

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2007 survey period¹ continued to produce decisions that help Indiana practitioners and judges interpret the Indiana Product Liability Act (“IPLA”).² This Survey does not attempt to address in detail all of the cases decided during the survey period.³ Rather, it examines selected cases that address important,

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1. The survey period is October 1, 2006, to September 30, 2007. This Article also addresses a few developments that occurred after September 30, 2007.

2. This 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 Price v. Wyeth Holdings Corp.*, 505 F.3d 624 (7th Cir. 2007) (addressing several procedural issues including reinstatement of claims after voluntary dismissal, default judgment, and removal to federal court); *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904-05 (7th Cir. 2007) (addressing the evidentiary standard for exclusion of expert testimony under *Daubert v. Merrell Dow Pharm., Inc.* and Federal Rule of Evidence 702); *Sims v. EGA Prods., Inc.*, 475 F.3d 865, 867-68 (7th Cir. 2007) (determining that damages which are disproportionate to the defendant’s wrong constitutes good cause to set aside default judgment); *Pribble v. Siegwirk USA, Inc.*, No. 1:06-cv-1120-SEB-JMS, 2007 U.S. Dist. LEXIS 24368, at *7-11 (S.D. Ind. Mar. 28, 2007) (addressing issues related to removal to federal court); *Klein v. Depuy, Inc.*, 476 F. Supp. 2d 1007, 1011-15 (N.D. Ind.), *aff’d*, 506 F.3d 553 (7th Cir. 2007) (applying North Carolina substantive law after determining Indiana substantive law did not apply); *In re Bridgestone/Firestone, Inc.*, No. IP04-S819C-B/S, 2007 U.S. Dist. LEXIS 9378, at *4 (S.D. Ind. Jan. 4, 2007) (reinstating motion to dismiss on grounds of *forum non conveniens*); *Large v. Mobile Tool, Int’l, Inc.*, No. 1:02cv177, 2006 U.S. Dist. LEXIS 90961, at *23-26 (N.D. Ind. Dec. 15, 2006) (determining that summary judgment on the issue of indemnification was not proper as there was conflicting evidence as to whether indemnification provision in an asset purchase agreement was

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 1978.⁴ 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.⁵ In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.⁶

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.⁷ 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 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."⁸ 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";⁹ (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";¹⁰ (3) "physical harm caused by a product";¹¹ (4) a product that is "in a defective condition unreasonably

clear and unambiguous); *Azar v. Merck & Co.*, No. 3:06-cv-0579 AS, 2006 U.S. Dist. LEXIS 78655, at *4-5 (N.D. Ind. Oct. 27, 2006) (granting motion to stay pending transfer to multidistrict litigation in federal court); *Dorman v. Osmose, Inc.*, 873 N.E.2d 1102, 1106-10 (Ind. Ct. App. 2007) (focusing on juror replacement and evidentiary admissions).

4. Act of Mar. 10, 1978, No. 141, § 28, 1978 Ind. Acts 1308, 1308-10.

5. Act of Apr. 21, 1983, No. 297, 1983 Ind. Acts 1814.

6. Act of Apr. 26, 1995, No. 278, §§ 1-7, 1995 Ind. Acts 4051, 4051-56. See *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

7. Act of Mar. 6, 1998, 1998 Ind. Acts 1. The current version of the IPLA is found in Indiana Code sections 34-20-1-1 to -9-1.

8. IND. CODE § 34-20-1-1 (2004).

9. 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."

10. Indiana Code section 34-20-1-1(2) 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.

11. IND. CODE § 34-20-1-1(3) (2004).

dangerous to [a] user or consumer” or to his property;¹² and (5) a product that “reach[ed] the user or consumer without substantial alteration in [its] condition.”¹³ 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.”¹⁴

A. “User” or “Consumer”

The language the General Assembly employs in the IPLA is very important when determining who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.”¹⁵ 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.¹⁶

“User” has the same meaning as “consumer.”¹⁷ Several published decisions in

12. *Id.* § 34-20-2-1.

13. *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 was 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.

IND. PATTERN JURY INSTRUCTIONS—CIVIL § 7.03 (2005).

14. IND. CODE § 34-20-1-1 (2004).

15. *Id.*

16. *Id.* § 34-6-2-29.

17. *Id.* § 34-6-2-147.

recent years construe the statutory definitions of “user” and “consumer.”¹⁸

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.”¹⁹ 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.”

There were no significant published decisions during the survey period that interpreted the terms “user” or “consumer.”²⁰

18. 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).

19. 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.

20. During the 2006 survey period, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (West Virginia), Inc.*, 841 N.E.2d 1133 (Ind. 2006). That case helped to further define 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”). *Id.* at 1136. Part of the design involved the installation of a heavy media coal sump. *Id.* An out-of-state steel company manufactured the sump that Daniels designed and sent it, unassembled, to the facility. *Id.* Stephen Vaughn worked for the construction company that Daniels hired to install the sump. *Id.* During the installation process, Vaughn climbed onto the top of the sump to help connect a pipe. *Id.* The chain he was using to secure the pipe in place gave way, causing Vaughn to fall and sustain injuries. *Id.* Vaughn did not wear his safety belt when he climbed onto the sump. *Id.* The Indiana Supreme Court held that Daniels could not be liable under the IPLA because Vaughn was not a “user” or “consumer.” *Id.* at 1141-43. 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

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.”²¹ “Seller” . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.”²² 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.”²³

Sellers can be held liable as manufacturers in two ways. First, a seller can be held liable as a manufacturer 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.²⁴

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

installation.” *Id.* at 1139.

21. IND. CODE § 34-6-2-77 (2004).

22. *Id.* § 34-6-2-136.

23. *Id.* § 34-20-2-1(2); *see, e.g., Williams v. REP Corp.*, 302 F.3d 660, 662-64 (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, 745-46 (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).

24. IND. CODE § 34-6-2-77(a) (2004).

distributor or seller.”²⁵

One other provision exists which practitioners must be aware in connection with liability of “sellers” under the IPLA. When the theory of liability is based on “strict liability in tort,”²⁶ 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.²⁷

There were no significant published decisions during the survey period that interpreted the terms “manufacturer” or “seller.”²⁸

25. *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 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. *Id.* at *9-10. The defendant argued that the phrase equates to “personal jurisdiction.” *Id.* at *12. 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.

26. 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.

27. IND. CODE § 34-20-2-3 (2004). In *Ritchie v. Glidden Co.*, 242 F.3d 713, 725-26 (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. 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. *Id.* 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 23, at 1173-75.

28. The 2006 survey period produced two important decisions in this area. In *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006), the plaintiff underwent hip replacement surgery and subsequently filed product liability and medical malpractice claims against defendants Stryker Corporation (“Stryker”) and Howmedica Osteonics

C. Physical Harm Caused by a Product

For purposes of the IPLA, “[p]hysical harm” . . . means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”²⁹ It “does not include gradually evolving damage to property or economic losses from such damage.”³⁰

For purposes of the IPLA, “[p]roduct” . . . means any item or good that is personalty at the time it is conveyed by the seller to another party.”³¹ “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.”³²

Although it is a “not for publication” memorandum decision, *Fincher v. Solar Sources, Inc.*³³ is an opinion that was rendered during the survey period and to which practitioners may look for additional guidance about what is and what

Corp. d/b/a Stryker Orthopaedics (“HOC”). *Id.* at *1. Stryker moved for summary judgment, contending that it did not manufacture or sell the device that Thornburg alleged caused her injuries. *Id.* Thornburg cited “only Stryker’s status as HOC’s parent company to support her claims against Stryker.” *Id.* at *4. 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.’” *Id.* (quoting *United States v. Bestfoods*, 524 U.S. 51, 60 (1998)). 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.” *Id.* Consequently, the court held that Thornburg’s evidence did not satisfy her summary judgment burden and granted summary judgment in Stryker’s favor. *Id.*

In *Fellner v. Philadelphia Toboggan Coasters, Inc.*, No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006), Tamara Fellner was killed when she was ejected from a wooden roller coaster train operated as an attraction at Holiday World amusement park. *Id.* at *1. The company that owned and operated the park and the roller coaster, Koch Development Corp. (“Koch”), could not be held liable with respect to plaintiffs’ strict liability and breach of implied warranty claims because it was neither a manufacturer nor a seller of the roller coaster. *Id.* at *3-4.

29. IND. CODE § 34-6-2-105(a) (2004).

30. *Id.* § 34-6-2-105(b); *see, e.g., 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); *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); *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).

31. IND. CODE § 34-6-2-114(a) (2004).

32. *Id.* § 34-6-2-114(b).

33. No. 42A01-0701-CV-25, 2007 WL 1953473 (Ind. Ct. App. 2007) (mem.).

is not a “product” for purposes of the IPLA. In *Fincher*, the plaintiff was a truck driver who was injured in an accident while hauling coal sludge.³⁴ Coal sludge has a wet consistency and is comprised of the fine particulate matter that remains after raw coal is mined and put through a washing process.³⁵ A panel of the Indiana Court of Appeals unanimously agreed that coal sludge was not a product under the IPLA.³⁶ According to the *Fincher* court,

[t]he coal sludge in question is a waste by-product of a coal mining operation. It is trash. The coal sludge was not marketable or ever in a marketed state. It was not sold or being transported to a consumer. It was being transported to a disposal site. It was also never intended for consumption or for any use by any consumer.³⁷

D. Defective and Unreasonably Dangerous

Only products that are in a “defective condition” are ones for which IPLA liability may attach.³⁸ 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.³⁹

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.⁴⁰

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 “warning defect”); or (3) the product has a defect that is the result of a malfunction or impurity in the manufacturing process (a “manufacturing defect”).⁴¹

34. *Id.* at *1.

35. *Id.*

36. *Id.* at *6.

37. *Id.*

38. IND. CODE § 34-20-2-1(1) (2004); *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).

39. IND. CODE § 34-20-4-1 (2004).

40. *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))).

41. *See First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 (7th Cir. 2004); *Westchester Fire Ins. Co.*, 2006 WL 3147710, at *5; *Baker*, 799 N.E.2d at

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 are not defective as a matter of law. 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].”⁴² 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.”⁴³

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 the ordinary knowledge about the product’s characteristics common to the community of consumers.”⁴⁴ A product is not

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 “plaintiff’s 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 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.

42. IND. CODE § 34-20-4-3 (2004). One recent case discussing “reasonably expectable use” is *Hunt v. Unknown Chemical Manufacturer 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 spread the ashes as fertilizer in the family garden. Later tests of the soil in the garden revealed elevated levels of arsenic. 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.).

43. IND. CODE § 34-20-4-4.

44. *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) (citing *Vaughn v. Daniels Co. (W. Va.), Inc.*, 717 N.E.2d 1110, 1128 (Ind. Ct. App. 2002), *vacated*, 841 N.E.2d 1133 (2006)). Those panels also seem to favor jury resolution in determining reasonably expected use. Indeed, the *Baker* opinion states that

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.⁴⁵

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

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. (citing *Vaughn*, 777 N.E.2d at 1128).

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.” *Id.* at 895. With respect to the defective design claims, plaintiff’s expert opined that the saw was defective and unreasonably dangerous by its design, suggesting that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. *Id.* at 900. The court rejected the claim, holding that the plaintiff and his expert had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.*; *see also* *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *1-4 (S.D. Ind. Oct. 15, 2002) (holding that Honeywell’s design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time the specifications were introduced into the stream of commerce).

45. *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. *Id.* at *2-3. Plaintiff admitted that he knew about the dangers associated with using the nip station because he was aware of reports by 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 *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.

dangerous.”⁴⁶

The IPLA provides that liability attaches for placing in the stream of commerce a product in a “defective condition”⁴⁷ 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.”⁴⁸ 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 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.⁴⁹

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.⁵⁰ Thus, just as in any other negligence case, a claimant advancing design

46. 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.

47. IND. CODE § 34-20-2-1(1) (2004).

48. *Id.* § 34-20-2-2.

49. *Id.*

50. 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 *Miller v. Honeywell Int’l Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002), *aff'd*, 2004 U.S. Dist. LEXIS 15261 (7th Cir. July 26, 2004); *Burt v. Makita, USA, Inc.*,

or warning defect theories must satisfy the traditional negligence requirements—duty, breach, injury, and causation.⁵¹ 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 defects and clearly accrued after the 1995 amendments took effect.⁵²

1. *Manufacturing Defect Theory*.—In *Gaskin v. Sharp Electronics Corp.*,⁵³ plaintiff Mary Gaskin rented a house in which her seventy-four-year-old mother, Lee Ester Gaskin, also resided.⁵⁴ On March 2, 2004, a fire broke out in the house.⁵⁵ Lee Ester died in the fire.⁵⁶ Plaintiffs sued Sharp Electronics ("Sharp"), the manufacturer of the television, "alleging that Sharp [was] strictly liable for designing, manufacturing, and placing into the stream of commerce the . . . television in an unreasonably dangerous and/or defective condition."⁵⁷ They also alleged that "Sharp was negligent in the design, manufacture, and marketing of the television."⁵⁸ The television at issue was located in Lee Ester's bedroom on

212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

51. *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) [the defendant] 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) [the defendant] failed to exercise reasonable care under the circumstances in providing warnings; and (4) [the defendant's] alleged failure to provide adequate warnings was the proximate cause of his injuries.").

52. *See, e.g.*, *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt*, 212 F. Supp. 2d at 900; *see also* *Fellner v. Phila. 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); *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1138 (Ind. 2006) (cause of action accrued on December 12, 1995).

53. No. 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007).

54. *Id.* at *1-2.

55. *Id.* at *1.

56. *Id.* at *2.

57. *Id.* As noted above, although the plaintiffs alleged strict liability ostensibly based upon theories of defective design and warnings, Indiana law does not permit strict liability in cases espousing those theories as a way to prove a product is defective. *See* IND. CODE § 34-20-2-2 (2004). Indiana law permits strict liability to attach only when a manufacturing defect theory is pursued. *See id.*

58. *Gaskin*, 2007 U.S. Dist. LEXIS 72347, at *2. Damages suffered as a result of Lee Ester's death, physical injuries suffered by Mary, and destruction of the home and its contents (other than the television itself) would appear to be the "physical harm" covered by the IPLA for which plaintiffs seek legal redress. The IPLA provides the legal basis for recovery of damages against

a television stand.⁵⁹ “Lee Ester Gaskin did not smoke, and she did not have any candles in the room. Mary Gaskin testified that the television was the only electrical appliance in the room, and the only item plugged into an electrical outlet. The television was largely destroyed in the fire.”⁶⁰

Sharp moved for summary judgment, arguing that plaintiffs “put forth insufficient evidence to prove that the television was defective.”⁶¹ In their response, plaintiffs did not address Sharp’s arguments concerning their design and warning defect theories.⁶² As a result, the court deemed plaintiffs’ arguments on those points to be waived and granted summary judgment to Sharp with respect to those two theories.⁶³ With regard to the manufacturing defect theory, the court identified the critical evidence as the testimony of Steven Shand, plaintiffs’ fire cause and origin expert.⁶⁴ Shand investigated the scene two days after the fire, by which time the damaged structure had been partially excavated, debris had been thrown out of the window, and there were missing items, including the television.⁶⁵

“Based upon a burn pattern analysis, the degree of destruction, and the evidence [he] examined,” Shand concluded that the fire originated in the

Sharp, the television manufacturer, as a result of such harm. The IPLA does not appear to contemplate “negligent manufacture” or “negligent marketing” theories. To the extent that the plaintiffs attempted in their complaint to pursue separate, non-IPLA-based negligence claims for the physical harm noted above, Indiana law does not appear to allow them to do so. The IPLA would, however, permit a “negligence” action to the extent that plaintiffs pursued a theory of liability against Sharp based upon allegedly defective design or warnings. *See* IND. CODE § 34-20-2-2. In either of those instances, the claim is essentially a “negligence” claim because it would require plaintiffs to prove that Sharp was negligent in its design of the television or in communicating its warnings or instructions. *See id.* Under the current IPLA, plaintiffs need not prove that Sharp was negligent if they employ a manufacturing defect theory to demonstrate defectiveness because it remains the only theory for which strict liability is available. *See id.*

59. *Gaskin*, 2007 U.S. Dist. LEXIS 72347, at *4.

60. *Id.*

61. *Id.* at *11-12.

62. *Id.* at *11.

63. *Id.*

64. *Id.* at *5-6. Plaintiffs also disclosed another liability expert, Dennis Dyl. *Id.* at *5. Dyl “opined that a poor pin connection on the CRT board inside the television resulted in high electrical resistance which generated heat and caused the fire.” *Id.* The trial court struck Dyl’s testimony “because it did not comport with the reliability requirements of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993).” *Id.* The court subsequently clarified that ruling, determining that Dyl could testify regarding “general principles,” “background testimony,” and “observations during his data collection” at trial only if plaintiffs could “show, depending upon all of the evidence, that it is relevant” and if plaintiffs “tie up the proposed evidence so that it fits the fact[s] of the case.” *Id.* at *2. Because the trial judge did not know what plaintiffs would be able to establish at trial, it presumed for the purpose of resolving Sharp’s motion for summary judgment, that the testimony from Dyl would be inadmissible in its entirety. *Id.* at *3.

65. *Id.* at *5-6.

northwest corner bedroom near the television stand.⁶⁶ He “concluded that the fire did not start on the bed” and also “eliminated the [two] receptacle outlets, the wall light switch, the overhead light, the closet, and the electrical wiring in the wall as possible sources of the fire.”⁶⁷ He could not offer a more definitive cause determination because he had not been able to examine all of the evidence removed from the scene.⁶⁸ With respect to the television in particular, “Shand stated during his deposition that he is not qualified to render any opinions about the television, [and,] therefore, he [did] not have an opinion [about] whether the television was the cause of the fire.”⁶⁹ Shand testified that, although he had no opinion about whether the television started the fire, it was the only ignition source that had not been eliminated.⁷⁰

In support of their legal position, plaintiffs relied heavily upon *Ford Motor Co. v. Reed*⁷¹ and *Whitted v. General Motors Corp.*⁷² Plaintiffs cited *Reed* for the proposition that plaintiffs could demonstrate the existence of a manufacturing defect in one of four ways: (1) producing an expert witness “to offer direct evidence of a specific manufacturing defect”; (2) producing an expert witness to circumstantially prove that a specific defect caused the product failure; (3) introducing “direct evidence from an eyewitness of the malfunction, supported by expert testimony explaining the possible causes of the defective condition”; and/or (4) introduction of “inferential evidence by negating other possible causes.”⁷³ Because the evidence provided by Shand was insufficient to satisfy any of the first three methods for proving manufacturing defect, the judge in *Gaskin* recognized that the only viable method of proving manufacturing defect available to the plaintiffs was the fourth method—introduction of inferential evidence by negating other possible causes.⁷⁴

Although recognizing that only the fourth method identified in *Reed* was “potentially” applicable to the case at hand, the court acknowledged “some confusion” about whether *any* of the methods identified in *Reed*, which are admittedly quite “similar to a *res ipsa [loquitor]* test, are truly applicable to Indiana products liability law.”⁷⁵ As a result, the judge carefully considered both

66. *Id.* at *6. In his report, Shand wrote that: “[a] television stand located in the area of fire origin had nearly been consumed and a ‘V’ pattern on the east wall established that the fire had burned upward and outward from the stand.” *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at *6-7.

70. *Id.* at *7. From his examination of the wall receptacle, Shand testified in his deposition that he believed only one receptacle had something plugged into it at the time of the fire, but could not rule out the possibility that there was a multi-prong adapter plugged into the receptacle. *Id.*

71. 689 N.E.2d 751 (Ind. Ct. App. 1997).

72. 58 F.3d 1200 (7th Cir. 1995).

73. *Gaskin*, 2007 U.S. Dist. LEXIS 72347, at *13 (citing *Reed*, 689 N.E.2d at 753).

74. *Id.*

75. *Id.* Courts have required the introduction of expert testimony in *res ipsa loquitor* actions. See, e.g., *Smoot v. Mazda Motors of Am., Inc.*, 469 F.3d 675 (7th Cir. 2006) (holding that plaintiff

the *Reed* and *Whitted* cases, ultimately determining that it would

recognize[] the four factors set forth in *Reed* as ‘helpful tools’ in the basic inquiry as to whether there is sufficient evidence of a defect, and recognize[] that in some rare circumstances, circumstantial evidence can produce reasonable inferences from which a jury can reasonably find that the defendant manufactured a product containing a defect.⁷⁶

In *Gaskin*, the judge noted that the evidence before him was “weaker than that in *Reed*, because . . . no expert has testified that the television caused the fire, and no expert has pinpointed exactly where the fire started in the television.”⁷⁷ “However,” he continued, “like in *Reed*, [p]laintiffs, with the help of Shand, have basically eliminated all other potential causes of the fire.”⁷⁸ He ultimately concluded as follows:

Viewing the facts in the light most favorable to the nonmovant, as this [c]ourt must on summary judgment, it finds that Shand has sufficiently negated other reasonably possible causes, and [p]laintiffs have satisfied the fourth method of proving a manufacturing defect as announced in *Whitted* and *Reed*. Moreover . . . Shand’s testimony that the fire started just [n]orth of the television stand (within several inches) was consistent with the theory that the television started the fire, and that the entertainment center was within the area of fire origin. Plaintiffs have demonstrated that there is a genuine issue of material fact as to whether the television caused the fire, and specifically, whether Sharp placed into the stream of commerce a television set that was defectively manufactured.⁷⁹

The parties also disputed whether plaintiffs had sufficiently demonstrated that the defective condition of the television existed at the time it left Sharp’s control. As noted above, there are two threshold IPLA requirements that an Indiana product liability plaintiff must establish as part of his or her prima facie case: (1) a product’s defective and unreasonably dangerous condition existed at the time it was conveyed by the seller to another party,⁸⁰ and (2) the defective product reached the user or consumer without substantial alteration.⁸¹ The court in *Gaskin* held that the plaintiffs offered enough evidence to preclude summary judgment with regard to those threshold proof requirements.⁸² The court pointed to evidence that the television at issue: (1) “was only two months old at the time

could not sustain an action for *res ipsa loquitur* without admissible expert testimony because the inference of negligence was obvious only to an expert).

76. *Id.* at *16 (citing *Reed*, 689 N.E.2d at 754).

77. *Id.* at *18.

78. *Id.*

79. *Id.* at *21 (citation omitted).

80. IND. CODE § 34-20-4-1 (2004).

81. *Id.* § 34-20-2-1.

82. *Gaskin*, 2007 U.S. Dist. LEXIS 72347, at *23-24.

of the [fire]”; (2) was purchased from a local retailer; (3) was “unwrapped in a pristine condition”; (4) “was only used for approximately one month”; (5) had no problems before the fire; (6) was not mishandled, and (7) “was never repaired.”⁸³ Accordingly, the judge in *Gaskin* concluded that, “although the evidence presented by [p]laintiffs is scant, it is sufficient to create a triable issue of fact. Plaintiffs produced enough evidence to raise a material issue of fact that the Sharp television . . . caused a fire due to a manufacturing defect.”⁸⁴

It should be briefly noted here that the parties and the court in *Gaskin* seem to have well-recognized that evidence of a product’s condition after leaving the manufacturer’s or seller’s control is important *both* as an IPLA-mandated threshold requirement for which the plaintiff bears the burden of proof, as well as an IPLA-based affirmative defense for which the defendant bears the burden of proof.⁸⁵

2. *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.⁸⁶ 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.⁸⁷ 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.”⁸⁸ 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.”⁸⁹

83. *Id.* at *24. The parties also disputed whether Sharp has properly raised the state-of-the-art presumption in Indiana Code section 34-20-5-1 and, if so, whether plaintiffs had rebutted it. Although professing that it was not deciding whether Sharp had properly raised the presumption, the court concluded that the plaintiffs had “put forth enough evidence of a manufacturing defect that a rational jury could find that the presumption has been overcome.” *Id.* at *25. A more detailed discussion about this portion of the *Gaskin* decision is addressed in *infra* note 273 and accompanying text.

84. *Gaskin*, 2007 U.S. LEXIS 72347, at *25.

85. Part IV.C., *infra*, addresses those points in more detail.

86. 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. *See, e.g.*, *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *10-20 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006).

87. *See Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

88. *McMahon v. Bunn-o-matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

89. *Westchester Fire Ins. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006) (citing *Bourne*, 432 F.3d at 638). Another recent Seventh Circuit case postulates that a design defect claim under the IPLA requires applying the classic

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.⁹⁰

In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard.⁹¹ As such, a claimant can hardly find a manufacturer negligent for adopting a particular design unless he or she can prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. The claimant must prove that the safer, feasible alternative design was in fact available and that the manufacturer unreasonably failed to adopt it.⁹²

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."⁹³ Thus, a manufacturer technically cannot make the "comment k" statutory defense available until and unless the claimant demonstrates a rebuttal. That raises interesting questions in light of Indiana's quirky treatment of Trial Rule 56 under *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*⁹⁴ In federal court, under a *Celotex*⁹⁵ 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.⁹⁶ 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.⁹⁷

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]. See *Bourne*, 452 F.3d at 637; see also *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (referencing Judge Learned Hand's articulation of the "B<PL" negligence formula).

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

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

92. 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.

93. IND. CODE § 34-20-4-4 (2004).

94. 644 N.E.2d 118 (Ind. 1994).

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

96. IND. TRIAL R. 56.

97. See, e.g., *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 637 (7th Cir. 2006); *McMahon*

During the 2006 survey period, the Indiana Supreme Court in *Schultz v. Ford Motor Co.*⁹⁸ endorsed the foregoing burden of proof analysis in design defect claims in Indiana.⁹⁹ State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.¹⁰⁰

3. *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.¹⁰¹

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.¹⁰²

v. Bunn-o-matic Corp., 150 F.3d 651, 657 (7th Cir. 1998); *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *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); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

98. 857 N.E.2d 977 (Ind. 2006).

99. *Id.* at 985 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)”).

100. *See, e.g., Bourne*, 452 F.3d 632, 633, 638-39 (holding 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). *Bourne* is a significant decision for Indiana product liability practitioners because 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. *See generally Bourne*, 452 F.3d 632; *see also Westchester Fire Ins.*, 2006 WL 3147710 (dismissing design defect claim based on allegations that a defectively designed wood flour product spontaneously combusted and caused a fire because the plaintiff presented no evidence showing there was a safer, reasonably feasible alternative); *Lytle v. Ford Motor Co.*, 814 N.E.2d 301 (Ind. Ct. App. 2004) (holding, inter alia, 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. Heye-Am.*, 799 N.E.2d 1135 (Ind. Ct. App. 2003) (holding that fact issues precluded summary judgment with respect to 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).

101. IND. CODE § 34-20-4-2 (2004).

102. *See First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682,

Indiana courts have been active in recent years in deciding cases espousing warning defect theories. Some of those cases include: *Tober v. Graco Children's Products, Inc.*;¹⁰³ *Ford Motor Co. v. Rushford*;¹⁰⁴ *Williams v. Genie Industries, Inc.*;¹⁰⁵ *Conley v. Lift-All Co.*;¹⁰⁶ *First National Bank & Trust Corp. v. American Eurocopter Corp.* (“*Inlow II*”);¹⁰⁷ and *Birch v. Midwest Garage Door Systems*.¹⁰⁸

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).

103. 431 F.3d 572 (7th Cir. 2005). For more detailed discussion and commentary about *Tober*, see Joseph R. Alberts & James Petersen, *Survey of Recent Developments in Indiana Product Liability Law*, 40 IND. L. REV. 1007, 1028-30 (2007).

104. 845 N.E.2d 197 (Ind. Ct. App. 2006), *rev'd*, 868 N.E.2d 806 (Ind. 2007). For more detailed discussion and commentary about the reversed Indiana Court of Appeals's opinion in *Rushford*, see Alberts & Petersen, *supra* note 103, at 1030-32.

105. No. 3:04-CV-217 CAN, 2006 WL 1408412 (N.D. Ind. May 19, 2006). For more detailed discussion and commentary about *Williams*, see Alberts & Petersen, *supra* note 103, at 1032-33.

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

107. *Inlow II*, 378 F.3d 682, *aff'g In re Inlow Accident Litig. (Inlow I)*, No. IP 99-0830-CH/K, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002). In the *Inlow* cases, a helicopter rotor blade struck and killed the 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 691. 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.

108. 790 N.E.2d 504 (Ind. Ct. App. 2003). In *Birch*, a young girl sustained serious injuries when the garage door 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. Additionally, 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 Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Indiana Product Liability Law*, 37 IND. L. REV. 1247, 1262-64 (2004); *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*, 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 23, at 1183-85.

On June 29, 2007, the Indiana Supreme Court decided *Ford Motor Co. v. Rushford*.¹⁰⁹ *Rushford* is noteworthy for its impact on retail sellers of products in Indiana because it holds that mere retail sellers may not owe a duty to warn, absent special circumstances, when the seller passes along adequate manufacturer's warnings.¹¹⁰

Marilyn Rushford sued Ford Motor Company and Eby Ford Lincoln Mercury a/k/a Eby Ford Sales, Inc. ("Eby Ford") by filing a two-count complaint.¹¹¹ Rushford argued strict product liability in her first count, alleging that a 2002 Ford Focus Wagon she and her husband purchased in 2002 was defective and unreasonably dangerous because Ford and Eby Ford failed to provide adequate warnings about the danger the front seat air bags posed to short adults.¹¹² The second count alleged negligence against Ford and Eby Ford for not placing a warning "that the deployment of the air bags could cause injury to adults such as [Rushford]."¹¹³ Both Ford and Eby Ford moved for summary judgment in the trial court.¹¹⁴ Both motions were denied.¹¹⁵ On April 11, 2006, the Indiana Court of Appeals concluded that Ford discharged its duty to warn by providing adequate warning to Rushford in the owner's manual and on the visor. The court reversed the trial court's denial of Ford's motion for summary judgment.¹¹⁶ The court of appeals, however, found that a question of fact existed as to whether Eby Ford exercised reasonable care under the circumstances by failing to warn or instruct Rushford to read the air bag warning in the owner's manual.¹¹⁷ Rushford did not contest the court of appeals's ruling in favor of Ford before the Indiana Supreme Court.¹¹⁸ Thus, the supreme court was left to decide the scope of duty owed by a retail seller to an Indiana buyer when a manufacturer's warning is adequate.

Marilyn Rushford was seventy years old when she and her husband purchased the 2002 Ford Focus wagon.¹¹⁹ Rushford informed Eby Ford's salesman that she had never driven an automobile and that she would not drive the Focus.¹²⁰ A few weeks after their purchase, Rushford sustained serious personal injuries¹²¹ when her husband collided with another vehicle, causing the

109. 868 N.E.2d 806 (Ind. 2007).

110. *See generally id.*

111. *Id.* at 808-09.

112. *Id.*

113. *Id.* at 809.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 808. Although last year's survey article recounted the facts of *Rushford*, *see* Alberts & Petersen, *supra* note 103, at 1030-32, they are again briefly discussed here to place the court's decision in context.

120. *Ford Motor Co.*, 868 N.E.2d at 808.

121. Rushford claimed that the collision caused her to suffer the loss of her left thumb, serious

vehicle's front passenger air bag to deploy.¹²²

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 SEAT BELTS and CHILD RESTRAINTS¹²³

The warning also contained a pictogram visually demonstrating air bag deployment against a rear-facing child seat.¹²⁴

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.¹²⁵

Rushford conceded that she saw the visor warning.¹²⁶ She claimed, however, that she did not read the warning closely.¹²⁷ She admitted seeing similar warnings in other vehicles the couple had owned, but thought visor warnings only pertained to child safety.¹²⁸ Similarly, she did not read the warning in the owner's manual because she did not drive the vehicle and because no one at Eby Ford told either Rushford or her husband that the manual contained a warning addressing air bags.¹²⁹

As in the trial court, Rushford conceded that the manufacturer's warnings on the visor and in the owner's manual were adequate.¹³⁰ On transfer, the Indiana Supreme Court noted that manufacturers owe a duty to provide adequate instructions for safe use and to provide warning as to dangers inherent in

injuries to her left hand and wrist, cervical fractures, and a head laceration. *Id.* at 808 n.2.

122. *Id.* at 808.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 810.

improper use.¹³¹ Quoting statutory language in the IPLA, the court wrote that for a buyer to succeed, he or she must demonstrate ““that the manufacturer or seller failed to exercise reasonable care under the circumstances.””¹³² The adequacy of a warning is generally reserved as a question of fact; however, the nature of the duty to warn is a question of law to be answered by the courts.¹³³

Rushford argued that because the car dealer knew she would not drive the vehicle, the dealer should have instructed her to read the warnings provided by Ford.¹³⁴ Unlike the Indiana Court of Appeals, which analyzed Rushford’s claim against the dealer through a breach of duty lens, the Indiana Supreme Court framed the issue as whether a duty existed in the first instance: “That is to say, what duty to warn of dangers does a retail seller owe to a user or consumer of a product when such dangers already have been communicated by the product’s manufacturer.”¹³⁵ In answering its own question, the court held:

[I]n the absence of any evidence that the product has been modified in some fashion and that the seller knew or should have known of any such modification, its duty to warn is discharged where the seller provides the buyer with the manufacturer’s warning of the danger at issue. In other words absent special circumstances, if the manufacturer provides adequate warnings of the danger of its products and the seller passes this warning along to the buyer or consumer, then the seller has no obligation to provide additional warnings.¹³⁶

Because Eby Ford had provided Rushford with the manufacturer’s warnings, it had no duty to provide additional warnings.¹³⁷ Doing so would place Eby Ford in the precarious position of determining which of the manufacturer’s particular warnings may be of unique importance to each consumer and then drawing the consumer’s attention to these specific warnings.¹³⁸

Rushford establishes that a retail seller can rely upon adequate warnings provided by a manufacturer. In reaching its decision, the *Rushford* court relied on the heeding presumption recognized in Indiana in *Dias v. Daisy-Heddon*¹³⁹ nearly thirty years ago.¹⁴⁰ Many times, the manufacturer is in the best position to know and understand the risks inherent in the use and misuse of an unaltered or unmodified product. In situations as in *Rushford*, where a retail seller merely sells a product in the same condition as received from the manufacturer, the seller, like the manufacturer, should rely on the fact that when adequate warnings

131. *Id.*

132. *Id.* (quoting IND. CODE § 34-20-2-2 (2004)).

133. *Id.*

134. *Id.*

135. *Id.* at 810-11.

136. *Id.* at 811.

137. *Id.*

138. *Id.* at 811-12.

139. 390 N.E.2d 222 (Ind. Ct. App. 1979).

140. *Rushford*, 868 N.E.2d at 811.

are given with a product, they will be read and heeded by a user or consumer. *Rushford* fails to address circumstances in which the manufacturer's warnings are inadequate or the product has been modified after it has left the manufacturer's control. In such circumstances, a retail seller may still owe a duty to warn or to provide additional warnings and instructions.

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.*"¹⁴¹ 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."¹⁴² In cases where a person who is a 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, 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.¹⁴³

Three cases decided during last year's survey period, *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,¹⁴⁴ *Ryan v. Philip Morris USA, Inc.*,¹⁴⁵

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

142. *Id.* § 34-20-1-2.

143. 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. 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).

144. No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006). There, a fire that allegedly started in a toaster manufactured by the defendant, Hamilton Beach/Proctor Silex ("Hamilton Beach"), destroying a couple's home and personal property. *Id.* at *1. Cincinnati Insurance insured the couple's home and brought a subrogation action against Hamilton Beach, asserting claims for negligence, breach of warranty, strict liability, violation of the Magnuson-Moss Warranty Act, and negligent failure to recall. *Id.* Hamilton Beach moved to dismiss the negligence, warranty, Magnuson-Moss, and negligent failure to recall claims. *Id.* The court agreed that the IPLA subsumes and incorporates all negligence and tort-based warranty claims. *Id.* at *2.

145. No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006). 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. *Id.* at *1. The defendants argued that the IPLA provides the sole and exclusive remedy for personal injuries allegedly caused by a product. *Id.* at *2. The court agreed, holding that the IPLA unequivocally precludes plaintiff's common law negligence and fraud claims. *Id.*

and *Fellner v. Philadelphia Toboggan Coasters, Inc.*,¹⁴⁶ reinforce the IPLA merger premise under such circumstances. The merger premise should apply, however, 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.¹⁴⁷

146. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006). The *Fellner* case involved a person who was killed when she was ejected from a wooden roller coaster at Holiday World amusement park. *Id.* at *1. 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. *Id.* Plaintiff sought to hold Koch liable for negligence, strict liability, and breach of implied warranties. *Id.* 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. *Id.* at *4. As noted 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. *Id.* 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. 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 . . . 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); *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), *aff'd*, 107 Fed. Appx. 693 (7th Cir. 2004); *Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Kennedy v. Guess, Inc.*, 765 N.E.2d 213, 220 (Ind. Ct. App. 2002), *vacated*, 806 N.E.2d 776 (Ind. 2004). 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.”

147. *Fellner*, 2006 WL 2224068, at *4; *see also* *Farmer Boy AG*, 2000 U.S. Dist. LEXIS 19502, at *10-11 (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

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 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.¹⁴⁸ 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.

II. STATUTES OF LIMITATION AND REPOSE

The IPLA contains a statute of limitation and a statute of repose for product liability claims. Indiana Code section 34-20-3-1 provides:

(a) This section applies to all persons regardless of minority or legal disability. Notwithstanding [Indiana Code section] 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

as it was limited to a breach of contract theory).

148. *See, 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 Manufacturing, Inc. v. Reynolds*, 849 N.E.2d 516 (Ind. 2006), the Indiana Supreme Court allowed a negligence claim based upon section 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.

accrues.¹⁴⁹

Product liability cases involving asbestos products, however, have a unique statute of limitations. 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.”¹⁵⁰ 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.”¹⁵¹

A. Statute of Limitations

In *Frye v. MedComp, Inc.*,¹⁵² Frye filed a product liability suit in an Indiana state court, alleging that a catheter inserted for chemotherapy on May 14, 2004, had malfunctioned causing chemotherapeutic agents to leak into his neck and chest resulting in permanent damage.¹⁵³ He filed his complaint on May 12, 2006, naming MedComp, Inc. as a defendant.¹⁵⁴ On September 18, 2006, the trial court issued an alias summons.¹⁵⁵ The alias summons, still listing “MedComp, Inc.” as the defendant, was served on Medical Components, Inc. on October 19, 2006, whose counsel appeared and removed the case to federal court on November 13, 2006, based upon diversity jurisdiction.¹⁵⁶

Medical Components moved to dismiss Frye’s suit because it had not been properly named as a defendant and because the two-year statute of limitations in Indiana Code section 34-20-3-1(b) barred the claim.¹⁵⁷ The district court agreed, reasoning that Indiana law requires both the filing of the complaint and the tendering of the summons to the clerk within the statutory time period to timely commence suit.¹⁵⁸ The court noted that Frye realized at some point that serving

149. IND. CODE § 34-20-3-1 (2004).

150. *Id.* § 34-20-3-2(a).

151. *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. 2005).

152. No. 1:06-cv-1635-SEB-VSS, 2007 U.S. Dist. LEXIS 5672 (S.D. Ind. Jan. 24, 2007).

153. *Id.* at *1.

154. *Id.* at *2.

155. *Id.* MedComp, Inc. appeared by counsel and filed an answer. *Id.* MedComp, Inc., an Indiana corporation, was a separate and distinct company, unrelated to the proper defendant who supplied the catheter, Medical Components, Inc. *Id.* at *5. Curiously, however, the plaintiff never amended his complaint to name the proper defendant, even though causing an alias summons to be issued and served on the correct defendant. *See id.* at *2.

156. *Id.*

157. *Id.* at *3-6.

158. *Id.* at *6 (citing IND. TRIAL R. 3).

MedComp, Inc. was a mistake.¹⁵⁹ Regardless, he never attempted to amend his complaint to name the proper defendant and the proper defendant was not served until 159 days after the complaint was filed, well outside the 120-day time period permitted by Federal Rule of Civil Procedure 4(m).¹⁶⁰ As a result, the suit was untimely under the Federal Rules of Civil Procedure, the Indiana Trial Rules, and the IPLA as well.¹⁶¹

B. Statute of Repose

As was the case during prior survey periods, the current survey period saw more cases interpreting and applying the IPLA's statute of repose to bar asbestos claims against companies that did not mine asbestos. On August 31, 2007, the Indiana Court of Appeals handed down a series of cases arising out of plaintiff Bill Littlefield's exposure to asbestos.¹⁶² Two of these cases discuss and apply the statute of repose, *Dap, Inc. v. Akaiwa*¹⁶³ and *TH Agriculture and Nutrition, LLC v. Akaiwa*.¹⁶⁴

Littlefield was exposed to asbestos some time between June 1, 1976, and August 1, 1982.¹⁶⁵ As a result of his exposure, he was diagnosed with mesothelioma on July 17, 2004.¹⁶⁶ Prior to the diagnosis Littlefield had no reason to believe that he had been exposed to asbestos.¹⁶⁷ On January 10, 2005, Littlefield filed a complaint naming numerous defendants, including TH Agriculture and Nutrition, LLC ("THAN").¹⁶⁸ Littlefield died on July 25, 2005,

159. *Id.* at *8.

160. *Id.* at *5 n.4, *8.

161. *Id.* at *8-9.

162. The series of cases decided concurrently by the court of appeals includes *Asbestos Corp. v. Akaiwa*, 872 N.E.2d 1095 (Ind. Ct. App. 2007); *Dap, Inc. v. Akaiwa*, 872 N.E.2d 1098 (Ind. Ct. App. 2007); *TH Agric. & Nutrition, LLC v. Akaiwa (THAN)*, 872 N.E.2d 1104 (Ind. Ct. App. 2007); *TH Agric. & Nutrition, LLC v. Nevius*, 872 N.E.2d 708 (Ind. Ct. App. 2007) (unpublished table decision); and *Sun Chem v. Akaiwa*, 872 N.E.2d 708 (Ind. Ct. App. 2007). *Dap, Inc.* and *THAN* substantively discuss and apply the statute of repose. See *Dap, Inc.*, 872 N.E.2d at 1098; *THAN*, 872 N.E.2d at 1104. Although the defendant in *Asbestos Corp.* raised the statute of limitations defense, the court of appeals did not substantively discuss or analyze it. 872 N.E.2d at 1095-98. The single issue the court found dispositive was whether the plaintiff had presented sufficient evidence of exposure to Asbestos Corp. Ltd. ("ACL") asbestos to survive summary judgment. *Id.* at 1095, 1098. The court of appeals found that the plaintiff had not presented sufficient evidence and reversed the trial court's denial of ACL's motion for summary judgment. *Id.* at 1098. The remaining two decisions, *TH Agric. & Nutrition, LLC v. Nevius* and *Sun Chem v. Akaiwa*, are unpublished and are not included in this survey.

163. 872 N.E.2d 1098 (Ind. Ct. App. 2007).

164. 872 N.E.2d 1104 (Ind. Ct. App. 2007).

165. *Id.* at 1105.

166. *Id.*

167. *Id.*

168. *Id.* TH Agriculture and Nutrition, LLC ("THAN") "was formed in 1998 and is the

and Akaiwa was substituted as his representative to maintain the actions.¹⁶⁹ THAN moved for summary judgment asserting the suit was time-barred.¹⁷⁰ Akaiwa resisted, contending that THAN was a distributor and/or supplier of raw asbestos fiber mined by other entities and therefore was a mining company, which would not allow THAN to avail itself of the ten-year statute of repose in Indiana Code section 34-20-3-1.¹⁷¹ In other words, Akaiwa tried to avoid the statute of repose by relying on Indiana Code section 34-20-2-4¹⁷² claiming that THAN was a miner under the IPLA because it stood as the principal distributor in Indiana for a bankrupt asbestos mining company over whom Indiana court's could not exercise jurisdiction.¹⁷³ The trial court apparently agreed and denied THAN's motion.¹⁷⁴

Observing that Akaiwa had ignored Indiana's statute of repose, the court of appeals was not persuaded.¹⁷⁵ Relying on *AlliedSignal v. Ott*,¹⁷⁶ the court acknowledged that Indiana's Supreme Court previously decided that the specific language chosen by the Indiana General Assembly when it drafted section 2¹⁷⁷ represented a conscious intent only to subject those entities that mined and sold commercial asbestos to the section.¹⁷⁸ All other entities that merely sold asbestos-containing products were subject to section 1 and claims against them could be extinguished by the passage of time and the IPLA's ten-year statute of

successor by merger to TH Agriculture and Nutrition, Inc., formerly known as Thompson-Hayward Chemical Company ("THCC")." *Id.* at 1004. THCC did not mine asbestos or manufacture asbestos-containing products. *Id.* At one time THCC did distribute various grades of chrysotile asbestos fibers to portions of the United States between 1960 and 1980 on behalf of Carey-Canadian Mines, Ltd. and maintained a distribution facility for a few years in the mid-1960s in Indianapolis, Indiana. *Id.* At the time of the suit, Carey was in bankruptcy. *Id.*

169. *Id.* at 1106.

170. *Id.*

171. *Id.* at 1106-08.

172. Indiana Code section 34-20-2-4 states:

If a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, *for the purposes of this chapter*, the manufacturer of the product.

IND. CODE § 34-20-2-4 (2004) (emphasis added).

173. *THAN*, 872 N.E.2d at 1106.

174. *Id.*

175. *Id.* at 1106-07.

176. 785 N.E.2d 1068, 1073 (Ind. 2003) (holding the language used represents the conscious intent of the legislature).

177. Indiana Code section 34-20-3 contains the statutes of limitations and repose for product liability actions. The general product liability statute of limitations and repose is codified at Indiana Code section 34-20-3-1 or "section 1." Certain asbestos-related cases are exempted from Indiana's ten-year statute of repose and are governed by Indiana Code section 34-20-3-2 or "section 2."

178. *THAN*, 872 N.E.2d at 1107.

repose.¹⁷⁹ In short, the “[s]upreme [c]ourt’s express holding in *Ott*¹⁸⁰ foreclose[d] the application of section 2 to non-miner defendants.”¹⁸¹ The court noted that Akaiwa did not dispute that THAN did not mine asbestos.¹⁸² Moreover, the court noted that Akaiwa’s argument that THAN, a distributor, should be treated as a miner under Indiana Code section 34-20-2-4 was rejected a year earlier in *Briggs v. Griffin Wheel Corp.*,¹⁸³ which Akaiwa had not attempted to distinguish.¹⁸⁴ Because THAN was not an asbestos miner, Akaiwa’s claim was governed by the ten-year statute of repose.¹⁸⁵ Littlefield was last exposed to asbestos more than ten years before filing suit, thus section 1’s statute of repose barred the action.¹⁸⁶

In *Dap, Inc. v. Akaiwa*,¹⁸⁷ the court of appeals also found that the statute of repose barred Akaiwa’s claims against Dap, Inc. (“Dap”).¹⁸⁸ Between 1960 and 1977, Dap manufactured an asphalt sealant and elastic glazing compound, both of which contained asbestos fibers.¹⁸⁹ Dap, however, “did not mine or sell raw asbestos.”¹⁹⁰ Sometime between 1980 and 1982, the decedent used sealants manufactured by Dap, presumably the Dap sealants decedent used between 1980 and 1982 contained asbestos fibers.¹⁹¹ Relying on the ten-year statute of repose, Dap moved for summary judgment.¹⁹² The trial court, however, found that the ten-year statute of repose did not apply.¹⁹³

As in the companion case, *TH Agriculture and Nutrition, LLC*, discussed above, the court of appeals again found *AlliedSignal v. Ott*¹⁹⁴ controlling.¹⁹⁵ The

179. *Id.*

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

181. *THAN*, 872 N.E.2d at 1108.

182. *Id.*

183. 851 N.E.2d 1261, 1263-64 (Ind. Ct. App. 2006). For a detailed discussion and commentary about *Briggs*, see Alberts & Petersen, *supra* note 103, at 1042-43.

184. *THAN*, 872 N.E.2d at 1108.

185. *Id.* at 1109.

186. *Id.* Although not raised by Akaiwa, amici Indiana Trial Lawyers’ Association (“ITLA”) and Defense Trial Counsel of Indiana (“DTCI”) participated in the appeal to address whether section 1 and section 2 violated article I, section 23 of the Indiana Constitution. *Id.* at 1108. The court of appeals again found the *Ott* decision controlling because it had previously addressed the constitutionality of the application of the statute of repose to non-miners. *Id.* at 1108-09. Thus, the constitutionality of the statute of limitations and repose were beyond the scope of its permissible review. *Id.*

187. 872 N.E.2d 1098 (Ind. Ct. App. 2007).

188. *Id.* at 1103.

189. *Id.* at 1099.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. 785 N.E.2d 1068, 1073 (Ind. 2003).

195. *Dap, Inc.*, 872 N.E.2d at 1100-04. Although Akaiwa did not timely file his appellee’s brief, the court of appeals nevertheless addressed the case on its merits. *Id.* at 1100.

court reasoned that because Dap was not a miner, section 2¹⁹⁶ was inapplicable.¹⁹⁷ Thus, the ten-year statute of repose contained in section 1 barred it because the action was commenced more than twenty years after the decedent's last possible exposure to asbestos.¹⁹⁸ Noting that *Ott* left open the possibility that the statute of repose "might be unconstitutional as applied to the plaintiff if a reasonably experienced physician could have diagnosed [the plaintiff] with an asbestos-related illness or disease within the ten-year statute of repose, yet [the plaintiff] had no reason to know of the diagnosable condition until the ten-year period had expired,"¹⁹⁹ the court then turned to the constitutionality of the statute of repose.²⁰⁰

In the trial court, Akaiwa argued that a reasonable physician could have diagnosed the decedent "within ten years after his exposure, even [though] doing so would have involved a medically unethical procedure."²⁰¹ Nonetheless, Akaiwa conceded that the decedent had no reason to seek medical diagnosis or treatment until he developed signs and symptoms of an asbestos-related illness in June 2004.²⁰² The court recognized that its 2005 decision in *Jurich v. John Crane, Inc.*²⁰³ expressly rejected the arguments made by Akaiwa in the trial court because *Ott*'s requirement of a manifested asbestos related illness or disease that could have been diagnosed by a reasonably skilled physician²⁰⁴ "refers to a disease that is a clinically-recognized symptomatic condition, or one that could have been detected by a competent physician conducting a routine examination of the patient."²⁰⁵ It excludes asymptomatic conditions or those that could only be discovered using "extreme and medically unsound or unethical measures."²⁰⁶ Because the decedent exhibited no symptoms until June 2004, approximately twenty-two years after his last exposure to asbestos, Akaiwa's argument that section 1 was unconstitutional as applied did not persuade the court of appeals.²⁰⁷

196. Recall that section 1 refers to Indiana Code section 34-20-3-1 and section 2 refers to section 34-20-3-2.

197. *Dap, Inc.*, 872 N.E.2d at 1101.

198. *Id.*

199. *Id.* (quoting *AlliedSignal v. Ott*, 7785 N.E.2d 1068, 1075 (Ind. 2003)).

200. *Id.*

201. *Id.* at 1101-02.

202. *Id.*

203. 824 N.E.2d 777, 780-83 (Ind. Ct. App. 2005).

204. *Ott*, 785 N.E.2d at 1076.

205. *Dap, Inc.*, 872 N.E.2d at 1102 (quoting *Jurich*, 824 N.E.2d at 783).

206. *Id.*

207. *Id.* at 1102-03. As in *TH Agriculture and Nutrition, LLC* ("THAN"), 872 N.E.2d. at 1108-09, amici Indiana Trial Lawyers' Association ("ITLA") and Defense Trial Counsel of Indiana ("DTCI") participated in the appeal to address whether section 1 and section 2 violated article I, section 23 of the Indiana Constitution. *Dap, Inc.*, 872 N.E.2d at 1102. With text nearly identical to that used in *THAN*, the court again passed on the constitutionality question finding that the issue was beyond the scope of its permissible review. *Id.*

III. EVIDENTIARY PRESUMPTION FOR COMPLIANCE WITH STATE-OF-THE-ART AND 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.²⁰⁸

A. *Compliance with State-of-the-Art*

The 2007 survey period included the first published opinion by an Indiana court giving a rebuttable presumption jury instruction based on Indiana Code section 34-20-5-1 for a state-of-the-art product. In *Bourke v. Ford Motor Co.*,²⁰⁹ plaintiff Anna Bourke brought suit against Ford on behalf of the Estate of Richard Bourke.²¹⁰ Bourke alleged that the 2000 Ford Explorer was defectively designed because it possessed inadequate rollover resistance.²¹¹ The court provided the jury with instructions defining state-of-the-art and that Ford was entitled to a rebuttable presumption that the Explorer was not defective and that Ford was not negligent if it had proven that the vehicle was state-of-the-art.²¹² The first instruction setting forth the presumption read:

Ford Motor Company has alleged that the 2000 Ford Explorer was manufactured in conformity with the state of the art. Ford has the burden of proving this allegation.

If you find that Ford Motor Company has proved by a preponderance of the evidence that before the 2000 Ford Explorer was sold by them, the product: 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; then you may presume that the 2000 Ford Explorer was not defective and Ford Motor Company is not negligent and find for them.

208. IND. CODE § 34-20-5-1 (2004).

209. No. 2:03-CV-136, 2007 U.S. Dist. LEXIS 15871 (N.D. Ind. Mar. 5, 2007).

210. *Id.* at *2.

211. *Id.*

212. *Id.* at *2-3.

However, if Plaintiff has introduced evidence tending to disprove this proposition then you may, but are not required to, find that the 2000 Ford Explorer was defective.²¹³

The instruction defining “state of the art” read:

The term “state of the art” is defined as the best technology reasonably feasible at the time the product was designed, manufactured, packaged and labeled.

Whether a product was manufactured in conformity with the generally recognized state of the art you may consider: evidence of the existing level of technology, industry standards, the lack of other advanced technology and the product’s safety record at the time the product was designed, manufactured, packaged and labeled.²¹⁴

The jury returned a verdict in favor of Ford.²¹⁵ Bourke sought a new trial claiming that there was insufficient evidence to support the state of the art instructions and because the instructions failed to adequately differentiate between state of the art and industry custom.²¹⁶

The court began by addressing whether its instructions were correct statements of the law and, if not, whether any error caused Bourke to suffer any prejudice.²¹⁷ Bourke agreed that the court’s rebuttable presumption instruction was correct. Thus, the court had little difficulty finding that the instruction was not error.²¹⁸ Bourke, however, asserted that the state of the art instruction was erroneous because it failed to distinguish between state of the art and industry custom.²¹⁹ The court disagreed, reasoning that the instruction at issue defining state of the art is nearly identical to an instruction approved in *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*²²⁰ As in *Indianapolis Athletic Club*, the reference to industry standards was within the context of a list containing several factors that a jury could consider.²²¹ Because the court concluded that both instructions contained accurate recitations of applicable law, there was no error and a new trial was not warranted.²²²

Bourke next claimed that there was insufficient evidence to support

213. *Id.*

214. *Id.* at *3.

215. *Id.*

216. *Id.*

217. *Id.* at *4-5.

218. *Id.* at *5-6.

219. *Id.*

220. *Id.* at *6 (citing *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*, 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999)).

221. *Id.* at *6-8.

222. *Id.* at *7-8.

giving the two instructions.²²³ The court interpreted Bourke's argument as one contending "that the jury's verdict was against the . . . weight of the evidence."²²⁴ Bourke argued that Ford had elicited no trial testimony that its rollover resistance system was "state of the art" per se.²²⁵ The court found that Bourke's interpretation was too narrow because whether the actual phrase "state of the art" was brought out during trial did not necessarily prove or disprove the vehicle in fact was state-of-the-art.²²⁶ Again relying on *Indianapolis Athletic Club*, the court reasoned that Ford was only required to

present evidence that would allow a reasonable juror to find that its 2000 Explorer's rollover resistance used the best technology reasonably feasible. To do this, [Ford] was required to present evidence of the existing level of technology, industry standards, the lack of other advanced technology and the product's safety record at the time the 2000 Ford Explorer was designed and manufactured.²²⁷

The court was satisfied that both sides presented ample evidence to explain the state of technology and scientific knowledge with respect to vehicle design, development, and testing as it existed when the 2000 Ford Explorer was designed and manufactured.²²⁸ Thus, a reasonable juror, the court determined, could conclude that the 2000 Ford Explorer was state-of-the-art and find in Ford's favor.²²⁹

B. Compliance with Government Standards

In *Flis v. Kia Motors Corp.* ("Flis I"),²³⁰ Judge Tinder correctly predicted the Indiana Supreme Court's decision in *Schultz v. Ford*²³¹ before the supreme court

223. *Id.* at *8.

224. *Id.*

225. *Id.* at *8-10.

226. *Id.* at *9-10.

227. *Id.* at *10 (citation omitted).

228. *Id.*

229. *Id.* at *10-11.

230. No. 1:03-cv-1567-JDT-TAB, 2005 WL1528227 (S.D. Ind. June 20, 2005).

231. During the 2006 survey period, the Indiana Supreme Court decided *Schultz v. Ford Motor Co.*, 857 N.E.2d 977 (Ind. 2006). *Id.* at 979. 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. *Id.* Schultz and his wife sued Ford, alleging negligence and defective roof design. *Id.* Ford denied liability and defended the suit. *Id.* During trial Ford relied in part on its compliance with Federal Motor Vehicle Safety Standard ("FMVSS") 216, *id.*, which governed minimum vehicle roof strength. *Id.* at 979 n.1. The trial court gave an instruction based on Indiana Code section 34-20-5-1. The instruction provided that Ford was entitled to a rebuttable presumption that it was not negligent and the Ford Explorer was not defective by virtue of its compliance with FMVSS 216. *Id.* at 979-80. The jury rendered a verdict in favor of Ford. *Id.* at 979. Schultz contended that the giving of the instruction was reversible error. *Id.* at 981. The

granted transfer.²³² As in *Schultz*, *Flis* involved the rollover of a sport utility vehicle, a claim of inadequate roof strength, and the vehicle's compliance with Federal Vehicle Motor Safety Standard ("FMVSS") 216.²³³ Judge Tinder, declined to follow the court of appeals's decision in *Schultz*, determining that the Indiana Supreme Court would decide the case differently, and instructed the jury on Kia's compliance with FMVSS 216 and state-of-the-art.²³⁴ Following the adverse verdict, Jane and Richard Flis filed a motion for a new trial on June 30, 2005.²³⁵ Plaintiffs argued, among other things, that the court erred in giving a final instruction based upon Indiana Code section 34-20-5-1 and Kia's compliance with FMVSS.²³⁶ Judge Tinder waited until the Indiana Supreme Court's ruling in *Schultz* before issuing his decision denying plaintiffs' motion.²³⁷ He recognized that the *Schultz* decision mandates as follows:

([A] presumption is properly given "continuing effect" under the last sentence of Indiana Evidence Rule 301 by the trial court instructing the

Indiana Supreme Court disagreed and affirmed the trial court. *Id.* at 989. Relying on the last sentence contained in Indiana Evidence Rule 301, that presumptions shall have continuing effect, the Indiana Supreme Court rejected the bursting bubble theory of presumptions. *Id.* at 982-85. The court acknowledged that the presumption recognized by Indiana Code section 34-20-5-1 was not a presumption in a traditional legal sense. *Id.* at 985. Nonetheless, giving "continuing effect" to a presumption through a jury instruction furthered the policies that created the presumption in the first place. *Id.* at 986. By authorizing the instruction the court reasoned that it "recognize[d] the policy embodied by the [l]egislature in [the governmental compliance statute], regardless of whether the provision conform[ed] to the conventional definition of a legal 'presumption.'" *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. *Id.* at 986-87. The court suggested that it might 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 because on balance the instruction was fair to both parties. *Id.* at 987. Therefore, the court affirmed the trial court's decision to give the jury instruction. *Id.* at 989.

232. *Flis I*, 2005 WL 1528227, at *11.

233. *Id.* at *1-2.

234. *Id.* at *11-16.

235. *Flis v. Kia Motors Corp. (Flis II)*, No. 1:03-CV-1567-JDT-TAB, 2006 U.S. Dist. LEXIS 89436, at *2 (S.D. Ind. Dec. 8, 2006). Plaintiffs' motion for new trial asserted two grounds for relief—juror misconduct and the giving of a governmental compliance instruction. *Id.* As to their allegations of misconduct, the plaintiffs argued that they were entitled to a new trial due to "juror non-disclosure, deceit, and misconduct during voir dire" that resulted in bias against them. *Id.* Although not germane to this product liability survey, Judge Tinder summoned the juror who plaintiffs claimed engaged in the deceitful conduct. *See id.* at 7. After briefing and a full hearing on the merits, including examination of the juror, the court concluded that no juror misconduct had in fact occurred as the juror neither withheld any information during voir dire nor allowed deliberations to be tainted by any outside influences. *Id.* at *5-16.

236. *Id.* at *16.

237. *Id.* at *17-18.

jury that when a basic fact is proven, the jury may infer the existence of a presumed fact.) In so holding, the [c]ourt cited this court's Entry on Governmental-Compliance and State-of-the-Art Instruction in this case. Therefore, under Indiana law as established by the Indiana Supreme Court in *Schultz*, the giving of [a final instruction based on compliance with governmental standards] was not error.²³⁸

Schultz and *Flis* establish the propriety of a governmental compliance instruction in cases where specific codes, standards, regulations, or specifications apply. Another federal case involving Ford decided during the survey period, *Bourke v. Ford Motor Co.*,²³⁹ suggests that the nexus between the compliance and the issues to be tried must be a close fit or the compliance presumption may not be available. Indeed, evidence of compliance may not even be admissible.

Bourke was filed in federal court in the Northern District of Indiana. There, the plaintiff filed a motion in limine to bar any evidence that the 2000 Ford Explorer at issue met any standards that were unrelated to the plaintiff's specific claim that the vehicle possessed inadequate rollover resistance.²⁴⁰ Although it conceded that no federal motor vehicle safety standard specifically addressed vehicle rollover resistance, Ford nevertheless argued that it should be able to introduce evidence of the vehicle's compliance with other federal safety standards to gain the benefit of the rebuttable presumption of non-defectiveness in Indiana Code section 34-20-5-1.²⁴¹ Judge Lozano opined that the language of the statute was clear and unambiguous, and he therefore resolved the issue by parsing the language of Indiana Code section 34-5-20-1.²⁴² He posited that the word "applicable" immediately preceded "codes, standards, regulations, or specifications."²⁴³ Quoting *Black's Law Dictionary*, he wrote, "[a]pplicable is defined as '[f]it, suitable, pertinent, related to, or appropriate; capable of being applied.'"²⁴⁴ The court then reiterated that not all federal motor vehicle safety standards applied to the defect plaintiff alleged in the case.²⁴⁵ The court reasoned that the plain meaning of the word "applicable" required Ford to establish that it complied with a specific standard or regulation regarding the defect at issue, rollover resistance, if it wanted to avail itself of the rebuttable presumption.²⁴⁶ The court then turned to both *Schultz*²⁴⁷ and *Cansler v. Mills*²⁴⁸ to support its

238. *Id.* at *18 (citations omitted).

239. No. 2:03-CV-136, 2007 U.S. Dist. LEXIS 1860 (N.D. Ind. Jan. 8, 2007), *reh'g denied*, No. 2:03-CV-136, 2007 U.S. Dist. LEXIS 15871 (N.D. Ind. Mar. 5, 2007).

240. *Id.* at *2.

241. *Id.* at *2-3.

242. *Id.* at *4-5.

243. *Id.* at *3.

244. *Id.* at *4 (quoting BLACK'S LAW DICTIONARY 98 (6th ed. 1990)).

245. *Id.* at *4-5.

246. *Id.* at *5.

247. 857 N.E.2d 977 (Ind. 2006).

248. 765 N.E.2d 698 (Ind. Ct. App. 2002), *overruled on other grounds*, 857 N.E.2d 977 (Ind.

decision.²⁴⁹ The court observed that in both *Cansler* and *Schultz* the manufacturers were able to rely on the presumption due to compliance with the safety standard governing the specific component or defect at issue.²⁵⁰ Therefore, the court concluded that compliance with any safety standard unrelated to rollover resistance was irrelevant and posed a risk of confusing and misleading the jury.²⁵¹ The pretrial ruling effectively barred evidence of compliance with any federal motor vehicle safety standard.

No Indiana appellate court has yet to squarely address whether compliance with “codes, standards, regulations, or specifications” not directly “applicable” to the specific defect claimed by a plaintiff entitles a manufacturer or seller to the benefit of the rebuttable presumption contained within Indiana Code section 34-5-20-1. As Judge Lozano seems to have correctly observed, a plain reading of Indiana Code section 34-5-20-1 lends support to his pretrial ruling as “applicable” immediately precedes “codes, standards, regulations, or specifications.” Thus, putting aside evidentiary rules, “applicable” connotes, if not requires, the existence of some connection or relevance to the issues in the case for the presumption to take hold. As yet unresolved, however, is just how “applicable” the codes, standards, regulations, or specifications must be before the compliance presumption arises.

The pretrial ruling in *Bourke* may have gone a little too far because compliance could be admissible for another purpose, such as to support a claim of state-of-the-art. Even though the presumption may not arise, the admissibility of compliance is a separate and distinct issue. For instance, industry custom is one factor to be considered by a jury to determine whether a product is state-of-the-art.²⁵² Accordingly, complying or failing to comply with appropriately promulgated and approved codes or standards may tend to prove or disprove whether a product is state-of-the-art. On the other hand, perhaps the fact that no code, standard, regulation, or specification exists addressing the specific claim at issue may help prove or disprove the existing level of technology or lack of other more advanced technology.

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

2006). In *Cansler*, the issue was non-deployment of a vehicle’s airbag in a collision. *Id.* at 701. FMVSS 208 specifically governs vehicle air bags. *Id.* at 705.

249. *Bourke*, 2007 U.S. Dist. LEXIS 1860, at *5-8.

250. *Id.*

251. *Id.* at *7-8.

252. *See id.* at *6-8; *Indianapolis Athletic Club v. Ako Standard Corp.*, 709 N.E.2d 1070, 1074 (Ind. Ct. App. 1999).

proceeded to make use of the product and was injured.”²⁵³ 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.”²⁵⁴ 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.²⁵⁵

There were no significant published decisions during the survey period that addressed incurred risk.

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.”²⁵⁶ 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)²⁵⁷ or that the injury resulted from “handling, preparation for use, or consumption that is not reasonably expectable” under Indiana Code section 34-20-4-3.²⁵⁸

253. IND. CODE § 34-20-6-3 (2004).

254. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999) (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 939 (Ind. Ct. App. 1994)).

255. *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.” (citing IND. CODE §§ 34-51-2-1 to -19). On that point, the *Vaughn* decision is consistent with several earlier cases, including *Baker v. Heye-America*, 799 N.E.2d 1135, 1145 (Ind. Ct. App. 2003), *Hopper v. Carey*, 716 N.E.2d 566, 575 (Ind. Ct. App. 1999), and *Cole*, 714 N.E.2d at 194, all of which stated that incurred risk is a complete defense in Indiana. Cf. *Mesman v. Crane Pro Servs.*, 409 F.3d 846 (7th Cir. 2005); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004). Although it held that no IPLA-based claims survived summary judgment, the *Vaughn* court did allow a common 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. *Vaughn*, 841 N.E.2d at 1145-46. For a discussion about the nature of the negligence claim that the court allowed to survive summary judgment, see *Alberts & Petersen, supra* note 103, at 1037-39.

256. 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)).

257. IND. CODE § 34-20-4-1(1) (2004).

258. *Id.* § 34-20-4-3.

Recent decisions in cases such as *Barnard v. Saturn Corp.*²⁵⁹ and *Burt v. Makita USA, Inc.*²⁶⁰ have resolved the applicability of the misuse defense as a matter of law. On the other hand, a 2005 case, *Henderson v. Freightliner, LLC*,²⁶¹ held that the incurred risk issue should be presented to a jury.²⁶² 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.²⁶³

The statutory definition of "misuse" quoted above appears to consider only

259. 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. *Id.* at 1027. The jack gave way, trapping the decedent underneath the car. *Id.* Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow. *Id.* at 1026-27. 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. *Id.* at 1025. 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 108, at 1286-87.

260. 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 23, at 1195-96.

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

262. 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 required that mechanics, among other things, "disconnect the leveling valve and exhaust all air from the air springs." *Id.* 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.

263. *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 Alberts & Petersen, *supra* note 103, at 1037-39.

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 be a complete defense as is incurred risk.²⁶⁴ Recent decisions, however, continue to reach inconsistent results when it comes to that issue. Three decisions, *Burt v. Makita USA, Inc.*,²⁶⁵ *Morgen v. Ford Motor Co.*,²⁶⁶ and *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*,²⁶⁷ have concluded that misuse is a complete defense. On the other hand, decisions in cases such as *Chapman v. Maytag Corp.*²⁶⁸ and *Barnard v. Saturn Corp.*²⁶⁹ 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).²⁷⁰

There were no significant published decisions during the survey period that addressed misuse.

C. Modification and Alteration

Indiana Code section 34-20-6-5 provides:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.²⁷¹

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

265. 212 F. Supp. 2d 893, 897 (N.D. Ind. 2002).

266. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *aff'd in part, vacated in part*, 797 N.E.2d 1146 (Ind. 2003).

267. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

268. 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) (citing *Chapman*, 297 F.3d at 689). For a more detailed analysis of *Chapman*, see Alberts & Boyers, *supra* note 23, at 1196-97.

269. 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 (citing *Chapman*, 297 F.3d at 689). The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed. *Id.* at 1029-30. "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 108, at 1286-87.

270. *See* IND. CODE § 34-20-8-1 (2004).

271. *Id.* § 34-20-6-5. Before the 1995 Amendments to the IPLA, product modification or

The modification/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:

[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.²⁷²

The interplay between these two statutes as it relates to a product's condition is important for courts and practitioners to understand. As briefly discussed above in Part I.D.1., evidence of a product's condition after leaving the manufacturer's or seller's control is significant *both* as an IPLA-mandated threshold requirement for which the plaintiff bears the burden of proof, as well as an IPLA-based affirmative defense for which the defendant bears the burden of proof.²⁷³

In a product liability case in Indiana, the IPLA requires the plaintiff, in order to establish his or her prima facie case, to demonstrate, first, that the product was in a defective condition at the time the seller or manufacturer conveyed it to another party,²⁷⁴ and, second, that the product reached him or her "without substantial alteration."²⁷⁵ If a plaintiff's evidence is insufficient to meet those requirements as a matter of law either before or at trial, he or she has failed to

alteration operated as a complete defense. See *Foley v. Case Corp.*, 884 F. Supp. 313, 315 (S.D. Ind. 1994).

272. IND. CODE § 34-20-2-1 (2004).

273. *Gaskin v. Sharp Electronics, Corp.*, No 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007), addressed above in Part I.D.1. in connection with manufacturing defect allegations, briefly addressed the "alteration" defense. Recall that *Gaskin* involved allegations that a television caused a fatal house fire. *Id.* at *2. The court recognized that plaintiffs had to prove that the allegedly defective condition in the television at issue existed at the time it left the manufacturer's control in order to satisfy an essential element of their prima facie case. *Id.* at *22. Whether there was a substantial alteration in the television between the time when it left the manufacturer's control and the time when it came into the plaintiff's possession, according to the court, was an affirmative defense to the foregoing essential element of the plaintiff's prima facie case. *Id.* at *23. The plaintiffs in *Gaskin* pointed to evidence that the television was purchased only two months prior to the fire, it was purchased from Best Buy in pristine condition, it was not mishandled by anyone, and it was never in need of repair. *Id.* at *24. Accordingly, the court concluded that there was sufficient evidence to allow the jury to ultimately determine whether plaintiffs could satisfy their burden of establishing a prima facie case and whether defendants could satisfy their burden of demonstrating the existence of a substantial alteration. *Id.*

274. IND. CODE. § 34-20-4-1 (2004).

275. *Id.* § 34-20-2-1.

establish a prima facie product liability case.

The defendant, on the other hand, can and should introduce evidence to establish either that the product was substantially altered before it reached the plaintiff or that it was substantially modified or altered after delivery to the initial user or consumer and such modification or alteration proximately caused the damages alleged. Establishing the former negates a prima facie component of plaintiff's case. Establishing the latter provides the basis for the statutory modification/alteration defense. In many cases, the same evidence will prove both points, such as a situation in which the initial user or consumer substantially altered the product before selling it to the plaintiff.

V. COMPARATIVE FAULT AND THE IPLA

The IPLA incorporates, in large measure, Indiana's comparative fault principles for all product liability actions. A defendant cannot be "liable for more than the amount of fault . . . directly attributable to that defendant," nor can a defendant "be held jointly liable for damages attributable to the fault of another defendant."²⁷⁶ In addition, the IPLA requires the trier of fact to compare the "fault of the person suffering the physical harm, as well as the fault of all others whom caused or contributed to cause the harm."²⁷⁷ For purposes of the IPLA, "fault" is

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

- (1) Unreasonable failure to avoid an injury or to mitigate damages.
- (2) A finding under [Indiana Code section] 34-20-2 . . . that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.²⁷⁸

The IPLA also contemplates assessment of fault for non-parties:

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.²⁷⁹

In *Dorman v. Osmose, Inc.*,²⁸⁰ plaintiff Dorman was wearing shorts while "building a deck with lumber treated with chromated copper arsenate ("CCA"), a preservative and pesticide manufactured by Osmose."²⁸¹ "[H]e accidentally

276. *Id.* § 34-20-7-1.

277. *Id.* § 34-20-8-1(a).

278. *Id.* § 34-6-2-45(a).

279. *Id.* § 34-20-8-1(b).

280. 873 N.E.2d 1102 (Ind. Ct. App. 2007).

281. *Id.* at 1105.

struck his leg against a piece of freshly cut wood, and several splinters lodged in his right shin.”²⁸² As a result of his injuries, Dorman sued Osmose, “alleging negligence and strict liability.”²⁸³ Osmose filed its answer, alleging, among other things, that Dorman was contributorily negligent.²⁸⁴ The case went to trial in 2006.²⁸⁵ At the close of trial, the court gave final instructions to the jury, including the following instructions, quoted in relevant part, concerning contributory negligence and fault apportionment:

[Osmose] contends that the [Dormans’] damages and injuries were caused by the negligence of [p]laintiff, Mark Dorman. Contributory negligence is the failure of a [p]laintiff to use reasonable care, when that failure contributes to the loss [p]laintiff claims and is a proximate cause of such loss. [Osmose] has the burden to prove by a preponderance of the evidence that [p]laintiff, Mark Dorman, was negligent.

...

Next, if [Osmose] is not at fault or if [p]laintiff Mark Dorman’s fault is greater than 50 percent, then you must return your verdict for [Osmose] and against the [Dormans]; and no further deliberation is required.²⁸⁶

The jury returned a verdict in favor of Osmose.²⁸⁷

Part of the Dormans’ appeal contended that the trial court abused its discretion by tendering the foregoing contributory negligence and fault apportionment instructions.²⁸⁸ “Specifically, the Dormans argue[d] that because Osmose claimed that its product was not dangerous and did not provide a warning to wear long pants when working with CCA-treated wood, [Dorman could not] be contributorily negligent for not taking precautions to avoid splinters from wood treated with CCA.”²⁸⁹ Osmose responded that there was evidence in the record showing that “any type of wood splinter could have caused [Dorman’s] injuries” and that Dorman failed to wear long pants even though he knew that he should wear long pants to avoid splinters.²⁹⁰

The court agreed with Osmose that the evidence supported the instruction.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 1109-10.

287. *Id.* at 1106.

288. *Id.* at 1109. The case has an involved procedural history, including a previous appeal. *Id.* at 1105. In addition to the comparative fault issue, Dorman raised two other issues on appeal, one involving the trial court’s decision not to replace one of the jurors at trial and the other involving the trial court’s denial of Osmose’s motion to admit certain language from a brief submitted in a prior appeal. *Id.* at 1104.

289. *Id.* at 1110.

290. *Id.*

Quoting *Peavler v. Board of Commissioners*,²⁹¹ the *Dorman* court wrote that “[c]ontributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection” and that “the plaintiff’s negligence must either be the proximate cause or a concurring or co-operating proximate cause of the plaintiff’s injury.”²⁹² Further citing to section 466 of the 1965 version of the Restatement (Second) Torts, the *Dorman* court identified two types of contributory negligence:

(a) an intentional and unreasonable exposure of himself to danger created by the defendant’s negligence, of which danger the plaintiff knows or has reason to know, or

(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.²⁹³

According to the court, the evidence presented “a situation that fits squarely into paragraph (b).”²⁹⁴ In doing so, the *Dorman* court cited, again, to *Peavler*, placing the following quotation in parentheses: “It is sufficient if the injury resulting from [plaintiff’s] failure to exercise ordinary care is such as was usual and therefore might have been expected.”²⁹⁵ The court pointed to testimony by physicians to the effect that foreign objects in the skin can cause cellulitis, that “wood splinter[s] of any kind . . . can cause acute infections such as that experienced by [Dorman],” and that there were not any known, published reports demonstrating “that a CCA-treated splinter is somehow different in terms of its toxic potential than [sic] is an untreated wood splinter.”²⁹⁶ The court also noted that Dorman “testified that he had worked with pressure treated wood eighty or ninety times beginning in high school,”²⁹⁷ “that he had been taught to keep his arms and legs covered while working with wood to protect against splinters,”²⁹⁸ and that he had both been admonished for, and prohibited from, wearing shorts while working at what the court inferred to be a construction job at Indiana University.²⁹⁹ The court, therefore, concluded that evidence in the record supported a contributory negligence jury instruction.³⁰⁰

The fault apportionment instruction appears to be perfectly consistent with both the IPLA and the Comparative Fault Act. The same does not seem to be

291. 557 N.E.2d 1077, 1080 (Ind. Ct. App. 1990).

292. *Dorman*, 873 N.E.2d at 1110.

293. *Id.* at 1111.

294. *Id.*

295. *Id.* (alteration in original) (quoting *Peavler*, 557 N.E.2d at 1081).

296. *Id.* at 1110.

297. *Id.*

298. *Id.* at 1110-11.

299. *Id.* at 1111.

300. *Id.*

true for the contributory negligence instruction. Although the appellate panel in *Dorman* determined that evidence of record supported the contributory negligence instruction, the cautionary tale here for practitioners is that such an instruction does not seem to be readily applicable to a product liability case accruing, as *Dorman*'s did, after the Indiana General Assembly specifically incorporated Indiana's comparative fault principles into the IPLA. The accident that resulted in *Dorman*'s injuries occurred on June 23, 1996,³⁰¹ well after the June 30, 1995 effective "accrual" date for applicability of the 1995 amendments that specifically incorporated Indiana's comparative fault principles into the IPLA.³⁰² The two principal authorities cited by the *Dorman* panel, *Peavler* and the Restatement (Second) of Torts, preceded the 1995 IPLA amendments that incorporated comparative fault principles into the IPLA.

Because the action did not involve an entity to which traditional notions of contributory negligence would still apply,³⁰³ use of the terms "comparative" and "fault" both appear more consistent with the IPLA than do the terms "contributory" and "negligence." Indeed, as Indiana courts have recognized, "common law characterizations of [a plaintiff's] conduct as contributorily negligent as a matter of law mean little in the context of comparative fault other than that [the plaintiff] must be assessed some portion of his damages."³⁰⁴ Use of the term "fault" as opposed to "negligence" also appears more appropriate because, as noted above, the current IPLA defines "fault" by employing different terms than does the contributory negligence instruction.

VI. FEDERAL PREEMPTION

"[F]ederal law preempts state law in three situations: (1) when the federal statute explicitly provides for preemption; (2) when Congress intends to occupy the field completely; and (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress."³⁰⁵

301. *Id.* at 1105.

302. Act of Apr. 26, 1995, No. 278, § 7, 1995 Ind. Acts 4051, 4055-56.

303. The contributory fault doctrine in Indiana precludes recovery by a plaintiff if his or her action or inaction contributed in any way to causing the alleged damages. Comparative fault, on the other hand, is a mechanism by which juries assign percentages of fault among all parties and non-parties, including plaintiffs. *See generally* IND. CODE § 34-51-2-7(b) (2004); *see also* Booker, Inc. v. Morrill, 639 N.E.2d 358 (Ind. Ct. App. 1994) ("A comparative fault statute . . . reflects a legislative determination that fairness is best achieved by a relative assessment of the parties' respective conduct" (citing *Robbins v. McCarthy*, 581 N.E.2d 929, 932 (1991))). Under Indiana's current comparative fault scheme, a plaintiff's recovery will be precluded only if his or her fault exceeds fifty percent. IND. CODE § 34-51-2-6 (2004). Traditional notions of contributory fault remain applicable in Indiana only in the context of tort claims against governmental entities or public employees. *Id.* § 34-51-2-2.

304. *Robbins v. McCarthy*, 581 N.E.2d 929, 934 (Ind. Ct. App. 1991).

305. *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2007 U.S. Dist. LEXIS 43455,

*Thornburg v. Stryker Corp.*³⁰⁶ determined whether the Food, Drug, and Cosmetic Act's ("FDCA") Medical Device Amendments ("MDA") preempted state law product liability claims against the manufacturer of a hip replacement device.³⁰⁷ In that case, the plaintiff alleged that the hip replacement manufacturer "designed, promoted, marketed, manufactured, assembled and sold" the defective hip replacement system and components at issue.³⁰⁸ The defendant moved for summary judgment, arguing that the claims were preempted.³⁰⁹

The manufacturer had applied for FDA approval pursuant to the FDA's pre-market approval process, and as part of that process, provided supporting data to the FDA concerning the hip device at issue.³¹⁰ The allegedly defective device received FDA approval, which allowed the manufacturer to sell it commercially within the United States under FDA-imposed conditions.³¹¹ The manufacturer did not alter the FDA-approved design, manufacturing process, or labeling without approval.³¹²

The trial court determined that the claims at issue were preempted, recognizing that the MDA contains an express provision that provides as follows:

Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement –

- (1) which is different from, or in addition to, any requirement applicable under this Act to the device, and
- (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act.³¹³

The court cited to a Seventh Circuit Court of Appeals holding that the preemption provision required establishment of the following things as a condition precedent to preemption:

- (1) a requirement that a state establish[es] or continue[s] in effect, with respect to a device intended for human use; (2) a relevant federal requirement under the FDCA applicable to the device at issue; and (3) a state requirement that is different from or in addition to the federal

*5 (S.D. Ind. July 3, 2007) (quoting *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 918 (7th Cir. 2007)).

306. *Thornburg*, 2007 U.S. Dist. LEXIS 43455.

307. *Id.* at *1-4.

308. *Id.* at *1.

309. *Id.* at *2.

310. *Id.* at *4.

311. *Id.*

312. *Id.*

313. 21 U.S.C. § 360k(a) (2000).

requirement.³¹⁴

The *Thornburg* court easily concluded that the first two conditions had been established. The IPLA satisfied the first condition because it governs all actions that are brought by a user or consumer of a product against the manufacturer or seller of products that cause injury or harm.³¹⁵ The MDA provided the “relevant federal requirement under the FDCA.”³¹⁶

According to the court, the third condition merited more treatment. With regard to that third condition, the court wrote:

[I]f a state law parallels a federal law requirement then federal law cannot preempt such state law. “In order for a state requirement to be parallel to a federal requirement . . . [Thornburg] must show that the requirements are genuinely equivalent. State and federal requirements are not genuinely equivalent if a manufacturer could be held liable under the state law without having violated the federal law.”³¹⁷

The court ultimately concluded that the IPLA and the FDCA requirements were not equivalent because a manufacturer could be held liable under state law without having violated federal law.³¹⁸

CONCLUSION

Even though more than a decade has passed since the Indiana General

314. *Thornburg*, 2007 U.S. Dist. LEXIS 43455, at *6 (alterations in original) (citing *McMullen v. Medtronic, Inc.*, 421 F.3d 482, 487 (7th Cir. 2005)).

315. *Id.* (citing IND. CODE § 34-20-1-1 (2004)).

316. *Id.*

317. *Id.* at *6-7 (citation omitted) (alteration in original) (quoting *McMullen*, 421 F.3d at 488). The plaintiff argued “that preemption is not appropriate ‘under a strong presumption against preemption,’” and she relied solely on a U.S. Supreme Court case, *Medtronic v. Lohr*. *Id.* at *7 (citing *Medtronic v. Lohr*, 518 U.S. 470 (1996)). In *Lohr*, the U.S. Supreme Court assessed preemption under the FDA’s pre-market approval process 21 U.S.C. § 510(k), which requires “a significantly shorter review process” than the section at issue (21 U.S.C. § 360(e)) and is available only to medical devices that are substantially similar to devices currently on the market. *Id.* at *7-8. The district court held that plaintiffs’ reliance upon *Lohr* was misplaced because the application process for the product in question (21 U.S.C. § 360(e)) imposed standards far more rigorous than those at issue in *Lohr*. *Id.*

318. *Id.* at *9. The court noted that *Thornburg* failed to assert the only claim that would *not* be preempted—that Stryker “failed to ‘conform with the *FDA requirements* prescribed by the [pre-market approval].” *Id.* at *8 (quoting *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 455 F. Supp. 2d 709, 716-17 (N.D. Ohio 2006) (emphasis added)). All three of the aforementioned factors were satisfied and *Thornburg*’s state law claims were, therefore, preempted in their entirety. *Id.* The court remarked that “the prevailing majority view among courts which have assessed preemption involving a § 360(e) review of medical devices is that federal law preempts state claims similar to *Thornburg*’s.” *Id.* at *8 (citing *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 455 F. Supp. 2d at 716-17).

Assembly made sweeping revisions to the IPLA in 1995, the 2007 survey period marked another busy, productive year both for judges interpreting Indiana product liability law and for lawyers helping to shape and guide it.

