SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2010 survey period[1] was another active one for Indiana practitioners and judges. As in previous years, this Survey presents both current and recent cases and relevant commentary about them in context by following the basic structure of 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 that involve product liability issues.[3] Rather, it examines selected cases that discuss the more important substantive concepts.

I. THE SCOPE OF THE IPLA

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."[4] When Indiana Code sections 34-

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1. The survey period is October 1, 2009 to September 30, 2010.

2. IND. CODE §§ 34-20-1-1 to 9-1 (2011). 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. This Article does not address those decisions in detail because of space constraints, even though they may be interesting to Indiana product liability practitioners. *See generally* Kucik v. Yamaha Motor Corp., No. 2:08-CV-161-75, 2009 WL 5200537 (N.D. Ind. Dec. 23, 2009) (addressing spoliation claim in product liability case); Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722 (Ind. 2010) (applying economic loss doctrine to services as well as products); White-Rodgers v. Kindle, 925 N.E.2d 406 (Ind. Ct. App. 2010) (addressing discovery of expert materials in product liability case).

4. IND. CODE § 34-20-1-1(3).

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";[5] (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling . . . [a] product";[6] (3) "physical harm caused by a product";[7] (4) a product that is "in a defective condition unreasonably dangerous to . . . [a] user or consumer" or to his property;[8] and (5) a product that "reach[ed] the user or consumer without substantial alteration in . . . [its] condition."[9] 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."[10]

A. "User" or "Consumer"

The language the Indiana General Assembly employs in the IPLA is important for determining who qualifies as an IPLA claimant. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by "users" and "consumers."[11] 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.[12]

"User" has the same meaning as "consumer."[13] Several published decisions in

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5. *Id.* § 34-20-2-1(1). Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." *Id.* § 34-20-1-1(1). 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." *Id.* § 34-20-2-1(1).

6. *Id.* § 34-20-1-1(2). Indiana Code section 34-20-1-1(2) identifies proper IPLA defendants as "manufacturers" or "sellers." *Id.* 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. *Id.*

7. *Id.* § 34-20-1-1(3).

8. *Id.* § 34-20-2-1.

9. *Id.* § 34-20-2-1(3).

10. *Id.* § 34-20-1-1.

11. *Id.*

12. *Id.* § 34-6-2-29.

13. *Id.* § 34-6-2-147. 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. *Id.* § 34-20-2-1(1).

recent years construe the statutory definitions of "user" and "consumer."[14]

Courts in Indiana have been relatively quiet since 2006 when it comes to interpreting the terms "user" or "consumer" for purposes of the IPLA,[15] though there was one federal trial court decision during last year's survey period.[16] This year's survey period did not produce any additional decisions on the topic.

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."[17] "'Seller' . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption."[18] 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."[19]

Courts hold sellers liable as manufacturers in two ways. First, a seller can be held liable as a manufacturer if the seller fits within the definition of "manufacturer" found in Indiana Code section 34-6-2-77(a). Second, a seller can be deemed a statutory "manufacturer" and can therefore be held liable to the same

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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." *Id.* 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."

14. *See, e.g.*, Butler v. City of Peru, 733 N.E.2d 912, 919 (Ind. 2000); Estate of Shebel v. Yaskawa Elec. Am., Inc., 713 N.E.2d 275, 279 (Ind. 1999). 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).

15. During the 2006 survey period, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (W. Va.)*, 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.

16. Pawlik v. Indus. Eng'g & Equip. Co., No. 2:07-CV-220, 2009 WL 857476 (N.D. Ind. Mar. 27, 2009).

17. IND. CODE § 34-6-2-77(a).

18. *Id.* § 34-6-2-136.

19. *Id.* § 34-20-2-1(2); *see, e.g.*, Williams v. REP Corp., 302 F.3d 660, 662-64 (7th Cir. 2002); Del Signore v. Asphalt Drum Mixers, 182 F. Supp. 2d 730, 745-46 (N.D. Ind. 2002); *see also* Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1169-72 (2003).

extent as a manufacturer in one other limited circumstance.[20] Indiana Code section 34-20-2-4 provides that a seller may be deemed a "manufacturer" "[i]f a court is unable to hold jurisdiction over a particular manufacturer" and if the seller is the "manufacturer's principal distributor or seller."[21]

Practitioners also must be aware that when the theory of liability is based upon "strict liability in tort,"[22] Indiana Code section 34-20-2-3 provides that an entity that is merely a "seller" and cannot otherwise be deemed a "manufacturer" is not liable and is not a proper IPLA defendant.[23]

This has been a relatively active area of product liability law in recent years, and a number of recent Indiana decisions, particularly from Indiana federal courts, have addressed the statutory definitions of "seller" and "manufacturer."[24] Last year's survey period produced three decisions in this area,[25] and this year's survey period produced yet another two. In *State Farm Fire & Casualty v. Jarden Corp.*,[26] the plaintiff sought damages for property damage caused by an allegedly defective space heater.[27] The plaintiff sued the manufacturer and the

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20. IND. CODE § 34-20-2-4.

21. *Id. 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 addressed 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).

22. The phrase "strict liability in tort," to the extent that it 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 a negligence standard governs cases utilizing a design defect or a failure to warn theory, not a "strict liability" standard. IND. CODE § 34-20-2-2.

23. *Id.* § 34-20-2-3. The IPLA makes it clear that liability without regard to the exercise of reasonable care (strict liability) applies only to product liability claims alleging a manufacturing defect theory, and a negligence standard controls claims alleging design or warning defect theories. *See, e.g.*, Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002); *see also* Alberts & Boyers, *supra* note 19, at 1173-75.

24. *E.g.*, Mesman v. Crane Pro Servs., 512 F.3d 352, 356 (7th Cir. 2008); LaBonte v. Daimler-Chrysler, No. 3:07-CV-232, 2008 WL 513319, at *1-2 (N.D. Ind. Feb. 22, 2008). For a detailed discussion about *Mesman* and *LaBonte*, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 42 IND. L. REV. 1093, 1098-1102 (2009); *see also* Fellner v. Phila. Toboggan Coasters, Inc., No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006); Thornburg v. Stryker Corp., No. 1:05-cv-1378-RLY-TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006).

25. *See* Pawlik v. Indus. Eng'g & Equip. Co., No. 2:07-CV-220, 2009 WL 857476 (N.D. Ind. Mar. 27, 2009); Gibbs v. I-Flow, Inc., No. 1:08-cv-708-WTL-TAB, 2009 U.S. Dist. LEXIS 14895 (S.D. Ind. Feb. 24, 2009); Duncan v. M & M Auto Serv., Inc., 898 N.E.2d 338 (Ind. Ct. App. 2008); *see also* Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 43 IND. L. REV. 873, 879-82 (2010).

26. No. 1:08-cv-1506-SEB-DML, 2010 WL 2541249 (S.D. Ind. June 16, 2010).

27. *Id.* at *1.

manufacturer's parent corporation.[28] The parent corporation moved for summary judgment, claiming that it was not a manufacturer or seller under the IPLA.[29] The plaintiff argued that the parent corporation was an interested party because it held itself out on its website as the provider of many branded products, including the space heater at issue.[30] The court determined that the website was insufficient to create a question of fact regarding whether the parent corporation was a "manufacturer" within the meaning of the IPLA.[31] All materials designated by the parent corporation demonstrated that it did not manufacture or sell the space heater.[32] The court noted that the general rule is that: "a parent corporation . . . is not liable for the acts of its subsidiaries."[33] In the absence of any evidence showing that the parent corporation actually manufactured or sold the space heater, the court held that summary judgment was appropriate.[34]

In a federal case filed in the Northern District of Indiana, *Kucik v. Yamaha Motor Corp.*,[35] Judge Theresa Springmann granted summary judgment in part because the named defendant could not be liable as the manufacturer pursuant to Indiana Code section 34-20-2-3.[36] There, the plaintiff was injured when a Yamaha motorcycle he was riding lost power during an attempted jump.[37] The plaintiff attempted to hold liable Yamaha Motor Corporation, the distributor of the motorcycle, under several IPLA-based theories of recovery. The motorcycle at issue was designed by Yamaha Motor Company Ltd., a Japanese company, not by Yamaha Motor Corporation.[38] Therefore, Yamaha Motor Corporation could only be liable under the IPLA if the court was unable to hold jurisdiction over Yamaha Motor Company, the actual manufacturer, and Yamaha Motor Corporation was its principal distributor.[39] The court noted that both of the parties presented argument on the issue, but neither submitted credible evidence to the court.[40] Because the plaintiff had the burden of proof and because he had failed to present sufficient admissible evidence to create a question of fact to bring the case within the purview of the IPLA, Judge Springmann granted summary judgment.[41]

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28. *Id.*
29. *Id.* at *6.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* (quoting United States v. Best Foods, 524 U.S. 51, 55-56 (1998)).
34. *Id.* at *7.
35. No. 2:08-CV-161-TS, 2010 WL 2694962 (N.D. Ind. July 2, 2010).
36. *Id.* at *8.
37. *Id.* at *2.
38. *Id.* at *7.
39. *Id.* (citing Kennedy v. Guess, Inc., 806 N.E.2d 776, 776-81 (Ind. 2004)).
40. *Id.* at *8.
41. *Id.* at *9.

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."[42] It "does not include gradually evolving damage to property or economic losses from such damage."[43]

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. 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."[44]

During last year's survey period, federal trial courts in Indiana twice issued decisions addressing whether "products" were involved.[45] This year's survey period produced no additional decisions.

D. Defective and Unreasonably Dangerous

Only products that are in a "defective condition" are subject to IPLA liability.[46] 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.[47]

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.[48]

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42. IND. CODE § 34-6-2-105(a) (2011).

43. *Id.* § 34-6-2-105(b); *see, e.g.*, Miceli v. Ansell, Inc., 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998); Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492, 493 (Ind. 2001); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 486 (Ind. 2001); *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).

44. IND. CODE § 34-6-2-114; *see also* Fincher v. Solar Sources, Inc., No. 42A01-0701-CV-25, 2007 WL 1953473, at *6 (Ind. Ct. App. July 6, 2007) (unpublished table disposition).

45. *See* Chappey v. Ineos USA LLC, No. 2:08-CV-271, 2009 U.S. Dist. LEXIS 24807 (N.D. Ind. Mar. 23, 2009); Carlson Rests. Worldwide, Inc. v. Hammond Prof'l Cleaning Servs., No. 2:06 cv 336, 2008 U.S. Dist. LEXIS 91878 (N.D. Ind. Nov. 12, 2008); *see also* Alberts et al., *supra* note 25, at 882-84.

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

47. IND. CODE § 34-20-4-1.

48. *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))).

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 problem in the manufacturing process (a "manufacturing defect").[49]

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."[50] A product is not unreasonably dangerous as a matter of law if it injures in a fashion that, by objective measure, is known to the community of persons consuming the product.[51]

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a "defective condition," recent decisions have recognized that the substantive defect analysis (i.e., whether a design was inappropriate or whether a warning was inadequate) should follow a threshold analysis that first examines whether, in fact, the product at issue is "unreasonably dangerous."[52]

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49. *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 1140; Natural Gas Odorizing, Inc. v. Downs, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997); *see also* Troutner v. Great Dane Ltd. P'ship, No. 2:05-CV-040-PRC, 2006 WL 2873430, at *3 (N.D. Ind. Oct. 5, 2006). 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]." Ind. Code § 34-20-4-3. *See also* Hunt v. Unknown Chem. Mfr. No. One, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at *27-37 (S.D. Ind. Nov. 5, 2003). 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." IND. CODE § 34-20-4-4.

50. IND. CODE. § 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).

51. *See Baker*, 799 N.E.2d at 1140; *see also* Moss v. Crosman Corp., 136 F.3d 1169, 1174 (7th Cir. 1998) (finding 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.' Thus, '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 Glouchester 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).

52. *See* Conley v. Lift-All Co., No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468,

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.[53] 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. Courts have discussed strict liability even when those claims allege warning and design defects and clearly accrued after the 1995 IPLA amendments took effect.[54] The IPLA makes clear that, just as in any other negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements: duty, breach, injury, and causation.[55]

The 2010 survey period produced yet another decision dealing directly with whether a product is defective and unreasonably dangerous as a matter of law. In *Kucik v. Yamaha Motor Corp.*,[56] Judge Springmann granted summary judgment because the plaintiff failed to demonstrate that the motorcycle at issue contained a manufacturing or design defect that proximately caused the accident at issue or the plaintiff's injuries.[57] On March 1, 2006, the plaintiff purchased a

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at *13-14 (S.D. Ind. July 25, 2005) (involving an alleged warning defect); Bourne v. Marty Gilman, Inc., No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1-2 (S.D. Ind. July 20, 2005), *aff'd*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect).

53. *See* Mesman v. Crane Pro Servs., 409 F.3d 846, 849 (7th Cir. 2005); *Inlow II*, 378 F.3d at 689 n.4 (7th Cir. 2004); *Conley*, 2005 U.S. Dist. LEXIS 15468, at *12-13; *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *9 n.2; *see also* Miller v. Honeywell Int'l, Inc., No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *37-38 (S.D. Ind. Oct. 15, 2002); Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); Birch *ex rel.* Birch v. Midwest Garage Door Sys., 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

54. *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, *3-4 (S.D. Ind. Aug. 2, 2006); 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); Vaughn v. Daniels Co. (W. Va.), 841 N.E.2d 1133, 1138-39 (Ind. 2006).

55. The Indiana Supreme Court's decision in 2009 in *Kovach v. Caligor Midwest*, 913 N.E.2d 193 (Ind. 2009), *reh'g denied*, articulates very well the concept that plaintiffs must establish all negligence elements, including causation, as a matter of law in a product liability case to survive summary disposition. *See also Conley*, 2005 U.S. Dist. LEXIS 15468, at *13-14.

56. No. 2:08-CV-161-TS, 2010 WL 2694962 (N.D. Ind. July 2, 2010).

57. *Id.* at *9. Before granting Yamaha's summary judgment motion, the court issued two earlier opinions. The first, issued on October 16, 2009, 2009 WL 3401978 (N.D. Ind. Oct. 16, 2009), granted the plaintiff's motion for leave to file a response to Yamaha's motion to dismiss. *Id.* at *3. In the second, the court denied Yamaha's motion to dismiss as a sanction against plaintiff for his failure to preserve the motorcycle at issue. 2009 WL 5200537, at *3 (N.D. Ind. Dec. 23, 2009).

Yamaha motorcycle.[58] Approximately two months later, he was injured when the motorcycle lost power during an attempted jump.[59] Several weeks after the accident, the plaintiff received a letter from Yamaha informing him that some intake valves manufactured for the motorcycle "had experienced fatigue in the neck area when operated at maximum RPM," which could cause a loss of power and possible engine failure.[60] After receiving the letter, the plaintiff had the valves replaced.[61] He later sold the motorcycle, and the parties to the suit were apparently unable to locate the motorcycle once the suit was commenced.[62]

Two years after the incident, the plaintiff filed suit.[63] His multi-count complaint alleged defective design, manufacturing defect, product liability, and inadequate warnings and instructions, as well as common law negligence, breach of warranty, and punitive damages.[64] Each of the claims was premised on the presence of a defect in the intake valves, which were the subject of the previous recall.[65]

Judge Springmann reasoned that regardless of the substantive IPLA theory on which the plaintiff proceeded, he was required to prove that the motorcycle was in a defective condition that rendered it unreasonably dangerous.[66] The dispositive issue was whether the loss of power which the plaintiff claimed to have experienced was the result of a defect in the motorcycle, particularly in its intake valves.[67] The plaintiff relied on testimony from a motorcycle mechanic and Yamaha's recall notice.[68] The court found the mechanic's testimony unconvincing because it assumed that the incident was caused by the recall.[69] Similarly, the plaintiff could not rely on the recall notice issued by Yamaha because it was a subsequent remedial measure.[70] Because there was no admissible evidence from which a jury could reasonably infer that the plaintiff's motorcycle was manufactured and designed with a specific defect, his product liability claims failed as a matter of law.[71]

We now addresses in detail a few cases in which plaintiffs attempted to demonstrate that products were defective and unreasonably dangerous utilizing warning, design, and manufacturing defect theories.

1. Warning Defect Theory.—The IPLA contains a specific statutory

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58. *Kucik*, 2010 WL 2694962, at *2.
59. *Id.*
60. *Id.*
61. *Id.* at *3.
62. *Id.*
63. *Id.* at *1.
64. *Id.* at *3-4, *9.
65. *See id.*
66. *Id.* at *4 (citing Baker v. Heye-Am., 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003)).
67. *Id.* at *5.
68. *Id.* at *5-6.
69. *Id.* at *5.
70. *Id.* at *6.
71. *Id.* at *7.

provision covering the warning defect theory, which reads as follows:

> A product is defective . . . if the seller fails to:
> (1) 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.[72]

In failure to warn cases, the "unreasonably dangerous" inquiry is essentially the same as the requirement that the defect be latent or hidden.[73]

Federal and state courts in Indiana have been busy in recent years when addressing issues in cases involving allegedly defective warnings and instructions. Some of those cases include: *Cook v. Ford Motor Co.*,[74] *Gibbs v. I-Flow, Inc.*,[75] *Deaton v. Robison*,[76] *Clark v. Oshkosh Truck Corp.*,[77] *Ford Motor Co. v. Rushford*,[78] *Tober v. Graco Children's Products, Inc.*,[79] *Williams v. Genie Industries, Inc.*,[80] *Conley v. Lift-All Co.*,[81] *First National Bank & Trust Corp. v. American Eurocopter Corp.* (*Inlow II*),[82] and *Birch v. Midwest Garage Door Systems*.[83]

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72. IND. CODE § 34-20-4-2 (2011); *see also* Deaton v. Robison, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007); Coffman v. PSI Energy, Inc., 815 N.E.2d 522, 527 (Ind. Ct. App. 2004) (both noting the standard for proving a warning defect case).

73. *See* First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (*Inlow II*), 378 F.3d 682, 690 n.5 (7th Cir. 2004). For a more detailed analysis of *Inlow II*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1222-27 (2005).

74. 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 785 (Ind. 2010). For a more detailed analysis of the *Cook* case, see Alberts et al., *supra* note 25, at 893-96.

75. No. 1:08-cv-708-WTL-TAB, 2009 U.S. Dist. LEXIS 14895 (S.D. Ind. Feb. 24, 2009). For a more detailed analysis of the *Gibbs* case, see Alberts et al., *supra* note 25, at 881-82.

76. 878 N.E.2d 499 (Ind. Ct. App. 2007). For a more complete discussion of *Deaton*, see Alberts et al., *supra* note 24, at 1110-14.

77. No. 1:07-cv-0131-LJM-JMS, 2008 WL 2705558 (S.D. Ind. July 10, 2008). For a more detailed discussion about *Clark* and potential problems it might create for practitioners, see Alberts et al., *supra* note 24, at 1114-18.

78. 868 N.E.2d 806 (Ind. 2007). For a more detailed discussion and commentary about *Rushford*, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 41 IND. L. REV. 1165, 1184-87 (2008).

79. 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).

80. 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 79, at 1032-33.

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

82. 378 F.3d 682 (7th Cir. 2004).

83. 790 N.E.2d 504 (Ind. Ct. App. 2003). For a more detailed analysis of *Birch*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L.

The 2010 survey period added five more cases to that list, all of which merit further discussion here. The first one, *Gardner v. Tristar Sporting Arms, Ltd.*,[84] involved a plaintiff who was injured when a shotgun he was holding in his lap discharged.[85] The plaintiff testified that he placed the shotgun across his lap with the safety turned to the "on" position as he drove his ATV home from a hunting trip.[86] He alleged that the shotgun spontaneously fired, even with the safety on.[87] Investigators at the scene confirmed that the safety was on and that the shotgun could be fired despite the safety.[88] The plaintiff alleged that the manufacturer negligently failed to warn of this danger.[89] The manufacturer moved for summary judgment.[90] The court granted summary judgment on the failure to warn claim because it was undisputed that the plaintiff failed to read the gun's instruction manual, noting that

> [e]vidence that the plaintiff, injured party, or other party instrumental in the use of the product leading to an injury failed to read instructions or warnings which were provided with the product may be sufficient to entitle the defendant to judgment as a matter of law, at least where the failure to read the instructions or warnings is not disputed.[91]

Because the plaintiff admitted he did not read the instruction manual, the plaintiff could not show that the alleged inadequate warnings caused the plaintiff's injury.[92]

The second warnings defect case we address, *Colter v. Rockwell Automation, Inc.*,[93] was one in which the plaintiff was injured by a device used to make automotive parts called a "shooter press."[94] The machine requires both hands to be placed on proximity switches to operate.[95] The plaintiff argued that "the shooter press spontaneously cycled onto his hand" when he reached out to take a finished part off the press.[96] The plaintiff claimed that improper and negligent wiring of the proximity switches allowed the shooter press to cycle

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REV. 1247, 1262-64 (2004); *see also* Burt v. Makita USA, Inc., 212 F. Supp. 2d 893, 895-96 (N.D. Ind. 2002); McClain v. Chem-Lube Corp., 759 N.E.2d 1096, 1103 (Ind. Ct. App. 2001). For a more detailed analysis of *Burt* and *McClain*, see Alberts & Boyers, *supra* note 19, at 1183-85.

84. No. 1:09-cv-0671-TWP-WGH, 2010 WL 3724190 (S.D. Ind. Sept. 15, 2010).
85. *Id.* at *1.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at *4.
90. *Id.*
91. *Id.* (quoting 63A AM. JUR. 2D *Products Liability* §1132 (2011)).
92. *Id.*
93. No. 3:08-CV-527JVB, 2010 WL 3894560 (N.D. Ind. Sept. 29, 2010).
94. *Id.* at *1.
95. *Id.*
96. *Id.*

inadvertently.[97] Further, the manufacturer failed to warn of the consequences of wiring in such a manner.[98] In support of this assertion, the plaintiff offered expert testimony regarding the wiring.[99] The defendant argued that the expert was not qualified to testify on a failure to warn claim because he was not qualified to render an opinion related to the adequacy of written warnings.[100] The court noted that in a failure to warn claim, "the underlying factor is the need to issue a warning in the first place. In other words, the claim cannot move forward unless the plaintiff shows that the defendant knew or should have known that its product was dangerous at the time the plaintiff's injury occurred."[101] The court found that the expert did not need to have specialized knowledge or experience in written warnings because his opinion related to the safety of the manufacturer's product on the day of the plaintiff's injury.[102] His educational and professional background qualified him to testify regarding that point.[103] Thus, the court did not exclude the expert's testimony.[104]

The third warnings defect case was *Meharg v. Iflow Corp.*[105] There, the plaintiff alleged that the cartilage in her shoulder was destroyed by the "off-label" use of a prescription drug administered via a pain pump.[106] The prescription drug was not designed for that particular use; however, the plaintiff claimed that the manufacturer should have known that doctors used the drug in off-label applications and should have warned against it.[107] The drug manufacturer alleged that there was no duty to warn of the off-label use.[108] The court stated,

> In cases such as this one that involve an off-label use of a prescription drug that is not endorsed or promoted by the manufacturer, the requisite knowledge of the risk is two-fold: the manufacturer must know (or be charged with knowledge of) both that the off-label use is occurring and that the off-label use carries with it risk of harm at issue—in this case, damaged cartilage.[109]

The plaintiff offered evidence of several articles suggesting that repeated injections can cause harm to cartilage.[110] However, the court found that as a matter of law, these articles were insufficient to demonstrate that at the time of

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97. *Id.*
98. *Id.*
99. *Id.* at *1-2.
100. *Id.* at *3.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. No. 1:08-cv-184-WTL-TAB, 2010 WL 711317 (S.D. Ind. Mar. 1, 2010).
106. *Id.* at *1.
107. *Id.* at *2.
108. *Id.*
109. *Id.*
110. *Id.* at *2-3.

the plaintiff's surgery, the drug manufacturer knew or should have known of the risk of cartilage damage.[111]

The fourth warnings defect case was *Lapsley v. Xtek, Inc.*[112] In *Lapsley*, the plaintiff was injured when he was greasing a spindle designed by the manufacturer.[113] The spindle was equipped with a "zerk" fitting.[114] The zerk fitting was a valve through which grease was injected into the spindle.[115] Shortly before the accident, the plaintiff removed the zerk fitting so he could grease the spindle more quickly.[116] He did not replace the zerk fitting and left the area for a short time.[117] When he returned, he was struck by a high-pressure stream of grease.[118] The plaintiff brought a failure to warn claim.[119] The court noted that a manufacturer must give a warning only if "(1) it knew or had reason to know that the product was likely to be dangerous when used in the manner employed by the plaintiff; and (2) it had no reason to believe that plaintiff would realize that dangerous condition."[120] The court found that there was no duty to warn if there was only a remote possibility of danger from use of the product.[121] Thus, the manufacturer was entitled to summary judgment because the plaintiff introduced no evidence that the manufacturer knew or should have known that its spindle was likely to inject high-pressure grease through the zerk opening.[122] There was no evidence of other similar incidents, and there was no evidence of tests, studies, publications, or other industry reports that would have made the manufacturer aware of a risk of harm resulting from the open zerk fitting.[123]

The fifth warnings defect case was styled *Hatter v. Pierce Manufacturing, Inc.*[124] It was a case in which the plaintiff was a firefighter who was injured when a cap on a fire truck's intake pipe was propelled off the pipe by pressurized air.[125] The plaintiff brought a failure to warn claim, and the manufacturer argued that the sophisticated intermediary doctrine was a defense.[126] The court noted that "[t]he sophisticated intermediary doctrine provides a defense to a manufacturer's duty to warn and is applicable only if the intermediary—in this case, [the fire department] . . . as the intermediary between . . . [manufacturer] and . . .

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111. *Id.* at *3.
112. No. 2:05-CV-174JVB, 2010 WL 1189809 (S.D. Ind. Mar. 23, 2010).
113. *Id.* at *2.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at *4.
120. *Id.*
121. *Id.* (citation omitted).
122. *Id.*
123. *Id.*
124. 934 N.E.2d 1160 (Ind. Ct. App. 2010).
125. *Id.* at 1163.
126. *Id.* at 1169.

[plaintiff]—knew or should have known of the product's dangers."[127] Thus, if the intermediary has knowledge or sophistication equal to the manufacturer, the manufacturer can rely on the intermediary to warn the consumer.[128] The court found in this case that there was sufficient evidence for the jury to have inferred that the fire department should have known of the danger arising from the pressure valve and release cap.[129] The firefighters were aware that the pipes on the trucks could become pressurized, and their previous difficulty with the cap should have placed them on notice that the pipe could become pressurized.[130] Accordingly, the court found that the sophisticated intermediary jury instruction was appropriately given.[131]

The sixth and final warnings defect case we address in this Survey is *Tucker v. SmithKline Beecham Corp.*,[132] a case in which the decedent committed suicide after taking the prescription drug Paxil.[133] The estate argued that Paxil increased the risk of suicide and that the manufacturer failed to warn of this increased risk.[134] The manufacturer had a warning that stated that the possibility of suicide is inherent in any major depressive disorder, and high-risk patients should be monitored closely.[135] The court determined that there was a question of fact about whether the warning was adequate.[136] According to the court, "Paxil's 2002 label stated only the well-known fact that suicide is a risk with all patients suffering from MDD. It did not warn that taking Paxil could increase that risk."[137] Accordingly, the court believed that a question of fact regarding the warning's adequacy precluded summary disposition.[138]

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.[139] 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.[140] One panel of the Seventh Circuit

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127. *Id.* at 1170.
128. *Id.*
129. *Id.* at 1171.
130. *Id.*
131. *Id.*
132. 701 F. Supp. 2d 1040 (S.D. Ind. 2010).
133. *Id.* at 1043.
134. *Id.* at 1066.
135. *Id.* at 1067.
136. *Id.*
137. *Id.*
138. *Id.* at 1068.
139. 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).
140. *See* Whitted v. Gen. Motors Corp., 58 F.3d 1200, 1206 (7th Cir. 1995); Burt v. Makita

(Judge Easterbrook writing) 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."[141] Phrased 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."[142]

The Indiana Supreme Court in *Schultz v. Ford Motor Co.*[143] endorsed the foregoing burden of proof analysis in design defect claims in Indiana.[144] State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.[145] The 2010 survey period contributed three more cases to the scholarship in this area.

In the first of those three cases, *TRW Vehicle Safety Systems, Inc. v. Moore*,[146] the plaintiff was killed after being ejected through the sunroof of his Ford

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USA, Inc., 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

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

142. 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) (citing *Bourne*, 452 F.3d at 638). Another recent Seventh Circuit case postulated that a design defect claim under the IPLA requires applying the classic formulation of negligence: B [burden of avoiding the accident] < P [probability of the accident that the precaution would have prevented] multiplied by 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) (explaining Judge Learned Hand's articulation of the "B < PL" negligence formula).

143. 857 N.E.2d 977 (Ind. 2006).

144. *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).").

145. *See, e.g.*, Mesman v. Crane Pro Servs., 512 F.3d 352, 359 (7th Cir. 2008); *Bourne*, 452 F.3d at 633, 638-39; *Westchester Fire Ins. Co.*, 2006 WL 3147710, at *5; Fueger v. CNH Am. LLC, 893 N.E.2d 330, 333 (Ind. Ct. App. 2008); Lytle v. Ford Motor Co., 814 N.E.2d 301, 317-18 (Ind. Ct. App. 2004); Baker v. Heye-Am., 799 N.E.2d 1135, 1143-44 (Ind. Ct. App. 2003).

146. 936 N.E.2d 201 (Ind. 2010). The court announced its decision on October 13, 2010, which is slightly outside the designated 2010 survey period. The authors have included the case in an effort to make the survey period article more comprehensive and timely. It is interesting to note that in the 2009 survey period article, we addressed in detail the Indiana Court of Appeals's decision in the same case, though there it was styled *Ford Motor Co. v. Moore*, 905 N.E.2d 418 (Ind. Ct. App. 2009), *vacated*, 936 N.E.2d 201 (Ind. 2010). We predicted then that the guidance provided by the *Moore* opinion might prove to be short-lived because the Indiana Supreme Court had granted transfer when the article was published. *See* Alberts et al., *supra* note 25, at 899. That turned out to be prophetic because the *Moore* decision was supplanted by the Indiana Supreme Court's decision only a few months later. Although the Indiana Supreme Court's decision has now been issued, the court of appeals decision nevertheless remains noteworthy for its comprehensive, scholarly collection and analysis of Indiana's substantive product liability law.

Explorer during a rollover that followed a tire failure.[147] Moore was ejected from the vehicle even though he was wearing his seatbelt.[148] After a fourteen-day jury trial, the jury found in favor of Moore's estate, awarded damages, and allocated fault as follows: Moore, 33%; Ford Motor Company ("Ford"), 31%; nonparty Goodyear Tire and Rubber Company ("Goodyear") 31%[149]; and, defendant TRW Vehicle Safety Systems, Inc. ("TRW"), 5%.[150] Ford, TRW, and Moore raised numerous issues on appeal and cross-appeal. Three are most relevant and noteworthy for this discussion. They are Ford's claims that the evidence was insufficient to support a verdict for negligent design, TRW's claims of the same, and Moore's claims that there was insufficient evidence to support allocation of fault to nonparty Goodyear.

First, Ford asserted that Moore's claims against it were grounded on three different product liability theories—defective seatbelt design, defective sunroof design, and defective design regarding the handling and stability characteristics of the vehicle—and the evidence was insufficient to prove at least one element of each theory.[151] Moore responded that there was sufficient evidence to support the jury's verdict against Ford.[152]

The court first noted that because the actions were based on design defect theories, the IPLA did not impose strict liability.[153] Instead, the standard was negligence.[154] Quoting from the IPLA, the court wrote, "'[T]he party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product.'"[155]

The estate claimed that Moore was ejected through the sunroof[156] of the vehicle when the vehicle's seatbelt, which he was wearing, developed slack during the collision.[157] Ford argued that the plaintiff failed to present competent expert testimony establishing the particular standard of care a manufacturer should exercise in designing a product and that Ford breached this standard.[158] Ford also argued that the plaintiff should have presented some evidence of the methodology a manufacturer should use in designing and selecting seatbelts.[159] Additionally, the court noted TRW's arguments that the plaintiff needed to offer

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147. *Moore*, 936 N.E.2d at 207.

148. *Id.*

149. Goodyear settled and was therefore not a party at trial. *Id.* at 207 n.1.

150. *Id.* at 207.

151. *Id.* at 208.

152. *Id.*

153. *Id.* at 209.

154. *Id.*

155. *Id.* (quoting IND. CODE § 34-20-2-2 (2011)).

156. The parties agreed that Moore was ejected through the sunroof. The dispute at trial was the cause of Moore's ejection.

157. *Moore*, 936 N.E.2d at 208.

158. *Id.*

159. *Id.*

testing data, studies, or other data to establish a feasible alternative design.[160]

The court agreed with the defense claims that Moore's estate bore the burden of proving that Ford breached a duty of care.[161] Claims of insufficient evidence to support a verdict are reviewed under a deferential standard.[162] Examining the evidence through this lens, the court was persuaded that sufficient evidence existed in the record to support the jury's verdict against Ford for negligent design.[163] The plaintiff presented expert testimony from a published mechanical engineer who had studied rollovers.[164] This expert testified that the vehicle's seatbelt system was defective because it allowed "the belt to become unlocked during the rollover portion of a rollover."[165] Moreover, the expert opined that had Ford chosen a seatbelt system design with a pretensioner in the retractor, a system which Ford had used in other passenger vehicles, particularly in Europe, then the belt would not have been able to come unlocked in the collision.[166] Ford disputed this evidence and attacked the expert's credibility, countering that there was no proof that the alternative design was safer.[167]

The court, however, was not persuaded. Ford's decision to equip the vehicle at issue without using a retractor pretensioner that it used in other vehicles manufactured in Europe was probative evidence of whether Ford acted with reasonable care.[168] "For the purpose of appellate review for sufficiency, such evidence may support a reasonable inference of seatbelt system design negligence."[169]

Similarly, the court was convinced that sufficient evidence existed in the record to support the claim that Ford was negligent when it designed the vehicle's sunroof.[170] Ford argued that the record lacked evidence to support the conclusion that the sunroof became dislodged during the rollover by occupant forces instead of as a result of the violence of the collision.[171] And, Ford argued, even if there was such evidence, there was no evidence the sunroof became dislodged due to a structural failure.[172]

The court concluded that whether the roof opening occurred because the glass sunroof became detached due to occupant forces or the severe nature of the collision was not determinative.[173] It was undisputed that Moore exited the

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160. *Id.* at 208-09.
161. *See id.* at 209.
162. *See id.* at 208.
163. *Id.* at 209-10.
164. *Id.* at 209.
165. *Id.* (citation omitted).
166. *Id.* at 209-10.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 210-11.
171. *Id.* at 210.
172. *Id.*
173. *See id.* at 210-11.

vehicle through the sunroof during the rollover.[174] Furthermore, evidence existed in the record that Moore was ejected through the sunroof opening when the glass became dislodged because its mounting brackets failed.[175] The estate had also presented evidence that: had Moore remained inside the vehicle, "he should have survived the accident"; the rollover tendency of sport utility vehicles was widely known before the vehicle at issue was built; and "the use of a stronger sunroof bracket design was technologically and economically feasible."[176] The court did not reweigh the evidence or assess witness credibility.[177] As such, it could not conclude that there was "a complete absence of evidence or reasonable inferences favoring the jury's verdict," and it concluded that "[it] must defer to the jury."[178] The court could not find that the jury decision to attribute partial fault to Ford was unreasonable when it examined the evidence offered and the inferences to be drawn from this evidence.[179]

Finally, even though some argument and evidence was offered during trial that the vehicle had design defects relating to its handling and stability, this issue was not submitted to the jury because it was omitted from the trial court's final jury instructions. In addition, the plaintiff did not make reference to a design defect claim in counsel's final argument. Because the issue was neither presented to the jury nor a basis for the verdict, the court declined to address the sufficiency of the evidence to support the claim.[180]

Second, TRW, Ford's supplier of the seatbelt assembly, claimed that there was insufficient evidence to support the jury's verdict against it for negligence.[181] TRW argued that the evidence at trial proved that "the seatbelt assembly was manufactured according to, and fully complied with, Ford's detailed specifications."[182] In addition, "the seatbelt assembly design was used in the vast majority of cars produced at the time," and Moore's accident was reasonably unforeseeable when the seatbelt assembly was made.[183] Again, the court relied upon the plain language of the IPLA and wrote that because the estate's claims against TRW alleged defective design, strict liability did not apply.[184] To recover damages, Moore's estate was required to prove that TRW was negligent, i.e., that

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174. *Id.* at 210.

175. *Id.*

176. *Id.* (internal citation omitted).

177. *Id.*

178. *Id.* (citing Martin v. Roberts, 464 N.E.2d 896, 904 (Ind. 1984)).

179. *Id.*

180. *Id.* at 210-11.

181. *Id.* at 214.

182. *Id.*

183. *Id.* TRW also argued that the seatbelt assembly fully met all government vehicle safety regulations. The court, however, did not discuss whether this was of any significance or whether the rebuttable presumption that the product is not defective and a manufacturer is not negligent as provided in Indiana Code section 34-20-5-1 had any impact on its decision to hold that TRW was not negligent.

184. *Moore*, 936 N.E.2d at 214.

it "failed to exercise reasonable care under the circumstances in designing the product."[185]

Moore's estate did not dispute TRW's assertion that it "merely supplied a component part according to Ford's specifications."[186] Indeed, at trial, detailed testimony was offered "regarding TRW's role in building the assembly, particularly the retractor, to Ford's detailed requirements."[187] The evidence at trial also indicated that TRW had proposed the development and use of a pretensioner to Ford, noting that pretensioners were in use in 95% of European passenger vehicles, but only in 6% of North American vehicles.[188]

The court wrote that "the alleged design negligence [of TRW] was the choice not to use a seatbelt assembly with pretensioners."[189] Moore's evidence, however, lacked any proof that the choice to select the assembly without a pretension was TRW's decision.[190] To the contrary, the evidence at trial was that TRW produced a seatbelt assembly according to and in compliance with Ford's design specifications.[191] The court acknowledged that evidence existed in the record of a feasible alternative seatbelt design, but that "there . . . [was] no evidence that TRW was authorized . . . to substitute and supply such an alternative seatbelt design.[192] The court concluded that the "mere availability of an alternative seatbelt design does not establish negligent design by a defendant that lacks the authority to incorporate it into the assembled vehicle."[193] As a result, the court concluded that there was insufficient evidence to support a verdict against TRW.[194]

Finally, Moore's estate claimed that there was insufficient evidence to support any fault allocation to nonparty Goodyear, who had settled prior to trial.[195] Indiana law permits properly pled nonparties to be included on verdict forms for fault allocation.[196] When this occurs, the defendant identifying the nonparty bears the burden of proving the nonparty's negligence.[197] A discussion related to nonparty fault allocation would often be beyond the purview of this Survey, but because the nonparty claims against Goodyear (as the designer, supplier, and/or manufacturer of the tire that failed in the accident) were governed by the IPLA, it is worthy of brief comment.

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185. *Id.* (quoting IND. CODE § 34-20-2-2 (2011)).
186. *Id.* at 215 (citation omitted).
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 215-16.
193. *Id.* at 216.
194. *Id.*
195. *Id.* at 224.
196. *See id.* (citing IND. CODE §§ 34-51-2-15 and 34-20-8-1(b) (2011)).
197. *Id.* (citing IND. CODE § 34-51-2-15).

One of the tires on the vehicle involved in the rollover was a Goodyear tire.[198] The vehicle was traveling approximately sixty to seventy miles per hour when the "'tire event started to unfold.'"[199] Although some testimony related to the tire's role was elicited, detailed examination or evidence concerning the cause of the tire failure and its specific role in the collision event was never elicited beyond the facts that the tire failed and that this failure precipitated the rollover.[200] The court concluded that because there was no evidence establishing whether the tire failure resulted from a tire defect, normal wear and tear, underinflation, a slow leak, road hazard, puncture, or some other cause, there was insufficient evidence to support a product liability verdict against Goodyear if it were a party.[201] Thus, insufficient evidence existed to support fault allocation against Goodyear as a nonparty.[202]

The *Moore* decision could prove to be significant for many reasons. It adds to the ever-growing body of Indiana case law applying negligence principles to product liability cases involving claims of defective design(s) and discussing the importance of establishing the existence of feasible alternative design(s). This, however, should not be surprising because it is the application of the plain language in the IPLA. The decision is also instructive in situations where product liability theories are applicable to a nonparty to be included on the verdict form for fault allocation. In these situations, one needs to remain mindful of the burden the party pleading the nonparty defense must meet. Indeed, the jury in the *Moore* case attributed as much fault to Goodyear as it did to Ford.[203] Thus, one could infer that the jury may have concluded that the tire's failure played as much of a role in causing the collision and Moore's death as it was persuaded the design decisions Moore asserted were made by Ford. Perhaps most importantly is the holding that a manufacturer who supplies a product that is to be incorporated into a larger or completed product may have available a viable defense to a design defect claim when this manufacturer supplies the component in compliance with the provided specifications. *Moore* seems to suggest that this would be particularly true when the supplier makes the manufacturer aware of (and/or perhaps suggests) other alternatives, but does not have the ability to provide alternatives. Logic seems to dictate that in these situations it would be more difficult for the component manufacturer not to have exercised reasonable care.

In the second of the three cases in this area, *Myers v. Briggs & Stratton Corp.*,[204] the plaintiff alleged that he injured his shoulder trying to start a log splitter. He alleged that the log splitter's flywheel was underweight.[205] The

198. *Id.* at 225.
199. *Id.* (citation omitted).
200. *See id.* at 225-26.
201. *Id.* at 226.
202. *Id.*
203. *Id.* at 207.
204. No. 1:09-cv-0020-SEB-TAB, 2010 WL 1579676 (S.D. Ind. Apr. 16, 2010).
205. *Id.* at *4.

plaintiff did not use an expert to prove the design defect; instead, he relied on testimony from a mechanic as a "fact witness" and a service bulletin issued by the manufacturer.[206] The manufacturer filed a motion for summary judgment alleging that the plaintiff did not have necessary expert testimony to prove proximate causation.[207] The plaintiff argued that the mechanic's testimony and service bulletin were sufficient.[208] The court disagreed, noting that the service bulletin did not identify any defect in the flywheel and that the mechanic merely testified that he replaced the flywheel.[209] Such evidence was insufficient to prove proximate cause.[210] Expert testimony was required, and the court granted the manufacturer's motion for summary judgment.[211]

The third decision in this area is the *Gardner* case, which we addressed above in connection with the warning defect theory. There, the plaintiff was injured when a shotgun he was holding in his lap discharged.[212] The plaintiff testified that he placed the shotgun across his lap with the safety engaged as he drove his ATV home from a hunting trip.[213] Even though the safety was "on," he alleged that the shotgun spontaneously fired.[214] Investigators at the scene confirmed that the safety was on and that the shotgun could be fired despite the safety.[215] The plaintiff alleged that the shotgun was defectively designed.[216] Indeed, the court required the plaintiff to show that "(1) the manufacturer placed into the stream of commerce a defectively designed, unreasonably dangerous product, (2) a feasible alternative design existed, and (3) the product defect proximately caused the plaintiff's injuries."[217] The court concluded that the plaintiff wholly failed to show the existence of a feasible safer alternative design.[218] Accordingly, the court entered summary judgment for the defendant with regard to the plaintiff's design defect claim.[219]

3. Manufacturing Defect Theory.—There have been a handful of important manufacturing defect decisions in recent years,[220] but only one worthy of mention

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206. *Id.* at *5.
207. *Id.* at *4.
208. *See id.* at *5.
209. *Id.*
210. *Id.* at *6.
211. *Id.*
212. No. 1:09-cv-0671-TWP-WGH, 2010 WL 3724190, at *1 (S.D. Ind. Sept. 15, 2010).
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at *5.
217. *Id.*
218. *Id.*
219. *Id.* at *8.
220. *E.g.*, Campbell v. Supervalu, Inc., 565 F. Supp. 2d 969, 980-81 (N.D. Ind. 2008) (holding that evidence was insufficient as a matter of law to allow jury to decide whether ground beef purchased at a local grocery store caused child's *E. coli* poisoning). For a more detailed discussion about *Campbell* in the manufacturing defect context, see Alberts et al., *supra* note 24, at 1135-39.

during the 2010 survey period. The plaintiff in *Gardner* also brought a manufacturing defect claim.[221] The defendant filed a motion for summary judgment, arguing that the plaintiff had no explanation for the shotgun's alleged spontaneous discharge.[222] The plaintiff offered testimony from an expert and from police investigators at the scene who claimed that the shotgun fired even with the safety engaged.[223] The court found that this evidence was sufficient to create a question of fact as to whether the shotgun was, in fact, manufactured in a condition that was unexpected and unintended by the manufacturer in that it allegedly fired while the safety was still engaged.[224]

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.*"[225] 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."[226]

The IPLA is quite clear that for its purposes, "physical harm" means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property."[227] It "does not include gradually evolving damage to property or economic losses from such damage."[228] Thus, reading the statutory language along with the relevant definitions, the Indiana General Assembly appears to have intended that the IPLA provide the exclusive remedy against an entity that the IPLA defines to be a product's "manufacturer" or a "seller" by a person the IPLA defines to be a "user" or "consumer" of a product when that product has caused sudden and major damage to property, personal injury, or death.

The Indiana General Assembly seemingly has carved out an exception to the IPLA's exclusive remedy only when the defendant otherwise fits the definition of a "seller" under the IPLA[229] and when the type of harm suffered by the

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See also Gaskin v. Sharp Elec. Corp., No. 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007) (addressing substantive issues raised in the context of an alleged manufacturing defect). For a detailed analysis of *Gaskin*, see Alberts et al., *supra* note 78, at 1176-80.

221. *Gardner*, 2010 WL 3724190, at *4.

222. *See id.* at *5.

223. *Id.*

224. *Id.*

225. IND. CODE § 34-20-1-1 (2011) (emphasis added).

226. *Id.* § 34-20-1-2.

227. *Id.* § 34-6-2-105(a).

228. *Id.* § 34-6-2-105(b).

229. Recall that 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

claimant is not sudden and major property damage, personal injury, or death.[230] Such theories of recovery appear to be the "other" actions the Indiana Code section 34-20-1-2 intended not to limit in the previous section (34-20-1-1). So what theories of recovery against "sellers" are intended by section 34-20-1-2 to escape the IPLA's exclusive remedy requirement?[231] The vast majority (if not all) of those claims would appear to consist of gradually-developing property damage and the type of economic losses typically authorized by the common law of contracts, warranty, or the Uniform Commercial Code (UCC). That would seem the logical interpretation of section 34-20-1-2 because this section seeks not to limit all "other" claims, which, by necessary implication, must mean all claims "other" than the ones identified in the previous section (claims for personal injury, death, and sudden, major property damage).[232]

Thus, when it comes to claims by users or consumers against manufacturers and sellers for physical harm caused by a product, the remedies provided by common law or the UCC should be "merged" into the IPLA-based cause of action.[233] Claims for economic losses or gradually developing property damage should not be merged into an IPLA claim so long as those actions are maintained

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component part of a product before the sale of the product to a user or consumer." IND. CODE § 34-6-2-77(a). "'Seller' . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption." *Id.* § 34-6-2-136.

230. *See id.* § 34-20-1-2.

231. Indeed, the legal theories and claims to which Indiana Code section 34-20-1-2 appear to except from the IPLA's reach fall into one of three categories: (1) those that do not involve physical harm (i.e., economic losses that are otherwise covered by contract or warranty law); (2) those that do not involve a "product"; and (3) those that involve entities that are not "manufacturers" or "sellers" under the IPLA.

232. Notwithstanding this conclusion, Indiana courts and some federal courts interpreting Indiana law have not interpreted the IPLA in that way. Indeed, they have allowed claimants in decisions such as *Ritchie v. Glidden Co.*, 242 F.3d 713 (7th Cir. 2001), *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), and *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004), to pursue personal injury common law negligence claims against "sellers" outside the IPLA even when personal injuries were the only alleged harm. *Kennedy* allowed personal injury claims to proceed against the "seller" of a product under common law negligence and Section 400 of the Restatement (Second) of Torts. *Kennedy*, 806 N.E.2d at 784. *Ritchie* allowed personal injury claims to proceed against the "seller" of a product under a negligence theory rooted in Section 388 of the Restatement (Second) of Torts. *Ritchie*, 242 F.3d at 726-27. *Goines* allowed personal injury claims to proceed against the "seller" of a product under a common law negligence duty recognized by a 1993 Indiana decision. *Goines*, 2002 U.S. Dist. LEXIS 5070, at *16-17.

233. That concept is consistent with Indiana law insofar as Indiana courts have not allowed claims for economic losses to be merged into tort actions. Indeed, the economic loss doctrine precludes a claimant from maintaining a tort-based action against a defendant when the only loss sustained is an economic as opposed to a "physical" one. *E.g.*, Gunkel v. Renovations, Inc., 822 N.E.2d 150, 151 (Ind. 2005); Fleetwood Enters., Inc. v. Progressive N. Ins. Co., 749 N.E.2d 492, 495-96 (Ind. 2001); Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 488-89 (Ind. 2001).

against entities defined by the IPLA as "sellers."

Several recent Indiana cases such as *Ryan ex rel. Estate of Ryan v. Philip Morris USA, Inc.*,[234] *Fellner v. Philadelphia Toboggan Coasters, Inc.*,[235] *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,[236] and *New Hampshire Insurance Co. v. Farmer Boy AG, Inc.*[237] have recognized that actions brought by users and consumers of products against manufacturers and sellers for physical harm caused by an allegedly defective product "merge" into the IPLA and that the IPLA provides the exclusive remedy. A 2010 case, *Myers v. Briggs & Stratton Corp.*,[238] is the latest decision to confirm that premise. In *Myers,* the plaintiff claimed that he injured his shoulder when he was trying to start a log splitter.[239] He did not plead a cause of action under the IPLA, but rather tried to argue that the manufacturer of the log splitter "negligently manufactured" it, that the seller "negligently allowed [it to be sold]," and that it "negligently malfunctioned."[240] The plaintiff claimed that he was not asserting a product liability claim, but rather was asserting a "simple negligence suit."[241] The court made quick work of the case, holding that the claims must be brought under the IPLA or not at all because the plaintiff had failed to demonstrate that his claim was anything other than "physical harm caused by a product."[242]

There have been some cases in recent years that have allowed personal injury common law negligence claims to proceed outside the scope of the IPLA, either because the plaintiff was not a "user" or "consumer" of a product, or because the defendant was not a "manufacturer" or a "seller" of a product, or because there was no "physical harm" as the IPLA defines those terms. In those cases, the particular facts presented essentially removed them from the IPLA's coverage in the first place, and there was, in effect, no real "merger" issue at all.[243]

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

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

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

237. No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502 (S.D. Ind. Dec. 19, 2000).

238. No. 1:09-cv-0020-SEB-TAB, 2010 WL 1579676 (S.D. Ind. Apr. 16, 2010).

239. *Id.* at *1.

240. *Id.* at *3.

241. *Id.*

242. *Id.*

243. *See, e.g.*, Vaughn v. Daniels Co. (W. Va.), 841 N.E.2d 1133, 1141-42 (Ind. 2006) (allowing plaintiff's personal injury common law negligence claims after determining that Vaughn was not a "user" or "consumer" of the allegedly defective product, and therefore, the claims fell outside of the IPLA); Duncan v. M & M Auto Serv., Inc., 898 N.E.2d 338, 342-43 (Ind. Ct. App. 2008) (limiting allegations to negligent repair and maintenance of a product as opposed to a product defect); Dutchmen Mfg., Inc. v. Reynolds, 891 N.E.2d 1074, 1081 (Ind. Ct. App. 2008) (allowing plaintiff's personal injury "common law" negligence claim based upon Section 388 of the Restatement (Second) of Torts after determining that the defendant was not a "manufacturer" or "seller" under the IPLA); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 426 (Ind. Ct. App. 2007) (allowing a common law public nuisance claim to proceed outside the scope of the IPLA because the harm at issue was not "physical" in the form of deaths or injuries suffered as a

There also have been, however, at least two peculiar decisions in recent years holding that claimants who have suffered sudden and major damage to property and/or personal injury may nevertheless maintain actions against product manufacturers and sellers based upon legal theories derived from authority outside the IPLA. Those decisions, *Deaton v. Robinson*[244] and *American International Insurance Co. v. Gastite*,[245] were issued by a panel of the Indiana Court of Appeals and a federal trial court. Both panels, in effect, refused to "merge" the claims into the IPLA in factual situations clearly governed by the IPLA, thereby placing them at odds with cases such as *Myers*, *Ryan*, *Fellner*, *Cincinnati Insurance*, and *New Hampshire Insurance*. The *Gastite* decision may be of limited value, however, because the court relied on a case decided four years before the Indiana General Assembly enacted the 1995 amendments to the IPLA to add the "regardless of the substantive legal theory" language.[246]

In 2009, the Indiana Supreme Court twice had the opportunity to address this issue in *Collins v. Pfizer, Inc.*,[247] and *Kovach v. Caligor Midwest*,[248] but declined to do so both times.[249]

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result of gun violence, but rather the increased availability or supply of handguns); Coffman v. PSI Energy, Inc., 815 N.E.2d 522, 536-37 (Ind. Ct. App. 2004) (allowing plaintiff's personal injury common law negligence claims under Section 392 of the Restatement (Second) of Torts after finding that the defendant at issue was neither a "manufacturer" or a "seller" as the IPLA defines the terms).

244. 878 N.E.2d 499 (Ind. Ct. App. 2007). The *Deaton* court indicated that liability could be imposed in a personal injury case against the manufacturer of an allegedly defective black powder rifle pursuant to both the IPLA and Section 388 of the Restatement (Second) of Torts. *See id.* at 501-03.

245. No. 1:08-cv-1360-RLY-DML, 2009 U.S. Dist. LEXIS 41529 (S.D. Ind. May 14, 2009). In *Gastite*, the court refused to merge separate breach of express and implied warranty claims with IPLA-based claims against a manufacturer even though the harm suffered was property damage caused by a house fire. *Id.* at *9-11.

246. In a footnote, the *Gastite* court wrote that "[a]lthough the IPLA provides a single cause of action for a user seeking to recover in tort from a manufacturer for harm caused by a defective product, a plaintiff may maintain a separate cause of action under a breach of warranty theory." *Id.* at *7 n.1 (internal citation omitted). The authority cited for that statement is *Hitachi Construction Machine Co. v. AMAX Coal Co.*, 737 N.E.2d 460, 465 (Ind. Ct. App. 2000). Reliance on *Hitachi* to support that point is tenuous at best, though, because the authority cited in *Hitachi* on that point is from 1991, four years before the Indiana General Assembly changed the law when it enacted the 1995 amendments to the IPLA to add the "regardless of the substantive legal theory" language. The case upon which the *Hitachi* panel relied is *B&B Paint Corp. v. Shrock Manufacturing, Inc.*, 568 N.E.2d 1017, 1020 (Ind. Ct. App. 1991).

247. No. 1:08-cv-0888-DFH-JMS, 2009 U.S. Dist. LEXIS 3719 (S.D. Ind. Jan. 20, 2009).

248. 913 N.E.2d 193 (Ind. 2009), *reh'g denied.*

249. For a more detailed discussion about *Collins* and *Kovach* as those cases relate to this point, see Alberts et al., *supra* note 25, at 906-08.

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 accrues.[250]

This year's survey period produced a key decision involving the statute of repose. In *Florian v. Gatx Rail Corp.*,[251] the plaintiff was injured when he drove his car into a black-painted railroad car at night.[252] The railroad car was manufactured in 1975, but it had been repainted sometime during the preceding ten years.[253] The plaintiff brought a product liability claim, alleging that the railroad car was defective because it was painted black.[254] The court concluded that the statute of repose barred the plaintiff's claims.[255] The statute of repose begins to run "from the time the product is 'delivered from the manufacturer . . . to the first consuming entity.'"[256] However, if an allegedly defective component is incorporated into the product after the initial delivery, the statute of repose

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250. Ind. Code § 34-20-3-1 (2011). Recent decisions have used the IPLA's statue of repose to dispose cases as untimely. *E.g.*, Campbell v. Supervalu, Inc., 565 F. Supp. 2d 969, 977 (N.D. Ind. 2008); C.A. v. Amli at Riverbend, L.P., No. 1:06-cv-1736-SEB-JMS, 2008 U.S. Dist. LEXIS 2558, at *8 (S.D. Ind. Jan. 10, 2008). For more detailed discussions about these cases, see Alberts et al., *supra* note 24, at 1147-51. In addition, product liability cases involving asbestos products have a unique statute of limitations. *See* Ind. Code § 34-20-3-2(a). For a discussion of the asbestos-related statute of repose, see generally *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144 (Ind. Ct. App. 2005). There were no key cases decided during the 2010 survey period involving the asbestos statute of repose.

251. 930 N.E.2d 1190 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 828 (Ind. 2010).

252. *Id.* at 1192-93.

253. *See id.* at 1201.

254. *See id.*

255. *Id.*

256. *Id.* at 1201-02 (quoting Ferguson v. Modern Farm Sys., Inc., 555 N.E.2d 1379, 1386 (Ind. Ct. App. 1990)).

starts anew.[257] The plaintiff claimed that the new "component" was the recent repainting of the railcar.[258] The court disagreed and found that repainting did not constitute a new component; rather, it was routine maintenance.[259] Accordingly, the product liability claim was barred by the ten-year statute of repose.[260]

III. FAULT ALLOCATION

Indiana Code section 34-20-8-1(a) provides that "[i]n a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with . . . [the Indiana Comparative Fault Act]."[261] The Indiana Comparative Fault Act (ICFA), Indiana Code section 34-51-2-7, requires the finder of fact in an action based upon fault to determine the percentage of fault of the claimant, the defendant, and any non-party.[262] "In assessing percentage of fault," the ICFA states that the fact-finder must "consider the fault of all persons who caused or contributed to cause the alleged injury."[263]

In this context, Indiana practitioners should be aware of *Green v. Ford Motor Co.*[264] There, plaintiff Green claimed to have suffered injuries in an accident involving a 1999 Ford Explorer he was driving, and he alleged that those injuries were enhanced by a defective and unreasonably dangerous vehicle restraint system that Ford designed.[265] The *Green* case squarely addressed the issue of fault allocation in the context of a design defect case in which an operative method of demonstrating liability is based upon liability for "enhanced injuries" (sometimes also referred to generally as "crashworthiness"), even when the manufacturer is not liable for the events that caused the underlying accident. Judge McKinney described the crashworthiness doctrine in Indiana as follows:

> In a typical crashworthiness case, the first collision causes the accident itself—for example, when the plaintiff's vehicle is rear-ended by another driver. The second collision—namely, when the plaintiff strikes the interior of the plaintiff's vehicle and is injured—causes the plaintiff's enhanced injuries. . . . "Under the doctrine of crashworthiness a motor vehicle manufacturer may be liable in negligence or strict liability for injuries sustained in a motor vehicle accident where a manufacturing or design defect, though not the cause of the accident, caused or enhanced the injuries." In such a case, the plaintiff bears the burden of proving that the defective condition of the product at issue proximately caused the

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257. *Id.* at 1202.
258. *Id.* at 1201.
259. *Id.* at 1201-02.
260. *Id.* at 1202.
261. IND. CODE § 34-20-8-1(a) (2011).
262. *Id.* § 34-51-2-7(b)(1).
263. *Id.*
264. No. 1:08-cv-0163-LJM-TAB, 2010 WL 2673926 (S.D. Ind. June 30, 2010).
265. *Id.* at *1.

> plaintiff's enhanced injuries. Specifically, the plaintiff must "demonstrate that a feasible, safer, more practicable product design would have afforded better protection." The defendant is not responsible for any of the plaintiff's injuries that resulted from the accident itself and not from the alleged defects in the defendant's products.[266]

Pursuant to Indiana Code section 34-20-8-1, Ford intended to argue at trial that Green was negligent in causing the underlying accident, and Green moved in limine to exclude all evidence of his alleged contributory fault.[267] Green claimed that because a crashworthiness claim related solely to his so-called "enhanced" injuries, evidence of his fault in causing the underlying accident was irrelevant and prejudicial.[268] Accordingly, Green moved to certify the question "whether, in a crashworthiness case alleging enhanced injuries under the [I]PLA, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault relates to the cause of the underlying accident."[269]

Judge McKinney agreed that the question should be referred to the Indiana Supreme Court because the "critical task" in enhanced injury cases is to define the "physical harm" at issue and to determine which parties caused or contributed to that harm.[270] Because in crashworthiness cases, the physical harm at issue is the enhancement of the injuries allegedly caused by a defective product design, it is unclear whether a plaintiff who negligently causes the underlying accident also causes the so-called enhanced injuries.[271] According to Judge McKinney, Indiana Code 34-20-8-1 does not answer that question; it "merely instructs that, if the plaintiff in a products liability action proximately causes at least some of the plaintiff's injuries, then the jury is required to apportion fault under the Indiana Comparative Fault . . . [Act]."[272] As a result, Judge McKinney certified the question to the Indiana Supreme Court phrased as follows: "whether a plaintiff's contributory negligence in causing the first collision is also, as a matter of Indiana law, 'fault' that the jury shall apportion under Indiana Code section 34-20-8-1."[273] The Indiana Supreme Court accepted the question and heard oral

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266. *Id.* (internal citations omitted).

267. *Id.* at *2.

268. *Id.* Green contended that "the only relevant inquiry . . . [was] whether Ford's negligent design of the 1999 Ford Explorer Sport's restraint system caused injuries that Green would not have otherwise suffered with a properly designed restraint system." *Id.* "In other words," the court wrote, "Green asserts that his alleged negligence is irrelevant because only a product's defective design can cause 'enhanced injuries.'" *Id.*

269. *Id.*

270. *Id.* at *3.

271. *See id.* at *2.

272. *Id.*

273. *Id.* In certifying the question, Judge McKinney wrote that "other jurisdictions that have addressed this issue have reached differing results", noting further as follows:

> The law is uncertain; no Indiana court has written on the issue and there is a split of authority in other states. Additionally, the issue concerns a matter of vital public

argument on December 9, 2010.[274]

CONCLUSION

The 1995 amendments to the IPLA have been in effect now for fifteen years. Although there are still some areas where courts are interpreting key provisions differently, Indiana jurisprudence now appears to be settling itself, and the collective group of product liability decisions over the last ten years or so is starting to provide a fairly sturdy foundation upon which practitioners may build their product liability claims and defenses.

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concern; indeed, many courts have answered the question—either affirmatively or negatively—as a matter of public policy. Moreover, this issue will arise in any crashworthiness case where the negligence of the plaintiff or any other third party in causing the underlying accident is at issue. Finally, the Court is of the opinion that Green's alleged negligence in causing the underlying accident would become outcome determinative when, as is the case here, a plaintiff may not recover if he or she is fifty percent at fault.

Id. at *3 (internal citation omitted).

274. Green v. Ford Motor Co., 931 N.E.2d 377 (Ind. 2010).