

# SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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## INTRODUCTION

In the eleven years since the Indiana General Assembly amended the Indiana Product Liability Act (“IPLA”)<sup>1</sup> in 1995, Indiana judges and product liability practitioners have made significant strides in refining and defining its scope and meaning. The 2005 survey period<sup>2</sup> brought continued activity by the Indiana Court of Appeals with respect to a variety of product liability issues. The Seventh Circuit Court of Appeals and the United States District Court for the Southern District of Indiana issued a surprising number of substantively important product liability federal decisions.

This survey does not attempt to address in detail all of the cases decided during the survey period that might be interesting to Indiana product liability practitioners.<sup>3</sup> Rather, it examines selected cases that address important product

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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 IPLA.

2. The survey period is October 1, 2004, to September 30, 2005.

3. There were many cases decided during the survey period that simply cannot be treated in detail here because of space constraints even though they may be interesting to Indiana product liability practitioners. Two such cases involve issues of federal preemption. In *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), the United States Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) does not expressly preempt state law-based claims for defective design, defective manufacture, negligent testing, and breach of express warranty. *Id.* at 443. FIFRA does not expressly preempt state law-based failure-to-warn and fraud claims if they are found to be equivalent or parallel to FIFRA’s labeling requirements covering “misbranding.” *Id.* at 447. In another interesting preemption case, *McMullen v. Medtronic, Inc.*, 421 F.3d 482 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1464 (2006), the Seventh Circuit affirmed a Southern District of Indiana decision that the federal requirements imposed by the Food and Drug Administration pursuant to the Medical Device Amendments to the Federal Food, Drug and Cosmetic Act preempted plaintiff’s common law claims against a device manufacturer for post-sale failure to warn. *Id.* at 490.

liability issues. This survey also provides some background information, context, and commentary where appropriate.

### 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 it to apply only to strict liability actions.<sup>4</sup> In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.<sup>5</sup>

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.<sup>6</sup> 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 IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, "regardless of the substantive legal theory or theories upon which the action is brought."<sup>7</sup> When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant whom is a user or consumer and is also "in the class of persons that the seller should reasonably foresee as being subject to the harm caused";<sup>8</sup> (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";<sup>9</sup> (3) "physical harm caused

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In addition, because product liability cases often turn on the admissibility, credibility, and persuasiveness of opinion witnesses, *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at \*1 (S.D. Ind. Mar. 24, 2005) and *Norfolk S. Ry. Co. v. Estate of Wagers*, 833 N.E.2d 93 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006), are also cases in which product liability practitioners will be interested. In *Henderson*, a case involving an injured diesel truck mechanic, the court held that opinion witness testimony about components of the truck, the truck itself, and the circumstances of plaintiffs' injuries was relevant, and that the offered testimony was admissible despite lack of peer review and specific scientific validation. *See* 2005 U.S. Dist. LEXIS 5832, at \*30-53. In *Estate of Wagers*, a case involving alleged exposure to asbestos and diesel fumes, the court affirmed the trial court's denial of a motion to exclude plaintiffs' opinion witness. 833 N.E.2d at 38.

4. Act of Apr. 21, 1983, 1983 Ind. Acts 297.

5. Act of Apr. 26, 1995, 1995 Ind. Acts 278; *see* *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

6. The current version of the IPLA is found in Indiana Code sections 34-20-1-1 to -9-1.

7. IND. CODE § 34-20-1-1 (2005).

8. Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." Indiana Code section 34-20-2-1(1) requires that IPLA claimants be in the "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."

9. Indiana Code section 34-20-1-1(a) identifies proper IPLA defendants as "manufacturers"

by a product”;<sup>10</sup> (4) a product that is in a defective condition unreasonably dangerous to a user or consumer or to his property;<sup>11</sup> and (5) a product that reached the user or consumer without substantial alteration in its condition.<sup>12</sup> Indiana Code section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements, “regardless of the substantive legal theory or theories upon which the action is brought.”<sup>13</sup>

A. “. . . brought by a user or consumer . . .”

The language the General Assembly employs in the IPLA is very important when it comes to who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.” For purposes of the IPLA, “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

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or “sellers.” Indiana Code section 34-20-2-1(2) provides the additional requirement that such a manufacturer or seller also be “engaged in the business of selling the product,” effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability.

10. IND. CODE § 34-20-1-1(3) (requiring “physical harm caused by a product”).

11. *Id.* § 34-20-2-1 (2005) (requiring that the product at issue be “in a defective condition unreasonably dangerous to any user or consumer or . . . to his property”).

12. *Id.* § 34-20-2-1(3) (requiring that the product at issue “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”). Indiana Pattern Jury Instruction 7.03 sets out a plaintiff’s burden of proof in a product liability action. It requires a plaintiff to prove each of the following propositions by a preponderance of the evidence:

- (1) the defendant was a manufacturer of the product (or part of the product) alleged to be defective and was in the business of selling the product;
- (2) the defendant sold, leased, or otherwise put the product into the stream of commerce;
- (3) the plaintiff was a user or consumer of the product;
- (4) the product was in a defective condition unreasonably dangerous to users or consumers (or to user’s or consumer’s property);
- (5) the plaintiff is in a class of persons the defendant should reasonably have foreseen as being subject to the harm caused by the defective condition;
- (6) the product was expected to and did reach the plaintiff without substantial alteration of the condition in which the defendant sold the product;
- (7) the plaintiff or the plaintiff’s property was physically harmed; and
- (8) the product was a proximate cause of the physical harm to the plaintiff or the plaintiff’s property.

13. *Id.* § 34-20-1-1.

expected use.”<sup>14</sup>

“User” has the same meaning as “consumer.”<sup>15</sup> Several published decisions in recent years construe the statutory definitions of “user” and “consumer.”<sup>16</sup>

A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined “user” or “consumer,” he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the “user” or “consumer” also be “in the class of persons that the seller should reasonably foresee as being subject to harm caused by the defective condition.”<sup>17</sup> Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken.<sup>18</sup> In that regard, the IPLA

14. *Id.* § 34-6-2-29.

15. *Id.* § 34-6-2-147.

16. *See* *Butler v. City of Peru*, 733 N.E.2d 912 (Ind. 2000) (mentioning that a maintenance worker could be considered a “user or consumer” of an 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 (Ind. 1999) (holding that a “user or consumer” includes a distributor who uses the product extensively for demonstration purposes). For a more detailed analysis of *Butler*, see Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001). For a more detailed analysis of *Estate of Shebel*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-36 (2000).

17. 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 . . . 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.”

18. It is important to recognize the distinction between the “reasonable foreseeability” test employed pursuant to Indiana Code section 34-20-2-1(1) and the separate “reasonableness” components of Indiana Code sections 34-20-4-1, -3, and -4. Indiana Code section 34-20-4-1 provides that 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 . . . not contemplated by reasonable persons among those considered expected users or consumers of the product.” 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].” Indiana Code section 34-20-4-4 incorporates the same premise: “[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.”

Indiana Code section 34-20-4-1 employs a “reasonableness” test to measure the condition of the product relative to its risks among persons already *considered expected users or consumers*. Similarly, Indiana Code sections 34-20-4-3 and -4 employ a “reasonableness” test to determine whether the product is handled and consumed in expectable ways. These analyses should be

does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product's defective condition if that claimant falls outside of the IPLA's definition of "user" or "consumer."

On February 7, 2006, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (West Virginia)*,<sup>19</sup> further defining and narrowing who qualifies as a "user" or "consumer" for purposes of bringing an action under the IPLA. Although the court decided *Vaughn* outside the 2005 survey period and presumably will be addressed in more detail in next year's survey article, practitioners should be aware of the decision. Briefly, the facts are as follows: Daniels Company designed and built a coal preparation plant at a facility owned by Solar Sources, Inc.<sup>20</sup> Part of the design involved the installation of a heavy media coal sump.<sup>21</sup> An out-of-state steel company manufactured the sump that Daniels designed and sent it, unassembled, to the facility.<sup>22</sup>

Stephen Vaughn worked for the construction company that Daniels hired to install the sump.<sup>23</sup> During the installation process, Vaughn climbed onto the top of the sump to help connect a pipe. The chain he was using to secure the pipe in place gave way, causing Vaughn to fall and sustain injuries.<sup>24</sup> Vaughn did not wear his safety belt when he climbed onto the sump.<sup>25</sup>

Vaughn and his wife sued Daniels, alleging, among other things, "negligent design, manufacturing, and maintenance of the sump and the processing plant," as well as a "strict liability" claim. The trial court granted summary judgment to Daniels, concluding that Daniels owed no duty of care to Vaughn and that Vaughn was not a "user" or "consumer" under the IPLA. The court of appeals affirmed summary judgment for Daniels on the negligence claim, but reversed on the product liability claim based upon an expansive view of the terms "user" and "consumer."<sup>26</sup>

The Indiana Supreme Court held that Daniels could not be liable under the IPLA because Vaughn was not a "user" or "consumer." The court also concluded that Daniels could be liable, however, under a separate common law theory of recovery. With regard to the IPLA claim, Vaughn could not be considered either a purchaser of the sump or a person "acting for or on behalf of

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separate and distinct from an examination that employs "reasonableness" as a guidepost for a user's or consumer's foreseeability as a potential IPLA plaintiff.

19. 841 N.E.2d 1133 (Ind. 2006).

20. *Id.* at 1136.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh'g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003), *vacated*, 841 N.E.2d 1133 (Ind.), *reh'g denied* (Ind. 2006). For a more detailed analysis of the court of appeals's decision in *Vaughn*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Indiana Product Liability Law*, 37 IND. L. REV. 1247, 1250-57 (2004).

the injured party.”<sup>27</sup> Although the *Vaughn* court recognized that “use” of a product might include “installation or assembly” if the manufacturer intends the product “to be delivered to the ultimate purchaser in an unassembled state[,]” such was not the case here because Solar ordered an “assembled and installed product.”<sup>28</sup> Because the “product” was not assembled and installed at the time of Vaughn’s accident, “neither Vaughn nor anyone else was a user of the product at the time it was still in the process of assembly and installation.”<sup>29</sup>

Vaughn did not have a product liability claim for negligent design of the sump because he was not a “user” or “consumer.” Practitioners should recognize, however, that the *Vaughn* court addresses his theoretical product liability claim against Daniels as if it were a strict liability claim.<sup>30</sup> The court’s opinion, as a result, has the potential to confuse those who seek to interpret it consistent with the IPLA’s requirements. Vaughn’s alleged design defect claim, if it existed, would not have been a “strict liability” claim because the IPLA requires him to prove, among other things, that Daniels “failed to exercise reasonable care under the circumstances in designing the product.”<sup>31</sup>

Practitioners also should consider in its proper context the common law negligence claim the Indiana Supreme Court allowed to proceed against Daniels. Vaughn argued, among other things, that Daniels was “negligent” in its design and manufacture of a “defective coal sump constituting a latent danger in the use of the product.” The *Vaughn* court’s holding makes it clear that such allegations are not product liability claims.<sup>32</sup> Rather, the claims that survive against Daniels allege common law negligence for failing to “design” (i.e., provide) sufficient safety devices to protect workers during installation of the sump within the context of the larger plant.

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

For purposes of the IPLA, “[m]anufacturer” . . . 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.”<sup>33</sup> “Seller” . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.”<sup>34</sup> Indiana Code section 34-20-2-1(2) employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless the “seller is

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27. *Vaughn*, 841 N.E.2d at 1139.

28. *Id.*

29. *Id.*

30. *Id.* at 1138-43.

31. IND. CODE § 34-20-2-2 (2005); *see, e.g.*, *Burt v. Makita USA, Inc.*, 212 F. Supp.2d 893, 899-900.

32. *Vaughn*, 841 N.E.2d at 1144.

33. IND. CODE § 34-6-2-77 (2005).

34. *Id.* § 34-6-2-136.

engaged in the business of selling the product.”<sup>35</sup>

Sellers can be held liable as manufacturers in two ways. First, if the seller fits within Indiana Code section 34-6-2-77(a)'s definition of “manufacturer,” which 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) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the manufacturer.<sup>36</sup>

Second, a seller can be deemed a statutory “manufacturer” and, therefore, be held liable to the same extent as a manufacturer, in one other limited circumstance. Indiana Code section 34-20-2-4 provides that a seller may be deemed a “manufacturer” if the court “is unable to hold jurisdiction over a particular manufacturer” and if the seller is the “manufacturer's principal distributor or seller.”<sup>37</sup>

There is one other important provision about which practitioners must be aware when it comes to liability of “sellers” under the IPLA. When the theory of liability is based on “strict liability in tort,”<sup>38</sup> Indiana Code section 34-20-2-3

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35. *Id.* § 34-20-2-1(2); *see, e.g.*, *Williams v. REP Corp.*, 302 F.3d 660 (7th Cir. 2002) (recognizing that Indiana Code § 33-1-1.5-2(3), the predecessor to Indiana Code § 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”); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730 (N.D. Ind. 2002) (holding that although the defendant provided some technical guidance or advice relative to ponds at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem it a “manufacturer” of the plant); *see also* Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1170-72 (2003).

36. IND. CODE § 34-6-2-77(a) (2005).

37. *Id.* § 34-20-2-4. *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind.), *reh'g denied* (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressing the circumstances under which entities may be considered “manufacturers” or “sellers” under the IPLA. *See also* *Goines v. Federal Express Corp.*, No. 99-cv-4307-JPG, 2002 U.S. Dist. LEXIS 5070, at \*14-15 (S.D. Ill. Jan. 8, 2002). The court, applying Indiana law, examined the “unable to hold jurisdiction over” requirement of Indiana Code section 34-20-2-4. *Id.* at \*9. The plaintiff assumed that “jurisdiction” refers to the power of the court to hear a particular case. The defendant argued that the phrase equates to “personal jurisdiction.” The court refused to resolve the issue, deciding instead to simply deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Id.* at \*14-15.

38. The phrase “strict liability in tort,” to the extent that the phrase is intended to mean

provides that an entity that is merely a “seller” and cannot be deemed a “manufacturer” is not liable, and is not a proper IPLA defendant.<sup>39</sup>

C. “. . . for physical harm caused by a product. . .”

For purposes 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.”<sup>40</sup> It does not include “gradually evolving damage to property or economic losses from such damage.”<sup>41</sup>

For purposes of the IPLA, “product” means “any item or good that is

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“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 provides that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard, not a “strict liability” standard.

39. IND. CODE § 34-20-2-3- (2005). In *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), the 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. *Id.* at 725-26. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels) and because Glidden did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* 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.” *Id.* at 725 (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. Indiana Code section 34-20-2-2 makes it clear that “liability without regard to the exercise of reasonable care” (strict liability) applies now only to product liability claims alleging a manufacturing defect theory. Claims alleging design or warning defect theories are controlled by a negligence standard. *See, e.g.*, *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002); *see also* *Alberts & Boyers, supra* note 35, at 1173-75.

40. IND. CODE § 34-6-2-105(a) (2005).

41. *Id.* § 34-6-2-105(b); *see, e.g.*, *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 493 (Ind. 2001) (holding that “personal injury and property damage to other property from a defective product are actionable under the IPLA, but their presence does not create a claim for damage to the product itself”); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 486 (Ind. 2001) (holding that there is no recovery under the IPLA where a claim is based on damage to the defective product itself); *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (denying a motion to dismiss a case a motion to dismiss in a case determining that Indiana recognizes that pregnancy may be considered a “harm” in certain circumstances); *see also* *Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc.*, No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830, at \*2 (S.D. Ind. Apr. 29, 2002) (holding that there was no recovery under the IPLA in a case involving a motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).



personalty at the time it is conveyed by the seller to another party.”<sup>42</sup> The term does not apply to a “transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”<sup>43</sup>

*D. “. . . a product in a defective condition unreasonably dangerous. . .”*

Only products that are in a “defective condition” are ones for which IPLA liability may attach.<sup>44</sup> 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 or consumption.<sup>45</sup>

42. IND. CODE § 34-6-2-114(a).

43. *Id.* § 34-6-2-105(b). The most recent significant case in this area is *Baker v. Heye-America*, 799 N.E.2d 1135 (Ind. Ct. App. 2003), in which the court held that a worker injured by a bottle-making machine could recover under the IPLA as the “user” of a “product.” *Id.* at 1141. In support of its conclusion that the bottle-making machine was, in fact, a product for IPLA purposes, the court reasoned that the process undertaken when it was rebuilt was “a substantial and complicated one that resulted in a complex new machine that was significantly different from its parts.” *Id.* at 1141. According to the *Baker* court, “Heye-America did more than simply provide the service of restoring [the machine] from a damaged condition . . . [t]hrough an interactive process with [Baker’s employer], Heye-America designed and produced a custom product that it placed in the stream of commerce.” *Id.*

*See also* *R.R. Donnelley & Sons Co. v. N. Tex. Steel Co.*, 752 N.E.2d 112, 121-22 (Ind. Ct. App. 2001) (holding that a 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); *Marsh v. Dixon*, 707 N.E.2d 998, 1001-02 (Ind. Ct. App. 1999) (holding that 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, 1085-86 (Ind. Ct. App. 1998) (holding that defendant provided products and not merely services because it transformed metal block into “new” products and because it repaired damaged products, both of which created “new,” substantially different work product); *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at \*7-8 (S.D. Ind. Dec. 19, 2000) (holding that installation of a custom-fit electrical system into a hog barn involved wholly or predominately the sale of a service rather than a product); *Buddy Gregg*, 2002 U.S. Dist. LEXIS 7830, at \*15 (holding that plaintiff could not pursue a negligent inspection claim separate and apart from the IPLA because no reasonable jury could determine that the allegedly negligent inspection occurred as part of a transaction for “services” that was separate from the purchase of a motor home).

44. IND. CODE § 34-20-2-1(1).

45. *Id.* § 34-20-4-1.

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.<sup>46</sup>

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect in its design (a “design defect”); (2) the product lacks adequate or appropriate warnings (a “warnings defect”); or (3) the product has a defect that is the result of a malfunction or impurity in the manufacturing process (a “manufacturing defect”).<sup>47</sup>

Although claimants are free to assert any of those three theories for proving that a product is in a “defective condition,” the IPLA provides explicit statutory guidelines identifying when products, as a matter of law, are 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].”<sup>48</sup> In addition,

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46. See *Baker*, 799 N.E.2d at 1140 (“[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous.” (citing *Cole v. Lantis Corp.*, 714 N.E.2d 194, 198 (Ind. Ct. App. 1999))).

47. See *First Nat’l Bank & Trust Cop. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 (7th Cir. 2004); *Baker*, 799 N.E.2d at 1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997).

48. IND. CODE § 34-20-4-3 (2005). One recent case discussing “reasonably expectable use” is an unpublished federal decision in *Hunt v. Unknown Chemical Manufacturer No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at \*1 (S.D. Ind. Nov. 5, 2003). There, Gary Hunt purchased lumber treated with chromium copper arsenate (“CCA”) from Furrow Building Materials. *Id.* at \*3. The chemical treatment waterproofs lumber and protects it from damage from wood-boring insects. *Id.* at \*2-3. Hunt used the wood primarily to construct a deck around a swimming pool. *Id.* at \*4. He then sold the home to the plaintiffs, who tore down the deck, burned the wood in the backyard, and spread the ashes as fertilizer in the family garden. *Id.* at \*3-4. Plaintiffs filed suit after learning “about the dangers resulting from exposure to CCA-treated wood.” *Id.* at \*4.

Judge McKinney cited Indiana Code section 34-20-4-3 for the proposition that manufacturers (as defined by the IPLA) can only be held liable for injury or damage caused by a product’s reasonably expectable use. *Id.* at \*27-28. He also recognized that Indiana cases such as *Wingett v. Teledyne Industries, Inc.*, 479 N.E.2d 51 (Ind. 1985), contemplate that some activities or actions relative to a product (demolition of ductwork in that case) are simply not foreseeable as a matter of law and, accordingly, are not “intended” or expected uses of the product. *Id.* at \*28-29. Applying Indiana law to the facts before him, Judge McKinney recognized that the “intended use of the treated wood that . . . Hunt bought from Furrow was the construction of decks and other structures.” *Id.* at \*31. He did “use the wood to construct and repair a swimming pool deck.” *Id.* at \*32. That use was not, however, the basis of plaintiffs’ claim. Rather, the claims stemmed from the burning of the treated wood at issue. *Id.* Accordingly, Judge McKinney concluded that “[p]laintiffs’ destruction of the wood and their post-destruction use of the wood ashes as ‘fertilizer’ for the yard were not reasonably foreseeable uses of the product.” *Id.*

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.”<sup>49</sup>

In addition to the two specific statutory pronouncements identifying when a product is not “defective” as a matter of law, Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of the IPLA. A product is “unreasonably dangerous” only if its use “exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary user or consumer who purchases [it] with ordinary knowledge about the product’s characteristics common to consumers in the community.”<sup>50</sup> A product is not unreasonably dangerous as a matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.<sup>51</sup>

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49. IND. CODE § 34-20-4-4.

50. *Id.* § 34-6-2-146; *see also Baker*, 799 N.E.2d at 1140; *Cole*, 714 N.E.2d at 199. In *Baker*, a panel of the Indiana Court of Appeals wrote that “[t]he question whether a product is unreasonably dangerous is *usually* a question of fact that must be resolved by the jury.” 799 N.E.2d at 1140 (emphasis added). Another panel wrote the same thing in *Vaughn v. Daniels Co.*, 777 N.E.2d 1128 (Ind. Ct. App. 2002) (citing *Cole*, 714 N.E.2d at 200). Those panels also seem to favor jury resolution in determining reasonably expected use. Indeed, the *Baker* opinion states that “reasonably expectable use, like reasonable care, involves questions concerning the ordinary prudent person, or in the case of products liability, the ordinary prudent consumer. The manner of use required to establish ‘reasonably expectable use’ under the circumstances of each case is a matter peculiarly within the province of the jury.” 799 N.E.2d at 1140 (citing *Vaughn*, 777 N.E.2d at 1128).

It would be incorrect, however, to conclude from those pronouncements that there exists something akin to a presumption that juries always *should* resolve whether a product is unreasonably dangerous or whether a use is reasonably expectable. Indeed, recent cases have resolved the defective and unreasonably dangerous issue as a matter of law in a design defect context even in the presence of divergent expert testimony. In *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002), the plaintiff 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 in the installed position. With respect to the defective design claims, plaintiff’s expert opined that the saw was defective and unreasonably dangerous by its design, suggesting 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. *Id.* at 900. The court rejected the claim, holding that the plaintiff and his expert had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.* *See also Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at \*1-4 (S.D. Ind. Oct. 15, 2002) (holding that Honeywell’s design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time the specifications were introduced into the stream of commerce).

51. *See Baker*, 799 N.E.2d at 1140; *see also Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (writing that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability). An open and obvious danger negates liability. “To be unreasonably dangerous, a defective condition must be hidden or concealed [and]

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a “defective condition,” recent decisions have quite clearly recognized that the substantive defect analysis (i.e., whether a design was inappropriate or whether a warning was inadequate) should *follow* a threshold analysis that first examines whether, in fact, the product at issue is “unreasonably dangerous.” Indeed, in two separate cases decided during the survey period, *Bourne v. Marty Gilman, Inc.*,<sup>52</sup> (involving an alleged design defect) and *Conley v. Lift-All Co.*,<sup>53</sup> (involving an alleged warnings defect), Judge Hamilton followed that precise approach.

The ILPA provides that liability attaches for placing in the stream of commerce a product in a “defective condition”<sup>54</sup> 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.”<sup>55</sup> What Indiana Code section 34-20-2-1 bestows, however, in terms of liability despite the exercise of “all reasonable care [i.e., fault],” section 34-20-2-2 then removes for two of the three operative theories used to show a defect. It eliminates the privity requirement between buyer and seller for imposition of liability and also confirms that a manufacturer’s or seller’s exercise of reasonable care eliminates liability in cases in which the theory of liability is based on a design warning defect:

[I]n 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.<sup>56</sup>

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evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff’s prima facie case that the defect was hidden.” *Hughes v. Battenfeld Gloucester Eng’g Co.*, No. TH 01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at \*7-8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 199). In *Hughes*, the plaintiff injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station. Plaintiff admitted that he knew about the dangers associated with using the nip station because he observed co-workers who were injured performing similar tasks. *Id.* at \*4. Plaintiff testified that he was aware of the alleged defect that caused his accident, and on two previous occasions he had filed written suggestions with his employer requesting that it reduce the risk of injury involved. *Id.* at \*3-4. Judge Tinder held that the dangerous condition of the nip station was open and obvious as a matter of law and entered summary judgment. *Id.* at \*17.

52. No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at \*1 (S.D. Ind. July 20, 2005).

53. No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at \*1 (S.D. Ind. July 25, 2005).

54. IND. CODE § 34-20-2-1(1) (2004).

55. *Id.* § 34-20-2-2.

56. *Id.*

Indiana practitioners and judges routinely have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the “exercise of all reasonable care”) for manufacturing defect cases.<sup>57</sup> Thus, just as in any other negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements—duty, breach, injury, and causation.<sup>58</sup>

Many courts have recognized that the post-1995 IPLA imposes a negligence standard in design and warnings cases, while retaining strict liability (liability despite the “exercise of all reasonable care”) for manufacturing defect cases.<sup>59</sup> Even though Indiana is now ten years removed from the 1995 amendments to the IPLA, some courts and practitioners continue to use erroneous language implying that “strict liability” and/or “liability without regard to reasonable care” still applies to cases in which the operative theory of liability is based upon inadequate warnings or improper design.<sup>60</sup>

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57. See *Mesman v. Crane Pro Servs., Inc., a Div. of Konecranes*, 409 F.3d 846, 849 (7th Cir.) (“Under Indiana’s products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design.”), *reh’g and reh’g en banc denied* (7th Cir. 2005); *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 691 n.7 (7th Cir. 2004); *Conley*, 2005 U.S. Dist. LEXIS 15468, at \*12-13 (“The IPLA effectively supplants the plaintiff’s common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff’s common law claims will therefore be treated as merged into the IPLA claims.”); *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*9 n.2 (“[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence.”); *Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

58. *E.g.*, *Conley*, 2005 U.S. Dist. LEXIS 15468, at \*13-14 (“To withstand summary judgment, Conley must come forward with evidence tending to show: (1) Lift-All had a duty to warn the ultimate users of its sling that dull or rounded load edges could cut an unprotected sling; (2) the hazard was hidden and thus the sling was unreasonably dangerous; (3) Lift-All failed to exercise reasonable care under the circumstances in providing warnings; and (4) Lift-All’s alleged failure to provide adequate warnings was the proximate cause of his injuries.”).

59. See, *e.g.*, *Inlow II*, 378 F.3d at 690 n.4 (“Both Indiana’s 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles.”); *Miller v. Honeywell Int’l Inc.*, No. IP 9-1742-C-M/S, 2002 U.S. Dist. LEXIS 20478, at \*38 (S.D. Ind. Oct. 15, 2002), *aff’d*, 2004 U.S. Dist. LEXIS 15261 (7th Cir. July 21, 2004); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Kennedy v. Guess, Inc.*, 765 N.E.2d 213, 220 (Ind. Ct. App. 2002).

60. A recent example is found in *Ziliak v. AstraZeneca LP*, 324 F.3d 518 (7th Cir. 2003). Although not relevant to the court’s ultimate decision, the *Ziliak* decision proclaimed that “manufacturers are *strictly liable* to consumers for injuries caused by defective or unreasonably dangerous products placed in the stream of commerce.” *Id.* at 521 (emphasis added). A few

1. *Design Defect Theory*.—Decisions that address substantive design defect allegations in Indiana require plaintiffs to prove the existence of what practitioners and judges often refer to as a “safer, feasible alternative” design.<sup>61</sup> 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.<sup>62</sup> One panel of the Seventh Circuit (Judge Easterbrook writing) has described that a “design-defect 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.”<sup>63</sup>

Indiana’s requirement of proof of a safer, feasible alternative design is

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sentences later, the court again incorporated strict liability into its analysis: “AstraZeneca is absolved of *strict liability* so long as it has imparted adequate warnings to treating physicians.” *Id.* (emphasis added). In support of its strict liability assumption, the *Ziliak* court cited Indiana Code section 34-20-2-1. *Id.* Because *Ziliak*’s cause of action accrued in November 1998, there is no question that the case is governed by the current version of the IPLA, which was enacted in 1995. Although, as the *Ziliak* court recognized, it is true that the “rule of liability” established by Indiana Code section 34-20-2-1 applies even though a seller has exercised all reasonable care in the manufacture and preparation of the product (the rule of strict liability), Indiana Code section 34-20-2-2 eliminates the rule of strict liability in all cases in which the theory of liability is inadequate warnings or improper design. *See also* Alberts & Bria, *supra* note 26, at 1247.

*Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 405-06 (Ind. Ct. App. 1999), is another case in which the Indiana Court of Appeals found no error in the trial court’s use of the term “strict liability” in its instructions to the jury even though the case was not limited to manufacturing defects.

Practitioners should note that the Indiana Pattern Jury Instructions do not adequately distinguish between the operative theories to which a negligence standard applies (warning defect and design defect) and the operative theory to which a strict liability standard applies (manufacturing defect). Specifically, Indiana Pattern Instruction 7.04 does not track Indiana Code section 34-20-2-2, which requires an IPLA claimant utilizing a design or warning defect theory to 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.”

61. In cases alleging improper design to prove that a product is in a “defective condition,” the substantive defect analysis may need to follow a threshold “unreasonably dangerous” analysis if one is appropriate. *E.g.*, *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*10-20.

62. *See Burt*, 212 F. Supp. 2d at 900; *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995). 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. 212 F. Supp. 2d at 900. The court rejected the claim, holding that the plaintiff had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.*; *see also Miller*, 2002 U.S. Dist. LEXIS 20478, at \*66 (finding that design defect theory required proof of an alternative design that was effective, safer, more practicable, and more cost-effective than the one at issue).

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

similar to what a number of other states require in the design defect context. Indeed, that requirement is reflected in Section 2(B) of the Restatement (Third) of Torts and the related comments.<sup>64</sup> In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard. As such, a claimant can hardly find a manufacturer negligent for adopting a particular design unless he or she can prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. The claimant must prove that the safer, feasible alternative design was in fact available and that the manufacturer unreasonably failed to adopt it.<sup>65</sup>

In addition, the IPLA adopts comment k of the Restatement (Second) of Torts for all products and, by statute, “a product is not defective . . . if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”<sup>66</sup> Thus, a manufacturer technically cannot make the “comment k” statutory defense available until and unless the claimant demonstrates a rebuttal to it. That raises interesting questions in light of Indiana’s quirky treatment of Trial Rule 56 under *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*<sup>67</sup> In federal court under a *Celotex*<sup>68</sup> standard, a manufacturer may file a summary judgment motion based upon the “comment k” defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design. Under Indiana’s treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design. Nevertheless, and regardless of the procedure governing the motion itself, the claimant still must prove the existence of a safer, feasible alternative design to rebut the IPLA’s “comment k” defense.

State and federal courts applying Indiana law have been busy in recent years addressing design defect claims. In *Baker v. Heye-America*,<sup>69</sup> a panel of the Indiana Court of Appeals held that fact issues precluded summary judgment with respect to, among other issues, whether the placement of, and lack of a guard for, a maintenance stop button rendered a glass molding machine defective or unreasonably dangerous or both.<sup>70</sup> In *Lytle v. Ford Motor Co.*,<sup>71</sup> another panel

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64. RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

65. To excuse that requirement would be tantamount to excusing the reasonable care statutory component of design defect liability. By way of example, a manufacturer could not be held liable under the IPLA for adopting design “A” unless there was proof that through reasonable care the manufacturer would have instead adopted design “B.” To make that case, a claimant must show the availability of design “B” as an evidentiary predicate to establish before proceeding to the other “reasonable care” elements.

66. IND. CODE § 34-20-4-4 (2005).

67. 644 N.E.2d 118 (Ind. 1994).

68. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

69. 799 N.E.2d 1135 (Ind. Ct. App. 2003).

70. *Id.* at 1145.

71. 814 N.E.2d 301 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 745 (Ind. 2005).

of the Indiana Court of Appeals held, among other things, that the theories offered by plaintiffs' opinion witnesses regarding the inadvertent unlatching of a seatbelt were not reliable<sup>72</sup> and that designated evidence failed to show that Ford's seatbelt design was defective or unreasonably dangerous.<sup>73</sup>

Federal courts issued two important opinions during the survey period in design defect cases. The first case, *Bourne v. Marty Gilman, Inc.*,<sup>74</sup> Judge David Hamilton held that a goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law.<sup>75</sup> After the Ball State University football team won an upset victory against the University of Toledo in October 2001, hundreds of fans, including plaintiff Andrew Bourne, ran onto the field to celebrate.<sup>76</sup> Many of the fans in the crowd were pushing and pulling at one of the goal posts in an effort to bring it down.<sup>77</sup> Some fans climbed onto the goal post and began rocking it.<sup>78</sup> Bourne said that he walked under the goal post and jumped up to swat it, but missed.<sup>79</sup> He then started walking toward the other end of the field with his back to the goal post.<sup>80</sup> He heard a snap, felt an impact across his back, and suffered a broken leg and a spinal injury.<sup>81</sup>

Bourne and his parents sued the manufacturer of the goal post, Marty Gilman, Inc. ("Gilman"), claiming that it was improperly designed.<sup>82</sup> Gilman has manufactured goal posts since 1960 and Ball State has used Gilman "slingshot" style goal posts since at least the mid 1990s.<sup>83</sup> The slingshot goal post uses a single vertical stem supporting a horizontal cross bar and two vertical upright posts. The vertical stem curves to allow its base to be set back from the playing

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72. *Id.* at 312.

73. *Id.* The Indiana Supreme Court denied transfer in April 2005.

74. No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at \*1 (S.D. Ind. July 20, 2005).

75. *Id.* at \*2.

76. *Id.* at \*1. Andrew Bourne did not have a ticket to the game. *Id.* at \*3. He spent most of the game "tailgating" outside the stadium. *Id.* Bourne and his friends entered the stadium without tickets late in the fourth quarter. *Id.* at \*3-4. When it was apparent that Ball State was going to win the game, the scoreboard operator saw fans gathering and expected them to tear down the goal posts. *Id.* at \*3. She caused a pre-programmed message to appear on the scoreboard that read "'the goal posts look lonely' or words to that effect." *Id.* The message was intended to encourage fans to enter the field and tear down the goal posts." *Id.* Ball State did not have any security personnel or other measures in place to prevent or discourage fans from running onto the field as the game ended. *Id.* at \*4. Bourne and his parents reached a separate settlement with Ball State University. *Id.* at \*1.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at \*5.

82. *Id.* at \*1.

83. *Id.* at \*5.



field.<sup>84</sup> Gilman goal posts at issue weigh approximately 470 pounds and are forty feet tall.<sup>85</sup> The cross-bar is 18.5 feet wide and ten feet above the ground. The two vertical posts are thirty feet long.<sup>86</sup>

In 1985 when it took over production from the original designer, Gilman changed the metal alloy used to build the goal post model at issue.<sup>87</sup> The new metal was described as “softer” and less resistant to bending than the older model.<sup>88</sup> Gilman switched to the softer metal because its specialized bending machine could not satisfactorily bend the older alloy to create the curved vertical stem.<sup>89</sup>

Gilman knew that celebrating fans tear down goal posts.<sup>90</sup> Gilman also knew “that the main stem of its own slingshot style goal posts could ‘snap’ under the weight of celebrating fans” and “that fans standing on the field when goal posts are being torn down are at risk of injury.”<sup>91</sup> In 1996 and again in 2000, Ball State fans tore down the Gilman goal posts.<sup>92</sup> In those previous instances, the goal posts broke at the vertical stem, just above the anchor plate at its base.<sup>93</sup> The goal post that fell on Bourne was the same as the ones that fell in 1996 and 2000, and it broke in the same location as did the ones in 1996 and 2000.<sup>94</sup> Gilman conceded that the vertical stem just above the anchor plate is the weakest point on the goal post and is, historically, where its “goal posts tend to break under the weight of fans.”<sup>95</sup>

Other goal post designs existed before Bourne’s injury, including a “hinged” goal post that can be lowered to the ground at the end of a game, a goal post with a double vertical stem to increase strength and improve weight distribution, and a variety of and others described as “fan resistant” or “indestructible” because they are made from structural steel instead of aluminum and are based in an “underground concrete footer rather than bolted at ground level.”<sup>96</sup>

Bourne and his parents contended that the new alloy Gilman used was prone to fracture under the weight of celebrating fans and that Gilman should have utilized one of the alternative goal post designs mentioned above.<sup>97</sup> Gilman

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84. *Id.* The “slingshot” style goal post was developed in 1969. *Id.* It replaced the older “H” style goal post, which used two vertical support posts in or on the edge of the playing field. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at \*5-6.

88. *Id.* at \*6.

89. *Id.*

90. *Id.* at \*7. “Gilman was aware that sixteen sets of college football goal posts were torn down by fans in 2000, ten goal posts in 2001, seventeen in 2002, and twelve in 2003.” *Id.*

91. *Id.* at \*7.

92. *Id.* at \*7-8.

93. *Id.* at \*8.

94. *Id.*

95. *Id.*

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

97. *Id.* at \*19-20.

countered by arguing that its goal post was neither defective nor unreasonably dangerous as a matter of Indiana law because the danger Bourne and other bystanders faced was “open and obvious.”<sup>98</sup>

Judge Hamilton agreed with Gilman, determining that the goal post was not unreasonably dangerous as a matter of law.<sup>99</sup> Judge Hamilton’s decision first recognized that the term “unreasonably dangerous” for purposes of IPLA liability “refers to any situation in which the use of a product 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’s characteristics common to the community of consumers.”<sup>100</sup> Citing *Lovell v. Marion Power Shovel Co.*<sup>101</sup> and *Welch v. Scripto-Tokai Corp.*,<sup>102</sup> Judge Hamilton pointed out that “whether a defect is open and obvious is relevant to the inquiry into whether a product was unreasonably dangerous.”<sup>103</sup> Indeed, under Indiana law, “a defective condition must be hidden or concealed” to be considered unreasonably dangerous; “[i]f a defective condition is open and obvious, then it does not present a risk of injuries ‘different in kind’ from those the average user might anticipate.”<sup>104</sup> “The test is an objective one, based upon what the user or consumer should have known.”<sup>105</sup>

In *Bourne*, the court agreed as a matter of law that “an objective person would have been well aware of the dangers that [Bourne] faced by standing in the area of a goal post being rocked by college students”:

First, as an objective matter, any reasonable observer on the scene would have recognized the danger that the goal post would fall under the weight of the fans climbing on it and rocking it back and forth. Pulling down the goal post is what Ball State effectively invited and expected the fans to do. Bourne himself testified that he was not surprised the goal post came down.

Second, the risk that a person might be hurt by a 40-foot tall metal structure falling under the weight of a dozen or more people was obvious, as a matter of law, to any reasonable observer on the scene.

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98. *Id.* \*12.

99. *Id.* at \*20.

100. *Id.* at \*11-12 (internal quotation marks omitted) (quoting IND. CODE § 34-6-2-146 (2004)). Because “consumer” for purposes of the IPLA includes a bystander “injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use,” a student such as Bourne who rushed the field at the end of the game was a “consumer” of the goal post. *Id.* (citing IND. CODE § 34-6-2-29 (2004)).

101. 909 F.2d 1088, 1090-91 (7th Cir. 1990).

102. 651 N.E.2d 810, 815 (Ind. Ct. App. 1995).

103. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*12.

104. *Id.* (internal quotation marks omitted) (quoting *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999)).

105. *Id.* (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 939 (Ind. Ct. App. 1994)).

The test of unreasonable danger is an objective one. The court “must take into account ‘the reasonably anticipated knowledge, perception, appreciation, circumstances, and behavior of expected users.’”<sup>106</sup>

Judge Hamilton noted that Indiana courts have a history of deciding as a matter of law that products are not unreasonably dangerous in cases involving “similarly obvious dangers,” such as the danger posed by a butane cigarette lighter,<sup>107</sup> “the risk that a running rotary lawnmower blade would cut a hand stuck beneath the mower,”<sup>108</sup> “the risk that a metal crane would conduct electricity from overhead wires to injure or kill the operator,”<sup>109</sup> “and the danger that a BB gun would injure a person shot with it.”<sup>110</sup> In *Bourne*, “[b]ystanders on the scene saw a 40-foot tall structure of metal pipes with a dozen or more adults climbing on it and bouncing and rocking it back and forth with the obvious intent to cause it to fall.”<sup>111</sup> As such, “[t]he court determined that the risk of injury to those below the goal post was obvious as a matter of law.”<sup>112</sup>

That *Bourne* “thought he was in a safe position because he had seen goal posts come down slowly on television” was unpersuasive because such a contention “does not address the fact that the test is an objective one.”<sup>113</sup> Similarly, the court rejected plaintiffs’ argument “that a reasonable person on the scene could have expected that the goal post would come down slowly” rather than snapping as the Gilman post did.<sup>114</sup> Using *Moss* and *Anderson* as illustrations, Judge Hamilton explained that such an argument “seeks to require more specific awareness of the degree of risks than Indiana law actually requires.”<sup>115</sup> According to Judge Hamilton,

106. *Id.* at \*13 (footnote and internal citation omitted) (quoting *Moss v. Crosman Corp.*, 136 F.3d 1169, 1175 (7th Cir. 1998)).

107. *Id.* at \*14 (citing *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814 (Ind. Ct. App. 1995)).

108. *Id.* (citing *Ragsdale v. K-Mart Corp.*, 468 N.E.2d 524, 527 (Ind. Ct. App. 1984)).

109. *Id.* (citing *Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 624-26 (7th Cir. 1995)).

110. *Id.* (citing *Moss*, 136 F.3d at 1175).

111. *Id.* at \*15.

112. *Id.*

113. *Id.* at \*16.

114. *Id.*

115. *Id.* In *Moss*, a child was killed when another child shot him in the eye with a BB gun. *Id.* “The victim’s parents[, who] sued the gun’s manufacturer . . . conceded that a reasonable person would understand that the gun could injure someone, [though] they argued that a reasonable person would not expect that the danger could be fatal.” *Id.* “The Seventh Circuit affirmed summary judgment for the manufacturer because the difference was one only of degree.” *Id.* “The fact that a reasonable person would understand the general type of risk was enough to show that the product was not unreasonably dangerous.” *Id.*

“*Moss* followed the reasoning of *Anderson*,” in which an electrician was electrocuted when his metal crane and bucket contacted overhead electrical wires. *Id.* at \*16. “Plaintiffs acknowledged that reasonable [consumers] (and the decedent himself) would understand there was

the general danger that a tall structure of metal pipes could injure someone as it fell under the weight of fans was objectively obvious to a reasonable bystander. The fact that Bourne's injuries were so serious is very unfortunate. But his injuries are not different from the general type of injury that a reasonable bystander would understand.<sup>116</sup>

*Bourne* is a significant decision because it reinforces at least three important points for Indiana product liability practitioners: (1) "defective condition" and "unreasonably dangerous" are not interchangeable terms; (2) the concept of "open and obvious" remains quite relevant in Indiana product liability law even though it is no longer a stand-alone defense; and (3) whether a product presents an unreasonable danger can and should, under the proper circumstances, be decided by the court as a matter of law rather than automatically defaulted to the jury.

First, the *Bourne* decision reminds practitioners that "defective condition" and "unreasonably dangerous" are not interchangeable terms under the IPLA. In this regard, that the published Lexis case summary indicates that the court held that the goal post was not defective under Indiana law is an unfortunate characterization of the holding. In point of fact, the court held that the goal post did not present an unreasonable danger to the plaintiff because the risk of serious injury associated with students climbing on and rocking the goal post during the celebration were open and obvious to an objective person.<sup>117</sup>

IPLA liability does not attach unless the defective condition arising from an improper design, an inadequate warning, or a manufacturing flaw *also* renders the product unreasonably dangerous as judged by an "objective person" standard.<sup>118</sup> Recent cases confirm that establishing one of the foregoing

a risk of electrical shock." *Id.* at \*16-17. "They argued[, however,] that this understanding did not reach so far as to include the possibility of a fatal electrocution." *Id.* at \*17. "The Seventh Circuit rejected the argument, affirming summary judgment for the crane manufacturer":

The question becomes whether the difference between an electrical shock and electrocution is one of kind or degree. We answer that the difference is one of degree. Anderson experienced an initial shock of electricity while standing in the metal basket attached to the steel crane. He was aware that an amount of electricity could surge through his person. The fact that a fatal amount of electricity surged through him is a matter of degree, not a matter of a completely different injury.

*Id.* (internal quotation marks omitted) (quoting *Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 625 (7th Cir. 1995)).

116. *Id.*

117. *See id.* at \*13.

118. IND. CODE § 34-20-4-1 (2005); *see supra* notes 44-46 and accompanying text. The IPLA defines when a product may be considered "unreasonably dangerous" for purposes of Indiana Code section 34-20-4-1(2). A product is "unreasonably dangerous" only if its use exposes the user or consumer to a risk of physical harm beyond that contemplated by the ordinary user or consumer who purchases it with ordinary knowledge about the product common to consumers in the community. *See* IND. CODE § 34-6-2-146 (2005). A product is not unreasonably dangerous as a

threshold requirements without the other will not result in liability under the IPLA.

As Judge Hamilton recognized, there was evidence in *Bourne* suggesting the existence of stronger goal post designs and the court assumed “for purposes of summary judgment that there were safer designs available at the time of the sale of this goal post to Ball State.”<sup>119</sup> Nevertheless, “a manufacturer is not obliged to build the safest possible product, at least where the danger in question is known to a reasonable consumer” and Gilman was “not required to sell only the safest goal post design, at least where the risk of injury is apparent to a reasonable bystander.”<sup>120</sup>

Second, as the *Bourne* decision makes clear, the concept of “open and obvious” remains viable even though it is no longer a stand-alone defense. Indeed, some courts have described the “open and obvious rule” as having been “abrogated” by *Koske v. Townsend Engineering Co.*<sup>121</sup> As Judge Hamilton recognized in *Bourne*, *Koske* eliminated the “open and obvious rule” only to the extent that it existed as a stand-alone defense “under earlier product liability law.”<sup>122</sup> Nevertheless, “open and obvious” considerations “remain relevant in determining whether a product is ‘unreasonably dangerous,’ meaning it is in a condition that ‘exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer.’”<sup>123</sup> As such, the “open and obvious” concept continues to provide “helpful guidance on Indiana law as to when a product is unreasonably dangerous.”<sup>124</sup>

Practitioners and judges in Indiana should not confuse application of the “open and obvious” concept for purposes of determining unreasonable danger (as occurred in *Bourne*) with its application for purposes of evaluating the IPLA’s statutory defenses. The “open and obvious” concept does not readily lend itself,

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matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product. *See Baker v. Heye-America*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003); *see also Moss*, 136 F.3d at 1174 (noting that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability).

119. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*19-20.

120. *Id.* at \*20 (citing *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 815 n.5 (Ind. Ct. App. 1995) (noting that “if a product is not dangerous to an extent beyond that contemplated by the ordinary consumer, the fact that the product could have been made safer does not establish liability”)). The *Bourne* decision is similar to Judge Tinder’s decision in *Hughes v. Battenfeld Gloucester Engineering Co.*, No. TH01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at \*7-8 (S.D. Ind. Aug. 20, 2003). *See supra* note 51.

121. 551 N.E.2d 437, 441 (Ind. 1990).

122. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*14 n.5.

123. *Id.* (citing IND. CODE § 34-6-2-146). Although recognizing that football goal posts are designed to gauge the accuracy of kickers, Judge Hamilton assumed that goal post manufacturers reasonably should expect that fans occasionally will try to tear them down. Accordingly, the statutory affirmative defense of misuse did not apply. *See* IND. CODE § 34-20-6-4 (2004).

124. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*14 n.5.

for example, to application in the context of the IPLA's "misuse" defense.<sup>125</sup> Although Judge Hamilton in *Bourne* recognized that football goal posts are designed specifically to gauge the accuracy of kickers, he assumed that goal post manufacturers reasonably should expect that fans occasionally would try to tear them down.<sup>126</sup> As such, the misuse defense did not apply.<sup>127</sup>

In contrast, however, the "open and obvious" concept often readily applies in the context of the IPLA's "incurred risk" defense.<sup>128</sup> When applying the "open and obvious" concept in the context of the "incurred risk" defense, the current debate centers around the extent to which the open and obvious nature of a risk of which an injured user or consumer is specifically aware constitutes an "incurred risk" as a matter of law, thus eliminating any IPLA liability and effecting a "complete defense." Several Indiana appellate cases have recently held that a claimant who incurs a risk under the foregoing circumstances is precluded from IPLA recovery. That issue has been brought to the fore once again by *Mesman v. Crane Pro Services, a Division of Konecranes, Inc.*<sup>129</sup>

It is important for practitioners and judges in Indiana to recognize that *Bourne* and *Mesman* construe the "open and obvious" concept in two very different ways. *Bourne* construes the concept in the context of determining unreasonable danger as a matter of law; *Mesman* construes the concept in the context of determining the extent to which a claimant might be foreclosed from recovery under the auspices of the "incurred risk" defense.

Third, *Bourne* stands for the proposition that judges can and should decide as a matter of law that a product is not "unreasonably dangerous" for purposes of IPLA liability when undisputed facts demonstrate that the risks it presents are objectively obvious. Citing a case applying Indiana product liability law from the early 1980s, the plaintiffs in *Bourne* argued that whether a product is "unreasonably dangerous" is a question for the jury and should not be decided as a matter of law.<sup>130</sup> Judge Hamilton rejected such a premise, recognizing

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125. IND. CODE § 34-20-6-4 (2005).

126. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*11 n.3.

127. *Id.*

128. *See* IND. CODE § 34-20-6-3 (2005).

129. 409 F.3d 846 (7th Cir.), *reh'g and reh'g en banc denied* (7th Cir. 2005); *see infra* Part IV.A.

130. Plaintiffs cited *Corbin v. Coleco Industries, Inc.*, 748 F.2d 411 (7th Cir. 1984), in which the Seventh Circuit reversed summary judgment for a manufacturer of an above-ground pool. *Id.* at 412. The plaintiff had assembled the four-foot deep pool and then dived into it. He broke his neck and was permanently paralyzed. The Seventh Circuit determined that a fact issue precluded judgment as a matter of law concerning whether a warning was required. *Id.* at 417-18. In doing so, the *Corbin* court wrote that "[w]hether a product is in an unreasonably dangerous defective condition is a question of fact." *Id.* at 419. As Judge Hamilton noted, the Seventh Circuit in *Corbin* also relied on evidence that the pool contained a feature that made it deceptively dangerous. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*19. The plaintiff in *Corbin* had intended to make a flat, shallow dive, but there was evidence that the side of the pool was weak and would wobble under the pressure of a dive, so as to throw the diver off balance unexpectedly. *Corbin*, 748 F.2d at 420.

Indiana product liability cases decided in the two decades since *Corbin* “shows that the question may be decided in a proper case as a matter of law, especially if the alleged danger is open and obvious, as with the risk that a lighter will start fires [*Welch*], the risk that a running lawnmower blade will injure a hand stuck underneath the mower [*Ragsdale*], and the risk that a BB gun will injure [*Moss*].”<sup>131</sup>

Practitioners and judges often default to the idea that juries must determine whether a product is “unreasonably dangerous” or whether a use is “reasonably expectable.” As *Bourne* reminds practitioners and judges, that kind of automatic default should not exist in every product liability case. Indeed, judges in several recent cases have had no problem resolving such issues as a matter of law, even in the presence of divergent expert testimony.<sup>132</sup>

The other important design defect case addressed by the federal courts during the survey period is *Mesman v. Crane Pro Services, a Division of Konecranes, Inc.*<sup>133</sup> Plaintiff John Mesman, a worker at a plant that manufactured steel products, suffered serious leg injuries when a load of steel sheets that a crane was unloading from a boxcar fell on him. The plant at which Mesman worked used the crane to unload steel sheets from railcars.<sup>134</sup> The crane had a beam called the “bridge,” which was fastened to the plant’s ceiling directly above the rail siding.<sup>135</sup> The crane also had a hoist, suspended from the beam, which the crane operator could move up and down and sideways along the bridge.<sup>136</sup> In addition, the crane had a “spreader beam” connected to the hoist, as well as chains connecting each end of the spreader beam to “scoops” for gripping loads.<sup>137</sup>

Before the accident, Konecranes evaluated the design and operation of the crane and made several changes. First, it substituted for the controls in the operator’s cab a hand-held remote-control device with which the operator would operate the crane from ground level.<sup>138</sup> To raise the load he would press the up button on the device and to lower it he would press the down button.<sup>139</sup> Second, Konecranes installed alongside the up and down buttons on the remote-control device an emergency stop button, which the operator could press if he or she

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There was no comparable evidence in *Bourne*. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*19.

131. *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*19.

132. See *supra* note 50 (describing *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002) and *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478 (S.D. Ind. Oct. 15, 2002)); see also *Alberts & Bria*, *supra* note 26, at 1267-69. *Hughes v. Battenfeld Gloucester Engineering Co.*, No. TH 01-1237-C-T/H, 2003 U.S. Dist. LEXIS 17177 (S.D. Ind. Aug. 20, 2003), reached a similar result. See *supra* note 51.

133. 409 F.3d 846 (7th Cir.), *reh’g and reh’g en banc denied* (7th Cir. 2005).

134. *Id.* at 847.

135. *Id.* at 848.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

“sensed an impending collision between the load and the cab.”<sup>140</sup> The operator could also reverse the direction of the hoist by pressing the “down” button on the remote.<sup>141</sup> Because, however, “the up and down control had a deceleration feature to reduce wear and tear on the crane, the spreader beam would continue to rise for three seconds after the down button was pressed.”<sup>142</sup> In those three seconds, the beam would still travel about a foot until it stopped and began its reverse motion.<sup>143</sup>

According to the *Mesman* court, Konecranes’s alterations did not change the fact that there was only a foot or two of clearance between the rim of the boxcar and the cab overhead when a boxcar was being unloaded underneath the section of the bridge to which the cab was attached.<sup>144</sup> As such, there existed the possibility that a load of steel could be jarred loose and could fall on anyone standing beneath it if the spreader beam struck the cab while being lifted by the hoist.<sup>145</sup>

On the day of the accident, the crane operator was standing about twenty feet away from a boxcar that was underneath the empty cab.<sup>146</sup> Mesman was standing in the boxcar as he “fastened a load of steel sheets to the scoops beneath the crane’s spreader beam.”<sup>147</sup> The operator pressed the “up” button on the remote controller, causing the beam and the load to rise.<sup>148</sup> The operator “saw that the spreader beam was going to hit the cab, but instead of pressing the emergency-stop button, . . . he [mistakenly] pressed the down button.”<sup>149</sup> “Because of the deceleration feature . . . and the narrow clearance between the cab and the rim of the boxcar, the beam continued to rise for three seconds,” hitting the cab and causing the load to fall on Mesman.<sup>150</sup>

Mesman and his wife sued Konecranes.<sup>151</sup> A jury determined that the crane operator’s mistake was the principal cause of the accident, assigning two-thirds of the responsibility for the accident to the operator’s employer.<sup>152</sup> The jury also found that Konecranes’s renovated crane design also contributed to the accident, assigning one-third of the responsibility to Konecranes.<sup>153</sup> According to the *Mesman* court, the accident would have been avoided “with certainty” if

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 849.

145. *Id.*

146. *Id.* at 848.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 847. The Mesmans originally sued in state court; Konecranes removed the case to the United States District Court for the Northern District of Indiana. *Id.*

152. *Id.* at 848.

153. *Id.* at 848-49.



Konecranes had removed the cab or eliminated the deceleration feature.<sup>154</sup> The accident might also have been avoided had Konecranes modified the limit switch so that the limit could be lowered when a load was being unloaded beneath the cab.<sup>155</sup>

The jury awarded the Mesmans a large verdict, but the judge set it aside and entered judgment for Konecranes.<sup>156</sup> The judge alternatively decided that Konecranes was, at the very least, entitled to a new trial because the jury had been confused by irrelevant evidence and had ignored critical instructions.<sup>157</sup>

The *Mesman* court (Judge Posner writing) described a negligent design as one in which “the product could have been redesigned at a reasonable cost to avoid the risk of injury.”<sup>158</sup> According to the *Mesman* court, “the risk of injury has to be weighed against the cost of averting it.”<sup>159</sup> Citing Judge “Learned Hand’s influential negligence formula” set forth in *United States v. Carroll Towing Co.*,<sup>160</sup> the court noted that

failure to take a precaution is negligent only if the cost of the precaution . . . is less than the probability of the accident that the precaution would have prevented multiplied by the loss that the accident if it occurred would cause; hence the formula:  $B < PL$ . . . . The cheaper the precaution, the greater the risk of accident, and the greater the harm caused by the accident, the likelier it is that the failure to take the precaution was negligent.<sup>161</sup>

In light of the facts presented in *Mesman*, the court viewed as “substantial” the risk of a heavy load falling on a worker if the spreader beam struck the cab

154. *Id.* at 849. Because the crane could be operated from ground level with a remote, the cab was no longer used. Konecranes’s decision not to remove the cab and thereby eliminate the danger of its being struck by the spreader beam was one of the design decisions that were claimed to have rendered the crane defective. *Id.* at 848. In addition, Konecranes built into the renovated crane a limit switch that would automatically stop the spreader beam from rising when it came too near the bridge. The switch, however, was set to prevent the spreader beam from touching the bridge where the cab was *not* attached. To prevent the spreader beam from touching the cab, the limit would have had to be set much lower, too low for convenient unloading of boxcars that were underneath any other section of the bridge. *Id.* at 848.

155. *Id.* at 849. Whether or not an adjustable limit switch would have prevented the accident was less certain because, according to the court, the operator “might have forgotten to adjust it.” *Id.*

156. *Id.* at 847.

157. *Id.*

158. *Id.* at 849 (citing *Weir v. Crown Equip. Corp.*, 217 F.3d 453, 460-61 (7th Cir. 2000); *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998); *Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027, 1031 (7th Cir. 1997); *Miller v. Todd*, 551 N.E.2d 1139, 1141 (Ind. 1990); *Stamper v. Hyundai Motor Co.*, 699 N.E.2d 678, 689 (Ind. Ct. App. 1998)).

159. *Id.*

160. 159 F.2d 169, 173 (2d Cir. 1947).

161. *Mesman*, 409 F.3d at 849 (internal citations omitted).

because: (1) there was a “narrow clearance under the section of the bridge to which the crane was attached”; and (2) “if the load did fall on someone it would be likely to kill or seriously injure him.”<sup>162</sup> And, according to the *Mesman* court, the substantial risk could have been avoided “at little cost simply by removing the cab,” which no longer had a function.<sup>163</sup>

Konecranes defended the case by arguing that the crane operator exposed Mesman to a danger that was “open and obvious.” That portion of the court’s analysis is properly addressed below in the context of the “incurred risk” defense.<sup>164</sup> In the context of the allegedly defective design allegations, the specific question before the court was “whether there was a sufficient likelihood that the operator of the rebuilt crane would fail to press the emergency-stop button when he saw the spreader beam about to hit the cab.”<sup>165</sup> The *Mesman* court found that the jury should have been instructed to focus upon that question and that “[t]he answer would depend on the likelihood of the kind of mistake that [the crane operator] made and the cost and efficacy of additional precautions, such as removing the cab.”<sup>166</sup> It was not, therefore, unreasonable for a jury to conclude that Konecrane was negligent in its failure to design the renovated crane in such a way as to protect Mesman against the kind of error that the crane operator made.<sup>167</sup> Accordingly, the court reversed the district judge’s entry of judgment for Konecranes.<sup>168</sup>

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162. *Id.*

163. *Id.* Alternative precautions (though perhaps less failsafe) might have included: (1) the addition of an “adjustable limit switch [that the operator] could have set to prevent the spreader beam from hitting the cab when it was underneath it”; (2) the “eliminat[ion of] the deceleration feature, so that pressing the down button while the spreader beam was rising would have brought the beam to an immediate stop”; (3) “reducing the period of deceleration from three seconds to one, which would have stopped the spreader beam within four inches after the down button was pressed rather than twelve”; and (4) the addition of “an additional automatic limit switch, one operative only when the unloading was taking place under the disused cab.” *Id.* at 850.

164. *See infra* Part IV.A.

165. *Mesman*, 409 F.3d at 851.

166. *Id.* at 851-52.

It is easy enough to push the wrong button in an emergency or to forget that pushing the down button isn’t as effective as pushing the emergency-stop button because of the deceleration feature. This argues for an automatic protective device, of which the cheapest would have been simply to remove the cab, made empty and useless by the removal from it of the crane controls.

*Id.* at 852.

167. *Id.*

168. *Id.* (citing *FMC Corp. v. Brown*, 551 N.E.2d 444, 445-46 (Ind. 1990); *Baker v. Heye-America*, 799 N.E.2d 1135, 1141-45 (Ind. Ct. App. 2003)). In addition and although it was error for the judge to enter judgment for Konecranes, the *Mesman* court did not conclude that the judge abused her discretion in ruling in the alternative that Konecranes was entitled to a new trial. *Id.* Indeed, the court noted that the “plaintiffs failed to put before the jury a clear picture of the cause of the accident and how it might have been prevented.” *Id.* In addition, the court pointed out that

2. *Warning Defect Theory*.—The IPLA contains a specific statutory provision covering the warning defect theory, which reads as follows:

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 consumer.<sup>169</sup>

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.<sup>170</sup>

Indiana courts have been active in recent years in resolving cases espousing warning defect theories, including *First National Bank & Trust Corp. v. American Eurocopter Corp.*<sup>171</sup> and *Birch v. Midwest Garage Door Systems*.<sup>172</sup>

“Konecranes contributed to the jury’s confusion by presenting evidence that the renovated crane . . . complied with industry safety standards.” *Id.* According to the court, such compliance was “irrelevant” because “the danger arose from site-specific conditions that the industry standards don’t address.” *Id.* That the plaintiffs responded by criticizing the standards, in the court’s view, only “distracted the jury from those conditions—specifically the narrow clearance between boxcar and spreading beam in the vicinity of the abandoned but not removed cab -- on which resolution of the issue of negligence should have depended.” *Id.*

169. IND. CODE § 34-20-4-2 (2005).

170. *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp.*, 378 F.3d 682, 690 n.5 (7th Cir. 2004). For a more detailed analysis of *American Eurocopter*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1221-27 (2005).

171. *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682 (7th Cir. 2004), *aff’g In re Inlow Accident Litig. (Inlow I)*, No. Ip 99-0830-C H/K, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002). In the *Inlow* cases, a helicopter rotor blade struck and killed the Conseco general counsel, Lawrence Inlow, as he passed in front of the helicopter after disembarking. *Id.* at 685. Because of the helicopter’s high-set rotor blades, the court determined as a matter of law that the deceleration-enhanced blade flap was a hidden danger of the helicopter and that the manufacturer had a duty to warn its customers of that danger. *Id.* at 688. The court ultimately held, however, that the manufacturer satisfied its duty to warn Conseco and Inlow as a matter of law in light of the sophisticated intermediary doctrine. *Id.* at 692-93.

172. 790 N.E.2d 504 (Ind. Ct. App. 2003). In *Birch*, a young girl sustained serious injuries when the door of the garage closed on her. *Id.* at 508. The court concluded that the garage door system at issue was not defective and that a change in an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 518. The court concluded that there was no duty to warn plaintiffs about changes in federal safety regulations because the system manual the plaintiffs received included numerous warnings regarding the type of system installed and that no additional information about garage door openers would have added to the plaintiffs’ understanding of the characteristics of the product. *Id.* at 518-19. For a more detailed analysis of *Birch*, see Alberts & Bria, *supra* note 26, at 1262-65.

See also *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002) (rejecting plaintiff’s argument that a saw should have had warning labels making it more difficult for the saw guard to

During the 2005 survey period, Judge Hamilton decided the case of *Conley v. Lift-All Co.*,<sup>173</sup> another interesting case alleging inadequate product warnings. In *Conley*, the plaintiff was injured when a nylon sling suspending a 7000-pound bundled load of angle iron broke, causing the angle iron to fall on him.<sup>174</sup> Lift-All Co. manufactured the sling, which Conley's employer used to unload trucks.<sup>175</sup> The parties agreed that the sling broke because the edges of the angle iron cut into it.<sup>176</sup>

In his suit against Lift-All, Conley ultimately pursued only a failure to warn theory, contending that "Lift-All failed to provide adequate warnings that the edges of a load that are not sharp could still cut the sling and cause it to drop its load if the sling is not protected by padding."<sup>177</sup> Judge Hamilton denied Lift-All's motion for summary judgment, determining that fact issues existed concerning: (1) "whether Lift-All had a duty to warn about the danger that dull or rounded edges could cut the sling"; (2) "whether Lift-All provided adequate warnings"; and (3) "whether the alleged failure to give adequate warning was a proximate cause of Conley's injuries."<sup>178</sup>

Judge Hamilton's decision first addressed whether there is a duty to warn in the first place, acknowledging that there is "no actionable failure to warn without a duty to warn"<sup>179</sup> and that "there is no duty to warn of known or obvious hazards."<sup>180</sup> The court went on to write that "[t]he concept that there is no duty to warn of known or obvious risks has been described as the 'open and obvious' rule in the context of negligence actions."<sup>181</sup> Consistent with his analysis in the *Bourne* case, Judge Hamilton rejected the idea that the concept of "open and obvious" is no longer applicable because the rule is no longer a stand-alone

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be left in a position where it appeared installed when in fact it was not; the scope of the duty to warn is determined by the foreseeable users of the product and there was no evidence that the circumstances of plaintiff's injuries were foreseeable such that defendants had a duty to warn against those circumstances); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096 (Ind. Ct. App. 2001) (holding that the trial court should have addressed whether the risks associated with use of a product were unknown or unforeseeable and whether the defendants had a duty to warn of the dangers inherent in the use of the product, because designated evidence showed that both defendants knew that the product at issue was to be used in conjunction with high temperatures that occurred as a result of the hot welding process). For a more detailed analysis of *Burt* and *McClain*, see *Alberts & Boyers*, *supra* note 35, at 1182-85.

173. No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005).

174. *Id.* at \*1.

175. *Id.*

176. *Id.* at \*1, \*5.

177. *Id.* at \*2.

178. *Id.*

179. *Id.* at \*14 (citing *Am. Optical Co. v. Weidenhamer*, 457 N.E.2d 181, 187 (Ind. 1983)).

180. *Id.* at \*14-15 (citing *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 655 (7th Cir. 1998); *Am. Optical*, 457 N.E.2d at 188).

181. *Id.* at \*15 (citing *Bemis Co. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981); *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 815 (Ind. Ct. App. 1995)).

defense.<sup>182</sup> Rather, as Judge Hamilton recognized, the existence of an “open and obvious” risk, in effect, renders the product not “unreasonably dangerous” as a matter of law, obviating the need for a warning.<sup>183</sup>

Synthetic web slings are commonly used for rigging loads, and Federal Occupational Safety and Health Administration (“OSHA”) regulations govern their use.<sup>184</sup> The American Society of Mechanical Engineers (“ASME”) also publishes standards applicable to the use of slings.<sup>185</sup> Lift-All argued that “it owed no duty to warn Conley of the hazard that a lifted load could cut an unprotected sling because this hazard was ‘open and obvious’ to the intended community of users.”<sup>186</sup>

According to Judge Hamilton, that question simply could not be resolved as a matter of law on the record before the court.<sup>187</sup> The record included Conley’s subjective belief that angle iron with rounded or dull edges would not cut the sling, which was based both upon his experience and his observation of others using slings without padding to unload angle iron.<sup>188</sup> In addition, “the OSHA regulations and ASME standards address the hazard of cutting an unprotected sling with only sharp edges.”<sup>189</sup> As the court explained, “[i]f a reasonable jury could infer from the facts that the hazard posed by a load of angle iron is hidden from the reasonable sling operator, a jury must decide whether Lift-All had a duty to warn of the danger.”<sup>190</sup>

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182. *Id.* at \*15-16.

183. *Id.* On this point, Judge Hamilton wrote that “the obviousness of a danger [is] relevant in determining whether a product was sold in an unreasonably dangerous and defective condition, and in evaluating the affirmative defense of incurred risk.” *Id.* at \*15-16 (citing *Koske v. Townsend Eng’g Co.*, 551 N.E.2d 437, 440-41 (Ind. 1990)). Moreover, “[w]hether a hazard is open and obvious and whether the product is unreasonably dangerous are essentially two ways of asking the same question.” *Id.* at \*17 n.2 (citing *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.5 (7th Cir. 2004)); *see also Inlow II*, 378 F.3d at 690 n.5 (“Under Indiana law, there is a duty to warn reasonably foreseeable users of all latent dangers inherent in the product’s use. . . . In failure to warn cases, the ‘unreasonably dangerous’ inquiry is not a separate inquiry from whether the defect is latent or hidden.”).

184. *Conley*, 2005 U.S. Dist. LEXIS 15468, at \*6.

185. *Id.* at \*8.

186. *Id.* at \*16-17.

187. *Id.* at \*17.

188. *Id.* at \*17-18. During his work history, “Conley witnessed or was involved in unloading angle iron with a Lift-All sling on hundreds of occasions.” *Id.* at \*11. He said that he never saw “a pad or other protection placed between the angle iron and the Lift-All sling, and unpadded slings had been used . . . for years without problems.” *Id.* at \*11-12. Conley also testified that he “was trained in how to unload angle iron using the Lift-All sling,” but “was not told and was not aware that such a pad or protection was necessary.” *Id.* at \*12. “On the day of the accident, . . . Conley personally inspected the sling that was used and saw no cuts, damage, or red core yarns.” *Id.* at \*11.

189. *Id.* at \*18.

190. *Id.* (citing *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999)). Judge

Lift-All submitted opinion testimony that “the general hazard presented by lifting a load with a synthetic sling, and the specific hazard of cutting the sling with a load of one quarter inch thick angle iron, would have been obvious to a reasonable sling operator ‘properly trained’ in using the sling.”<sup>191</sup> According to the court, however, such testimony “begs the question of whether sling operators such as Conley are in fact properly trained in OSHA regulations and ASME standards, and whether a manufacturer like Lift-All may assume that they will be properly trained.”<sup>192</sup> The court continued:

Lift-All presents no evidence that sling operators typically are in fact “properly trained.” . . . Without evidence that Conley received proper training, [Lift-All’s expert’s] opinion that the hazard of lifting angle iron with an unpadded sling would have been known or obvious to a *properly trained* sling operator does not prove beyond reasonable dispute that the risk that rounded or dull edges would cut the sling would have been known or obvious to an ordinary user or consumer.<sup>193</sup>

Citing *Anderson v. P.A. Radocy & Sons, Inc.*,<sup>194</sup> among other cases, Judge Hamilton also noted that “[a] duty to warn may . . . exist even if end users of a product know about a danger but believe that the product can still be used safely.”<sup>195</sup> Conley, however, testified that he never saw anyone use protection between a load of angle iron and the Lift-All sling.<sup>196</sup>

Accordingly, the court concluded that “Conley’s evidence raises a genuine issue of fact as to whether a reasonable sling operator would have recognized that a load of angle iron could cut an unpadded Lift-All sling. Whether Lift-All had a duty to warn Conley of this hazard cannot be decided as a matter of law.”<sup>197</sup>

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Hamilton distinguished the fact situation before him in *Conley* from the one presented by *In re Inlow Accident Litigation (Inlow I)*, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002), *aff’d sub nom.* First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682 (7th Cir. 2004). In *Inlow I*, he “found that the specific risk of blade ‘flap’ posed by decelerating helicopter rotor blades would have been obvious to a trained helicopter pilot but not to an untrained passenger.” *Conley*, 2005 U.S. Dist. LEXIS 15468, at 22 (citing *Inlow I*, 2002 U.S. Dist. LEXIS 8318, at \*16; *Inlow II*, 378 F.3d at 691). The *Inlow II* court held that although the dangers presented by moving rotor blades on some helicopters may be open and obvious, the danger posed by this particular helicopter’s decelerating blades was not obvious to passengers. *Inlow II*, 378 F.3d at 691. Whereas “[t]he helicopter manufacturer in *Inlow I* came forward with evidence showing that all the helicopter pilots were in fact aware of the specific risk posed by decelerating rotor blades,” Lift-All failed to “come forward with comparable evidence of knowledge.” *Conley*, 2005 U.S. Dist. LEXIS 15468, at \*22-23.

191. *Conley*, 2005 U.S. Dist. LEXIS 15468, at \*19-20.

192. *Id.* at \*21.

193. *Id.*

194. 67 F.3d 619, 621-22 (7th Cir. 1995).

195. *Conley*, 2005 U.S. Dist. LEXIS 15468, at \*24.

196. *Id.* at \*11.

197. *Id.* at \*25.

Having found a duty to warn to exist by virtue of a factual dispute about whether the product was “unreasonably dangerous,” Judge Hamilton next addressed whether the warning Lift-All provided was adequate as a matter of law. The sling at issue included the following warning on a tag sewn to it, which Conley admitted seeing:

**! WARNING**

**FOLLOW THIS WARNING OR PERSONAL INJURY MAY RESULT  
INSPECT THE SLING FOR DAMAGE BEFORE EACH USE DO NOT  
CUT, OVERLOAD OR EXPOSE TO TEMPERATURE ABOVE 200  
[degrees] F**

**DISCARD WHEN RED CORE YARNS APPEAR.**<sup>198</sup>

In addition, Lift-All slings like the one that Conley used were packaged with an information and warning sheet that stated in part:

**! WARNING**

**FAILURE TO READ, UNDERSTAND AND FOLLOW THE USE  
AND INSPECTION INSTRUCTIONS FURNISHED WITH EACH  
SLING MAY RESULT IN SEVERE PERSONAL INJURY OR  
DEATH.**

**! WARNING WEB SLINGS CAN BE CUT BY CONTACT WITH  
SHARP OR UNPROTECTED LOAD EDGES. PROPER PADDING  
MUST BE USED TO PROTECT THE SLINGS.**

Web slings shall always be protected from being cut or damaged by corners, edges, protrusions, or abrasive surfaces. See Wear Pad section of Lift-All Catalog.<sup>199</sup>

Several of the operating and inspection standards set forth by OSHA and ASME were also reiterated on the information and warning sheet.<sup>200</sup>

Conley testified that he never saw the sling involved until it was unpackaged and that he never saw a Lift-All catalog or any written material or warnings other than the warning sewn on the sling.<sup>201</sup> Lift-All countered that it is impossible to provide definitive warnings on the sling itself because of the wide array of “rigging techniques, . . . load shapes, compositions, and weights.”<sup>202</sup> Lift-All also pointed out that “presenting information and warnings through separate documentation . . . is a method used throughout the industry.”<sup>203</sup>

According to Judge Hamilton, “a reasonable jury could infer from Conley’s testimony that [his employer] did not make available to sling operators the documents that Lift-All packed with its slings.”<sup>204</sup> Citing the venerable case *The*

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198. *Id.* at \*9.

199. *Id.* at \*10.

200. *Id.*

201. *Id.* at \*6, \*9-10.

202. *Id.* at \*27.

203. *Id.* at \*27-28.

204. *Id.* at \*28.

*T.J. Hooper*,<sup>205</sup> Judge Hamilton pointed out that the industry's widespread presentation of warnings on separate packaging documentation "does not always control whether the method is reasonable."<sup>206</sup> Accordingly, the court held that there was "a genuine issue of fact as to whether Lift-All could reasonably rely on buyers to pass along the warnings in the packaging."<sup>207</sup>

The *Conley* decision also holds that it was a question for the jury whether Lift-All adequately provided warnings to the "sophisticated intermediary," Conley's employer.<sup>208</sup> "Under this doctrine, the duty to warn end users is satisfied when the product is sold to a 'sophisticated intermediary' whom the manufacturer has adequately warned."<sup>209</sup> The doctrine only applies if the intermediary has "knowledge or sophistication equal to that of the manufacturer, and the manufacturer must be able to reasonably rely on the intermediary to warn the ultimate users."<sup>210</sup>

In *Conley*, the evidence showed that Conley's employer consistently used unprotected slings to lift the angle iron without any accidents, even though the detailed warnings given in the packaging by Lift-All provided that slings could be cut by sharp or unprotected load edges. Judge Hamilton ruled that "[t]he evidence stops short of showing as a matter of law that [Conley's employer] had knowledge or sophistication equal to that of [Lift-All], let alone that [Lift-All] could reasonably rely on [Conley's employer] to pass the warnings along to the end users who would be in the danger zone."<sup>211</sup> As such, "[a] reasonable jury could infer from Conley's testimony that [his employer did] not train its sling operators . . . to use padding when lifting angle iron or generally to be aware of the various types of edges that may cut an unprotected sling."<sup>212</sup>

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205. 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J.) (finding that an entire industry may be negligent, therefore industry custom is only evidence of what is reasonable).

206. *Conley*, 2005 U.S. Dist. LEXIS 15468, at \*28-29.

207. *Id.* at \*29.

208. *Id.* at \*33-34.

209. *Id.* at \*29 (citing *First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 691 (7th Cir. 2004); *Taylor v. Monsanto Co.*, 150 F.3d 806, 808-09 (7th Cir. 1998)).

210. *Id.* at \*30 (citing *Inlow II*, 378 F.3d at 691; *Taylor*, 150 F.3d at 808).

211. *Id.* at \*31-32.

212. *Id.* at \*34. The final issue addressed by the court in *Conley* was whether Lift-All's alleged failure to adequately warn proximately caused Conley's injuries. *Id.* at \*35. According to Judge Hamilton, "the focus is on the effect of giving a warning on the actual circumstances surrounding the accident" and "[t]he question is whether the plaintiff's injury was a natural and probable consequence of the failure to warn about the dangers associated with the product." *Id.* at \*35 (internal quotations marks omitted) (quoting *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 164 (Ind. Ct. App. 1997)). The plaintiff may need to "show that an adequate warning would have altered the conduct which led to the injury." *Id.* (internal quotation marks omitted) (quoting *Downs*, 685 N.E.2d at 164).

Conley presented two alternative warnings to the court that he believed would have adequately warned of the danger that dull or rounded edges could also cut the sling, and that padding or protection should be used with any type of edge. *Id.* at \*36. "An expert is normally required in



Practitioners should take note of Judge Hamilton's analysis in *Bourne* and in *Conley*. Though the legal methodology is applied in a perfectly consistent fashion, the ultimate conclusions differed. In *Bourne*, the issues were resolved as a matter of law because the undisputed facts presented led to only one reasonable conclusion. According to the court, the same simply did not hold true in *Conley*.

E. “. . . regardless of the substantive legal theory. . .”

Indiana Code section 34-20-1-1 provides that the IPLA “governs 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 substantive legal theory or theories upon which the action is brought.*”<sup>213</sup> 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.<sup>214</sup> At the same time, however, Indiana Code section 34-20-1-2 provides that the “[IPLA] shall not be construed to limit any other action from being brought against a seller of a product.”<sup>215</sup> That language, when compared with the “regardless of the legal theory upon which the action is brought”<sup>216</sup> language found in Indiana Code section 34-20-1-1 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.<sup>217</sup>

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design defect cases,” but by court order, Conley had been precluded from presenting an expert at trial. *Id.* at \*38. Judge Hamilton wrote that “Indiana law allows a plaintiff to prove in a proper case that a warning is inadequate without expert testimony on the subject[,]” and “[e]xpert testimony is required to sustain the plaintiff's burden of proof on the question of the existence of a defect only where matters are beyond the common understanding of a lay juror.” *Id.* at \*41 (citations omitted). As with the other issues in *Conley*, Judge Hamilton held that “whether the alleged failure to warn was a proximate cause of Conley's injuries presents a disputed issue of fact.” *Id.* at \*42.

213. IND. CODE § 34-20-1-1 (2005) (emphasis added).

214. *E.g.*, N.H. Ins. Co. v. Farmer Boy AG, Inc., No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at \*10-11 (S.D. Ind. Dec. 19, 2000) (holding that a claim alleging “breach of implied warranty in tort is a theory of strict liability in tort and, therefore, has been superceded by the theory of strict liability,” and, thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

215. IND. CODE § 34-20-1-2 (2005).

216. *Id.* § 34-20-1-1.

217. As quoted above, Indiana Code section 34-20-1-2 provides that the IPLA “shall not be construed to limit any other action from being brought against a seller of a product.” *Id.* § 34-20-1-2. Both the placement of that provision and the words chosen are important. Having specifically provided in Indiana Code section 34-20-1-1 that the IPLA governs *all* actions against a seller or a manufacturer for physical harm caused by a product regardless of the substantive theory or theories upon which the action is brought, it would seem to follow that the only “other action” to which the

In recent years, state and federal courts in cases such as *Kennedy v. Guess, Inc.*,<sup>218</sup> *Coffman v. PSI Energy, Inc.*,<sup>219</sup> *Ritchie v. Glidden Co.*,<sup>220</sup> and *Goines v. Federal Express Corp.*<sup>221</sup> have allowed claimants to pursue common law or non-IPLA statutory actions against manufacturers and sellers for the very same “physical harm” the IPLA covers. Three cases decided during the 2005 survey period appear to continue that trend.

In *Gunkel v. Renovations, Inc.*,<sup>222</sup> the Indiana Supreme Court held that under the “economic loss” doctrine, “physical injuries and damages to other property are recoverable in tort, but damages to the defective product itself are not.”<sup>223</sup> The question then becomes whether the “other property” was acquired by the plaintiff separately or “as a component of the defective product.”<sup>224</sup> The Gunkels contracted with Renovations, Inc. (“Renovations”) to build the Gunkels’ residence. Six months later, the Gunkels contracted with J & N Stone, Inc. (“J & N”) to install stone and masonry to the exterior of the residence. After the façade was installed, water entered through gaps in the façade. The Gunkels claimed that because of the moisture, “walls, ceilings, floors, drywall, carpet, and carpet padding were damaged.”<sup>225</sup>

The Gunkels sued Renovations for breach of contract and fraud, and later added J & N as a defendant under claims of negligence and breach of contract. The breach of contract claim against J & N was dismissed on partial summary judgment. The trial court also granted summary judgment on the negligence claim against J & N because the Gunkels’ negligence claim sought purely economic damages. The Court of Appeals agreed and held that because the Gunkels sought only economic losses, they had no tort claim.<sup>226</sup> The Supreme Court disagreed.<sup>227</sup>

The Supreme Court found that

Indiana law under the [IPLA] and under general negligence law is that damage from a defective product or service may be recoverable under a

General Assembly later refers are those alleging some type of non-physical (i.e., commercial) harm. Such harm may be redressed as a matter of contract or warranty in a separate action not intended to be affected by the IPLA’s coverage of “physical harm.”

218. 806 N.E.2d 776 (Ind.), *reh’g denied* (Ind. 2004). For a detailed analysis of *Kennedy*, see Alberts, *supra* note 170, at 1210-14, 1241-42.

219. 815 N.E.2d 522 (Ind. Ct. App.), *reh’g denied* (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 745 (Ind. 2005).

220. 242 F.3d 713 (7th Cir. 2001).

221. No. 99-cv-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002) (applying Indiana law).

222. 822 N.E.2d 150 (Ind.), *reh’g denied* (Ind. 2005).

223. *Id.* at 151.

224. *Id.*

225. *Id.*

226. *Id.* at 151-52.

227. *Id.* at 156-57.

tort theory if the defect causes personal injury or damage to other property, but contract law governs damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected.<sup>228</sup>

Without discussing why this case was not analyzed under the IPLA, the *Gunkel* court continued with an analysis under the economic loss doctrine and interpreted the definition of “other property.”

The *Gunkel* court found that “property acquired separately from the defective good or service is ‘other property,’ whether or not it is, or is intended to be, incorporated into the same physical object.”<sup>229</sup> Therefore, the court concluded, the economic loss rule precluded recovery by the Gunkels for the damage to the façade, “but tort recovery for damage to the home, and its parts, caused by the allegedly negligent installation of the façade is not limited by the economic loss rule.”<sup>230</sup>

Shortly after releasing its opinion in *Gunkel*, the Indiana Supreme Court decided *Hyundai Motor America, Inc. v. Goodin*,<sup>231</sup> another example of a claimant utilizing a cause of action outside of the IPLA in a product liability case. In *Goodin*, the plaintiff sued Hyundai under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act<sup>232</sup> for breach of express and implied warranty, as well as revocation of acceptance, based upon problems she had with a car purchased from a dealer.<sup>233</sup> After a two-day trial, a jury found in favor of Hyundai on the breach of express warranty claim, “but found in favor of Goodin on her claim for breach of implied warranty of merchantability,” assessing \$3000 in damages and \$19,237.50 in attorneys’ fees “pursuant to the fee shifting provisions of the Magnuson-Moss Warranty Act.”<sup>234</sup>

Hyundai then orally moved to set aside the verdict because Goodin did not have vertical privity with Hyundai. The trial court initially denied the motion, but the next day granted the motion concluding that lack of vertical privity precluded Goodin’s claim for breach of implied warranty. The trial court then granted Goodin’s motion to reinstate the verdict, determining that Hyundai was estopped from asserting lack of privity.<sup>235</sup> The court of appeals agreed with Hyundai, holding that it was not estopped, privity was an element of Goodin’s claim, and privity was lacking.<sup>236</sup>

The Indiana Supreme Court accepted transfer and addressed the issue of privity in the context an alleged breach of implied warranty of merchantability.

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228. *Id.* at 153.

229. *Id.* at 155.

230. *Id.* at 156-57.

231. 822 N.E.2d 947 (Ind. 2005).

232. 15 U.S. §§ 1301-12 (2000).

233. *Goodin*, 822 N.E.2d at 950.

234. *Id.*

235. *Id.* at 950-51.

236. *Id.* at 951.

Much of the discussion centered around the Uniform Commercial Code (“UCC”). The *Goodin* court mentioned the IPLA, however, in support of its conclusion, writing that the IPLA “does not require a personal injury plaintiff to prove vertical privity in order to assert a products liability claim against the manufacturer.”<sup>237</sup> The *Goodin* court also wrote that “elimination of [the] privity requirement gives consumers . . . the value of their expected bargain, but will rarely do more than duplicate the [IPLA] as to other consequential damages.”<sup>238</sup> And, if plaintiffs are able to recover additional damages under the UCC based upon the elimination of the privity requirement, “Indiana law would award the same damages under the [IPLA] as personal injury or damage to ‘other property’ from a ‘defective’ product.”<sup>239</sup>

Each of the foregoing cases allowed claimants to pursue common law or non-IPLA statutory claims outside the IPLA even when their allegations appeared to involve the type of “physical harm” the IPLA covers. And, in *Kennedy*, *Coffman*, *Ritchie*, and *Goines*, such was true even when the defendants were not “manufacturers” or “sellers” under the IPLA.<sup>240</sup> Clearly, there are important policy considerations involved when courts decide to impose common law and non-IPLA liability in cases involving “physical harm” as defined by the IPLA, particularly in cases against entities that do not otherwise qualify as “manufacturers” or “sellers” under the IPLA.

*Gunkel*, *Goodin*, *Kennedy*, *Coffman*, *Ritchie*, and *Goines* make it readily apparent that Indiana federal and appellate courts seem to have no difficulty allowing alternative statutory and common law claims against product sellers, suppliers, and manufacturers that fall outside the reach of the IPLA even when the “physical harm” suffered is the very type of harm the IPLA otherwise would cover. Legislative action likely is the only way to reverse that trend, if indeed the Indiana General Assembly intended something different.

## II. STATUTES OF REPOSE

Product liability cases involving asbestos products are unique in several ways, including the manner by which the Indiana General Assembly chose to handle the repose period that applies to them. Indiana Code section 34-20-3-2(a) provides that a product liability action based upon either “property damage resulting from asbestos” or “personal injury, disability, disease, or death resulting from exposure to asbestos . . . must be commenced within two (2) years after the cause of action accrues.”<sup>241</sup> That rule applies, however, “only to product liability

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237. *Id.* at 954 (citing IND. CODE §§ 34-20-2-1 to -4 (2004); *Lane v. Barringer*, 407 N.E.2d 1173, 1175 (Ind. Ct. App. 1980)).

238. *Id.* at 959.

239. *Id.* (citing *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150 (Ind.), *reh’g denied* (Ind. 2005)).

240. *See supra* notes 218-21 and accompanying text.

241. IND. CODE § 34-20-3-2(a) (2005). The statute further provides that an action accrues “on the date when the injured person knows that the person has an asbestos related disease or injury,” *id.* § 34-20-3-2(b), and that the “subsequent development of an additional asbestos related disease

actions against . . . persons who mined *and* sold commercial asbestos,” and to “funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.”<sup>242</sup>

In *AlliedSignal, Inc. v. Ott*,<sup>243</sup> the Indiana Supreme Court held that Indiana Code section 34-20-3-1 bars claims against manufacturers that did not sell bulk asbestos fiber for asbestos-related injuries accruing more than ten years after the initial delivery.<sup>244</sup> In doing so, the court concluded that the asbestos-specific “discovery rule” exception to the ten-year repose period<sup>245</sup> does not apply to manufacturers that did not sell bulk asbestos fiber.<sup>246</sup> The *Ott* court also held that application of the ten-year statute of repose does not violate “due process” guarantees provided by article I, section 23 of the Indiana Constitution.<sup>247</sup> The court, however, left open, pending further factual findings whether the statute of repose violated article I, section 12 of the Indiana Constitution as applied.<sup>248</sup>

On the latter issue, the court determined that a cause of action “accrues” when “the disease has actually manifested itself.”<sup>249</sup> The court then acknowledged that injury “does not occur upon mere exposure to (or inhalation of) asbestos fibers” but that “injury may well occur before the time that it is discovered.”<sup>250</sup> As such, the court concluded that Indiana Code section 34-20-3-1 “might be unconstitutional as applied to the plaintiff if a reasonably experienced physician could have diagnosed Jerome Ott with an asbestos-related illness or disease within the ten-year statute of repose, yet Ott had no reason to know of the diagnosable condition until the ten-year period had expired.”<sup>251</sup> Because the record had not been developed to address that issue, the case was remanded to the trial court for further proceedings.<sup>252</sup>

Two follow-up cases, including the same *Ott* case noted above, made their way to the Indiana Court of Appeals during the current survey period. First, in *Jurich v. John Crane, Inc.*,<sup>253</sup> plaintiffs claimed that they contracted mesothelioma (a type of lung cancer) as a result of workplace exposure to

or injury is a new injury and is a separate cause of action.” *Id.* § 34-20-3-2(a).

242. *Id.* § 34-20-3-2(d) (emphasis added).

243. 785 N.E.2d 1068 (Ind. 2003), *appeal after remand*, 827 N.E.2d 1194 (Ind. Ct. App. 2005).

244. *Id.* at 1072-73. For a detailed analysis of *Ott* and a brief overview of the cases and issues that preceded it, see Alberts & Bria, *supra* note 26, at 1276-82.

245. IND. CODE § 34-20-3-2 (2005) (formerly IND. CODE § 33-1-1.5-5.5).

246. *Ott*, 785 N.E.2d at 1073.

247. *Id.* at 1075-77.

248. *Id.* at 1077.

249. *Id.* at 1075.

250. *Id.*

251. *Id.*

252. *Id.*

253. 824 N.E.2d 777 (Ind. Ct. App.), *trans. denied sub nom.* *Jurich v. Anchor Packing Co.*, 841 N.E.2d 179 (Ind. 2005).

asbestos.<sup>254</sup> The defendants sought summary judgment based upon the statute of repose.<sup>255</sup> Plaintiffs countered with testimony from opinion witnesses that cellular changes leading to the development of mesothelioma could have been detected within the statute of repose period with certain invasive exams and tests.<sup>256</sup> The trial court granted the defendants' motions for summary judgment, concluding that the IPLA statute of repose was constitutional as applied to the plaintiffs.<sup>257</sup> Plaintiffs appealed.

The *Jurich* court first acknowledged that evidence from opinion witnesses indicated that inhalation of asbestos by the plaintiffs probably caused immediate lung damage that eventually led to mesothelioma, but that such initial damage was not mesothelioma, and that a reasonably experienced physician would not have diagnosed either plaintiff with mesothelioma until after the repose period had expired.<sup>258</sup> According to the court, although certain invasive tests could have been performed on the plaintiffs during the repose period, "it would have been highly dangerous, unethical, and medically inappropriate to perform" such invasive tests on persons with no symptoms whatsoever.<sup>259</sup>

Interpreting *Ott*, the *Jurich* court concluded that an "'asbestos-related illness or disease' that could have been diagnosed by a 'reasonably experienced physician'" meant a "disease that is a clinically-recognized symptomatic condition, or one that could have been detected by a competent physician conducting a routine examination of the patient."<sup>260</sup> Such a definition excludes "asymptomatic conditions that merely represent the early stages of a potential disease or condition that could only be detected by a physician utilizing extreme and medically unsound or unethical measures."<sup>261</sup> Accordingly, based upon the facts as applied to the *Ott* requirements, the plaintiffs "failed to demonstrate that the [I]PLA statute of repose is unconstitutional as applied to them."<sup>262</sup>

A separate panel of the court of appeals reached the result in *Ott v. AlliedSignal, Inc.*,<sup>263</sup> the appeal arising out of the same original lawsuit that reached the Indiana Supreme Court on the issues noted above. After the Indiana Supreme Court remanded the case to the trial court, the trial court granted summary judgment to several defendants based upon the statute of repose.<sup>264</sup> Plaintiffs appealed the grant of summary judgment to the Indiana Court of Appeals, challenging, among other things, that the statute of repose was

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254. *Id.* at 778.

255. *Id.*

256. *Id.* at 779.

257. *Id.* at 778.

258. *Id.* at 783.

259. *Id.*

260. *Id.* (quoting *AlliedSignal, Inc. v. Ott*, 785 N.E.2d 1068, 1075 (Ind. 2003)).

261. *Id.*

262. *Id.* at 784.

263. 827 N.E.2d 1144 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).

264. *Id.* at 1147.

unconstitutional as it was applied to the facts of the case.<sup>265</sup>

Relying heavily on the *Jurich* decision with regard to its analysis of the article I, section 12 issue, the court of appeals affirmed.<sup>266</sup> The court agreed with *Jurich*'s "general framework," determining that a manifested asbestos-related illness or disease that a reasonably experienced physician could have diagnosed, is indeed, a "disease that is a clinically-recognized symptomatic condition, or one that could have been detected by a competent physician conducting a routine examination of the patient."<sup>267</sup> According to the court, such a test is appropriate "because it requires the plaintiff either to display symptoms or to present a condition that can be diagnosed without unusual or heroic measures."<sup>268</sup> Ott did not have any clinically recognizable symptoms of lung cancer during the repose period, and his condition could only have been detected by "an invasive and dangerous procedure that would not have been clinically indicated in the absence of symptoms."<sup>269</sup>

The *Ott* court also rejected the notion that application of the statute of repose violates the Equal Privileges and Immunities Clause (article I, section 23) of the Indiana Constitution because it precludes claims that have longer latency periods caused by newer products but not shorter latency claims caused by identical older products.<sup>270</sup> The court held that the statutory classification "survives scrutiny under article I, section 23 of the Indiana Constitution."<sup>271</sup>

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265. *Id.* at 1148. The trial court concluded that the statute of repose as applied to Ott did not violate article I, section 12 of the Indiana Constitution because even though the "process of the development of [Ott's] cancer likely began during the ten-year repose period[.]" there was no evidence that the disease manifested within the repose period. *Id.* at 1149. Furthermore, "the trial court found no evidence that a reasonably experienced physician could have diagnosed the illness within the repose period." *Id.*

266. *Id.* at 1149, 1152-53 (citing *Jurich v. John Crane, Inc.*, 824 N.E.2d 777 (Ind. Ct. App.), *trans denied sub nom.* *Jurich v. Anchor Packing Co.*, 841 N.E.2d 179 (Ind. 2005)). The court of appeals first determined that the trial court erroneously struck affidavits supporting Ott's motions. The affidavits were submitted by opinion witnesses who had never examined Ott or his medical records, and two of the affidavits were prepared for other cases. The panel believed that the affidavits should have been admitted because they explained the disease process applicable to all asbestos-related cancer victims, and were "therefore relevant in that it makes facts of consequence to the determination of the action more or less probable than it would be without the evidence." *Id.* at 1150 (citing IND. EVID. R. 401). Ultimately, however, the admission of the affidavits did not result in reversal.

267. *Id.* at 1153.

268. *Id.* at 1155.

269. *Id.*

270. *Id.* at 1159.

271. *Id.* at 1160.

### III. EVIDENTIARY PRESUMPTION FOR COMPLIANCE WITH GOVERNMENT STANDARDS

The IPLA, by Indiana Code section 34-20-5-1, entitles a manufacturer or seller to a rebuttable 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, 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.<sup>272</sup>

Two cases decided during the survey period reached opposite conclusions with respect to how the presumption should operate in an evidentiary context. Interestingly enough, both cases involve motor vehicle accidents. In the first case, *Schultz v. Ford Motor Co.*,<sup>273</sup> plaintiff Schultz was involved in a one-car accident in his Ford Explorer. During the accident, the vehicle slid sideways off the roadway, rolled over, hitting the ground on the driver's side roof, and then landed on its wheels.<sup>274</sup> The driver's side roof collapsed one foot when the vehicle hit the ground.<sup>275</sup> Schultz suffered a cervical cord injury.<sup>276</sup> Schultz sued Ford, alleging negligence and defective roof design.<sup>277</sup>

Schultz's trial brief objected to the use of any jury instruction derived from the IPLA governmental compliance presumption or the Indiana Pattern Jury Instruction 7.05(D), which was patterned after the IPLA's statutory presumption.<sup>278</sup> Schultz again raised his objection to the jury instruction at trial.<sup>279</sup> The trial court overruled the objection and read Ford's proffered jury instruction to the jury.<sup>280</sup> After an eight week trial, the jury found in favor of Ford on all claims.<sup>281</sup>

On appeal, Schultz argued that it was reversible error for the trial court to give Ford's instruction on the governmental compliance presumption because the

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272. IND. CODE § 34-20-5-1 (2005).

273. 822 N.E.2d 645 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 182 (Ind. 2005).

274. *Id.* at 647.

275. *Id.*

276. *Id.*

277. *Id.* at 647-48.

278. *Id.* at 648.

279. *Id.*

280. *Id.*

281. *Id.* at 648.



statute has no evidentiary value.<sup>282</sup> Schultz asserted that the only purpose of the presumption is to require the plaintiff to rebut the presumption and, “once that burden is met, the presumption serves no further purpose and drops from the case.”<sup>283</sup> Schultz also asserted that the IPLA governmental compliance presumption “creates a rebuttable *presumption*, which imposes a burden of production—not proof—and, hence, is an improper subject of jury instruction.”<sup>284</sup> Ford replied “that the presumption of non-negligence under the IPLA is closer to a statutorily recognized inference and, as such, is appropriate for use as an instruction to the jury.”<sup>285</sup>

Finding the distinction between a presumption and inference to be key to the case holding, the *Schultz* court discussed the two terms. First, the court stated that “‘presumption’ is one of the slipperiest members of the family of legal terms.”<sup>286</sup> Furthermore,

“A presumption is an assumption of fact resulting from a rule of law that requires the fact to be assumed from another proven fact or group of facts. Stated differently, a presumption is a declaration of public policy that if a litigant presents evidence of a specified set of facts, then an additional fact will be presumed to exist.”<sup>287</sup>

The *Schultz* court found the distinction between a presumption and inference to be “best understood by noting that ‘a presumption is a deduction that the law requires the trier of fact to make if it finds a certain set of facts.’”<sup>288</sup> Therefore, the court concluded, “a presumption differs from an inference, which the trier may or may not make according to his own conclusions drawn from the facts adduced at trial. A presumption is mandatory, while an inference is permissive.”<sup>289</sup>

The *Schultz* court also cited Miller’s Indiana Evidence treatise in Indiana Practice for three differences between presumptions and inferences.<sup>290</sup>

First, presumptions are mandatory unless rebutted; the presumed fact must be taken as true in the absence of evidence to the contrary. Inferences are permissible, but never mandatory, when the evidence is being weighed; the trier of fact is not required to draw inferences.

Second, presumptions are not weighed in the sense evidence is weighed

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282. *Id.* at 652.

283. *Id.* at 652.

284. *Id.* at 653.

285. *Id.*

286. *Id.* (citing JOHN W. STRONG, MCCORMICK ON EVIDENCE § 342 (5th ed. 1999)).

287. *Id.* (quoting 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE, INDIANA EVIDENCE § 301.101 (2d ed. 1995)).

288. *Id.* (quoting *In re Borom*, 562 N.E.2d 772, 775 (Ind. Ct. App. 1990)).

289. *Id.* (citing *Borom*, 562 N.E.2d at 775).

290. *Id.*

if contrary evidence is produced, although a presumption met by rebutting evidence may effectively become an inference under Rule 301. An inference remains in the case despite the presentation of contrary proof and may be weighed with all the other evidence.

Third, a presumption need not be based entirely upon logical probabilities; public policy, social convenience, safety or procedural convenience may lead to the creation of a presumption. An inference, however, must be logical. Inferences also must be based on evidence.<sup>291</sup>

After its review of the distinctions between presumptions and inferences, the *Schultz* court concluded that the IPLA governmental compliance presumption “creates a mandatory presumption and not a permissive inference.”<sup>292</sup> The court stated that the IPLA “presumption is mandatory and, unless rebutted, allows the conclusion that the manufacturer was not negligent. The governmental compliance presumption does not arise logically, but instead is a legislative fiction created to address the public policy concerns that manufacturers do not get adequate credit for complying with governmental standards.”<sup>293</sup>

The court agreed with *Schultz*, and found that “the governmental compliance presumption helps Ford on a motion for summary judgment or a directed verdict, but an instruction explaining this presumption has no evidentiary value and no practical effect at trial.”<sup>294</sup> Holding that it was reversible error for the trial court to read Ford’s proffered jury instruction on the governmental compliance statute, the *Schultz* court wrote, “[t]he rebuttable presumption of [the IPLA] is not evidence; instead, it should be used as guidance for the court and not as evidence for the jury.”<sup>295</sup>

In *Flis v. Kia Motors Corp.*,<sup>296</sup> Judge Tinder reached a different conclusion, writing that “the Indiana Supreme Court would most likely disagree with the *Schultz* opinion regarding an instruction based upon Indiana Code section 34-20-5-1 and grant transfer in that case.”<sup>297</sup> In *Flis*, the driver of a Kia sport utility vehicle was injured during a one-car accident in which her vehicle rolled over.<sup>298</sup> As was the case in *Schultz*, Kia offered a jury instruction based upon the IPLA governmental compliance presumption and Indiana Pattern Jury Instruction 7.05(D).<sup>299</sup> *Flis* objected to the use of the proffered instruction based upon the

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291. *Id.* (footnotes omitted) (citing 12 MILLER, *supra* note 287, § 301.101).

292. *Id.* at 654.

293. *Id.*

294. *Id.* at 655.

295. *Id.*

296. No. 1:03-cv-1567-JDT-TAB, 2005 U.S. Dist. LEXIS 12911, at \*1 (S.D. Ind. June 20, 2005).

297. *Id.* at \*17.

298. *Id.* at \*2.

299. *Id.*

*Schultz* decision.<sup>300</sup> Judge Tinder overruled the plaintiff's objection.<sup>301</sup>

After first recognizing that the court must "use its best judgment to apply the rules of law that the Supreme Court of Indiana would apply,"<sup>302</sup> Judge Tinder characterized the *Schultz* decision as one applying the "'bursting bubble' theory of presumptions, 'whereby the presumption bursts' [sic] and vanishes once evidence to dispute the existence of the presumed fact is produced."<sup>303</sup> However, he went on to point out that Rule 301 of the Indiana Rules of Evidence modifies the traditional "bursting bubble" theory by providing in the second sentence of the rule that, "[a] presumption shall have continuing effect even though contrary evidence is received."<sup>304</sup>

Although he recognized that Indiana's evidentiary rules did not apply to the procedural conduct of a trial in federal court, Judge Tinder reviewed Indiana's Rule 301 in an effort to give effect to the presumption, which is an issue of substantive Indiana product liability law under the IPLA.<sup>305</sup> As such, Judge Tinder had to consider how the Indiana Supreme Court likely would resolve the issue, ultimately determining that the Indiana Supreme Court would not follow *Schultz*.<sup>306</sup>

Perhaps aware of the conflict between *Flis* and *Schultz*, the Indiana Supreme Court granted transfer in *Schultz* in August 2005. Oral argument was held in November 2005.

#### IV. 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."<sup>307</sup> 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."<sup>308</sup> At least one Indiana court has held in the summary judgment context that application of the incurred risk defense requires

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300. *Id.*

301. *Id.*

302. *Id.* at \*10 (internal quotation marks omitted) (quoting *Dameron v. City of Scottsburg*, 36 F. Supp. 2d 821, 831 (S.D. Ind. 1998)).

303. *Id.* at \*11 (quoting 12 MILLER, *supra* note 283, § 301.102).

304. *Id.* at \*12-13 (internal quotation marks omitted) (quoting IND. R. EVID. 301).

305. *Id.* at \*15-16.

306. *Id.* at \*15-17.

307. IND. CODE § 34-20-6-3 (2005).

308. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999); *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at \*11 (S.D. Ind. Mar. 24, 2005).

uncontradicted evidence from which the sole inference to be drawn is that the plaintiff had actual knowledge of the specific risk and understood and appreciated that risk.<sup>309</sup>

In this regard, we revisit the case of *Mesman v. Crane Pro Services, a Division of Konecrane, Inc.*,<sup>310</sup> which was discussed above in connection with design defect issues.<sup>311</sup> There, plaintiff John Mesman suffered serious leg injuries when a load of steel sheets fell on him while a crane was unloading them from a boxcar.<sup>312</sup> Before the accident, Konecranes, Inc. evaluated the design and operation of the crane and made several changes, “including substitut[ing] for the controls in the operator’s cab a hand-held remote-control device with which the operator would operate the crane from ground level.”<sup>313</sup> Konecranes also installed an emergency stop button alongside the “up” and “down” buttons on the remote device, which the operator could press if he or she “sensed an impending collision between the load and the cab.”<sup>314</sup> “Because the up and down controls had a deceleration feature to reduce wear and tear on the crane, the spreader beam would continue to rise for three seconds after the down button was pressed.”<sup>315</sup> In those three seconds, the beam would still travel about a foot until it stopped and began its reverse motion.<sup>316</sup>

On the day of the accident, Mesman was standing in the boxcar as he “fastened a load of steel sheets to the scoops beneath the crane’s spreader beam.”<sup>317</sup> Standing on the floor of the plant about twenty feet away from the boxcar, the crane operator pressed the “up” button on the remote controller,

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309. Indiana courts have decided some important incurred risk cases in the last few years. *E.g.*, *Smolk 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) (finding that because the plaintiffs did not adequately specify the basis of their claim, it 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*, 714 N.E.2d 194 (concluding that because plaintiff’s job necessarily entailed moving containers across a gap between aircraft and aircraft loading equipment and he apparently believed that he had to somehow find a way to work around the known danger posed by the gap, whether plaintiff voluntarily incurred the risk of falling through the gap is a question of fact for the jury’s resolution).

310. 409 F.3d 846 (7th Cir.), *reh’g and reh’g en banc denied* (7th Cir. 2005).

311. *See supra* Part I.D.

312. *Mesman*, 409 F.3d at 847.

313. *Id.* at 848.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

causing the beam and the load to rise.<sup>318</sup> The operator “saw that the spreader beam was going to hit the cab, but instead of pressing the emergency-stop button, . . . he [mistakenly] pressed the down button.”<sup>319</sup> “Because of the deceleration feature . . . and the narrow clearance between the cab and the rim of the boxcar, the beam continued to rise for three seconds,” hitting the cab and causing the load to fall on Mesman.<sup>320</sup>

As part of its defense to the design defect allegations, Konecranes argued that the crane operator “exposed Mesman to a danger that was open and obvious.”<sup>321</sup> “By pressing the down button, Konecranes argue[d], [the crane operator] exposed Mesman to a danger that was ‘open and obvious’ to [the crane operator].”<sup>322</sup> In this context, “the danger [was] that the rising spreader beam would not stop in time to avoid hitting the cab and dislodging the beam’s load unless the emergency-stop button was pushed.”<sup>323</sup> “Konecranes argue[d] that it had no legal obligation to protect against such a danger.”<sup>324</sup> Konecranes further contended that although the danger was not obvious to Mesman, it was obvious to the crane operator and the “appearance of danger” to the crane operator was “legally relevant to the apportionment of liability between the [crane operator’s] employer and Konecranes.”<sup>325</sup>

The *Mesman* court (Judge Posner writing) refused to apply the “open and obvious” concept to the facts presented, pointing out that the current version of the IPLA deliberately omitted the “open and obvious” rule as a stand-alone defense, replacing it instead with the “incurred risk” defense “that requires proof that the user . . . was actually ‘aware of the danger of the product.’”<sup>326</sup> In the context of applying the “open and obvious” concept to the “incurred risk” defense, however, the *Mesman* court specifically recognized that an open and obvious risk “remains relevant to liability” because “[i]t is circumstantial evidence that the user of the product knew of the danger (and thus ‘incurred’ the risk)”<sup>327</sup> and because it “bears on whether the risk was great enough to warrant protective measures beyond what the user himself would take.”<sup>328</sup>

Konecranes argued that the General Assembly eliminated the “open and obvious” defense only with respect to claims alleging manufacturing defects, and

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318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 850.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* (quoting IND. CODE § 34-20-6-3 (2004)).

327. *Id.* (citing *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1150-51 (Ind. Ct. App. 1990)).

328. *Id.* at 851 (citing *Lovell v. Marion Power Shovel Co.*, 909 F.2d 1088, 1090-91 (7th Cir. 1990); *Miller v. Todd*, 551 N.E.2d 1139, 1143 (Ind. 1990); *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 815 (Ind. Ct. App. 1995); *Gregg*, 554 N.E.2d at 1150-51).

not with respect to claims alleging design defects.<sup>329</sup> Stated differently, although Konecranes never specifically pleaded or argued the “incurred risk” defense *per se*, Konecranes, in effect, contended that “incurred risk” remains a complete defense even after the 1995 IPLA amendments.<sup>330</sup> The *Mesman* court rejected that contention:

Suppose a machine is designed without a shield over its moving parts. It is obvious to the operator that if he sticks his hand into the machine while the machine is operating, the hand will be mangled. In the old days [before the 1995 amendments] that would have been a complete defense. But the new law recognizes that because of inadvertence or other human error, or because of debris or a slippery surface that might cause a worker to trip, or even because of a distracting noise or a sudden seizure, open and obvious hazards do on occasion result in accidents. If those accidents can be avoided by a design modification at very little cost, then even if the risk is slight, the modification may be cost-justified . . . . The analogy to the doctrine of last clear chance, which imposes a duty of care on a potential injurer even when the potential victim has carelessly or even recklessly exposed himself to danger, is apparent.<sup>331</sup>

The *Mesman* court openly acknowledged that such a determination places it at odds with recent Indiana appellate decisions holding that a plaintiff whom is found to have incurred an open and obvious risk is barred from recovery under the IPLA.<sup>332</sup> These decisions conclude the “open and obvious nature of the danger . . . negate[s] a necessary element of the plaintiff’s *prima facie* case” (i.e., that the defect was hidden).<sup>333</sup> In effect, such holdings render “incurred risk” a complete defense.

The Indiana Supreme Court’s decision in *Vaughn* not only addressed the terms “user” and “consumer,” it cleared up any lingering controversy about how courts and practitioners in Indiana should view the incurred risk defense in product liability cases. The *Vaughn* court plainly held that “[i]ncurred risk acts as a complete bar to liability with respect to negligence claims brought under the IPLA.”<sup>334</sup>

The *Vaughn* decision is consistent with several prior cases on that point, including *Baker v. Heye-America*,<sup>335</sup> *Hopper v. Carey*,<sup>336</sup> and *Cole v. Lantis*

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329. *Id.* at 851.

330. *Id.* at 850-51.

331. *Id.* at 851 (internal citations omitted).

332. *Id.*

333. *Id.* (quoting *Cole v. Lantis*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999)). Actually, the *Mesman* court recognized only that its interpretation of the “incurred risk” defense is at odds with *Cole* and *Baker*. *Id.*

334. *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1146 (Ind. 2006).

335. 799 N.E.2d 1135 (Ind. Ct. App. 2003).

336. 716 N.E.2d 566, 576 (Ind. Ct. App. 1999) (“[E]ven if a product is sold in a defective condition unreasonably dangerous, recovery *will be denied* an injured plaintiff who had actual

*Corp.*,<sup>337</sup> and the court of appeals's decision in *Vaughn*.<sup>338</sup> Those cases all previously determined that incurred risk remains a complete defense in Indiana.<sup>339</sup>

In addition to *Mesman, Henderson v. Freightliner, LLC*<sup>340</sup> is another federal decision issued during the survey period that addressed the incurred risk defense. In that case, Ronald Henderson was a "diesel truck mechanic who was seriously injured when a component of the pressurized air suspension system" of a truck manufactured by Freightliner burst.<sup>341</sup> At the time of the accident, Henderson was working on the driver's side air spring, which consisted of a rubber air bag and a piston.<sup>342</sup> When replacing the air spring assembly, Freightliner's service manual instructs mechanics, among other things, to "[r]aise the vehicle frame and support it with safety stands," to disconnect the leveling valve, and to "exhaust all air from the air springs."<sup>343</sup> Henderson was familiar with the warning and knew that he needed to take such steps before working on the suspension system.<sup>344</sup> When he first rolled under the truck on his roller platform, however, he had not yet released the air in the air suspension system and it remained pressurized.<sup>345</sup> The air spring assembly exploded while Henderson was beneath the truck.<sup>346</sup>

The parties disputed whether Henderson rolled under the truck merely to diagnose or inspect the air spring, or whether he had actually started to work on

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knowledge and appreciation of the specific danger and voluntarily [incurred] the risk." (emphasis added) (internal quotation marks omitted)).

337. 714 N.E.2d 194, 199 (Ind. Ct. App. 1999).

338. 777 N.E.2d 1110 (Ind. Ct. App. 2002), *clarified on reh'g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003), *vacated*, 841 N.E.2d 1133 (Ind.), *reh'g denied* (Ind. 2006).

339. In *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 745 (Ind. 2005), a panel of the Indiana Court of Appeals seemed to assume, as did *Mesman*, that the incurred risk defense is not a complete one because it embraces a discussion built around a comparative fault analysis, ultimately finding no liability because, as a matter of law, no reasonable juror could have concluded anything other than that Coffman's comparative fault in incurring the risk exceeded the total fault that could be assessed to the alleged tortfeasors. The court in *Coffman* noted that "incurred risk bars a product strict liability claim when the evidence is undisputed and reasonable minds could draw" only one inference. 815 N.E.2d at 528 (citing *Smock Materials Handling Co. v. Kerr*, 719 N.E.2d 396, 402 (Ind. Ct. App. 1999)). "While the allocation of each party's proportionate fault is generally a question for the trier of fact, such is not the case when there is no dispute in the evidence and the fact finder could reach only one conclusion." *Id.* at 528.

340. No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005).

341. *Id.* at \*1.

342. *Id.* at \*4.

343. *Id.* at \*5.

344. *Id.*

345. *Id.*

346. *Id.* at \*5-6.

it.<sup>347</sup> Although Henderson did not recall anything that occurred after he rolled under the truck, “a co-worker inspected the scene” after the accident “and found tools under the truck, including an impact gun, some sockets, and a wrench.”<sup>348</sup> The first mechanic to work on the truck after Henderson’s injury, Timothy Couch, testified that he found a deep-well socket that belonged to Henderson wedged between the truck’s frame and the axle housing.<sup>349</sup> Couch testified that mechanics put sockets in that location to prevent the frame from lowering onto the axle housing when the air is released from the suspension system.<sup>350</sup>

Removing an air spring assembly requires a mechanic to loosen U-bolts that hold the truck’s leaf springs in place.<sup>351</sup> The parties also disputed whether the U-bolts securing the leaf spring were tight when Couch began to remove the failed air spring assembly, or whether Henderson had already loosened them.<sup>352</sup>

Henderson brought claims against Freightliner as well as the manufacturer of the allegedly defective air spring component of the truck’s suspension system and the allegedly defective leaf spring that was part of the suspension.<sup>353</sup> Each of the defendants moved for summary judgment, arguing, among other things, that Henderson incurred the risk of harm by working on the truck’s suspension system without first bleeding the air pressure from the system.<sup>354</sup>

Judge Hamilton began his analysis by recognizing that the defendants had to “present sufficient evidence to convince a reasonable jury that Henderson had actual knowledge of the specific risk that he faced” in order for the incurred risk defense to apply.<sup>355</sup> To apply the defense to foreclose claims as a matter of law in the context of a summary judgment motion, Judge Hamilton wrote that the defendants would have to show that any reasonable jury would be required to find that Henderson had such knowledge.<sup>356</sup>

Judge Hamilton concluded that the defendants were not entitled to judgment as a matter of law with respect to the incurred risk defense because record evidence, in his view, “would easily allow a jury to find that Henderson had not begun working on a still pressurized air suspension system when the piston exploded.”<sup>357</sup> According to the court, evidence existed that would allow a jury to conclude that Henderson was merely preparing to work on the system, that he had gathered some tools in preparation for such work, and that he was underneath

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347. *Id.* at \*6.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at \*7.

352. *Id.*

353. *Id.* at \*2.

354. *Id.* at \*10. Defendants alternatively argued that they were entitled to summary judgment because Henderson’s conduct amounted to a misuse of the truck. *Id.*; see *infra* Part IV.B.

355. *Id.* at \*11.

356. *Id.*

357. *Id.* at \*12.



the truck only to initially inspect the suspension system.<sup>358</sup> “Perhaps most telling,” according to Judge Hamilton, “a jury could find that he put the deep well socket on the truck frame so that he would have more room to work after bleeding the air from the system.”<sup>359</sup>

“Henderson [clearly] understood that it was dangerous to work on a pressurized suspension system.”<sup>360</sup> Indeed, he admitted in his deposition that he wanted to get the air out of the system before he removed the components to avoid an explosion.<sup>361</sup> According to Judge Hamilton, such an “understanding provides some evidence that weighs against the circumstantial evidence that defendants cite to argue that he began working while the system was still pressurized.”<sup>362</sup>

### 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.<sup>363</sup>

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 may be similar to the facts necessary to prove either that the product is in a condition not contemplated by reasonable users or consumers under Indiana Code section 34-20-4-1(1) or that the injury resulted from handling, preparation for use, or consumption that is not reasonably expectable under Indiana Code section 34-20-4-3.

Recent decisions in cases such as *Barnard v. Saturn Corp.*,<sup>364</sup> and *Burt v.*

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358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at \*12-13.

363. IND. CODE § 34-20-6-4 (2005). Stated in a slightly different way, misuse is a “use for a purpose or in a manner not foreseeable by the manufacturer.” *Henderson*, 2005 U.S. Dist. LEXIS 5832, at \*10 (internal quotation marks omitted) (quoting *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003)).

364. 790 N.E.2d 1023 (Ind. Ct. App. 2003). *Barnard* was a wrongful death action against the manufacturers of an automobile and its lift jack. *Id.* at 1026-27. Plaintiff’s decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. The jack gave way, trapping the decedent underneath the car. *Id.* at 1027. Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow. *Id.* at 1026. For example, the decedent failed to block the tires while he used the jack, he used the jack when the vehicle was not on a flat surface, and he got underneath his vehicle while it was raised on the jack—all of these actions were contrary to the warnings provided by the manufacturers. *Id.* at 1030.

*Makita USA, Inc.*,<sup>365</sup> have resolved the applicability of the misuse defense as a matter of law. The *Henderson* case, discussed in detail above in the context of the incurred risk defense, also involved the misuse defense. There, defendants argued that Henderson began working on the truck's air suspension system without first bleeding the air pressure from the system, which was a misuse because the truck's service manual requires that mechanics, among other things, disconnect the leveling valve and to exhaust all air from the springs.<sup>366</sup> Judge Hamilton decided that the disputed issues of fact noted above precluded him from granting summary judgment that the misuse defense foreclosed recovery as a matter of law.<sup>367</sup>

As is the case with the incurred risk defense, courts applying Indiana law continue to reach contrary decisions with regard to whether misuse is a complete defense. In *Burt v. Makita USA, Inc.*,<sup>368</sup> an Indiana federal district court recognized that the misuse of a product operates as a complete defense.<sup>369</sup> Two other Indiana Court of Appeals decisions, *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*<sup>370</sup> and *Morgen v. Ford Motor Co.*,<sup>371</sup> have held that a misuse is a "complete" defense under the IPLA, recognizing that the facts giving rise to a misuse defense effectively create an unforeseeable intervening cause, thus eliminating any need to compare fault.<sup>372</sup> On the other hand, decisions in cases

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The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed. The *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that "no reasonable trier of fact could find that [the Decedent] was less than fifty percent at fault for the injuries that he sustained." *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question. For a more detailed analysis of *Barnard*, see Alberts & Bria, *supra* note 26, at 1286-87.

365. 212 F. Supp. 2d 893 (N.D. Ind. 2002). In *Burt*, the plaintiff was injured by a circular saw's blade guard. *Id.* at 894. 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 attached. To the contrary, the evidence suggest[ed] that the accident was unforeseeable, caused by a very unusual set of factual circumstances.

*Id.* at 898. Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law. *Id.* That being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met, which necessarily also meant that the defense of "misuse" had been established as a matter of law. *Id.* at 898; see also Alberts & Boyers, *supra* note 35, at 1195-96.

366. *Henderson*, 2005 U.S. Dist. LEXIS 5832, at \*5, \*10.

367. *Id.* at \*10-14.

368. 212 F. Supp. 2d 893 (N.D. Ind. 2002).

369. *Id.* at 897.

370. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

371. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *aff'd in part, vacated in part*, 797 N.E.2d 1146 (Ind. 2003), *reh'g denied* (Ind. 2004).

372. *Id.*

such as *Chapman v. Maytag Corp.*,<sup>373</sup> and *Barnard v. Saturn Corp.*,<sup>374</sup> have determined that the degree of a user's or a consumer's misuse is a factor to be assessed in determining that user's or consumer's "fault," which must then be compared with the "fault" of the alleged tortfeasor(s). The Indiana Supreme Court in *Morgen v. Ford Motor Co.*,<sup>375</sup> acknowledged the conflicting authority, but did not address the issue.

The debate is interesting. The 1995 amendments to the IPLA changed Indiana law with respect to fault allocation and distribution in product liability cases. Indeed, the Indiana General Assembly provided 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.<sup>376</sup> In addition, the IPLA now requires the trier of fact to compare the "fault" (as the term is defined by statute) of the person suffering the physical harm, as well as the "fault" of all others whom caused or contributed to cause the harm.<sup>377</sup> 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.<sup>378</sup>

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 he also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement.<sup>379</sup>

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

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373. 297 F.3d 682 (7th Cir. 2003). In *Henderson*, Judge Hamilton cited *Chapman* for the proposition that "[t]he misuse defense is not necessarily a complete defense but is an element of comparative fault." 2005 U.S. Dist. LEXIS 5832, at \*10. For a more detailed analysis of *Chapman*, see Alberts & Boyers, *supra* note 35, at 1196-97.

374. 790 N.E.2d 1023 (Ind. Ct. App. 2003). According to the *Barnard* court, "the defense of misuse should be compared with all other fault in a case and does not act as a complete bar to recovery in a products liability action." *Id.* at 1029. The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed. *Id.* "By specifically directing that the jury compare all fault in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme." *Id.* at 1030; see also Alberts & Bria, *supra* note 26, at 1286-87.

375. 797 N.E.2d 1146, 1148 n.3 (Ind. 2003).

376. IND. CODE § 34-20-7-1 (2005).

377. *Id.* § 34-20-8-1(a).

378. *Id.* § 34-20-8-1(b).

379. *Chapman v. Maytag Corp.*, 279 F.3d 682, 689 (7th Cir. 2003).

necessarily mean that it is exempted. After all, it would seem equally likely that the legislature's silence on the matter indicates 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.<sup>380</sup>

### *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 physical harm where the modification or alteration is not reasonably expectable to the seller.<sup>381</sup>

The alteration defense is incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1. Indeed, the Indiana Code provides that

a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if . . . 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.<sup>382</sup>

Accordingly, if a claimant cannot establish or if a defendant conclusively proves that the product underwent some "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.<sup>383</sup>

One decision during the survey period addresses the "alteration" defense.

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380. Before the 1995 amendments to the IPLA, misuse was a "complete" defense. *E.g.*, *Estrada v. Schmutz Mfg. Co.*, 734 F.2d 1218 (7th Cir. 1984).

381. IND. CODE § 34-20-6-5 (2005). Before the 1995 Amendments to the IPLA, product modification or alteration operated as a complete defense. *See Foley v. Case Corp.*, 884 F. Supp. 313, 315 (S.D. Ind. 1994).

382. IND. CODE § 34-20-2-1.

383. Indiana Pattern Jury Instruction 7.05(C) does not correctly reflect Indiana law in this regard. There is undeniable overlap within the statutory framework in this context. 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, there should be little controversy that the alteration/modification defense is "complete" in nature by the very statute that imposes product liability in Indiana as a threshold matter.

Recall in *Henderson*, a truck mechanic was injured while either working on or preparing to work on a Freightliner truck's air suspension assembly.<sup>384</sup> The truck at issue had an auxiliary axle added to help handle additional weight.<sup>385</sup> The axle was added sometime after its original manufacture but before Henderson's injury.<sup>386</sup> Freightliner did not manufacture, design, or install the auxiliary axle.<sup>387</sup>

Freightliner argued that the addition of the auxiliary axle substantially altered the truck because "it increased the likelihood that a malfunction or failure of the suspension system or its component parts would occur."<sup>388</sup> Freightliner contended that such "a substantial alteration was an unforeseeable intervening and proximate cause of Henderson's injuries" that entitled it to summary judgment.<sup>389</sup> Judge Hamilton disagreed, concluding that Freightliner's evidence stopped "well short of claiming that the auxiliary axle actually contributed at all to the Henderson accident."<sup>390</sup>

Freightliner relied on three cases, *Wolfe v. Stork RMS-Protecon, Inc.*,<sup>391</sup> *Leon v. Caterpillar Industrial, Inc.*,<sup>392</sup> and *Bishop v. Firestone Tire & Rubber Co.*,<sup>393</sup> in support of the argument that plaintiffs could not meet their burden of proof with respect to proximate cause.<sup>394</sup> Judge Hamilton distinguished all three cases, pointing out that the alteration at issue in each case "was a direct and undisputed cause of the injury, and there was no evidence independent of the alteration that the product was defective when it left the control of the defendant manufacturer."<sup>395</sup> According to Judge Hamilton, that was simply not the case in *Henderson*, and moreover, plaintiffs came forward with evidence from which "a jury could infer that the leaf spring and air spring with which the truck left Freightliner's control were the sole causes of the injury."<sup>396</sup> Indeed, the court wrote that Freightliner did not "come forward with evidence tending to show that the auxiliary axle contributed to this injury in any way" and that its opinion witness "testified only vaguely that the alteration 'increased the likelihood' that some unspecified 'malfunction or failure of the suspension system or its component parts would occur.'"<sup>397</sup>

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384. *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DHF-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005).

385. *Id.* at \*7.

386. *Id.*

387. *Id.*

388. *Id.* at \*22-23.

389. *Id.* at \*23.

390. *Id.*

391. 683 N.E.2d 264 (Ind. Ct. App. 1997).

392. 69 F.3d 1326 (7th Cir. 1995).

393. 814 F.2d 437 (7th Cir. 1987).

394. *Henderson*, 2005 U.S. Dist. LEXIS 5832, at \*24.

395. *Id.* at \*24-25.

396. *Id.* at \*28-29.

397. *Id.* at \*29. Plaintiffs also pointed to additional evidence that the auxiliary axle was in place and was supporting part of the weight of the truck's load at the time of the accident, which

The result of the court's ruling in *Henderson* was that the statutory "alteration" defense did not preclude recovery as a matter of law.<sup>398</sup> Freightliner was free to make its "substantial alteration argument to a jury."<sup>399</sup>

#### CONCLUSION

The 2005 survey period once again proved that this is an important and thought-provoking time for product liability practitioners and judges in Indiana.

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tended "to show that the auxiliary axle contributed nothing to the accident." *Id.*

398. *Id.*

399. *Id.*