steel rack system sold a product and did not merely provide services because it modified raw steel to produce the component parts and, in doing so, transformed the raw steel into a new product that was substantially different from the raw material used); *New Hampshire Ins. Co. v. Farmer Boy AG, Inc.*, No. IP98-0031-CT/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000) (installation of a custom-fit electrical system into a hog barn involved wholly or predominately the sale of a service rather than a product); *Marsh v. Dixon*, 707 N.E.2d 998, 1002 (Ind. Ct. App. 1999) (an amusement ride involved the provision of a service and not the sale of a product); *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079, 1085 (Ind. Ct. App. 1999) (defendant provided products and not merely services it transformed metal block into "new" products and because it repaired damaged products, thus creating "new," substantially different work product).

95. IND. CODE § 34-20-1-1 (1998) (emphasis added).

96. *E.g., New Hampshire Ins. Co.*, 2000 U.S. Dist. LEXIS 19502, **10-11 (claim alleging breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superseded by the theory of strict liability; plaintiff could proceed on a breach of warranty claim so long as it was limited to a contract theory).

not be construed to limit any other action from being brought against a seller of a product.”⁹⁷ That language, when compared with the “regardless of the legal theory upon which the action is brought” language found in Indiana Code section 34-20-1-2 raises an interesting question: whether alternative claims against product sellers or suppliers that fall outside the reach of the IPLA are still viable when the “physical harm” suffered is the very type of harm the IPLA otherwise would cover.

The courts in *Ritchie*,⁹⁸ *Kennedy*,⁹⁹ and *Goines*,¹⁰⁰ all seem to assume, without hesitation, that claimants in Indiana are free to assert separate “negligence” and “strict liability” claims against “sellers,” and that claimants can utilize warning and design theories in each claim. In *Ritchie*, recall that the plaintiff failed to designate sufficient facts to demonstrate that the seller of a paint spray gun had actual knowledge of alleged product defect (lack of warning labels).¹⁰¹ Accordingly, the court held that the seller could not be considered a “manufacturer” under the IPLA and thus, could not be held liable under the IPLA.¹⁰² Regardless, the *Ritchie* court went on to address the plaintiff’s allegation that she could nevertheless recover from the seller based on a common law negligence claim rooted in Section 388 of the Restatement (Second) of Torts.¹⁰³ That section contemplates liability for suppliers of goods “known to be dangerous for an intended use if the supplier does not use reasonable care to warn the consumer of the dangers of the chattel.”¹⁰⁴ In response to that allegation, the seller argued that the plaintiff had failed to demonstrate a material issue of fact with respect to whether it, in fact, supplied the sprayer.¹⁰⁵ The court found that genuine issues of material fact precluded summary judgment on that issue.¹⁰⁶

In *Kennedy*, after determining that the “sellers” involved were not entitled to summary judgment pursuant to Indiana Code section 34-20-2-4, the court refused to dismiss a common law “negligence” claim against those “sellers” based upon pre-1995 case law and the Restatement of Torts (Second) Section 400.¹⁰⁷ That section of the Restatement (Second) contemplates liability for a seller who “puts out as his own product a chattel manufactured by another . . . as though he were

97. IND. CODE § 34-20-1-1 (1998).

98. *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001).

99. *Kennedy v. Guess*, 765 N.E.2d 213 (Ind. Ct. App. 2002).

100. *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JP6, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002).

101. See *supra* note 71 and accompanying text.

102. *Ritchie*, 242 F.3d at 713. Whether that decision is consistent with Indiana Code section 34-20-2-3 is addressed *supra*.

103. *Ritchie*, 242 F.3d at 726.

104. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 388 (1965)).

105. *Id.*

106. *Id.*

107. *Kennedy v. Guess*, 765 N.E.2d 213, 211-22 (Ind. Ct. App. 2002), *trans. granted, vacated* by No. 29502-0211-CV-594, 2002 Ind. LEXIS 831 (Ind. Nov. 1, 2002).

its manufacturer.”¹⁰⁸ Both of the Indiana cases cited by the *Kennedy* court to support the existence of a separate common law “negligence” action were 1990 cases¹⁰⁹ (*Koske v. Townsend Engineering Co.*¹¹⁰ and *Moore v. Sitzmark Corp.*¹¹¹). Similarly, the Indiana cases cited in support of the Restatement Second both pre-date the 1995 amendments to the IPLA¹¹² (*Dudley Sports Co. v. Schmitt*¹¹³ and *Lucas v. Dorsey*¹¹⁴).

Goines is strikingly similar to *Kennedy*. In *Goines*, the plaintiff brought what were called “general negligence” and “strict liability” claims against an entity that was a “seller” under the IPLA.¹¹⁵ The claims, although designated as separate, each alleged warning and design defects and both were based on the same underlying alleged misconduct.¹¹⁶ The court held that the “seller” was not entitled to summary judgment pursuant to Indiana Code section 34-20-2-4 with respect to the IPLA/strict liability claims.¹¹⁷ However, the court went on to treat the “negligence” claims separately.¹¹⁸ It granted summary judgment with regard to the design and manufacturing claims because the seller had no duty in light of its lack of knowledge of the alleged defect and its lack of involvement in the manufacturing process.¹¹⁹ The court refused to grant summary judgment with respect to the failure to warn claim, basing its decision upon the “common law” duty to warn as set forth in the 1993 Indiana Court of Appeals decision in *Lucas v. Dorsey Corp.*¹²⁰

In *Ritchie*, *Kennedy*, and *Goines*, it is clear that the courts were subjecting “sellers” to potential liability based on common law negligence theories for the very same “physical harm” covered by the IPLA. In doing so, those courts seem to believe that common law “negligence” claims based upon design and warning theories still exist separate and apart from the IPLA. In support of that belief, the courts routinely cite to cases that were decided before the 1995 amendments to the IPLA and at a time when Indiana still recognized dual-track strict liability and negligence claims. As has been noted above, the 1995 amendments impose negligence standards for design and warning claims and retain strict liability only for manufacturing claims.

The very real question arising out of those cases is whether courts have the

108. *Id.* at 220-21 (quoting RESTATEMENT (SECOND) OF TORTS § 400 (1965)).

109. *Id.* at 220.

110. 551 N.E.2d 437, 443 (Ind. 1990).

111. 555 N.E.2d 1305, 1308 (Ind. Ct. App. 1990).

112. *Kennedy*, 765 N.E.2d at 221.

113. 279 N.E.2d 266, 273 (Ind. App. 1972).

114. 609 N.E.2d 1191, 1201 (Ind. Ct. App. 1993).

115. *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JP6, 2002 U.S. Dist. LEXIS 5070, at **4-5 (S.D. Ill. Jan. 8, 2002).

116. *Id.* at *5.

117. *Id.* at **14-15.

118. *Id.* at *15.

119. *Id.* at *16.

120. *Id.* at **16-17 (citing *Lucas v. Dorsey*, 609 N.E.2d 1191, 1198 (Ind. Ct. App. 1993)).

power to impose common law negligence liability against “sellers” when the harm allegedly suffered is the same “physical harm” covered by the IPLA. If a “seller” cannot be held liable for “physical harm” that is clearly within the purview of IPLA (*e.g.*, a manufacturing defect theory when the seller has no actual knowledge of the defect and cannot otherwise be deemed a manufacturer pursuant to Indiana Code section 34-20-2-4 or Indiana Code section 34-6-2-77), how can the same entity be liable for the same “physical harm” outside the purview of the IPLA? That idea seems to run contrary to the Indiana General Assembly’s policy determination that the IPLA covers all actions for “physical harm” “regardless of the substantive theory of liability.”¹²¹ It appears to be an open question whether and to what extent such a common law negligence claim for the same “physical harm” covered by the IPLA is an “other action” that Indiana Code section 34-20-1-2 confirms is not limited by the IPLA.

II. THEORIES OF LIABILITY AND RELATED ISSUES

The IPLA, through Indiana Code section 34-20-2-1, imposes liability when 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 . . . if: (1) 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; (2) the seller is engaged in the business of selling the product; and (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.¹²²

That rule of liability is true even though: “(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”¹²³ However, the very next paragraph of Indiana Code section 34-20-2-2 takes away what was deemed to be true by subsection (1) (liability without regard to “fault” or reasonable care) with respect to design and warning claims:

However, in an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.¹²⁴

Indiana Code section 34-20-2-2 eliminates the privity requirement between

121. IND. CODE § 34-20-1-1 (1998).

122. *Id.* § 34-20-2-1.

123. *Id.* § 34-20-2-2.

124. *Id.*

buyer and seller for imposition of liability and confirms that a manufacturer's or seller's exercise of reasonable care does not eliminate liability except in cases in which the theory of liability is design defect or warning defect. Indiana courts routinely have recognized that the IPLA imposes a negligence standard in design and warning cases, while retaining strict liability for manufacturing defect cases.¹²⁵ Thus, just as in any other negligence case, a claimant in a design or warning case must prove: (a) duty; (b) breach of that duty; and (c) injury caused by the breach.

Unfortunately for practitioners, some courts have not yet fully grasped the fact that because "strict liability" in its common usage means "liability without regard to reasonable care" in a Restatement of Torts (Second) section 402A sense, use of that term no longer makes sense when dealing with cases alleging design or warning claims. Even though Indiana is years removed from the 1995 amendments to the IPLA, many courts continue to fall into the trap of using "strict liability" when referring to proof requirements in design and warning claims brought under the IPLA.¹²⁶

In Chapter 4 of the IPLA, the focus returns to the IPLA's threshold requirement that only products that are in a "defective condition" are products for which liability may attach pursuant to the IPLA. For purposes of the IPLA, a product is in a "defective condition" if

at the time it is conveyed by the seller to another party, it is in a condition: (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling and consumption.¹²⁷

Claimants in Indiana prove that a product is in a "defective condition" by asserting one or a combination of three theories: (1) the product has a defect that is the result of a malfunction or impurity in the manufacturing process; (2) the product has a defect in its design; or (3) the product lacks adequate or appropriate warnings.¹²⁸ There is a specific statutory provision covering the warning defect theory. It states that:

A product is defective . . . if the seller fails to: (1) properly package or label the product to give reasonable warnings of danger about the product; or (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or

125. See, e.g., *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002).

126. See, e.g., *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 405-06 (Ind. Ct. App. 1999) (court found no error in the trial court's use of the term "strict liability" in its instructions to the jury in a case that was not limited to manufacturing defects).

127. IND. CODE § 34-20-4-1 (1998).

128. E.g., *id.* § 34-20-2; *Burt*, 212 F. Supp. 2d at 899-900.

consumer.”¹²⁹

The IPLA also provides two specific provisions defining when a product is not defective. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].”¹³⁰ Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”¹³¹ Those two statutes are consistent with the two requirements for liability set forth in Indiana Code section 34-20-4-1.

The statutes that comprise chapter 4 make it clear that the IPLA requires that the product at issue be both in a condition “not contemplated by expected users or consumers” and “unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways.”¹³² Sections 3 and 4 of chapter 4 solidify that fact, as does recent case law.¹³³ A product is “unreasonably dangerous” if its use “exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge” about the product common to consumers in the community.¹³⁴ “A product is not unreasonably dangerous if it ‘injures in a way which, by objective measure, is known to the community of persons consuming the product.’”¹³⁵

A. Warning Defect Cases

The duty to warn in Indiana consists of two duties: “(1) to provide adequate instructions for safe use, and (2) to provide a warning as to dangers inherent in improper use.”¹³⁶ Pre-IPLA cases extended the duty to warn to all persons who may reasonably be foreseen as coming in contact with a dangerous product.¹³⁷

129. IND. CODE § 34-20-4-2 (1998).

130. *Id.* § 34-20-4-3.

131. *Id.* § 34-20-4-4.

132. *Id.* § 34-20-4-1.

133. *See, e.g., In re Inlow, Accident Litigation*, No. IP99-0830-CH/K, 2002 U.S. Dist. LEXIS 8318, at **66-67 (S.D. Ind. Apr. 16, 2002) (“Although closely related to the question of whether a product is defective because of a failure to warn, a plaintiff must show that the product was unreasonably dangerous as a separate element of a product liability claim.”); *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability).

134. *In re Inlow*, 2002 U.S. Dist. LEXIS 8318, at *66 (quoting IND. CODE § 33-1-1.5-2(7)).

135. *Id.* at *67 (quoting *Anderson v. P.A. Radocy & Sons, Inc.*, 865 F. Supp. 522, 531 (N.D. Ind. 1994), *aff'd*, 67 F.3d 619 (7th Cir. 1995)).

136. *E.g., Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997).

137. *E.g., Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1162 (Ind. Ct. App. 1988).

The published opinion in *Burt v. Makita USA, Inc.*¹³⁸ is the trial court's order granting summary judgment to defendants. In that case, plaintiff was injured when a blade guard on a circular table saw struck him in the eye.¹³⁹ The saw was manufactured by Makita Corp. and distributed by Makita USA, Inc. Plaintiff's co-worker noticed that the blade guard of the saw involved in the accident was not installed, so he found the blade guard and set about to install it. Realizing that he did not have either a screwdriver or the wrenches needed to complete the installation, the co-worker left the guard on the saw while he went to retrieve the tools. The guard was left in what appeared to be the installed position.¹⁴⁰ However, the bolts needed to secure the guard firmly in place had not been tightened. While the co-worker was away, the plaintiff approached the saw. Plaintiff believed that the guard was in place and that the saw had recently been used. When he began to saw, the guard was thrown off the saw and hit him in the eye.

Plaintiff asserted both design and warning claims. With respect to his warning claims, plaintiff's expert suggested that the saw have warning labels that would make it more difficult for the guard to be left in a position where it appeared installed when in fact it was not.¹⁴¹ The court rejected those claims recognizing that the scope of the duty to warn is determined by the foreseeable uses of the product and that there was no evidence that the circumstances of plaintiff's injuries were foreseeable such that defendants had a duty to warn against those circumstances.¹⁴²

In the case of *In re Lawrence W. Inlow, Accident Litigation*,¹⁴³ a Conseco Inc. executive, Lawrence C. Inlow, was killed when he was hit in the head by a rotating helicopter rotor blade after he disembarked from the helicopter.¹⁴⁴ The Inlow Estate filed suit against, among others, several corporate entities involved in the manufacturing and distribution of the helicopter.¹⁴⁵ The claims against the manufacturer and distributor defendants alleged liability based upon their failure to warn the executive and/or the Conseco pilots of the risks associated with disembarking from the helicopter while the blades were slowing down.¹⁴⁶

Judge Hamilton granted summary judgment to the manufacturer and distributor defendants with regard to all of the Estate's claims against them, including claims for negligence, product liability, fraud, and constructive fraud.¹⁴⁷ The court first determined that, as a matter of law, the manufacturer and distributor defendants did not have a duty to warn helicopter operators or

138. 212 F. Supp. 2d 893 (N.D. Ind. 2002).

139. *Id.* at 895.

140. *Id.*

141. *Id.*

142. *Id.* at 899.

143. No. IP99-0830-CH/K, 2002 U.S. Dist. LEXIS 8318, at *1 (S.D. Ind. Apr. 16, 2002).

144. *Id.* at *1.

145. *Id.* at **1-2.

146. *Id.* at *3.

147. *Id.* at *69.

passengers “about known, open, and obvious dangers that moving and decelerating rotor blades pose for exiting or boarding passengers.”¹⁴⁸ The court also determined that “the fact that decelerating rotor blades pose a greater risk is obvious to trained pilots,” who are qualified as “sophisticated intermediaries” under Indiana law such that the “manufacturer [had] no duty to warn helicopter passengers about that specific risk” of greater danger as the blades are decelerating.¹⁴⁹

The court next pointed out that the Estate’s claim also failed because the helicopter, “although dangerous, was not ‘unreasonably dangerous’ under the IPLA.”¹⁵⁰ On this point, the court held that the Estate’s claim failed because Inlow’s death was “caused by the known risk of physical injury from being struck by a decelerating rotor blade.”¹⁵¹ The helicopter simply did not place Inlow “at risk ‘of injuries different in kind from those the average [user] might anticipate.’”¹⁵²

In *Morgen v. Ford Motor Co.*,¹⁵³ a pre-IPLA case (accrual in 1993), Morgen was severely injured in a rear-end collision while riding in the rear seat of a Ford Escort.¹⁵⁴ He sued Ford, claiming that the Escort was defective and that Ford failed to provide reasonable warnings.¹⁵⁵ Morgen’s experts claimed that the structural design of the car reduced occupant survival space or headroom.¹⁵⁶ The trial court refused to read an Indiana Pattern Jury Instruction to the effect that Ford had a duty to warn about latent defects, deciding that the case was not a warning defect case but rather a design defect case.¹⁵⁷ The court of appeals reversed, pointing out that there was testimony that Morgen would not have sat in the backseat of the Escort if a warning had been provided and that a warning would have caused the car’s owner not to have purchased it and not to have allowed Morgen to ride in the backseat.¹⁵⁸ Thus, according to the court, such testimony “provides the causal relationship between the breach of the duty to warn and the injury sustained to support giving the warning instruction.”¹⁵⁹ The *Morgen* court also concluded that other tendered instructions simply did not properly inform the jury about the information that Ford needed to possess about defects in its product to trigger a duty to warn.¹⁶⁰ The Indiana Supreme Court has

148. *Id.* at **3-4.

149. *Id.* at *4.

150. *Id.* at *66.

151. *Id.* at *68.

152. *Id.*

153. 762 N.E.2d 137 (Ind. Ct. App. 2002), *reh’g denied*, 2002 Ind. App. LEXIS 791 (Ind. Ct. App. Apr. 22, 2002), *trans. granted, vacated by* 2002 Ind. LEXIS 852 (Ind. Nov. 1, 2002).

154. *Id.* at 139.

155. *Id.*

156. *Id.* at 140.

157. *Id.* at 144.

158. *Id.* at 145.

159. *Id.*

160. *Id.* at 146.

granted transfer in *Morgen*, and thereby vacated the decision. Indiana practitioners look forward to the court's pronouncements.

In *McClain v. Chem-Lube Corp.*,¹⁶¹ a welder sued the manufacturer and seller of anti-spatter compound, claiming injuries as a result of exposure to fumes and vapors associated with use of the compound.¹⁶² The trial court granted summary judgment because the manufacturer and seller designated evidence that the compound complied with OSHA standards for formaldehyde emission.¹⁶³ The plaintiffs' duty to warn claim was not addressed. According to the court, however, the designated evidence showed that both defendants knew that the product was to be used in conjunction with high temperatures that occurred as a result of the hot welding process.¹⁶⁴ The *McClain* court held that the trial court should have addressed the issue, and that genuine issues of material fact existed with respect to whether the risks inherent in the use of the anti-spatter product were unknown or unforeseeable and whether or not the defendants had a duty to warn of the dangers inherent in the use of the product.¹⁶⁵

B. Design Defect Cases

Indiana courts have required plaintiffs in design cases to prove what practitioners and judges often refer to as a "feasible alternative design."¹⁶⁶ Plaintiffs must demonstrate that another design not only could have prevented the injury but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.¹⁶⁷ Judge Easterbrook has described that a design claim in Indiana is a "negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents."¹⁶⁸

In addition to the failure to warn claim, the *Burt* case discussed above also involved design defect allegations. Recall that the plaintiff in *Burt* was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard in what appeared to be the installed position. With respect to his design claims, plaintiff's expert suggested that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw.¹⁶⁹ The court rejected the claim, holding that the plaintiff has "wholly failed to show a feasible alternative design that would have reduced the risk of injury."¹⁷⁰

161. 759 N.E.2d 1096 (Ind. Ct. App. 2001).

162. *Id.* at 1099.

163. *Id.* at 1100.

164. *Id.* at 1104.

165. *Id.*

166. *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

167. *Id.*; *Whitted v. General Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995).

168. *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

169. 212 F. Supp. 2d at 895.

170. *Id.* at 900.

C. Manufacturing Defect Cases

In *Chapman v. Maytag Corp.*,¹⁷¹ Kyle Chapman was electrocuted when he came into contact with some ductwork in the crawl space of a home at which family members were sustaining minor electrical shocks.¹⁷² The special representative of Kyle's estate sued Maytag, the manufacturer of a stove that allegedly contained a defective wire.¹⁷³ The district court denied Maytag's motion for summary judgment and its efforts to exclude the testimony of the plaintiffs' purported expert witness.¹⁷⁴ Thereafter, the parties tried the case to a jury, which returned a verdict and substantial damages in favor of the plaintiffs.¹⁷⁵ The Seventh Circuit reversed, determining that the district court failed to properly apply Daubert principles¹⁷⁶ when considering the admissibility of the testimony of plaintiff's purported expert.¹⁷⁷ With respect to two other key product liability issues, the Seventh Circuit affirmed the district judge.¹⁷⁸

One of those other two key issues involved Maytag's ability to "warn" its way of out of a manufacturing defect claim. The parties did not dispute that the stove had a manufacturing defect in that it contained a wire that had become pinched between a metal housing cover and the metal back of the stove during the assembly process.¹⁷⁹ Maytag nevertheless argued that the range was delivered with a host of warnings advising consumers that the failure to plug the range into a properly grounded three-hole receptacle in compliance with local rules and the NEC could result in a shock hazard.¹⁸⁰ Kyle Chapman had incorrectly installed the outlet into which the range was plugged, which rendered that outlet devoid of a grounding wire and, therefore, contrary to the foregoing product warnings.¹⁸¹

The Seventh Circuit agreed with the district judge that "'adequate warnings will not render a product with a manufacturing defect non-defective,' regardless of whether compliance with the warnings would have rendered the product safe."¹⁸² "Accordingly, it was well within the discretion of the district court to hold that warnings will save a product from being defective only when a product is without manufacturing defects."¹⁸³

171. 297 F.3d 682 (7th Cir. 2002).

172. *Id.* at 685.

173. *Id.*

174. *Id.* at 687.

175. *Id.*

176. *Id.* at 686-87.

177. *Id.* at 687.

178. *Id.* at 689.

179. *Id.* at 685.

180. *Id.* at 684-85.

181. *Id.* at 685.

182. *Id.* at 689.

183. *Id.*

D. Duty & Proximate Causation

In *City of Gary v. Smith & Wesson Corp.*,¹⁸⁴ the City of Gary and its mayor sued several handgun manufacturers, distributors, and retailers, alleging negligent marketing, distribution, sale, and failure to warn. Allegations included: (1) breach of duty for creating and supplying and supporting an illegitimate secondary market for handguns; (2) failure to exercise reasonable care in marketing, manufacture, distribution, and sale of guns; and (3) negligent design, manufacture, distribution, and sale of guns with inadequate, incomplete, or nonexistent warnings regarding the risks of harm.¹⁸⁵ The city alleged a separate design defect claim against the manufacturers for failure to include adequate safety devices.¹⁸⁶ The court rejected all such bases of liability, holding that no duty of care existed between the parties because the attenuated relationship between the city and the defendants rendered the connection between the harm alleged by the city and the conduct of the defendants tenuous and remote.¹⁸⁷ The court concluded that the city simply was not a reasonably foreseeable plaintiff injured in a reasonably foreseeable manner.¹⁸⁸

The *Morgen*¹⁸⁹ case discussed above also involves duty and proximate causation questions. Recall that the case involved a plaintiff who was severely injured in a rear-end collision while riding in the rear seat of a Ford Escort. He sued Ford, claiming that the Escort was defective and that Ford failed to provide reasonable warnings.¹⁹⁰ The trial court refused to instruct the jury that the accident could have had several proximate causes.¹⁹¹ Instead, the trial court instructed the jury that Morgen could not recover from Ford if the evidence showed that his injuries were caused solely by the conduct of the driver who collided with the car in which Morgen was riding.¹⁹² According to the *Morgen* court, there can be more than one proximate cause in a product liability case and, therefore, a plaintiff need not prove that the defective product was the sole proximate cause of the injury.¹⁹³ Ultimately, because the use of the word "solely" in the instruction given informed the jury that there could be more than one proximate cause, the trial court did not err in giving the instruction.¹⁹⁴ However, the court admonished the parties that it would be preferable to "specifically instruct the jury that there can be more than one proximate cause of

184. 776 N.E.2d 368 (Ind. Ct. App. 2002).

185. *Id.* at 384.

186. *Id.*

187. *Id.* at 388.

188. *Id.*

189. *Morgen v. Ford Motor Co.*, 762 N.E.2d 137 (Ind. Ct. App. 2002), *reh'g denied*, 2002 Ind. App. LEXIS 791 (Ind. Ct. App. Apr. 22, 2002), *trans. granted, vacated by* 2002 Ind. LEXIS 852 (Ind. Nov. 1, 2002).

190. *Id.* at 139.

191. *Id.* at 140.

192. *Id.* at 147.

193. *Id.*

194. *Id.*

an injury.”¹⁹⁵

III. LIMITATIONS AND REPOSE ISSUES

A. Statute of Limitations

The IPLA provides, in relevant part, that “a product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer.”¹⁹⁶ Practitioners and judges alike generally refer to the first clause of that statute as the statute of limitations and to the latter as the statute of repose.

The IPLA does not define the meaning of “accrues” for purposes of fixing the two-year statute of limitations generally applicable to all product liability actions in Indiana. However, Indiana courts have adopted a discovery rule for the accrual of tort-based damage claims caused by an allegedly defective product. Indeed, in *Degussa Corp. v. Mullens*,¹⁹⁷ the Indiana Supreme Court made it clear that the date upon which a product liability claim accrues depends upon a subjective analysis of a patient’s communications with his or her doctor about when a causal link between a disease and the defendant’s product is established. “Once a plaintiff’s doctor expressly informs the plaintiff that there is a ‘reasonable possibility, if not a probability’ that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law.”¹⁹⁸ “When a doctor so informs a potential plaintiff, the plaintiff is deemed to have sufficient information such that he or she should promptly seek ‘additional medical or legal advice needed to resolve any remaining uncertainty or confusion’ regarding the cause of his or her injuries, and therefore be able to file a claim within two years of being informed of a reasonably possible or likely cause.”¹⁹⁹

195. *Id.*

196. IND. CODE § 34-20-3-1 (1998).

197. 744 N.E.2d 407 (Ind. 2001).

198. *Id.* at 411.

199. *Id.* In addition,

[a]n unexplained failure to seek additional information should not excuse a plaintiff’s failure to file a claim within the statutorily defined time period. . . . Although “events short of a doctor’s diagnosis can provide a plaintiff with evidence of a reasonable possibility that another’s product caused his or her injuries, a plaintiff’s mere suspicion or speculation that another’s product caused the injuries is insufficient to trigger the statute.”

Id. See also *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84, 87-88 (Ind. 1985) (a cause of action accrues when the claimant knew or should have discovered that he or she “suffered an injury or impingement, and that it was caused by the product or act of another”). See also Nelson A. Nettles, *When Does A Product Liability Claim “Accrue”? When Is It “Filed”?*, IND. LAW., May 9, 2001, at 23.

The Seventh Circuit followed *Degussa Corp.* in *Nelson v. Sandoz Pharmaceuticals Corp.*²⁰⁰ In that case, the trial court granted summary judgment to a pharmaceutical manufacturer based on the IPLA statute of limitations.²⁰¹ After concluding that Indiana law applied, the Seventh Circuit reversed.²⁰² The court first cited *Degussa Corp.* for the proposition that the statute of limitations “begins to run from the date that the plaintiff knew or should have discovered that she suffered an injury or impingement and that it was caused by the product or act of another.”²⁰³ According to the Seventh Circuit, the plaintiff’s suspicion, standing alone, was insufficient to trigger the limitations period. That period begins to run if a physician suggests a reasonable possibility, if not a probability, of a causal connection between the illness alleged and the product involved.²⁰⁴

B. Statute of Repose

Indiana Code section 34-20-3-1 provides, in relevant part, that “a product liability action must be commenced within . . . ten (10) years after the delivery of the product to the initial user or consumer.”²⁰⁵ The statute of repose gets a little more complicated in the last two years of the 10-year period mentioned above. Indiana Code section 34-20-3-1(b) 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.”²⁰⁶ Practitioners should be wary here in light of some very specific statutory language. Note that subsection (b) grants the full two-year period after accrual if the cause of action accrues at least eight years but less than ten years after initial delivery. If accrual occurs ten years to the day after the initial delivery, it would appear as though suit must be filed that day because the additional two-year period only applies if accrual occurs at any time less than ten years after initial delivery.

Recent case law confirms that there are at least two situations in which a manufacturer can be liable even beyond ten years after delivery to the initial user or consumer: (1) when the manufacturer supplies replacement parts for the product and the replacement parts are the cause of the plaintiffs’ injury; and (2) when the manufacturer rebuilds the product, such that the rebuild significantly extends the life of the product and thereby restores it to like-new condition.

The Indiana Supreme Court has recognized the utility and underlying policy justifications for the existence of a statute of repose and has reaffirmed that the wisdom of the policy underlying a product liability statute of repose is a question

200. 288 F.3d 954 (7th Cir. 2002).

201. *Id.* at 958.

202. *Id.* at 965.

203. *Id.* at 966 (quoting *Degussa*, 744 N.E.2d at 410).

204. *Id.* at 966-67.

205. IND. CODE § 34-20-3-1(b)(2) (1998).

206. *Id.* § 34-20-3-1(b).

for the legislature.²⁰⁷ Moreover, the Indiana Supreme Court in *McIntosh v. Melroe Co.*²⁰⁸ has held that application of the statute of repose does not violate article I, sections 12 or 23 of the Indiana Constitution.²⁰⁹

During the survey period, the Seventh Circuit recognized the existence and implications of *McIntosh*. In *Land v. Yamaha Motor Corp.*,²¹⁰ the estate of a man killed in an explosion while trying to start a WaveRunner sued the manufacturer. The WaveRunner involved was first sold or delivered to a consumer on July 28, 1987, more than ten years before the explosion, which occurred on June 25, 1998.²¹¹ After determining that Indiana law applied, the trial judge held that the IPLA's ten-year statute of repose barred the claim.²¹² In doing so, the trial judge rejected plaintiffs' attempt to circumvent the statute of repose by arguing that defendants breached duties to warn users of dangerous defects in the WaveRunner long after the original sale.²¹³ The Seventh Circuit affirmed, concluding that the statute of repose cannot be circumvented by claiming that the manufacturer continued its negligence after the initial sale by failing to warn customers of known dangers.²¹⁴ The Seventh Circuit also concluded that post-sale failure-to-warn claims merge with the underlying product liability claims that are barred, in their entirety, by the statute of repose.²¹⁵ In response to an argument that the statute of repose was unconstitutional, the Seventh Circuit noted that *McIntosh* already had conclusively addressed that issue.²¹⁶

In *Menchofer v. Honeywell, Inc.*,²¹⁷ the plaintiff's business facilities were destroyed in a fire that plaintiffs claimed was not timely detected by an alarm system purchased from and monitored by Honeywell.²¹⁸ Plaintiffs purchased the system from Honeywell in 1980.²¹⁹ The fire occurred in 1998. Accordingly, Honeywell moved for summary judgment, arguing that the IPLA statute of repose barred plaintiffs from maintaining a product liability action against it.²²⁰ Plaintiffs responded by arguing that their claims were based on Honeywell's ongoing monitoring, supervision, and maintenance of the alarm system.²²¹ Because those claims sound in negligence and because it was clear that the product was sold to its initial user more than ten years before the fire, Judge

207. *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 278 (Ind. 1999).

208. 729 N.E.2d 972 (Ind. 2000).

209. *Id.* at 973.

210. 272 F.3d 514 (7th Cir. 2001).

211. *Id.* at 515-56.

212. *Id.* at 517.

213. *Id.* at 518.

214. *Id.*

215. *Id.*

216. *Id.*

217. No. IP-99-1674-CB/S, 2002 U.S. Dist. LEXIS 260 (S.D. Ind. Jan. 7, 2002).

218. *Id.* at *4.

219. *Id.* at *1.

220. *Id.* at **5-6.

221. *Id.* at (6).

Barker granted summary judgment to Honeywell to the extent that plaintiffs were attempting to make a product liability claim.²²²

C. Statute of Repose in Asbestos Exposure Cases

Indiana Code section 34-20-3-2 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.”²²³ That exception regarding asbestos applies, however, “only to product liability actions against (1) persons who mined and sold commercial asbestos; and [to product liability actions against] 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.”²²⁴

The crux of the continuing controversy is the phrase, “[p]ersons who mined *and* sold commercial asbestos.”²²⁵ 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. There is also a debate about the intended meaning of the term “commercial asbestos.”

The survey period decision in *Harris v. ACandS, Inc.*²²⁶ joins at least seven other appellate opinions handed down in the last four years interpreting the asbestos statute of repose. Each of those cases involved damages allegedly caused by inhalation of dust after working with or around asbestos-containing products. In five of those cases, a majority of the appellate panels held that the Indiana Code section 34-20-3-2 exception to the IPLA repose period applies to entities that mined commercial asbestos, even if they did not sell it, and to entities that sold commercial asbestos, even if they did not mine it.²²⁷ In one of

222. *Id.*

223. IND. CODE 34-20-3-2(a) (1998).

224. *Id.* § 34-20-3-2(d).

225. *Id.* (emphasis added).

226. 766 N.E.2d 383 (Ind. Ct. App. 2002).

227. See *Black v. ACandS, Inc.*, 752 N.E.2d 148 (Ind. Ct. App. 2001); *Poirier v. A.P. Green Servs., Inc.*, 754 N.E.2d 1007 (Ind. Ct. App. 2001); *Fulk v. Allied Signal, Inc.*, 755 N.E.2d 1198 (Ind. Ct. App. 2001); *Parks v. A.P. Green Indus., Inc.*, 754 N.E.2d 1052 (Ind. Ct. App. 2001); *Allied Signal, Inc. v. Estate of Herring*, 757 N.E.2d 1030 (Ind. Ct. App. 2001).

Clearly, the intent of the legislature in enacting § 34-20-3-2 was at least in part to acknowledge the long latency period of asbestos-related injuries. Without the § 34-20-3-2 exception, the statute of limitations and statute of repose would be meaningless for the vast majority of people harmed by exposure to asbestos. Asbestos-related injuries would truly be a wrong without a remedy. Equally clear is that the legislature thus could not have intended by enacting § 34-20-3-2 to so severely limit the means of recovery.

Black, 752 N.E.2d at 154.

those cases, *Estate of Jurich v. Garlock, Inc.*²²⁸ the panel concluded that the defendants sold asbestos-containing products, not “commercial asbestos,” but nevertheless held that the defendants could not use the IPLA’s statute of repose to bar the claim because the statute violates article 1, section 12 of the Indiana Constitution. In another of these cases, *Sears Roebuck and Co. v. Noppert*,²²⁹ the panel concluded as a matter of law that the exception to the ten-year product 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.²³⁰

On November 20, 2001, the Indiana Supreme Court, in the case of *Allied Signal, Inc. v. Ott*,²³¹ granted emergency transfer of a direct appeal of an Allen Superior Court interlocutory order denying motions for summary judgment after finding, as did *Jurich*, that Indiana Code section 34-20-3-2 violates article I, sections 12 and 23 of the Indiana Constitution.²³² The Indiana Supreme Court heard oral argument in *Ott* on May 16, 2002.²³³

IV. THE STATE OF THE ART AND GOVERNMENTAL COMPLIANCE PRESUMPTION

The IPLA, by Indiana Code section 34-20-5-1, entitles a manufacturer or seller to a presumption that the product causing the physical harm is not defective and that the product’s manufacturer or seller is 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,

228. 759 N.E.2d 1066 (Ind. Ct. App. 2001).

229. 705 N.E.2d 1065 (Ind. Ct. App.), *trans. denied*, *Sears v. Noppert*, 726 N.E.2d 300 (Ind. 1999).

230. *Id.* at 1068. The court in *Noppert* made its decision in the context of whether the Nopperts had a meritorious claim in the context of a motion brought pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure. In doing so, the *Noppert* court concluded that, “while 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.” *Id.* (footnotes omitted).

231. Supreme Court Cause Number 02S04-0110-CV-599 (decision pending).

232. *Id.*

233. On March 25, 2003, the Indiana Supreme Court reversed the trial court in *Ott*, concluding that Indiana Code section 34-20-3-2 did not apply to entities which merely incorporated asbestos into finished products and did not mine and sell commercial asbestos. *See Allied Signal, Inc. v. Ott*, 785 N.E.2d 1068 (Ind. 2003), *reh’g denied*. Indiana Code section 34-20-3-1 withstood a facial challenge to its constitutionality under article 1, section 12 and article 1, section 23 of the Indiana Constitution. The supreme court remanded the case to determine if Indiana Code section 34-20-3-1 violates article 1, section 12 as applied to the Otts. The supreme court also reversed the Indiana Court of Appeals decisions discussed above. *See, e.g., Jurich v. Garlock*, 785 N.E.2d 1093 (Ind. 2003); *Allied Signal, Inc. v. Herring*, 785 N.E.2d 1090 (Ind. 2003); *Harris v. AC & S, Inc.*, 785 N.E.2d 1087 (Ind. 2003); *Black v. AC & S, Inc.*, 785 N.E.2d 1084 (Ind. 2003).

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.²³⁴

Recent case law demonstrates that the rebuttable presumptions established in Chapter 5 of the IPLA do not shift the burden of proof, but rather they impose upon the opposing party a burden of producing evidence sufficient to rebut the presumption.²³⁵ The quality of the evidence necessary to rebut the presumption remains something that trial judges should decide on a case-by-case basis as a matter of law.

The case of *McClain v. Chem-Lube Corp.*,²³⁶ discussed above in the context of warning defects, also involved passages addressing the presumption. Recall in that case that a welder sued the manufacturer and seller of anti-spatter compound, claiming injuries as a result of exposure to fumes and vapors associated with use of the compound.²³⁷ The trial court granted summary judgment because the manufacturer and seller designated evidence that the compound complied with OSHA standards for formaldehyde emission.²³⁸ The court of appeals reversed, concluding, in part, that: (1) the trial court failed to address whether there was sufficient evidence designated to rebut the "safety state of the art" presumption²³⁹ with respect to whether OSHA compliance is proof that the anti-spatter compound is not defective and that the defendants are not negligent; and (2) the plaintiff sufficiently rebutted the "governmental compliance" presumption because there was sufficient evidence designated to create a factual dispute with regard to whether the OSHA standard concerning formaldehyde emission had been met.²⁴⁰

In *Cansler v. Mills*,²⁴¹ the plaintiff's car rear-ended another car, which had veered into plaintiff's lane of traffic. The plaintiff was injured when his airbag failed to deploy.²⁴² The plaintiff testified that he was traveling at a speed of forty-five to fifty miles per hour when the accident occurred. Plaintiff's vehicle sustained significant front-end damage.²⁴³ The trial court granted summary judgment to the car's manufacturer, finding first that plaintiff's mechanic was not qualified to render an admissible opinion concerning the air bag's failure to

234. IND. CODE § 34-20-5-1 (1998).

235. See *Cansler v. Mills*, 765 N.E.2d 698 (Ind. Ct. App. 2002); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096 (Ind. Ct. App. 2001).

236. 759 N.E.2d 1096.

237. *Id.* at 1099.

238. *Id.* at 1100.

239. IND. CODE § 34-20-5-1(1) (1998).

240. *Id.* at 1102-03.

241. 765 N.E.2d 698 (Ind. Ct. App. 2002).

242. *Id.* at 701.

243. *Id.*

deploy.²⁴⁴ Because the mechanic's opinion was deemed inadmissible, the trial court determined that the plaintiff failed to rebut the presumption that the car was not defective by virtue of the manufacturer's compliance with a Federal Motor Vehicle Safety Standard.²⁴⁵

The Indiana Court of Appeals reversed, holding that the trial court abused its discretion in disregarding the mechanic's testimony and in determining that plaintiff had failed to rebut the presumption of non-defectiveness.²⁴⁶ With regard to the rebuttable presumption issue, the court first determined that the designated evidence established compliance with FMVSS 208, which entitled the manufacturer to a presumption that the airbag was not defective.²⁴⁷ However, the *Cansler* court held that the plaintiff designated evidence of a sufficient quality to rebut the presumption.²⁴⁸ The mechanic's skilled lay opinion about the extent of damage to the car and the plaintiff's testimony about speed at impact, combined with passages in the car's owner's manual concerning the circumstances under which the airbag should inflate (moderate to severe frontal or near-frontal crashes) was sufficient "circumstantial evidence" to support the inference that the airbag was defective because it did not deploy despite the presence of all the necessary elements outlined in the owner's manual.²⁴⁹ Accordingly, the court held that the presumption had been rebutted.²⁵⁰

V. DEFENSES

A. *Use With Knowledge of Danger (Incurred Risk)*

Indiana Code section 34-20-6-3 provides that "[i]t 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."²⁵¹ Incurred risk is a defense that "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."²⁵² At least one Indiana court has held in the summary judgment context that application of the incurred risk defense requires evidence without conflict from which "the sole inference to be drawn is that the plaintiff had actual knowledge of the specific risk and understood and appreciated that

244. *Id.*

245. *Id.*

246. *Id.* at 705.

247. *Id.*

248. *Id.* at 706.

249. *Id.* at 707.

250. *Id.*

251. IND. CODE § 34-20-6-3 (1998).

252. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999).

risk.”²⁵³ This survey article does not address in detail any incurred risk cases.²⁵⁴

B. Misuse

Indiana Code section 34-20-6-4 provides that “[i]t 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.”²⁵⁵ Knowledge of a product’s defect is not an essential element of establishing the misuse defense.

The facts necessary to prove the defense of “misuse” many times will be similar or identical to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers²⁵⁶ or the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable,²⁵⁷ or both. Thus, there are in Indiana at least three separate statutory standards that might bar liability when injury results from a set of circumstances related to use that is not reasonably expectable or foreseeable. *Burt v. Makita USA, Inc.*,²⁵⁸ illustrates how a set of facts can be analyzed to deny recovery using Indiana Code section 34-20-4-1(1), Indiana Code section 34-20-4-3, or Indiana Code section 34-20-6-4. Recall that the *Burt* case is the one in which the plaintiff was injured by a circular saw’s blade guard. The district court held that there was

no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly

253. *Id.* (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 940 (Ind. Ct. App. 1994)).

254. Indiana courts have decided some important incurred risk cases in the last few years. *See, e.g., Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396 (Ind. Ct. App. 1999) (finding no basis for the incurred risk defense under the facts of that case; plaintiff had no knowledge of the fact that the manufacturer had changed the design of the lift so as to eliminate pins that would have prevented rods from falling unexpectedly from the lift cups underneath the lift platform); *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999) (holding that because the plaintiffs did not adequately specify the basis of their claim, the court was unclear whether the defect in the fire truck was open and obvious or whether warnings were placed on the truck informing the passengers of the specific risk from which the Hoppers’ injuries resulted and the court was unable to determine the applicability of the incurred risk defense); *Cole v. Lantis Corp.*, 714 N.E.2d 194 (Ind. Ct. App. 1999) (finding that because plaintiff’s job necessarily entailed moving containers across gap between aircraft and aircraft loading equipment and his apparent belief that he had to somehow find a way to work around the known danger posed by the gap, the majority concluded that whether plaintiff voluntarily incurred the risk of falling through the gap is a fact question for the jury’s resolution).

255. IND. CODE § 34-20-6-4 (1998).

256. *Id.* § 34-20-4-1(1).

257. *Id.* § 34-20-4-3.

258. 212 F. Supp. 2d 893 (N.D. Ind. 2002).

attached. To the contrary, the evidence suggests that the accident was unforeseeable, caused by a very unusual set of factual circumstances.²⁵⁹

Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law.²⁶⁰ That being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met and the defense of "misuse" in Indiana Code section 34-20-6-4 had been established.²⁶¹

In addition to the several other product liability issues addressed in the opinion, the court in *Morgen v. Ford Motor Co.*,²⁶² dealt with a jury instruction about misuse. *Morgen* is a pre-IPLA case (accrual in 1993), in which Morgen was severely injured in a rear-end collision while riding in the rear seat of a Ford Escort.²⁶³ He sued Ford, claiming that the Escort was defective and that Ford failed to provide reasonable warnings.²⁶⁴ Morgen's experts claimed that the structural design of the car reduced occupant survival space or headroom.²⁶⁵ Ford argued that Morgen's injuries occurred because of his failure to wear a seatbelt, which Ford contended was a product misuse.²⁶⁶ The trial gave Ford's tendered jury instruction on misuse, after which the jury returned a general verdict for Ford.²⁶⁷ The Indiana Court of Appeals reversed, determining that a misuse instruction was improper because there is no common law or statutory duty for an occupant of a vehicle to wear a seat belt, because there is no statutory duty for a backseat passenger to wear a seat belt, and because it is foreseeable that automobile passengers may not wear seat belts.²⁶⁸

The Seventh Circuit's opinion in *Chapman v. Maytag Corp.*²⁶⁹ also must be considered in connection with the "misuse" defense. Recall that the parties in *Chapman* did not dispute that the stove involved had a manufacturing defect in that it contained a wire that had become pinched between a metal housing cover and the metal back of the stove during the assembly process.²⁷⁰ Maytag nevertheless argued that the stove was delivered with a host of warnings advising consumers that the failure to plug the range into a properly grounded three-hole receptacle in compliance with local rules and the NEC could result in a shock hazard.²⁷¹ The decedent had incorrectly installed the outlet into which the stove was plugged, which rendered that outlet devoid of a grounding wire, thus

259. *Id.* at 898.

260. *Id.* at 899.

261. *Id.* at 898.

262. *See supra* note 153.

263. *Id.* at 139.

264. *Id.*

265. *Id.* at 139-40.

266. *Id.* at 140.

267. *Id.*

268. *Id.* at 142.

269. 297 F.3d 682 (7th Cir. 2002).

270. *Id.* at 685.

271. *Id.* at 684-85.

contrary to the foregoing product warnings.²⁷² Maytag argued that plugging the stove into an inadequate outlet contrary to label warnings amounted to a misuse of the product that completely barred plaintiffs' action against it.²⁷³

The Seventh Circuit determined that the district court did not abuse its discretion in determining that any "misuse" of the product falls within the scope of the IPLA's definition of "fault."²⁷⁴ Because a jury is directed to compare all "fault" in a case, the district court did not abuse its discretion in determining that the IPLA requires "misuse" be part of the comparative fault analysis and not a complete defense.²⁷⁵

The Seventh Circuit also determined that the district court did not abuse its discretion in determining that the decedent's failure to heed Maytag's warnings, even if assumed adequate, would not constitute "misuse."²⁷⁶ The fundamental reason why the Seventh Circuit deferred to the district judge's discretion on this point appears to be the fact that the case involved a manufacturing defect and that failure to follow label warnings could not be considered a "misuse" in the presence of such a manufacturing defect.²⁷⁷ Indeed, the Seventh Circuit noted that Maytag cited in support of its position only Indiana cases that did not involve manufacturing defects.²⁷⁸

C. *Modification and Alteration*

Indiana Code section 34-20-6-5 provides that "[i]t 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 the physical harm where the modification or alteration is not reasonably expectable to the seller."²⁷⁹

Although this survey article does not address in detail any modification or alteration cases, practitioners should recognize that the alteration defense is also incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1.²⁸⁰ Indeed, Indiana Code section 34-20-2-1 provides that

a person who sells, leases, or otherwise puts in to 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

272. *Id.* at 685.

273. *Id.* at 688.

274. *Id.* at 689.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. IND. CODE § 34-20-6-5 (1998).

280. *Id.* § 34-20-2-1.

or consumer or to the user's or consumer's property if . . . (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.²⁸¹

Accordingly, if a claimant cannot establish the absence of a substantial alteration, or if a defendant conclusively proves that the product underwent some of *substantial alteration* between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief as a threshold matter.

D. Other Defenses

Although it does not directly address any provisions of the IPLA, Chief Judge McKinney's order in *Miller v. Honeywell International, Inc.*²⁸² affirms another defense available to product manufacturers in Indiana under certain limited circumstances. In *Miller*, the manufacturer of an oil debris detection system ("ODDS") incorporated into an Army helicopter that crashed at Camp Atterbury filed a motion for summary judgment based on the "military contractor defense" in a wrongful death action in which the plaintiffs asserted that the ODDS was defectively designed.²⁸³ The court applied the "military contractor defense" recognized by the United States Supreme Court in *Boyle v. United Technologies Corp.*²⁸⁴ Chief Judge McKinney granted summary judgment concluding that the manufacturer of the ODDS had established each of the three required elements of the military contractors defense: the United States Army approved reasonably precise specifications for the equipment; the equipment conformed to those specifications; and the contractor had warned the United States about any dangers known to the contractor but not to the United States.²⁸⁵

VI. COMPARATIVE FAULT AND NONPARTY ISSUES

The 1995 amendments to the IPLA changed Indiana law with respect to fault allocation and distribution in product liability cases. The Indiana General Assembly made it clear that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to Indiana Code section 34-20-8, nor can a defendant be held jointly liable for damages attributable to the fault of another defendant.²⁸⁶

The IPLA now requires the trier of fact to compare the fault of the person suffering the physical harm, as well as the fault of all others whom caused or

281. *Id.*

282. 2002 U.S. Dist. LEXIS 20474 (S.D. Ind. Sept. 30, 2002).

283. *Id.* at **2-4.

284. 487 U.S. 500, 503-06 (1988).

285. *Miller*, 2002 U.S. Dist. LEXIS 20474, at **71-72. The ODDS had been subjected to over five years of scrutiny and testing by U.S. Army engineers who made discretionary decisions as to all three alleged design defects based on their own tests. *See id.* at **49-52.

286. IND. CODE § 34-20-7-1 (1998).

contributed to cause the harm.²⁸⁷ The statute requires that the trier of fact compare such fault “in accordance with” Indiana Code sections 34-51-2-7 to -9.²⁸⁸ 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.²⁸⁹

A. *Are the Defenses “Complete”?*

Incurred risk, misuse, and alteration/modification all were “complete” defenses to IPLA claims before the 1995 amendments because they served to relieve a defendant of liability, if the defendant was able to plead and prove any one of them.²⁹⁰ In light of the introduction of fault allocation principles into product liability cases in Indiana in 1995, there appears to be some question about whether the statutory defenses remain complete defenses or whether they are simply arguments that affect the level or percentage of fault to be placed upon a particular claimant.

That the alteration or modification defense is “complete” may be the least controversial because the alteration defense is incorporated directly into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1.²⁹¹ Indeed, Indiana Code section 34-20-2-1 provides that

a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous . . . is subject to liability for physical harm caused by that product . . . if . . . (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.²⁹²

Accordingly, the “alteration” defense is “complete” by the very statute that imposes product liability in Indiana as a threshold matter. If a claimant cannot establish that the product was not substantially altered or if a defendant conclusively proves that the product underwent some of “substantial alteration” between the time of manufacture or sale and the time the injury occurred, the IPLA simply does not provide any relief.

287. *Id.* § 34-20-8-1(a).

288. *Id.* §§ 34-51-2-7 to -9.

289. *Id.* § 34-20-8-1(b).

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

291. IND. CODE § 34-20-2 (1998).

292. *Id.*

Incurred risk may remain a complete defense, although that question seems to be the most intriguing. The Indiana General Assembly amended what is now Indiana Code section 34-20-6-3(3) to eliminate the word "unreasonably" from the phrase that previously read "nevertheless proceeded 'unreasonably' to make use of the product."²⁹³ The language used is significant because it lends support for the proposition that incurred risk is not subject to fault apportionment.²⁹⁴ In addition, the definition of "fault" for purposes of Indiana's Comparative Fault Act²⁹⁵ includes "incurred risk," whereas the definition of "fault" for purposes of the IPLA does not.²⁹⁶ The IPLA "fault" definition does, however, include the "[u]nreasonable failure to avoid an injury or to mitigate damages."²⁹⁷ Whether that language, in effect, means the same thing as "incurred risk" seems to be an open question.

At least one Indiana appellate decision seems to provide support for the proposition that incurred risk remains a complete defense in Indiana. In *Hopper v. Carey*,²⁹⁸ the Indiana Court of Appeals recognized that IPLA claims are subject to specifically enumerated defenses, including the "incurred risk"²⁹⁹ defense. The *Hopper* court pointed out that "even if a product is sold in a defective condition unreasonably dangerous, recovery will be denied an injured plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily [incurred] the risk."³⁰⁰ 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.

There is a conflict between two recent Indiana Court of Appeals panels and one federal decision with respect to whether "misuse" is a complete defense. The two cases that have held the defense of misuse under the IPLA to be a

293. *Id.* § 34-20-6-3(3) (formerly IND. CODE § 33-1-1.5-4(b)(1) (repealed 1998)).

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

295. IND. CODE § 34-51-2 (1998).

296. Compare *id.* § 34-6-2-45(a), with *id.* § 34-6-2-45(b). Unlike the definition used for cases governed by the Comparative Fault Act, the IPLA "fault" definition 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). 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 "[u]nreasonable failure to avoid an injury or to mitigate damages" and "[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." *Id.* § 34-6-2-45(a).

297. See *id.*

298. 716 N.E.2d 566 (Ind. Ct. App. 1999).

299. *Id.* at 570.

300. *Id.* at 576 (quoting *Koske v. Townsend Engineering Co.*, 551 N.E.2d 437, 441 (Ind. 1990)).

“complete” defense are *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*³⁰¹ and *Morgen v. Ford Motor Co.*³⁰² Indiana courts view the “misuse” defense as “complete” because the existence of facts giving rise to the defense amount to an unforeseeable intervening cause that relieves the manufacturer of liability as a matter of law.³⁰³ The federal decision, *Chapman v. Maytag Corp.*³⁰⁴ held that the district judge did not abuse his discretion in determining that any “misuse” of a product falls within the scope of the IPLA’s definition of “fault.”³⁰⁵ Because a jury is directed to compare all “fault” in a case, the district court did not abuse his discretion in determining that the IPLA requires “misuse” be part of the comparative fault analysis and not a complete defense.³⁰⁶

The debate is interesting. To be sure, the statutory definition of “misuse” seems to consider only the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser’s conduct. That would tend to explicitly demonstrate that “misuse” is not “fault.” The district judge in *Chapman* recognized as much. As the district judge also recognized, however, it is also true that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement and a plaintiff’s misuse arguably falls within Indiana Code section 34-6-2-45(a)’s definition of “fault.”³⁰⁷ However, that the General Assembly may not have overtly indicated 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 equally as likely that the legislature’s silence on the matter would indicate 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.

B. Non-Party Practice

Recent case law holds that Indiana Code section 34-51-2-16 governs the amendment of a pleading to assert a nonparty defense in a product liability case.³⁰⁸ Parties must plead the nonparty defense with “reasonable promptness.”³⁰⁹ In *McClain v. Chem-Lube Corp.*,³¹⁰ a welder sued the manufacturer and seller of an anti-spatter compound, claiming injuries as a result of exposure to fumes and vapors associated with use of the compound. Among

301. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

302. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *reh’g denied* 2002 Ind. App. LEXIS 791 (Ind. Ct. App. Apr. 22, 2002), *trans. granted, opinion vacated by* 2002 Ind. LEXIS 852 (Ind. Nov. 1, 2002).

303. *Id.*

304. 297 F.3d 682 (7th Cir. 2002).

305. *Id.* at 689.

306. *Id.*

307. IND. CODE § 34-6-2-45(a) (1998).

308. *Id.* § 34-51-2-16.

309. *Id.*

310. 759 N.E.2d 1096 (Ind. Ct. App. 2001).

the many issues in that case was one that involved the nonparty defense.³¹¹ The manufacturer named the welder's employer as a non-party by way of a motion to amend pleadings six months after the expiration of the statute of limitations.³¹² The *McClain* court concluded that the manufacturer defendant had ample opportunity before the expiration of the limitations period to name the employer as a nonparty, and that its failure to do so resulted in the manufacturer's inability to assert a nonparty defense against the employer.³¹³ Thus, the *McClain* court held that the trial court abused its discretion in allowing the manufacturer to amend the pleadings.

In *Bondex v. Ott*,³¹⁴ four defendant product manufacturers appealed an interlocutory order by the trial court that precluded them from naming several bankrupt entities as nonparties.³¹⁵ The trial court had concluded that allowing the defendants to name bankrupt entities as nonparties would be a violation of the automatic stay provision of the Bankruptcy Code found at 11 U.S.C. § 362.³¹⁶ The Indiana Court of Appeals reversed holding that an allocation of fault to a nonparty through the comparative fault provision of the IPLA was not an imposition of liability against the nonparty.³¹⁷ The appellate court reached its conclusion by applying the language of Indiana Code section 34-51-2-8 which makes clear that a jury may assess a judgment for damages against only defendants, not against non-parties.³¹⁸

CONCLUSION

The 2002 survey period was yet another one in which Indiana practitioners challenged each other and Indiana courts to define and refine Indiana product liability law in light of the 1995 amendments to the IPLA. The professional integrity, spirit, and scholarship exhibited as part of that process makes us all proud to be advocates.

311. *Id.* at 1104-06.

312. *Id.* at 1104-05.

313. *Id.* at 1106.

314. 774 N.E.2d 82 (Ind. Ct. App. 2002).

315. *Id.* at 83.

316. *Id.* at 84.

317. *Id.* at 87.

318. *Id.* at 86.