

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2006 survey period¹ was important for Indiana judges and product liability practitioners, particularly because of some insightful and well-reasoned decisions by the Indiana Supreme Court and the Seventh Circuit Court of Appeals. In the twelve years since the Indiana General Assembly amended the Indiana Product Liability Act (“IPLA”)² in 1995, Indiana judges and product liability practitioners have made significant progress in refining its scope. The 2006 survey period was no different.

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

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1. The survey period is October 1, 2005, to September 30, 2006, though there are a few cases that this survey article addresses that courts decided after September 30, 2006.

2. 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.

3. Courts issued several important opinions in cases in which the theory of recovery was related to or in some way based upon “product liability” principles but the appellate issue did not involve a question implicating substantive Indiana product liability law. Those decisions are not addressed in detail here because of space constraints even though they may be interesting to Indiana product liability practitioners. *See Maroules v. Jumbo, Inc.*, 452 F.3d 639 (7th Cir. 2006) (deciding *res ipsa loquitur* and related evidentiary issues); *Patrick Indus., Inc. v. ADCO Products, Inc.*, No. 3:05cv0616 AS, 2006 WL 2579642 (N.D. Ind. Sept. 5, 2006) (determining the burden imposed by Federal Civil Procedure Rule 56 to defeat application of statute of limitations); *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006) (burden imposed by Federal Civil Procedure Rule 56 to show that a defendant sold, leased, or otherwise placed an allegedly defective product into the stream of commerce); *Downey v. Union Pac. R.R.*, 411 F. Supp. 2d 977 (N.D. Ind. 2006) (reviewing the negligence duty associated with supplier of chattel); *Parks v. Guidant Corp.*, 402 F. Supp. 2d 964 (N.D. Ind. 2005) (federal officer removal); *Glotzbach v. Froman*, 854 N.E.2d 337 (Ind. 2006) (analyzing the relationship between workers’ compensation recovery and necessity of proving a product liability case); *Alli v. Eli Lilly & Co.*, 854 N.E.2d 372 (Ind. Ct. App. 2006) (applying Michigan substantive product liability law after

substantive product liability issues. This survey also provides some background information, context, and commentary when 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.⁴ In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.⁵

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.⁶ The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of the statutes governing civil practice.

The 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."⁷ 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 who 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";⁸ (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";⁹ (3) "physical harm caused

determining Indiana substantive product liability law did not apply); *Bridgestone Ams. Holding, Inc. v. Mayberry*, 854 N.E.2d 355 (Ind. Ct. App. 2006) (deciding issues involving jurisdiction and extent of protective order); *Faris v. AC&S, Inc.*, 842 N.E.2d 870 (Ind. Ct. App. 2006) (deciding procedural and loss of consortium issues).

In addition, because product liability cases often turn on the admissibility, credibility, and persuasiveness of expert opinion witnesses, *Ervin v. Johnson & Johnson, Inc.*, No. 2:04CV0205-JDT-WGH, 2006 WL 1529582 (S.D. Ind. May 30, 2006), is likewise a case in which product liability practitioners may be interested.

4. Act of Apr. 21, 1983, 1983 Ind. Acts 1814.

5. Act of Apr. 26, 1995, 1995 Ind. Acts 4051. 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 (2004).

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" 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.

by a product”;¹⁰ (4) a product that is in a “defective condition unreasonably dangerous to [a] user or consumer” or to his property;¹¹ and (5) a product that “reach[ed] the user or consumer without substantial alteration in [its] condition.”¹² 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.”¹³

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 expected use.¹⁴

“User” has the same meaning as “consumer.”¹⁵ Several published decisions

10. IND. CODE § 34-20-1-1(3) (2004).

11. *Id.* § 34-20-2-1.

12. *Id.* § 34-20-2-1(3). 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 the 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. IND. CODE § 34-20-1-1 (2004).

14. *Id.* § 34-6-2-29.

15. *Id.* § 34-6-2-147.

in recent years construe the statutory definitions of “user” and “consumer.”¹⁶

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 the harm caused by the defective condition.”¹⁷ 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. In that regard, the IPLA 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), Inc.*,¹⁸ further defining and narrowing who qualifies as a “user” or “consumer” for purposes of bringing an action under the IPLA. In that case, Daniels Company (“Daniels”) designed and built a coal preparation plant at a facility owned by Solar Sources, Inc. (“Solar”).¹⁹ Part of the design involved the installation of a heavy media coal sump.²⁰ An out-of-state steel company manufactured the sump that Daniels designed and sent it, unassembled, to the facility.²¹

Stephen Vaughn worked for the construction company that Daniels hired to install the sump.²² 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

16. See *Butler v. City of Peru*, 733 N.E.2d 912, 919 (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, 279 (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. 841 N.E.2d 1133 (Ind. 2006).

19. *Id.* at 1136.

20. *Id.*

21. *Id.*

22. *Id.*

place gave way, causing Vaughn to fall and sustain injuries.²³ Vaughn did not wear his safety belt when he climbed onto the sump.²⁴

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.²⁵ 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.”²⁶

The Indiana Supreme Court held that Daniels could not be liable under the IPLA because Vaughn was not a “user” or “consumer.”²⁷ Vaughn could not be considered either a purchaser of the sump or a person “acting for or on behalf of the injured party.”²⁸ 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.”²⁹ 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.”³⁰

Practitioners should recognize here that the court addresses Vaughn’s design defect product liability claim against Daniels as if it was a “strict liability” claim.³¹ The court’s unfortunate use of the term “strict liability” in such a context might confuse those who seek to interpret the opinion consistent with the IPLA’s requirements. To the extent that Vaughn asserted a product liability claim employing a design defect theory, it is not a “strict liability” claim because the IPLA requires Vaughn to prove, among other things, that Daniels “failed to exercise reasonable care under the circumstances in designing the product.”³²

23. *Id.*

24. *Id.*

25. *Id.*

26. *Vaughn v. Daniels Co. (W. Va.), Inc.*, 777 N.E.2d 1110, 1139 (Ind. Ct. App. 2002), *clarified on reh’g*, 782 N.E.2d 1062 (Ind. Ct. App. 2003), *vacated*, 841 N.E.2d 1133 (Ind. 2006). For a more detailed analysis of the court of appeals’ decision in *Vaughn*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L. REV. 1247, 1250-57 (2004).

27. *Vaughn*, 841 N.E.2d at 1133.

28. *Id.* at 1139.

29. *Id.*

30. *Id.*

31. *Id.* at 1138-43.

32. See IND. CODE § 34-20-2-2 (2004); see also *infra* notes 71-76 and accompanying text.

B. “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.”³³ “Seller” . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.”³⁴ 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 engaged in the business of selling the product.”³⁵

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.³⁶

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.”³⁷

33. IND. CODE § 34-6-2-77 (2004).

34. *Id.* § 34-6-2-136.

35. *Id.* § 34-20-2-1(2); *see, e.g.*, *Williams v. REP Corp.*, 302 F.3d 660, 663 (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, 745 (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).

37. *Id.* § 34-20-2-4. *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressing the circumstances

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,”³⁸ Indiana Code section 34-20-2-3 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.³⁹

Thornburg v. Stryker Corp.,⁴⁰ is the only published decision from the survey period addressing whether or not a particular defendant is, in fact, a manufacturer or seller under the IPLA. In that case, the plaintiff, Vickie Thornburg, underwent hip replacement surgery and subsequently filed product liability and medical malpractice claims against defendants Stryker Corporation (“Stryker”) and Howmedica Osteonics Corp. d/b/a Stryker Orthopaedics (“HOC”).⁴¹ Stryker moved for summary judgment, contending that it did not manufacture or sell the

under which entities may be considered “manufacturers” or “sellers” under the IPLA. *See also* *Goines v. Fed. 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 “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 (2004). 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, 899 (N.D. Ind. 2002); *see also* *Alberts & Boyers*, *supra* note 35, at 1173-75.

40. No. 1:05-CV-1378-RLY-TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006).

41. *Id.* at *1.

device that Thornburg alleged caused her injuries.⁴² Thornburg cited only Stryker's status as HOC's parent company to support her claims against Stryker.⁴³ According to the court, such evidence "alone is ineffectual because it ignores the 'general principle of corporate law . . . that a parent corporation . . . is not liable for the acts of its subsidiaries.'"⁴⁴ The record was otherwise "bereft of any evidence that Stryker sold, leased, or otherwise placed the allegedly defective hip replacement system into the stream of commerce."⁴⁵ Consequently, the court held that Thornburg's evidence did not satisfy her summary judgment burden and granted summary judgment in Stryker's favor.⁴⁶

*Fellner v. Philadelphia Toboggan Coasters, Inc.*⁴⁷ also addressed the extent to which a plaintiff could maintain a product liability claim against a defendant. In that case, Tamara Fellner was killed when she was ejected from a wooden roller coaster train operated as an attraction at Holiday World, an amusement park in southern Indiana.⁴⁸ Defendant Philadelphia Toboggan Coasters, Inc. ("PTC") developed and manufactured the cars.⁴⁹ Defendant Koch Development Corp. ("Koch") owns and operates both Holiday World and the roller coaster involved.⁵⁰ The personal representative of Fellner's estate sued PTC for "the design and manufacture of the cars" and also sued Koch "for the operation of the roller coasters."⁵¹ Plaintiff sought to "hold Koch liable for negligence, strict liability, and breach of implied warranties."⁵²

Arguing that it was not a "seller" of a product for purposes of the IPLA, Koch moved to dismiss the plaintiffs' strict liability and breach of implied warranties against it, as well as plaintiffs' punitive damages claims.⁵³ The court agreed that those claims should be dismissed.⁵⁴ There is no doubt that plaintiff sought by the so-called "strict liability" count to pursue Koch based upon

42. *Id.*

43. *Id.* at *4.

44. *Id.* (quoting *United States v. Bestfoods*, 524 U.S. 51, 60 (1998)).

45. *Id.*

46. *Id.*

47. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006).

48. *Id.* at *1.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The negligence claim against Koch appeared to assert that Koch: "(1) failed to ensure that Fellner was safely and properly secured by the restraints . . . ; (2) failed to properly hire, train and supervise ride attendants; and (3) failed to properly test, inspect, and maintain the restraints." *Id.* The so-called "strict liability" claim appeared to assert that Koch failed to "provide proper and adequate warnings" about the roller coaster. *Id.* There was also an allegation that Koch "failed to comply with local, state, and federal regulations, ordinances, rules, and statutes applicable to amusement park rides[.]" *Id.* It was difficult to determine whether such an allegation was intended to support an IPLA-based theory of recovery or a common law negligence theory of recovery.

53. *Id.*

54. *Id.* at *4.

manufacturing and warning defect theories. As such, those allegations are covered by the IPLA because they arise out of physical harm a product (the roller coaster in this case) caused. The IPLA, however, does not permit Koch to be sued under its provisions for physical harm caused by the roller coaster car because it was not the “seller” of the car at issue. Citing *Marsh v. Dixon*,⁵⁵ the court determined that an “an amusement park [that] sells tickets to individual purchasers is not the ‘seller’ of a product for purposes of the [IPLA].”⁵⁶

It is important for the sake of clarity to point out that the *Fellner* decision employs the term “strict liability” as if it is synonymous with all IPLA-based product liability claims. It may have done so because plaintiff pursued a self-styled “strict liability” count against Koch based upon both manufacturing and warning defects. Regardless, as Indiana Code section 34-20-2-2 makes clear, product liability claims relying upon an improper design or inadequate warning theory of recovery must be evaluated using a negligence standard. Warning defect claims are not subject to “strict” liability to the extent that “strict” liability means liability absent the exercise of “all reasonable care in the manufacture and preparation of the product” (i.e., liability without “fault”).⁵⁷ Accordingly, regardless whether Koch was a seller of the roller coaster, plaintiff could not pursue a “strict liability” claim against Koch based upon a warning defect theory in the first instance because such claims require proof of negligence and are not “strict” in the sense that liability can be proved without regard to fault.

C. 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.”⁵⁸ It does not include “gradually evolving damage to property or economic losses from such damage.”⁵⁹

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

55. 707 N.E.2d 998, 1001-02 (Ind. Ct. App. 1999).

56. *Fellner*, 2006 WL 2224068 at *4.

57. IND. CODE § 34-20-2-2 (2004); *see infra* notes 71-76 and accompanying text.

58. IND. CODE § 34-6-2-105(a) (2004).

59. *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 damage to other property from a defective product are actionable under the [IPLA], but their presence does not create a claim under the Act 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 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.”⁶⁰ “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.”⁶¹

D. Defective and Unreasonably Dangerous

Only products that are in a “defective condition” are ones for which IPLA liability may attach.⁶² 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.⁶³

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.⁶⁴

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”).⁶⁵

60. IND. CODE § 34-6-2-114(a) (2004).

61. *Id.* § 34-6-2-105(b).

62. *Id.* § 34-20-2-1(1); *see also* *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No. 2:03-cv-178-TS, 2006 WL 3147710 at *5 (N.D. Ind., Oct. 31, 2006).

63. IND. CODE § 34-20-4-1 (2004).

64. *See Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003) (“[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))).

65. *See First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 (7th Cir. 2004); *Westchester Fire Ins.*, 2006 WL 3147710 at *5; *Baker*, 799 N.E.2d at 1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997). *Troutner v. Great Dane Ltd. Partnership*, No. 2:05-CV-040-PRC, 2006 WL 2873430 (N.D. Ind. Oct. 5, 2006), provides additional authority confirming that a plaintiff’s product liability claim will fail as a matter of law if he or she does not articulate a legitimate manufacturing, design, or warning defect. In that case, the plaintiff was a semi-truck driver who fell and suffered head injury when a grab bar mounted on his trailer gave way. *Id.* at *1. The plaintiff sued the companies that manufactured and sold the trailer and the grab bar, alleging that they placed a trailer with a grab bar into the stream of commerce in a defective and unreasonably dangerous condition. *Id.* The case was removed to federal court, and both manufacturing defendants moved for summary judgment, pointing out that plaintiffs’ own expert testified that the most likely cause of the failure of the grab bar was inadequate and negligent maintenance. *Id.* at *3. The plaintiff did not file a response to either

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].”⁶⁶ In addition, 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.”⁶⁷

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 consumer who purchases [it] with ordinary knowledge about the product’s characteristics common to the community of consumers.”⁶⁸ A product is not

motion. *Id.* at *1. Because, under such circumstances, no reasonable jury could find for plaintiff on the product liability claims, the court granted summary judgment. *Id.* at *3.

66. IND. CODE § 34-20-4-3 (2004). One recent case discussing “reasonably expectable use” is *Hunt v. Unknown Chemical Mfr. No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at *28-*32 (S.D. Ind. Nov. 5, 2003) (Homeowner tore down and burned a deck that was made from lumber treated with chromium copper arsenate. He then spread the ashes as fertilizer in the family garden. Judge Larry McKinney held that homeowner could not pursue product liability claim because his use of the lumber was not, legally speaking, foreseeable, intended, or expected.).

67. IND. CODE § 34-20-4-4.

68. *Id.* § 34-6-2-146; *see also Baker*, 799 N.E.2d at 1140; *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999). 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). 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.

Id.

It would seem 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

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.⁶⁹

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.”⁷⁰

The IPLA provides that liability attaches for placing in the stream of commerce a product in a “defective condition”⁷¹ 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.”⁷² What the IPLA bestows, however, in terms of liability despite the exercise of “all reasonable care [i.e., fault],” it then removes for design and warning defect cases, replacing it with a negligence

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).

69. 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] 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.

70. Indeed, in *Bourne v. Marty Gilman, Inc.*, No. 1:03-CV-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1 (S.D. Ind. July 20, 2005), *aff’d* 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect) and *Conley v. Lift-All Co.*, No. 1:03-CV-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *1 (S.D. Ind. July 25, 2005) (involving an alleged warnings defect), Judge Hamilton followed that precise approach.

71. IND. CODE § 34-20-2-1(1) (2004).

72. *Id.* § 34-20-2-2.

standard:

[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.⁷³

The statutory language is, therefore, clear; it imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the “exercise of all reasonable care”) only for those claims relying upon a manufacturing defect theory.⁷⁴ 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.⁷⁵ Despite the IPLA’s unambiguous language and several years worth of authority recognizing that “strict liability” applies only in cases involving alleged manufacturing defects, some courts unfortunately continue to employ the term “strict liability” when referring to IPLA claims, even when those claims allege warning and design

73. *Id.*

74. *See Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (7th Cir. 2005) (“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.”); *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.4 (7th Cir. 2004) (“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.”); *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.”), *aff’d* 452 F.3d 632 (7th Cir. 2006); *see also Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003); *Miller v. Honeywell Int’l Inc.*, No. IP9-1742-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. 2004); *Burt v. Makita, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002).

75. *E.g., Conley*, 2005 U.S. Dist. LEXIS 15468, at *13-*14 (“To withstand summary judgment, [the plaintiff] 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.”).

defects and clearly accrued after the 1995 amendments took effect.⁷⁶

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.⁷⁷ 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.⁷⁸ 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.”⁷⁹ Stated in a slightly different way, “[t]he [p]laintiff bears the burden of proving a design to be unreasonable, and must do so by showing there are other safer alternatives, and that the costs and benefits of the safer design make it unreasonable to use the less safe design.”⁸⁰

Indiana’s requirement of proof of a safer, feasible alternative design is 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.⁸¹ In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard.⁸² 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

76. *E.g.*, *Burt*, 212 F. Supp. 2d at 900; *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *see also Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1138 (Ind. 2006) (cause of action accrued on December 12, 1995); *Fellner v. Philadelphia Toboggan Coasters, Inc.*, No. 3:05-CV-218-SEB-WGH, 2006 WL 2224068, at *1, *4 (S.D. Ind. Aug. 2, 2006) (cause of action accrued on May 31, 2003); *Cincinnati Ins. Cos. v. Hamilton Beach/Proctor Silex, Inc.*, No. 4:05 CV 49, 2006 WL 299064, at *2-*3 (N.D. Ind. Feb. 7, 2006) (cause of action accrued on June 30, 2003).

77. 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.

78. *See Burt*, 212 F. Supp. 2d at 900; *Whitted*, 58 F.3d at 1206.

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

80. *Westchester Fire Ins. Co. v. Am. Wood Fibers, Ind.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006). Another recent Seventh Circuit case postulates that a design defect claim under the IPLA requires “applying the classic formulation of negligence: B [burden of avoiding the accident] < P [probability of the accident that the precaution would have prevented] L [loss that the accident if it occurred would cause].” *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 637 (7th Cir. 2006). *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Judge Learned Hand’s articulation of the “B<PL” negligence formula).

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

82. Ind. Code § 34-20-2-2 (2004); *see also Bourne*, 452 F.3d at 637; *Westchester Fire Ins.*, 2006 WL 3147710, at *5.

available and that the manufacturer unreasonably failed to adopt it.⁸³

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.”⁸⁴ 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.*⁸⁵ In federal court under a *Celotex*⁸⁶ 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.⁸⁷ 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.⁸⁸

During the 2006 survey period, the Indiana Supreme Court, in *Schultz v. Ford Motor Co.*,⁸⁹ endorsed the foregoing burden of proof analysis in design defect claims in Indiana.⁹⁰

State and federal courts applying Indiana law have been busy in recent years addressing design defect claims.⁹¹ Federal courts issued two important opinions

83. 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.

84. IND. CODE § 34-20-4-4 (2004).

85. 644 N.E.2d 118 (Ind. 1994).

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

87. IND. R. PROC. 56.

88. *E.g.*, *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt v. Makita, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002); *see also Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 637 (7th Cir. 2006); *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998); *Westchester Fire Ins. Co. v. Am. Wood Fibers, Ind.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006).

89. 857 N.E.2d 977 (Ind. 2006).

90. *Id.* at 986 n.12 (For a discussion of the burden of proof at summary judgment in a design defect claim, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 39 IND. L. REV. 1145, 1158-60 (2006)).

91. *See Lytle v. Ford Motor Co.*, 814 N.E.2d 301 (Ind. Ct. App. 2004) (An Indiana Court of Appeals panel held, among other things, that the theories offered by plaintiffs’ opinion witnesses regarding the inadvertent unlatching of a seatbelt were not reliable and that designated evidence failed to show that Ford’s seatbelt design was defective or unreasonably dangerous.); *Baker v.*

during the survey period in design defect cases. In the first case, *Bourne v. Marty Gilman, Inc.*,⁹² the United States Court of Appeals for the Seventh Circuit held that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law.⁹³ *Bourne* is a significant decision for Indiana product liability practitioners because, as discussed below, it reinforces at least four important precepts: (1) “defective condition” and “unreasonably dangerous” are not interchangeable terms; (2) the concept of “open and obvious” remains relevant in Indiana product liability law even though it is no longer a stand-alone defense; (3) whether a product presents an unreasonable danger can and should, under the proper circumstances, be decided by a judge as a matter of law; and (4) a claimant’s expert testimony must be sufficient, even at summary judgment stage, to satisfy Indiana’s safer, feasible alternative design requirement in cases in which the claimant pursues a design defect claim.

Plaintiff Andrew Bourne suffered leg and spinal injuries after the Ball State University football team won an upset victory in October 2001.⁹⁴ After the game, fans rushed the field to celebrate, eventually pulling, climbing upon, and rocking one of the goal posts in an effort to bring it down.⁹⁵ Bourne said that he walked under the goal post and jumped up to grab it, but missed.⁹⁶ He then started walking toward the other end of the field when he heard a snap and felt the impact across his back.⁹⁷

Bourne and his parents sued the goal post manufacturer, Marty Gilman, Inc. (“Gilman”), arguing that the goal post was unreasonably dangerous and defective.⁹⁸ Gilman moved for summary judgment, contending that the risk the goal post presented was obvious.⁹⁹ Gilman’s evidence acknowledged that the company has known that fans sometimes tear down goal posts.¹⁰⁰ Gilman’s evidence also established that the aluminum posts are about forty-feet tall and weigh 470 pounds, and that the structure is a so-called “slingshot” design with

Heye-Am., 799 N.E.2d 1135 (Ind. Ct. App. 2003) (An Indiana Court of Appeals panel 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.); *see also* Mesman v. Crane Pro Servs., 409 F.3d 846 (7th Cir. 2005).

92. 452 F.3d 632 (7th Cir. 2006).

93. *Id.* at 633, 638-39.

94. *Id.* at 633. The district court’s analysis of the facts surrounding the end of the game and the collapse of the goal post is a bit more detailed than the Seventh Circuit’s decision. *See Bourne v. Marty Gilman, Inc.*, No. 1:03-CV-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1-*4 (S.D. Ind. July 20, 2005).

95. *Bourne*, 2005 U.S. Dist. LEXIS 15467 at *4.

96. *Id.*

97. *Id.*

98. *Id.* at *1.

99. *Id.* at *10-*12.

100. *Id.*

one vertical support holding up the structure.¹⁰¹

The Bournes countered by submitting an affidavit of a safety engineer who testified that reasonable manufacturers should foresee that goal posts will be torn down by fans and that unwary fans' "lay knowledge of metallurgy lulls them into believing that goal posts fall gradually enough to permit a safe retreat."¹⁰² According to the court, the engineer "did not testify to any science on which he based his opinion."¹⁰³ Instead, his conclusions "apparently rested on availability of alternative designs[,] including "double-offset gooseneck," "hinged," and "fan-resistant" versions.¹⁰⁴ Those designs were more expensive than the Gilman slingshot style at issue.¹⁰⁵ The Bournes' engineer did not run any comparative tests using these other types of posts nor did he cite to any scientific data.¹⁰⁶ According to the court, the Bournes' engineer assumed for the sake of his opinion that more expensive alternatives would be safer.¹⁰⁷

Judge David Hamilton granted summary judgment for Gilman, determining as a matter of law that the goal post was not unreasonably dangerous because it was obvious to an objective, reasonable person that a goal post collapsing under the weight of celebrating fans poses a risk of serious injury.¹⁰⁸ The Bournes appealed to the Seventh Circuit, arguing that the "open and obvious" rule cannot bar a claim for defective design under the Indiana Product Liability Act ("IPLA"), even if a risk is obvious, if they could prove that Gilman should have

101. *Id.* The slingshot style goal post was introduced in 1969 to minimize the danger posed to players in the end zone by the older H-shaped goal posts, which had two vertical supports. *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 633-34 (7th Cir. 2006). Gilman did not design the slingshot-style goal posts, but instead bought the design in 1985. *Id.* at 634. At that time, Gilman switched to a different type of aluminum alloy to facilitate its manufacturing process. *Id.* Gilman admitted that it did not consider at that time any engineering controls to address hazards created by collapsing goal posts. *Id.*

102. *Id.* at 634. Plaintiffs' engineer compiled a non-exhaustive list of football games during which students tore down goal posts. *Id.* He also cited two newspaper articles reporting incidents of injury other than Bourne's, though he did not attempt to compile any statistics. *Id.*

103. *Id.* According to the court, plaintiffs' engineer "offered only speculation to support his premise that social and cultural pressure misleads the average fan into believing that goalposts collapse slowly enough that ripping them down is safe." *Id.* Although the engineer hinted that Gilman's "change in aluminum alloy in 1985 rendered the posts more dangerous, he cited no evidence comparing the posts before and after the change." *Id.*

104. *Id.* The "double-offset gooseneck" design reinforces the single vertical support with another support right next to it. *Id.* The "hinged" design permits the posts to be lowered after a game. *Id.* The "fan-resistant" or "indestructible" design is made out of steel. *Id.*

105. *Id.* The posts like the ones that injured Bourne cost \$4700 per pair. *Id.* Hinged posts cost \$6500. *Id.* "Indestructible" posts cost between \$23,000 and \$32,000. *Id.* The cost of the "double-offset gooseneck" design was not in the record. *Id.*

106. *Id.* According to the court, the engineer "presented just a few marketing materials distributed by makers of these alternative designs." *Id.*

107. *Id.*

108. *Id.* at 634-35.

adopted a safer, feasible alternative design.¹⁰⁹

The Seventh Circuit ultimately agreed that Judge Hamilton's ruling was sound, although it believed it more accurate to state that the goal post was not unreasonably dangerous as a matter of law, rather than declaring that the danger posed by it was obvious as a matter of law.¹¹⁰ In doing so, the Seventh Circuit made it clear that the case examined whether the product was defective and unreasonably dangerous as a matter of law, not whether the "incurred risk" defense applied as a matter of law.¹¹¹ This is an important distinction because the extent to which a product's risk is "open" or "obvious" is a critical element in determining both the reasonableness of the danger it presents and the degree to which a user actually knew of the product's danger.¹¹² The former, not the latter, determination was at issue in *Bourne*.¹¹³

The Seventh Circuit also rejected the Bournes' argument that the goal post was in a "defective condition" because it exposed Andrew to a greater risk than what he, as an ordinary consumer with ordinary knowledge, contemplated.¹¹⁴ With regard to that argument, the court held that "the Bournes must lose because they cannot show a defect with the evidence that they have adduced."¹¹⁵ In the court's view, the "fatal flaw" with the Bourne's argument was that their engineer's "mere conclusions" were the only evidence that the design was defective, and it was insufficient as a matter of law.¹¹⁶ In that regard, the court concluded:

[The engineer] offers only speculation that social pressure and publicity falsely assure [fans] that pulling down posts is safe. (Perhaps seeing the weakness, the Bournes contend simply that people would not rip down posts if they knew the risks.) . . . [The engineer's] suggestion that [Gilman's] change in aluminum alloy in 1985 made the product less safe is nothing but innuendo. [The engineer] does not provide a basis on which a finder of fact could evaluate the frequency of injuries caused by goalposts, or calculate the extent to which risk would actually be reduced by the alternative designs, or justify the cost of those alternatives relative

109. *Id.* at 635.

110. *Id.* at 637.

111. *Id.*

112. *Id.*

113. *Id.* The plaintiffs in *Bourne* relied on the Seventh Circuit's decision in *Mesman v. Crane Pro Services*, 409 F.3d 846 (7th Cir. 2005), for the proposition that Indiana law no longer permits a manufacturer to avoid liability in a design defect case simply because a defect is "open and obvious." The *Bourne* court was quick to distinguish *Mesman* as a case involving application of the "incurred risk defense," which Gilman did not plead nor argue in the case before it. *Bourne*, 452 F.3d at 636-37. For a discussion of precisely that distinction, see Alberts et al., *supra* note 90, at 1188-91.

114. *Bourne*, 452 F.3d at 637.

115. *Id.*

116. *Id.* at 638.

to the benefits of aluminum posts As if unaware of their burden, [plaintiffs] say neither statistics nor testing is required because the competitors actually sell safer (according to [the engineer]) posts (although they are 38% to 700% more expensive). But that will not do: mere existence of a safer product is not sufficient to establish liability Otherwise, the bare fact of a Volvo would render every KIA defective.¹¹⁷

In addition, the court pointed out that the engineer never considered the “possibility of unintended increase in risk to intended users, like the students or staff who would have to hurriedly lower the hinged post to police the crowd at the end of a game.”¹¹⁸ According to the *Bourne* court, such costs “of those incidental effects must be weighed in the balance After all, Indiana neither requires manufacturers to be insurers nor to guard against all risks by altering the qualities sought by intended users.”¹¹⁹

Bourne is a significant decision for Indiana product liability practitioners because it reinforces at least four important precepts. First, the Seventh Circuit in *Bourne*, as did Judge Hamilton, recognized that Indiana law requires a product liability plaintiff to show that the product at issue is both “in a defective condition” and that it is “unreasonably dangerous.”¹²⁰ The decision thus confirms that 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.¹²¹

The second important precept *Bourne* confirms is that “open and obvious” danger remains relevant in Indiana product liability cases even though the 1995 amendments to the IPLA eliminated the so-called “open and obvious” defense. The *Bourne* court recognized,

Obviousness remains a relevant inquiry because . . . the question of what is unreasonably dangerous depends upon the reasonable expectations of consumers and expected uses.¹²² . . . In some cases, the obviousness of the risk will obviate the need for any further protective measures, or obviousness may prove that an injured user knew about a risk but nonetheless chose to incur it.¹²³

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 635-36 (citing *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998)); *Moss v. Crossman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998); *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003)).

121. *Id.*

122. *Id.* at 637 (citing IND. CODE §§ 34-20-4-1, 34-6-2-146 (2004)); *Mesman v. Crane Pro Servs.*, 409 F.3d 846, 850-51 (7th Cir. 2005); *FMC Corp. v. Brown*, 551 N.E.2d 444, 446 (Ind. 1990)).

123. *Id.* (citing *Mesman*, 409 F.3d at 850-51; *FMC Corp.*, 551 N.E.2d at 446).

Practitioners and judges in Indiana should be mindful that application of the “open and obvious” concept can be used in at least two different ways. *Bourne* demonstrates how that concept can be used and applied in determining unreasonable danger. The “open and obvious” concept also applies in the context of the IPLA’s “incurred risk” defense¹²⁴ even though it is correct to acknowledge, as did the *Bourne* court, that there is technically no longer a stand-alone “open and obvious” danger defense. Application of the “open and obvious” danger concept as part of a defendant’s “incurred risk” defense makes it more difficult for manufacturer defendants to achieve summary judgments largely because the defense requires a defendant to establish that the user actually knew of the product’s danger. No such requirement exists when the “open and obvious” concept is used to support the argument that a product is not unreasonably dangerous because of the open and obvious nature of the danger it presents.

The third important product liability precept that the *Bourne* decision reinforces is 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. Indeed, as the *Bourne* court wrote, “[a]lthough obviousness typically factors in the equation for the jury . . . , there are some cases where the case is so one-sided that there is no possibility of the plaintiffs’ recovery.”¹²⁵

As was the case in the district court in *Bourne*, claimants seeking to avoid summary judgment often cite cases from twenty or thirty years ago to support the idea that whether a product is “unreasonably dangerous” is always a question for the jury and should not be decided by a judge as a matter of law. The Seventh Circuit in *Bourne* rejects that premise, pointing out that such a determination is inherently different from, for example, whether a case is one “in which no reasonable jury could find that the plaintiff was less responsible for his own injury than others were[.]”¹²⁶

The fourth precept *Bourne* confirms is that a claimant’s expert testimony must be sufficient, even at summary judgment stage, to satisfy Indiana’s safer, feasible alternative design requirement in cases in which the claimant pursues a design defect claim. Indeed, the court’s analysis demonstrates the various facts that Indiana courts should balance when considering whether a suggested alternative design is really safer and feasible than the one the plaintiff is assailing.

Another federal decision during the 2006 survey period that addressed a design defect claim is *Westchester Fire Ins. Co. v. American Wood Fibers, Inc.*¹²⁷ In that case, the plaintiff, Westchester Fire Insurance Company (“Westchester”) filed suit as the subrogee of a company that operated what is referred to in the

124. IND. CODE § 34-20-6-3 (2004).

125. *Id.* at 637.

126. *Id.*

127. No. 2:03-CV-178-TS, 2006 WL 3147710 (N.D. Ind. Oct. 31, 2006).

opinion as the Hammond Expanders plant, a facility damaged by a fire that allegedly was caused when a wood flour product spontaneously combusted.¹²⁸ Defendant American Wood Fibers, Inc. (“AWF”) manufactured the wood flour product.¹²⁹

The jury returned a defense verdict for AWF.¹³⁰ Westchester filed a motion for a new trial pursuant to Federal Rule of Civil Procedure 59(a).¹³¹ The court denied the motion, and in doing so reiterated the reasons why its rulings were correct and why no new trial was warranted. One of the arguments plaintiff offered in support of its attempt to justify a new trial charged that the court erred by dismissing its manufacturing defect claim and its design defect claim.¹³² Specifically, the plaintiff argued that the defendant’s wood flour was defective because it contained “extractives” that were naturally present in the wood more likely for it to spontaneously combust.¹³³ The defendant’s manufacturing process ground wood into wood flour and did not reduce or remove the naturally occurring level of extractives.¹³⁴

The court dismissed the manufacturing claim because Westchester submitted no evidence suggesting that the wood flour deviated in any way from the intended design or differed in any way from the wood flour AWF normally manufactured.¹³⁵ The court also dismissed the design defect claim because Westchester presented no evidence showing there as a safer, reasonably feasible alternative.¹³⁶ Indeed, according to the court, Westchester offered no evidence “as to whether it is possible to remove or reduce the extractives from wood flour or as to the cost of doing so.”¹³⁷

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.¹³⁸

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the

128. *Id.* at *1.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at *5.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. IND. CODE § 34-20-4-2 (2004).

same as the requirement that the defect be latent or hidden.¹³⁹

Indiana courts have been active in recent years in resolving cases espousing warning defect theories, including *Conley v. Lift-All Co.*,¹⁴⁰ *First National Bank & Trust Corp. v. American Eurocopter Corp.* (“*Inlow II*”)¹⁴¹ and *Birch v. Midwest Garage Door Systems*.¹⁴² The 2006 survey year brought continued activity, and three cases deserve discussion.

In *Tober v. Graco Children’s Products, Inc.*,¹⁴³ the Seventh Circuit addressed the viability of a post-sale duty to warn claim under Indiana law.¹⁴⁴ In that case, the Tobers sued Graco after their eight-month old son, Trevor, was asphyxiated when he became entangled in the harness straps of a Lil’ Napper swing on the

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

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

141. *Inlow II*, 378 F.3d 682, No. IP 99-0830-C H/K, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002), *aff’g In re Inlow Accident Litig. (Inlow I)*. In the *Inlow* cases, a helicopter rotor blade struck and killed the Consec 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 Consec and Inlow as a matter of law in light of the sophisticated intermediary doctrine. *Id.* at 692-93.

142. 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 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.

143. 431 F.3d 572 (7th Cir. 2005).

144. *Id.* at 579.

morning of April 2, 2002.¹⁴⁵ Trevor was placed in the Lil' Napper swing by his daycare provider and left unattended.¹⁴⁶ The Lil' Napper swing had the following warning label:

NEVER LEAVE CHILD UNATTENDED
ALWAYS KEEP CHILD IN VIEW EVEN WHILE SLEEPING
STAY WITHIN REACH OF YOUR CHILD.¹⁴⁷

In addition, the swing's instruction manual stated that "failure to use the harness restraint system properly could result in the baby falling from the swing."¹⁴⁸ There was no warning in the manual regarding the risk of strangulation.¹⁴⁹ By 1997, Graco had received several reports of children sustaining injuries or death after becoming entangled in the Lil' Napper harness.¹⁵⁰ Graco recalled the Lil' Napper swings in 1997 to retrofit them with new seat pads and new harnesses to prevent the risk of strangulation.¹⁵¹

The Tobers alleged that Graco: (1) failed to correct the defect in the Lil' Napper swings; (2) failed to warn of the swing's risks; and (3) failed to adequately recall the swings.¹⁵² The district court granted Graco's summary judgment motion with respect to the recall issue, determining that Indiana courts do not recognize a claim for negligent recall.¹⁵³ The district court also granted Graco's summary judgment motion with respect to the Tobers' warning claim, concluding that it was merely a re-packaged negligent recall claim.¹⁵⁴

The Tobers appealed the district court's ruling with regard to the warning claim and contended that Graco was "unreasonably dilatory in discharging its post-sale duty to warn¹⁵⁵ of the strangulation hazard posed by the Lil' Napper."¹⁵⁶ The Tobers also contended that Graco finally did issue a post-sale warning, via a recall, the warning was flawed."¹⁵⁷ The Tobers contended that two cases established a post-sale duty to warn under Indiana law:¹⁵⁸ *Dague v. Piper*

145. *Id.* at 575.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 577.

153. *Id.*

154. *Id.* at 577-78.

155. A "post-sale" duty to warn refers to hazards that the manufacturer discovers after the product is sold. Warnings that relate to hazards that the manufacturer knows or has reason to know of at the time of sale are called "point of sale" warnings. *Id.* at 578 n.6.

156. *Id.* at 578.

157. *Id.*

158. *Id.*

*Aircraft Corp.*¹⁵⁹ and *Reed v. Ford Motor Company Co.*¹⁶⁰ The Seventh Circuit decided that the Tobers overstated the holdings of *Dague* and *Reed* and that the district court correctly granted summary judgment on this claim:

In our review of the IPLA as well as state and federal case law, we too find that, although the Indiana legislature did not expressly exclude a manufacturer's post-sale duty to warn from the IPLA, the statute does not expressly prescribe or define any cause of action arising from a post-sale duty to warn. Therefore, the Tobers' claim that Graco breached its post-sale duty to warn fails . . .¹⁶¹

Tober is, therefore, significant for Indiana product liability practitioners because it recognizes that the IPLA does not authorize a cause of action for breaching a "post-sale duty to warn."¹⁶²

Another important case addressing failure to warn claims under the IPLA is *Ford Motor Co. v. Rushford*.¹⁶³ *Rushford* discusses the extent to which a seller and manufacturer have a duty to provide additional warnings after learning of the unique characteristics of a particular consumer.¹⁶⁴ In that case, the plaintiff, Marilyn Rushford ("Rushford"), was injured when the front-passenger airbag of her Ford Focus deployed during a front-end collision.¹⁶⁵ Rushford's husband, Charles, was driving at the time of the accident, and Rushford was riding in the front passenger seat.¹⁶⁶ The Rushfords purchased the car from Eby Ford Lincoln Mercury.¹⁶⁷ When they purchased the car, Rushford told the Eby salesman that she did not drive and that Charles would be the primary driver.¹⁶⁸

The front passenger visor of the car contained the following warning:

! WARNING

DEATH or SERIOUS INJURY can occur

Children 12 and under can be killed by the air bag

The BACK SEAT is the SAFEST place for children

NEVER put a rear-facing child seat in the front

Sit as far back as possible from the air bag

ALWAYS use SEATBELTS and CHILD RESTRAINTS¹⁶⁹

Rushford did not read the warning on the sun visor, although she admitted

159. 418 N.E.2d 207 (Ind. 1981).

160. 679 F. Supp. 873 (S.D. Ind. 1988).

161. *Tober*, 431 F.3d at 579.

162. *Id.*

163. 845 N.E.2d 197 (Ind. Ct. App. 2006), *trans. granted* (Ind. Oct. 3, 2006).

164. *Id.* at 201-02.

165. *Id.* at 199.

166. *Id.*

167. *Id.* at 198.

168. *Id.* at 198-99.

169. *Id.* at 198.

seeing it.¹⁷⁰ In addition, the owner's manual contained the following warning:

Seating and Safety Restraints

While the system is designed to help reduce serious injuries, it may also cause abrasions, swelling or temporary hearing loss.

Because air bags must inflate rapidly and with considerable force, there is the risk of death or serious injuries such as fractures, facial and eye injuries or internal injuries, particularly to occupants who are not properly restrained or are otherwise out of position at the time of air bag deployment. Thus, it is extremely important that occupants be properly restrained as far away from the air bag module as possible while maintaining vehicle control.¹⁷¹

Rushford did not read the owner's manual, and she contended that no one told her that the owner's manual contained a warning regarding the airbags.¹⁷² Rushford sued Eby and Ford, alleging that they failed to warn of the risks airbags pose to short people.¹⁷³ Ford and Eby filed motions for summary judgment, which the trial court denied.¹⁷⁴

On appeal, Rushford conceded that the airbag warning contained in the owner's manual was adequate, although she never read it.¹⁷⁵ Rather, she argued that Ford and Eby had a duty to orally warn her that owner's manual contained the airbag warning.¹⁷⁶ In light of the fact that she told the salesman at the Eby dealership that she did not drive, it was unlikely that she would ever read the manual.¹⁷⁷

With regard to Ford's motion for summary judgment, the court pointed out that there was no evidence showing Ford knew Rushford did not drive.¹⁷⁸ Furthermore, there was no evidence that Eby was acting as Ford's agent such that Eby's knowledge should be imputed to Ford.¹⁷⁹ Thus, the appellate court reversed the trial court's denial of Ford's motion for summary judgment.¹⁸⁰

The appellate court, however, reached a different conclusion with regard to Eby's motion for summary judgment. The appellate court held that there was a question of fact regarding whether it was reasonable for Eby, based on its knowledge that Rushford did not drive, to fail to direct her to read the owner's

170. *Id.*

171. *Id.*

172. *Id.* at 198-99.

173. *Id.* at 199-200.

174. *Id.* at 200.

175. *Id.* at 201.

176. *Id.*

177. *Id.*

178. *Id.* at 202.

179. *Id.*

180. *Id.* at 203.

manual.¹⁸¹ Accordingly, the trial court's denial of Eby's summary judgment motion was affirmed.¹⁸²

The court of appeals' decision in *Rushford* is significant because it suggests that a seller may not be able to rely solely upon the manufacturer's warning if the seller has some specific knowledge that the buyer may not read the warning. *Rushford*'s long-term significance may be in doubt because the Indiana Supreme Court granted transfer on October 3, 2006.¹⁸³

Another warning case decided during the survey period is *Williams v. Genie Industries, Inc.*¹⁸⁴ In that case, the plaintiff, Williams, was working at an elevated height in a lift manufactured by defendant Genie Industries, Inc. installing gypsum board on a decorative bulkhead.¹⁸⁵ While Williams was in the basket, the lift was moved to a sloped surface, activating the lift's pothole protection system.¹⁸⁶ As a result, part of the lift extended, and Williams used his hand to dislodge the lift.¹⁸⁷ When the lift dislodged, the basket lowered and Williams's hand was injured when it became caught.¹⁸⁸ Next to Williams's hand on the lift was a warning label that read: "WARNING Crushing Hazard. Contact with moving parts may cause serious death or injury. Keep away from moving parts."¹⁸⁹ Williams did not read the warning.¹⁹⁰ Williams alleged, among other things, that Genie failed to warn of the lift's dangerous propensities.¹⁹¹ Genie moved for partial summary judgment with respect to the failure to warn claim.¹⁹²

The court noted that an adequate warning should cause a reasonable person to exercise safety and caution commensurate with the potential danger, and the court found that the adequacy of warnings is classically a question of fact reserved to the trier of fact.¹⁹³ In addition, the plaintiff must prove proximate cause in a warnings case, which may require the plaintiff to show that an adequate warning would have caused the plaintiff to alter his conduct which led to the injury.¹⁹⁴ Finally, the court stated that the law should provide "a presumption that an adequate warning would have been read and heeded, thereby minimizing the obvious problems of proof of causation."¹⁹⁵

181. *Id.*

182. *Id.*

183. *Id.* at 197.

184. No. 3:04-CV-217 CAN, 2006 WL 1408412 (N.D. Ind. May 19, 2006).

185. *Id.* at *1.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at *3.

191. *Id.* at *1.

192. *Id.*

193. *Id.* at *2.

194. *Id.*

195. *Id.* (citing *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 826

Genie argued (1) that there was “no dispute that warnings were on the lift,” (2) that Williams failed to establish proximate cause, and (3) that because Williams “did not read the warnings affixed to the lift or the operator’s manual,” he could not “assert a failure to warn claim.”¹⁹⁶ The court concluded that although the lift contained warnings, the warnings may not have adequately warned against the particular risk encountered by Williams: at the time of the incident, the lift was not moving; rather, it was stationary.¹⁹⁷ Thus, the adequacy of the warnings was a question of fact for the jury.¹⁹⁸ The court also found that there was a question of fact regarding proximate cause because Williams’ expert suggested that an alternate warning regarding the risk encountered by Williams could have been drafted.¹⁹⁹ Finally, the court rejected Genie’s argument that Williams could not assert a failure to warn claim because he did not read the warning on the lift:

[I]f the warnings are inadequate and the labels fail to capture the user’s attention, failure to read them does not bar the claim as a matter of law. Because there is a question of fact regarding the adequacy of the warnings, this Court cannot find that Williams’ failure to read them bars his claim as a matter of law.²⁰⁰

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.*”²⁰¹ 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.”²⁰² In cases where a person who is user or consumer under the IPLA sues an entity that is a manufacturer or seller under the IPLA for what is indisputably a physical harm caused by a product, there is little doubt that the IPLA merges and subsumes all other tort-based theories of recovery, such as common law negligence claims, tort-based breach of warranty claims, and non-IPLA-based statutory claims.²⁰³

(Ind. App. 1975)).

196. *Id.* at *3.

197. *Id.*

198. *Id.*

199. *Id.* at *3-*4.

200. *Id.* at *4.

201. IND. CODE § 34-20-1-1 (2004) (emphasis added).

202. *Id.* § 34-20-1-2.

203. The statutory theory applies because in Indiana the causes of action that typically seek redress for physical harm spring from tort-based theories of recovery. *See* 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.

Indeed, three cases decided during the survey period reinforce the IPLA merger premise under such circumstances. In the first case, *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,²⁰⁴ a fire that allegedly started in a toaster manufactured by the defendant, Hamilton Beach/Proctor Silex (“Hamilton Beach”), destroyed a couple’s home and personal property.²⁰⁵ Cincinnati Insurance insured the couple’s home and brought a subrogation action against Hamilton Beach,²⁰⁶ asserting claims for negligence, breach of warranty, strict liability, violation of the Magnuson-Moss Warranty Act, and negligent failure to recall.²⁰⁷ Hamilton Beach moved to dismiss the negligence, warranty, Magnuson-Moss, and negligent failure to recall claims.²⁰⁸

Hamilton Beach argued that the IPLA subsumes all negligence and warranty claims, that the Magnuson-Moss claim could not survive without an underlying state-based warranty claim, and that Indiana law does not recognize in any event a negligent failure to recall claim.²⁰⁹ The court agreed that the IPLA subsumes and incorporates all negligence and tort-based warranty claims,²¹⁰ reasoning as follows:

Though the [IPLA] describes separate proof schemes derived from strict liability and negligence standards, the [IPLA] itself provides for a single cause of action when a consumer seeks to recover from a manufacturer or seller for physical harm. . . . In pleading the negligence and [IPLA-based] counts, [plaintiffs] allege the same basic facts regarding the design and manufacture of the toaster and describe the same resulting physical harm from its alleged malfunction. Each count aligns with the requirements of I.C. § 34-20-2-1 with an identical set of facts. Each claim is asserted by the same consumer against the same manufacturer for the same physical harm caused by the same product. Though the [plaintiffs] have alleged underlying theories that include design defects, manufacturing defects, and negligence, the [IPLA] explicitly states that it governs “regardless of the substantive legal theory upon which the action is brought.”²¹¹

The second of the three survey period cases reinforcing the IPLA merger

19, 2000) (holding that a claim alleging breach of implied warranty in tort has been superceded by IPLA-based liability and, thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

204. No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006).

205. *Id.* at *1.

206. Cincinnati Insurance also brought a subrogation action against Kellogg Company, the entity that sold the Pop Tart that allegedly was in the toaster when the fire started. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at *2.

211. *Id.* (citations omitted).

premise is *Ryan v. Philip Morris USA, Inc.*²¹² In *Ryan*, the widow of a man who allegedly died as a result of smoking asserted causes of action against several cigarette manufacturers for product liability, negligence, and fraud.²¹³ The defendants argued that the IPLA provides the sole and exclusive remedy for personal injuries allegedly caused by a product.²¹⁴ The court agreed, holding that the IPLA unequivocally precludes plaintiff's common law negligence and fraud claims.²¹⁵

The third case merging a non-IPLA-based tort theory into the IPLA is *Fellner v. Philadelphia Toboggan Coasters, Inc.*,²¹⁶ first discussed above in the section involving what entities qualify as "manufacturers" and "sellers." The case involved a person who was killed when she was ejected from a wooden roller coaster at Holiday World amusement park.²¹⁷ One of the defendants that the personal representative of Fellner's estate sued was Koch Development Corp. ("Koch"), the entity that owned and operated both Holiday World and the roller coaster involved.²¹⁸ Plaintiff sought to hold Koch liable for negligence, strict liability, and breach of implied warranties.²¹⁹

Like the decisions in *Cincinnati Insurance* and *Ryan*, the *Fellner* decision held that the tort-based implied warranty claim merged into plaintiff's IPLA-based product liability claims, resulting in dismissal of the breach of implied warranty claim because it was not a stand-alone theory of recovery.²²⁰ As noted

212. No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006).

213. *Id.* at *1. The plaintiff also asserted a claim for punitive damages. *Id.*

214. *Id.* at *2.

215. *Id.* "Because the court agrees that all of [plaintiff's] claims are preempted, or supplanted, by the [IPLA], the motion to dismiss will be granted with respect to Plaintiff's common law claims for negligence and fraud." *Id.* Defendants also argued that the plaintiff's fraud claims were not pleaded with the requisite particularity that Federal Rule of Civil Procedure 9(b) requires. *Id.* Because the court agreed that the IPLA precludes the fraud claim, it did not need to reach the issue about whether the fraud claim was pleaded with sufficient particularity. *Id.* at *3. The court's decision to dismiss the negligence and fraud claims did not, however, equate to a dismissal of plaintiffs' entire case because the court correctly recognized that her complaint pleaded factual allegations sufficient to support (at least at the motion to dismiss stage) an IPLA-based product liability claim. *Id.*

216. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006).

217. *Id.* at *1.

218. *Id.*

219. *Id.* The negligence claim against Koch asserts that Koch: (1) "failed to ensure that Fellner was safely and properly secured by the restraints"; (2) "failed to properly hire, train and supervise ride attendants"; and (3) "failed to properly test, inspect, and maintain the restraints." *Id.* The so-called "strict liability" claim appears to assert that Koch failed to "provide proper and adequate warnings" about the roller coaster. *Id.* There is also an allegation that Koch "failed to comply with local, state, and federal regulations, ordinances, rules, and statutes applicable to amusement park rides." *Id.* It is difficult to determine whether such an allegation is intended to support an IPLA-based theory of recovery or a common law negligence theory of recovery.

220. *Id.* at *4.

above, however, it is important to point out that the *Fellner* decision employs the term “strict liability” as if it is synonymous with all IPLA-based product liability claims.²²¹ It is not. The IPLA imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the exercise of “all reasonable care”) only for those claims relying upon a manufacturing defect theory.²²² Thus, when interpreting the *Fellner* decision, practitioners should recognize that the court merged the tort-based breach of implied warranty claim into the IPLA claim even though only plaintiff’s manufacturing defect theory involves “strict liability.”

The foregoing merger premise applies only to tort-based theories of recovery when a product causes physical harm. Contract-based warranty theories of recovery are independent from tort-based warranty theories, and the former undoubtedly fall into the category of “any other action” that Indiana Code section 34-20-1-2 does not limit.²²³

A potential conflict between Indiana Code sections 34-20-1-1 and 34-20-1-2 might exist, however, in cases in which the factual circumstances disqualify a claim from being brought under the IPLA yet a product nevertheless causes the physical harm for which the plaintiff seeks redress. In recent years, courts have

221. *Id.*

222. IND. CODE § 34-20-2-2 (2004); *see also* *Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (7th Cir. 2005) (“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”); *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.4 (7th Cir. 2004) (“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.”); *Conley v. Lift-All Co.*, No. 1:03-CV-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *12-*13 (S.D. Ind. July 25, 2005) (“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 v. Marty Gilman, Inc.*, No. 1:03-CV-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 (S.D. Ind. July 20, 2005) (“[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.”), *aff’d* 452 F.3d 632 (7th Cir. 2006); *Birch v. Midwest Garage Door Systems*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003); *Miller v. Honeywell Int’l Inc.*, No. IP98-1742C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 892, 899-900 (N.D. Ind. 2002); *Kennedy v. Guess, Inc.*, 765 N.E.2d 213, 220 (Ind. Ct. App. 2002), *vacated*, 806 N.E.2d 776 (Ind. 2004).

223. *Fellner*, 2006 WL 2224068; *see also* *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, No. IP98-0031-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 has been superceded by IPLA-based liability and, thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

made no mention of the possibility of a conflict between the two provisions and have had little trouble allowing claims involving plaintiffs and defendants that are otherwise outside the IPLA's scope to exist when a product has caused physical harm.²²⁴ In those instances, practitioners are left to ponder to what degree section 34-20-1-2's admonition against limiting "any other action" conflicts with section 34-20-1-1's apparent requirement that *all* claims for physical harm caused by a product "regardless of the substantive legal theory or theories upon which the action is brought" be merged into the IPLA. Legislative action may be the only way to definitively resolve the issue.

In this context, recall the *Vaughn v. Daniels Co. (West Virginia), Inc.* case,²²⁵ which we first addressed above in the "user" or "consumer" section. There, the plaintiff, Stephen Vaughn, worked for a construction company that Daniels hired to install a coal sump in a coal plant.²²⁶ Vaughn was injured during the installation process when he climbed onto the top of the sump to help connect a pipe and the chain others were using to secure the pipe gave way.²²⁷ Daniels's responsibility was to design and build a coal preparation plant on premises owned by Solar Sources, Inc. in Cannelburg, Indiana.²²⁸ As part of its contract to build the plant, Daniels was responsible for designing and installing a heavy media coal sump.²²⁹ Daniels's plans called for the sump to be delivered to the site in an unassembled state and then assembled and installed on-site by the subcontractor, Trimble Engineers and Constructors, Inc. ("Trimble").²³⁰ Vaughn was a Trimble employee.²³¹

After first concluding that Vaughn did not have an IPLA-based product liability claim based upon a design defect theory because he was not a "user" or "consumer,"²³² the court nevertheless allowed a similarly-styled common law

224. *E.g.*, *Ritchie v. Glidden Corp.*, 242 F.3d 713 (7th Cir. 2000); *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002) (applying Indiana law); *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004). In a case decided during the 2006 survey period, *Dutchmen Mfg., Inc. v. Reynolds*, 849 N.E.2d 516 (Ind. 2006), the Indiana Supreme Court allowed a negligence claim based upon § 388 of the Restatement (Second) of Torts to proceed against a tenant's predecessor and a landlord in a case involving personal injuries sustained as a result of an alleged failure to warn the successor tenant about a known defect in the scaffolding. *Id.* at 518-21. However, the scaffolding was assembled and installed by the predecessor tenant in a manner that affixed it to the ceiling beams of the leased building. *Id.* at 520-22. Therefore, the case does not appear to involve any "product liability" claims because the injury does not appear to have occurred as the result of any "product" placed in the stream of commerce. *Id.* at 522-23.

225. 841 N.E.2d 1133 (Ind. 2006).

226. *Id.* at 1136.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *See supra* notes 18-32 and accompanying text.

“negligent design” claim against Daniels to survive summary judgment.²³³ In doing so, the court reasoned that imposing a common law negligence duty upon Daniels was appropriate because “[t]he relationship between Daniels and Vaughn was that of designer-seller of the product and an employee of the designer-seller’s subcontractor who assembled and installed the product before delivery to the final purchaser.”²³⁴ The court further reasoned that “[i]t was reasonably foreseeable that if Daniels did not use reasonable care to design a safe unassembled and uninstalled facility, those who handled [the product] in the process of assembly and installation, including Vaughn, might be at risk of injury.”²³⁵

The *Vaughn* court appears to accept the basic premise that extra-IPLA tort liability can be imposed in cases in which a product causes physical harm despite the fact that the plaintiff is precluded from bringing an IPLA action because he is not the product’s “user.”²³⁶ The court’s subsequent analysis of the extra-IPLA negligence claim, however, requires some close scrutiny with regard to exactly what kind of claim the court allowed Vaughn to pursue.

Because Vaughn’s surviving “common law” negligence claim alleged “negligent design” against Daniels, it might create some confusion given the court’s clear holding that there is no IPLA-based product liability against Daniels for defective “design” of the particular product itself (the coal sump).²³⁷ So what does one make of the surviving negligence claim asserting improper design? Is it really a design defect product liability claim masquerading for its very survival as a common law claim? Probably not, but the answer to that question is not completely clear. According to the court, Daniels’s potential common law negligence liability appears to spring from its role as the designer of the working conditions and circumstances under which the coal sump was installed and not from the design of the coal sump itself. It seems fair to say that the court characterizes Daniels’s common law negligence liability, if any, as deriving from Daniels’s common law requirement to design and implement sufficient safety devices to protect workers such as Vaughn during assembly and installation of the product at issue (the coal sump).

Viewed in that way, there is a discernable difference between the nature of the common law “negligent design” claims and the IPLA-based product liability claims that are based upon an alleged design defect in the coal sump itself. As such, the court’s holding allowing a common law “design” claim to exist outside

233. *Vaughn*, 841 N.E.2d at 1145-46. In dealing with Vaughn’s negligence claims, the court first determined that defendant Solar Sources, Inc., as Daniels’s principal, was not liable as Daniels’s alleged independent contractor. *Id.* at 1143-44. The court also initially determined that Daniels was not liable by virtue of having assumed via a written safety policy a duty for the design safety of the construction site, nor was Daniels liable by virtue of owing a contractual duty to Vaughn. *Id.* at 1144-45.

234. *Id.* at 1145.

235. *Id.*

236. *Id.* at 1144.

237. *Id.*

the IPLA may not be inconsistent with the IPLA's requirement that all physical harm claims that a product causes (Vaughn's only allegations) be brought under the IPLA "regardless of the substantive legal theory or theories upon which the action is brought."²³⁸

II. STATUTES OF REPOSE AND LIMITATION

The IPLA contains a statute of limitation and a statute of repose for product liability claims. Indiana Code section 34-20-30-1 provides,

(a) This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-11-6-1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

- (1) within two (2) years after the cause of action accrues; or
- (2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.²³⁹

Product liability cases involving asbestos products, however, have a unique statute of limitation. 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."²⁴⁰ That rule applies, however, "only to product liability 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."²⁴¹

During the survey period, three interesting cases involving the statutes of limitation and repose were decided. Two of the cases, *Morgan v. Columbus*

238. IND. CODE § 34-20-1-1 (2004) (emphasis added).

239. *Id.* § 34-20-3-1.

240. *Id.* § 34-20-3-2(a).

241. *Id.* § 34-20-3-2(d). For a discussion of the asbestos-related statute of repose, see *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005) and Alberts et al., *supra* note 90, at 1181.

*McKinnon Corp.*²⁴² and *Bumpus v. Frey*,²⁴³ involve the application of the discovery rule to the statute of limitation. The cases reach conflicting conclusions, despite the similarity of their facts. The third case, *Briggs v. Griffin Wheel Corp.*,²⁴⁴ addresses whether a principal distributor or seller of asbestos-containing products can be considered a “miner and seller” for the purposes of the asbestos-related statute of limitation.

In *Morgan v. Columbus McKinnon Corp.*,²⁴⁵ the plaintiff (“Morgan”) sustained an electrical shock while using a chain hoist at his place of employment.²⁴⁶ The chain hoist was manufactured by Columbus McKinnon Corporation and sold to Horner Electric, Inc. (“Horner”).²⁴⁷ Horner modified the hoist and sold it to Ferguson Enterprises, Inc.²⁴⁸ The hoist was later delivered to Morgan’s employer.²⁴⁹ Morgan sustained the electric shock on May 24, 2001.²⁵⁰ The next day, Morgan went to the plant physician complaining of an ache in his left arm and neck and a feeling of nervousness.²⁵¹ He was evaluated by a neurologist on November 1, 2001, who diagnosed Morgan with “[s]pells following an electrocution.”²⁵² He was also evaluated by a neuropsychologist on August 27, 2003, who diagnosed Morgan with mild cognitive impairment.²⁵³

Morgan sued Columbus, Ferguson, and an “unknown party” on May 13, 2003.²⁵⁴ On March 19, 2004, Morgan filed an amended complaint naming Horner as a defendant.²⁵⁵ Horner filed a motion for summary judgment, arguing that Morgan’s claims were barred by the statute of limitations.²⁵⁶ The trial court granted the motion for summary judgment, and Morgan appealed.²⁵⁷

The court of appeals affirmed the trial court's decision.²⁵⁸ Indiana Code section 34-20-3-1 provides that any product liability action based upon negligence or strict liability must be commenced within two years after the cause of action accrues.²⁵⁹ The court noted that under the “discovery rule,” the statute of limitations runs from “the date the plaintiff knew or should have discovered

242. 837 N.E.2d 546 (Ind. Ct. App.), *trans. denied* 841 N.E.2d 187 (Ind. 2005).

243. No. 3:05-cv-0056-RLY-WGH, 2006 WL 2640000 (S.D. Ind. Sept. 13, 2006).

244. 851 N.E.2d 1261 (Ind. Ct. App. 2006).

245. 837 N.E.2d 546 (Ind. Ct. App. 2006).

246. *Id.* at 547-48.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 548.

252. *Id.* (quoting the neurologist).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 551.

259. IND. CODE § 34-20-3-1 (2004).

that she suffered an injury or impingement, and that it was caused by the product or act of another.”²⁶⁰ Morgan argued that he did not receive a diagnosis of cognitive and psychological disorders until October 30, 2001, several months after the electric shock.²⁶¹ The court rejected that argument and held that Morgan experienced symptoms that would cause a reasonable person to take action that would lead to discovery of his cause of action:

Events short of diagnosis can provide a plaintiff with enough evidence to take action; once a plaintiff’s doctor expressly informs the plaintiff that there is a reasonable possibility, if not a probability, that an injury was caused by an act or product, then the statute of limitations begins to run.²⁶²

Morgan was treated for complaints related to the shock as early as the day after the shock occurred.²⁶³ The court concluded that his symptoms were such that a person of reasonable diligence would take action that would lead to the discovery of his cause of action.²⁶⁴ Thus, the court affirmed the trial court’s decision that the statute of limitation began to run no later than May 25, 2001, the date of his first treatment after the shock.²⁶⁵

In *Bumpus v. Frey*,²⁶⁶ Judge Richard L. Young reached a different conclusion in a case with similar facts. In that case, the plaintiff (“Bumpus”) worked on a melon farm. He was exposed to a crop fumigant on or before April 17, 2003, and claimed that he suffered serious and permanent injury.²⁶⁷ On April 28, 2005, Bumpus sued Hendrix and Dail, Inc. (“H&D”), the company that supplied the chemical.²⁶⁸ During discovery, Bumpus admitted that he experienced symptoms immediately after his exposure to the chemical.²⁶⁹ On that basis, H&D moved for summary judgment, claiming that the two-year statute of limitations barred Bumpus’s claims.²⁷⁰ Bumpus argued that his action against H&D was timely because he did not notice significant respiratory problems and was not diagnosed with a medical problem related to the exposure until June 2003.²⁷¹

Judge Young held that under the discovery rule it was not reasonable to expect that Bumpus would be immediately aware of the medical problems associated with the exposure, especially in light of the fact that he did not receive

260. *Morgan*, 837 N.E.2d at 549 (quoting *Degussa Corp. v. Mullens*, 744 N.E.2d 407, 410 (Ind. 2001)).

261. *Id.* at 549.

262. *Id.* at 549-50.

263. *Id.* at 550.

264. *Id.*

265. *Id.*

266. No. 3:05-cv-0056-RLY-WGH, 2006 WL 2640000 (S.D. Ind. Sept. 13, 2006).

267. *Id.* at *1.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at *2.

medical confirmation until June 2003, several months after the exposure.²⁷² Accordingly, Judge Young found that the statute of limitation did not begin to run until June 2003, and Bumpus's action against H&D was timely filed.²⁷³

*Briggs v. Griffin Wheel Corp.*²⁷⁴ addresses whether a principal distributor or seller of asbestos-containing products can be considered a "miner and seller" for the purposes of the asbestos-related statute of limitation. In that case, the plaintiff, Briggs, brought a wrongful death and loss of consortium claim against Griffin Wheel Corporation ("Griffin") and Railroad Friction Products ("RFP"), sellers/distributors of asbestos-containing products.²⁷⁵ She alleged that her husband died as a result of asbestos exposure at his place of employment.²⁷⁶ Briggs's husband retired in 1982, but Briggs did not file suit until February 3, 2000.²⁷⁷ Griffin and RFP filed motions for summary judgment alleging that Briggs's claims were barred by the statute of repose contained in Indiana Code section 34-20-3-1.²⁷⁸ Because Briggs's husband retired in 1982, it was apparent that Briggs's claim was filed more than ten years after any possible delivery of an asbestos-containing product.²⁷⁹

Briggs argued that the asbestos-related statute of limitation should apply to her claim rather than the general statute of limitation found in Indiana Code section 34-20-3-1.²⁸⁰ She argued that because the companies that manufactured the asbestos-related products were bankrupt and outside the court's jurisdiction, the distributor/sellers should be considered "manufacturers" under Indiana Code section 34-20-2-4, which provides that a manufacturer's principal seller or distributor can be deemed a "manufacturer" if the court is unable to hold jurisdiction over the manufacturer in-fact.²⁸¹ In making this argument, Briggs attempted to bring the distributor/seller defendants within the "miners and sellers" exception of Indiana Code section 34-20-3-2.²⁸²

The court concluded that even if the defendants could be considered manufacturers under Indiana Code section 34-20-2-4, the statute plainly states that a "principal distributor or seller" may be considered to be a "manufacturer" for purposes of Indiana Code section 34-20-2 only.²⁸³ Accordingly, Indiana Code section 34-20-2-4 does not bear on the statutes of limitation found in Indiana Code section 34-20-3.²⁸⁴ The court also noted that the asbestos exception to the

272. *Id.*

273. *Id.*

274. 851 N.E.2d 1261 (Ind. Ct. App. 2006).

275. *Id.* at 1264.

276. *Id.* at 1262.

277. *Id.*

278. *Id.*

279. *Id.* at 1262-63.

280. *Id.*

281. IND. CODE § 34-20-2-4 (2004).

282. *Briggs*, 851 N.E.2d at 1263.

283. *Id.*

284. *Id.*

statute of repose should be narrowly construed; it is to apply only to those persons who mine and sell asbestos:

[W]e do not believe that construing a principal distributor or seller of asbestos-containing products as a manufacturer would in turn expose it to the miner and seller exception. It would be illogical for us to consider a manufacturer to be a miner and seller of commercial asbestos, especially in light of our Supreme Court's clear interpretation of IC 34-30-3-2.²⁸⁵

Thus, the court held that the claims against the seller and distributor of the asbestos were subject to the ten-year statute of repose.

III. EVIDENTIARY PRESUMPTION FOR COMPLIANCE WITH GOVERNMENT STANDARDS

The IPLA, via 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.²⁸⁶

In an important and well-reasoned decision, the Indiana Supreme Court interpreted and clarified this presumption, offering guidance to the practitioner on the appropriate role the presumption plays in jury trials. In *Schultz v. Ford Motor Co.*,²⁸⁷ the plaintiff ("Schultz") was injured when he lost control of his Ford Explorer. The vehicle rolled over and the roof collapsed, rendering Schultz a quadriplegic.²⁸⁸ Schultz and his wife sued Ford, alleging negligence and defective roof design.²⁸⁹ During trial, the court gave the jury the following instruction:

Ford Motor Company has alleged that the Plaintiffs' 1995 Ford Explorer complied with the Federal Motor Vehicle Safety Standard 216. Ford Motor Company has the burden of proving this allegation. If you find Ford Motor Company has proved by a preponderance of the evidence that before the 1995 Ford Explorer was sold by Ford Motor Company

285. *Id.* at 1264.

286. IND. CODE § 34-20-5-1 (2004).

287. 857 N.E.2d 977 (Ind. 2006).

288. *Id.* at 979.

289. *Id.*

that it complied with Federal Motor Vehicle Standard 216 then you may presume that Ford Motor Company was not negligent in its design of the 1995 Ford Explorer and that the 1995 Ford Explorer was not defective. However the Plaintiffs may rebut this presumption if they introduced evidence tending to show that the 1995 Ford Explorer was defective.²⁹⁰

At trial, the jury rendered a verdict in favor of Ford.²⁹¹ On appeal, the Schultzes contended that the trial court committed reversible error by giving the jury instruction. The court of appeals agreed and held that the “rebuttable presumption of IC 34-20-5-1 is not evidence; instead it should be used as guidance for the court and not as evidence for the jury.”²⁹²

The supreme court vacated the court of appeals decision and affirmed the trial court’s issuance of the jury instruction.²⁹³ The court held that under Indiana Evidence Rule 301, the trial court may instruct the jury that “when a basic fact is proven, the jury may infer the existence of a presumed fact.”²⁹⁴

The key to the court’s decision was its interpretation of Indiana Evidence Rule 301, which provides:

In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. *A presumption shall have continuing effect even though contrary evidence is received.*²⁹⁵

The *Schultz* court began its analysis by discussing two competing approaches to presumptions.²⁹⁶ The first approach, “referred to as the ‘bursting bubble’ theory,” states that a presumption is not evidence that can be weighed by the jury.²⁹⁷ The presumption disappears from the case when the party against whom the presumption operates introduces evidence that disputes the presumed fact.²⁹⁸ The “bursting bubble theory” does not shift the burden of persuasion—it only

290. *Id.* at 979-80.

291. *Id.* at 979.

292. *Schultz v. Ford Motor Co.*, 822 N.E.2d 654, 655 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 182 (Ind. 2005).

293. *Schultz*, 857 N.E.2d at 989. It is important to note that Judge John D. Tinder in *Flis v. Kia Motors Corp.*, No. 1:03-cv-1567-JDT-TAB, 2005 WL 1528227 (S.D. Ind. June 20, 2005), correctly predicted the result the Indiana Supreme Court ultimately reached in *Schultz*. *See also* Alberts et al., *supra* note 90, at 1186-87.

294. *Schultz*, 857 N.E.2d at 985.

295. IND. EVID. R. 301 (emphasis added).

296. *Schultz*, 857 N.E.2d at 982-83.

297. *Id.* at 982.

298. *Id.* at 983.

shifts the burden of production.²⁹⁹ The second approach states that “the finder of fact would be required to find the presumed fact once the basic fact is established, unless the opponent of the presumption persuaded the factfinder of the nonexistence of the presumed fact.”³⁰⁰

The *Schultz* court concluded that the last sentence of Indiana Evidence Rule 301, known as the “continuing effect” rule, was a response to the concern that the “‘bursting bubble’ approach too often prevents juries from effectuating the policies that gave rise to the presumption[.]”³⁰¹ Thus, the court held that “a presumption is properly given ‘continuing effect’ under the last sentence of Indiana Evidence Rule 301 by the trial court instructing the jury that when a basic fact is proven, the jury may infer the existence of a presumed fact.”³⁰²

The court next turned its attention to the IPLA’s governmental compliance presumption and noted that it is not a traditional presumption.³⁰³ According to the *Schultz* court, a conventional presumption:

relieves the party with the burden of proof on a presumed fact from having to produce evidence of the presumed fact once that party has proved a basic fact. Unless the opponent of the presumption presents evidence tending to disprove the presumed fact, the party in whose favor the presumption operates is entitled to judgment on that issue.³⁰⁴

The IPLA’s governmental compliance presumption does not follow this typical presumption pattern because the absence of negligence or defect constitutes the “presumed fact” under the IPLA, and the plaintiff—not the defendant—has the burden of proof on the issue of negligence and defect.³⁰⁵ In light of the unconventional nature of the IPLA’s governmental compliance presumption, the *Shultzes* argued that the presumption should only apply at the summary judgment stage where it would require the plaintiff to come forward with evidence it would not otherwise be required to produce.³⁰⁶ The court noted that the *Schultzes*’ interpretation would not support the policy giving rise to the presumption:

The point of giving “continuing effect” to a presumption through a jury instruction is to further the policies that give rise to the presumption in the first place. By authorizing the instruction here, we recognize the policy embodied by the Legislature in [the governmental compliance statute], regardless of whether the provision conforms to the conventional definition of a legal “presumption.”³⁰⁷

299. *Id.* at 982.

300. *Id.*

301. *Id.* at 985.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 986.

Finally, the *Schultz* court addressed the concern that the use of the word “presumption” in an instruction could have a prejudicial effect on juries.³⁰⁸ The court suggested that it would be less prejudicial to use words such as “infer” or “assume”; however, the inclusion of the verb “presume” and the noun “presumption” in the jury instruction at issue did not amount to reversible error:

Viewed as a substantive matter, we find the instruction to have been balanced, i.e., fair to both sides. To be sure, it told the jury that it could find Ford not to have been negligent in its design of the 1995 Ford Explorer and the Ford Explorer was not defective if it found that Ford had proved its compliance with FMVSS 216. This undoubtedly benefited Ford. But the instruction went on to conclude by telling the jury that it could find this proposition to be rebutted so long as the Schultzes’ introduced evidence tending to show that the 1995 Ford Explorer was defective.³⁰⁹

The court, therefore, affirmed the trial court's issuance of the jury instruction.³¹⁰

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.”³¹¹ 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.”³¹² It is a “complete” defense in that it precludes a defendant’s IPLA liability (in design and warning defect cases) if it is found to apply to a particular set of factual circumstances.³¹³

308. *Id.* at 986-87.

309. *Id.* at 987.

310. *Id.* at 989.

311. IND. CODE § 34-20-6-3 (2004).

312. *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).

313. *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1146 (Ind. 2006) (“Incurred risk acts as a complete bar to liability with respect to negligence claims brought under the [I]PLA.”). On that point, the *Vaughn* decision is consistent with several earlier cases, including *Baker v. Heye-America*, 799 N.E.2d 1135 (Ind. Ct. App. 2003), *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999), and *Cole*, 714 N.E.2d at 194, all of which held that incurred risk is a complete defense in Indiana. *Cf. Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 745 (Ind. 2005); *Mesman v. Crane Pro Servs.*, 409 F.3d 846 (7th Cir. 2005). Although it held that no IPLA-based claims survived summary judgment, the *Vaughn* court did allow a common

Indiana federal and state courts have decided some important incurred risk cases in the last few years, including *Mesman v. Crane Pro Services, a Division of Konecranes, Inc.*,³¹⁴ *Henderson v. Freightliner, LLC*,³¹⁵ *Smock Materials Handling Co. v. Kerr*,³¹⁶ and *Hopper v. Carey*.³¹⁷ The 2006 survey period ushered in only one additional significant case, *Westchester Fire Insurance Co. v. American Wood Fibers, Inc.*³¹⁸ That case, which we originally addressed above in the context of manufacturing defect and design defect allegations, also involved issues concerning the applicability of IPLA-based defenses. Westchester Fire Insurance Company (“Westchester”) sued American Wood Fibers, Inc. (“AWF”) following a fire at a facility operated by Westchester’s insured. Westchester contended that a wood flour product AWF manufactured allegedly caused the fire when it spontaneously combusted.³¹⁹ One of the arguments Westchester made in support of a new trial was that the trial court erred by giving jury instructions regarding, among other things, the IPLA-based incurred risk and modification/alteration defenses.³²⁰

law negligence claim to proceed against Daniels and, accordingly, allowed the issue of Vaughn’s fault to remain in the case for the jury’s consideration solely in connection with the negligence claim. *Id.* For a discussion about the nature of the negligence claim that the court allowed to survive summary judgment, see *supra* notes 224-35 and accompanying text.

314. 409 F.3d 846 (7th Cir. 2005) (holding that incurred risk defense was not available in case in which a worker was injured when steel sheets fell on him as the sheets were unloaded from a railroad boxcar).

315. No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005) (finding record evidence precluded summary judgment in case involving whether a diesel truck mechanic incurred the risk of an injury; fact issues existed with respect to whether the injuries were suffered while in the process of inspecting a truck’s air suspension system or while working on it).

316. 719 N.E.2d 396 (Ind. Ct. App. 1999) (determining that there was 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).

317. 716 N.E.2d 566 (Ind. Ct. App. 1999) (determining 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); *see also Cole*, 714 N.E.2d at 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).

318. No. 2:03-CV-178-TS, 2006 WL 3147710 (N.D. Ind. Oct. 31, 2006).

319. *Id.* at *1.

320. *Id.* One of the other defenses offered at trial that apparently was the subject of a jury instruction was the so-called “sophisticated user” defense. The sophisticated user defense operates to eliminate a manufacturer’s duty to warn of its product’s dangers. The court concluded that the evidence justified giving a sophisticated user instruction because the facility operators had some

The court disagreed, concluding that the jury could have found from the evidence presented that personnel at the Hammond Expanders facility were at fault for the manner in which they handled the wood flour.³²¹ First, the court noted that AWF's warning label instructed that wood flour should be stored in a cool, dry place, yet Hammond Expanders chose to store the flour near the hot compressor room.³²² Second, Hammond Expanders received Material Safety Data Sheet for wood flour from another wood flour supplier warning that wood flour could spontaneously combust.³²³ Third, evidence showed that Hammond Expanders "had some knowledge of the properties and characteristics of wood flour as it used several different types of wood flour in manufacturing its own product."³²⁴ Thus, the court held that the evidence justified a jury instructions about the IPLA-based incurred risk defense, as well as "whether [Westchester] altered or modified the product by storing it next to the hot compressor room."³²⁵

B. Misuse

Indiana Code section 34-20-6-4 provides that it "is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party."³²⁶ 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.*³²⁷ and *Burt v.*

knowledge about the properties and characteristics of wood flour and because they received warning labels addressing proper storage, as well as a Material Data Safety Sheet for wood flour from another wood flour supplier warning that wood flour could spontaneously combust. *Id.* at *2.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. IND. CODE § 34-20-6-4 (2004). Stated in a slightly different way, misuse is a "use for a purpose or in a manner not foreseeable by the manufacturer." *Henderson v. Freightliner, LLC*, No. 1:02-CV-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005) (quoting *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003)) (internal quotation marks omitted).

327. 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

*Makita USA, Inc.*³²⁸ have resolved the applicability of the misuse defense as a matter of law. *Henderson v. Freightliner, LLC*,³²⁹ on the other hand, is a 2005 case that determined the incurred risk issue should be presented to a jury.³³⁰ Although the *Vaughn* case involved the court's resolution of a "misuse" issue, the court addressed plaintiff's purported "misuse" not as an IPLA-based defense to a product liability claim, but rather as an element of the jury's consideration in connection with Vaughn's common law negligence claim.³³¹

The statutory definition of "misuse" quoted above appears 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 seem to confirm that "misuse" should not be considered "fault" and, therefore, misuse should, as is incurred risk, be a complete defense.³³² Recent decisions, however, continue to

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. 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.

328. 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.*; see also Alberts & Boyers, *supra* note 35, at 1195-96.

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

330. In *Henderson*, defendants argued that plaintiff Henderson began working on a diesel truck's air suspension system without first bleeding the air pressure, 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. 2005 U.S. Dist. LEXIS 5832, at *5, *10. 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. *Id.* at *10-*14.

331. *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1145-46 (Ind. 2006). For a more detailed discussion about the negligence claim that the *Vaughn* court allowed to survive against Daniels, see *supra* notes 224-35 and accompanying text.

332. The district judge in *Chapman v. Maytag Corp.*, 297 F.3d 682 (7th Cir. 2002), recognized

reach inconsistent results when it comes to that issue. Three decisions, *Burt v. Makita USA, Inc.*,³³³ *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*,³³⁴ and *Morgen v. Ford Motor Co.*,³³⁵ have concluded that misuse is a complete defense. On the other hand, decisions in cases such as *Chapman v. Maytag Corp.*³³⁶ and *Barnard v. Saturn Corp.*³³⁷ 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).³³⁸

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

as much. He also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement. *Id.* at 689.

333. 212 F. Supp. 2d 893, 897 (N.D. Ind. 2002).

334. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999), *declined to follow* *Barnard v. Saturn Corp.*, 790 N.E.2d 1023 (Ind. Ct. App. 2003).

335. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *aff'd in part, vacated in part*, 797 N.E.2d 1146 (Ind. 2003).

336. 297 F.3d 682 (7th Cir. 2002). 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." *Henderson v. Freightliner, LLC*, NO. 1:02-CV-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005). For a more detailed analysis of *Chapman*, see Alberts & Boyers, *supra* note 35, at 1196-97.

337. 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.

338. 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. IND. CODE § 34-20-7-1 (2004). 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. *Id.* § 34-20-8-1(a). The IPLA mandates that "in assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm." *Id.* § 34-20-8-1(b).

modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.³³⁹

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.³⁴⁰

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.³⁴¹

Because the alteration or modification 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 it is "complete" in nature.

*Tober v. Graco Children's Products*³⁴² is a 2005 case that addresses the "alteration" defense.³⁴³ In that case, the Tobers sued Graco after their eight-

339. *Id.* § 34-20-6-5. 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).

340. IND. CODE § 34-20-2-1 (2004).

341. *Id.*

342. 431 F.3d 572 (7th Cir. 2005).

343. *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DHF-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005), is an important "alteration" case that decided during the 2005 survey period. There, a truck mechanic was injured while either working on or preparing to work on a Freightliner truck's air suspension assembly. The truck at issue had an auxiliary axle added to help handle additional weight. *Id.* at *7. The axle was added after its original manufacture but before Henderson's injury. *Id.* Freightliner did not manufacture, design, or install the auxiliary axle. *Id.* 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." *Id.* at *22-*23. Freightliner contended that such "a substantial alteration was an unforeseeable intervening and proximate cause of Henderson's injuries" that entitled it to summary judgment. *Id.* at *23. 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." *Id.*

month old son was asphyxiated when he became entangled in the harness straps of an infant swing.³⁴⁴ An investigation after the infant's death revealed that the harness straps had been tied in a fixed knot that prevented the harness from being properly adjusted.³⁴⁵

At trial, the district court issued a jury instruction which stated that to prevail on their product liability claim, the Tobers were required to show that the swing was not substantially altered at the time of the asphyxiation incident.³⁴⁶ On appeal, the Tobers argued that they were required only to show that the swing had not been substantially altered at the time of purchase.³⁴⁷ The Seventh Circuit disagreed.³⁴⁸ An element of the plaintiff's *prima facie* case under the IPLA is that the product was expected and did reach the consumer without substantial alteration.³⁴⁹ Thus, the court held that the IPLA required the Tobers to prove that the product: (1) was defective when it left the manufacturer; (2) remained in the same defective condition when used by the end user; and (3) was used in a manner the manufacturer intended.³⁵⁰ The *Tober* court went on to point out that a manufacturer is liable, therefore, only for "its own defects in the products and not for defects caused by the alteration or misuse of its products."³⁵¹ Accordingly, the court concluded that the district court's jury instruction was not improper.³⁵²

CONCLUSION

The 2006 survey period was a busy one for Indiana product liability practitioners and judges, and it produced some of the most well-reasoned and insightful decisions in recent memory. Although some questions linger when it comes to interpreting key provisions of the IPLA, the 2006 survey period shows that practitioners and judges continue to work diligently to clarify and resolve the remaining areas of uncertainty.

344. *Tober*, 431 F.3d at 574-75.

345. *Id.* at 575-76.

346. *Id.* at 579.

347. *Id.*

348. *Id.*

349. *Id.* at 579.

350. *Id.*

351. *Id.* at 580.

352. *Id.*