

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

JOSEPH R. ALBERTS*

INTRODUCTION

The first year of the Twenty-first Century was a busy one for Indiana judges and practitioners in the area of product liability law.¹ During the 2001 survey period, which is October 1, 2000 to September 30, 2001,² state and federal courts in Indiana answered some lingering questions, tackled some new issues, and added to an already impressive body of law interpreting the Indiana Product Liability Act (“IPLA”).³

This survey does not attempt to address in detail all cases decided during the survey period that apply Indiana product liability law. Rather, it examines selected cases that are representative of the seminal product liability issues that courts applying Indiana law have handled during the relevant time frame. This survey also provides some background information and context where appropriate.

I. CASES INTERPRETING STATUTORY DEFINITIONS

All claims users or consumers⁴ file in Indiana against manufacturers⁵ and

* Senior Litigation Attorney, Dow AgroSciences LLC, Indianapolis; B.A., *cum laude*, 1991, Hanover College; J.D., *magna cum laude*, 1994, Indiana University School of Law—Indianapolis; Chairman, Product Liability Section, Defense Trial Counsel of Indiana (1999-2001); Chairman, Corporate Counsel Section, Indiana State Bar Association. The author thanks Brenda Ferguson, Knight Anderson, James Boyers, Jeff McKean, Nelson Nettles, and Tom Jarzyniecki for their contributions.

1. Many commentators and courts use the term “products liability” when referring to actions alleging damages as a result of defective and/or unreasonably dangerous consumer products. The applicable Indiana statutes, however, utilize the term “product liability” (no “s”). This survey follows the lead of the Indiana General Assembly and likewise employs the term “product liability.”

2. This Article includes some cases decided on the periphery of those dates.

3. The Indiana General Assembly first enacted the IPLA in 1978. *See* Pub. L. No. 141, § 28, 1978 Ind. Acts 1298, 1308, *repealed by* 1995 Ind. Acts 4051 (1995). It originally covered claims in tort using both negligence and strict liability theories. In 1983, the legislature amended the statute to apply only to strict liability actions. *See* Pub. L. No. 297-1983, § 1, 1983 Ind. Acts 1815. In 1995, the legislature amended the statute to once again encompass tort theories of recovery based on both strict liability and negligence theories. *See* Pub. L. No. 278-1995, § 1, 1995 Ind. Acts 4051; *see also* *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

4. For purposes of application 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

sellers⁶ for physical harm⁷ a product⁸ causes are statutory. The IPLA governs all such claims “regardless of the substantive legal theory or theories upon which the action is brought.”⁹ The 1995 amendments to the IPLA incorporated negligence principles in cases in which claimants base their theory of liability upon either defective design or inadequate warnings.¹⁰ “Strict liability” remains only in cases in which the theory of liability is a manufacturing defect.¹¹ The 1995 amendments also limited actions against sellers,¹² more specifically defined the circumstances under which a distributor or seller can be considered a manufacturer,¹³ converted the traditional state of the art defense into a rebuttable

expected use.

IND. CODE § 34-6-2-29 (1998). “User” has the same meaning as “consumer.” *Id.* § 34-6-2-147.

5. For purposes of application of the IPLA, “manufacturer” means “a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.” *Id.* § 34-6-2-77(a). “Manufacturer” also 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 actual manufacturer.

Id.

6. For purposes of application of the IPLA, “seller” means “a person engaged in the business of selling or leasing a product for resale, use, or consumption.” *Id.* § 34-6-2-136.

7. For purposes of application of the IPLA, “physical harm” means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.” *Id.* § 34-6-2-105(a). It does not include “gradually evolving damage to property or economic losses from such damage.” *Id.* § 34-6-2-105(b).

8. For purposes of application of the IPLA, “product” means “any item or good that is personalty at the time it is conveyed by the seller to another party.” *Id.* § 34-6-2-114(a). The term does not encompass a “transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.” *Id.* § 34-6-2-114(b).

9. *Id.* § 34-20-1-1.

10. *See id.* § 34-20-2-2.

11. *See id.* The editors of Burns Indiana Statutes Annotated have included a title that could be misleading to their readers. The short title the editors have chosen for Indiana Code section 34-20-2-2 is “Strict Liability—Design Defect.” IND. CODE ANN. § 34-20-2-2. That title might cause a reader to incorrectly assume that the statute allows a claimant to prove a design defect case without proving as part of that claim that the manufacturer or seller failed to conform to what is really a negligence standard—the exercise of “reasonable care under the circumstances in designing the product.” IND. CODE § 34-20-2-2.

12. *See id.* § 34-20-2-3.

13. *See id.* § 34-20-2-4.

presumption,¹⁴ and injected comparative fault principles into product liability cases.¹⁵

As such, cases interpreting the IPLA are of the utmost importance. The following cases are a sampling of those decided during the survey period that interpret terms the IPLA incorporates.¹⁶

14. *See id.* § 34-20-5-1. The presumption is that the product is not defective and that the product's manufacturer is not negligent. *Id.* The IPLA entitles a manufacturer or seller to such a presumption 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.

Id.

15. The 1995 amendments changed Indiana law with respect to fault allocation and distribution in product liability cases. The Indiana General Assembly made it clear that a defendant cannot be liable for more than the amount of fault "directly attributable to that defendant," as determined pursuant to Indiana Code section 34-20-8, nor can a defendant "be held jointly liable for damages attributable to the fault of another defendant." *Id.* § 34-20-7-1.

The 1995 amendments now require the trier of fact to compare "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." *Id.* § 34-20-8-1(a). The statute requires that the trier of fact compare such fault "in accordance with IC 34-51-2-7, IC 34-51-2-8, or IC 34-51-2-9." *Id.* The IPLA mandates that

[i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.

Id. § 34-20-8-1(b).

Practitioners also should recognize that the definition of "fault" for purposes of the IPLA is not the same as the definition of "fault" applicable in actions that the Comparative Fault Act governs. *Compare id.* § 34-6-2-45(a), *with id.* § 34-6-2-45(b). For purposes of the IPLA, the definition of "fault" does not include the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." *Id.*

16. As noted in the opening paragraph of this survey Article, there are several cases that this piece does not address in great detail that are, nevertheless, worthy of special mention. One such case is *Rogers ex rel. Rogers v. Cosco, Inc.*, 737 N.E.2d 1158 (Ind. Ct. App. 2000), *trans. denied*, 761 N.E.2d 419 (Ind. 2001), which the Indiana Court of Appeals decided on November 2, 2000. Although that decision technically falls within the survey period for this Article, last year's survey Article fully addressed it. *See* Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 882-86, 917-20 (2001).

In addition to *Rogers*, there are several published state and federal cases that Indiana product liability practitioners may be interested in that are not reviewed in this article because, although they are product liability cases, substantive product liability issues are not the focus of the opinions.

See In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation, 155 F. Supp. 2d 1069 (S.D. Ind.) (applying Michigan and Tennessee substantive law to claims involving tort, contract, consumer protection, express and implied warranty, and unjust enrichment claims; applying federal law on RICO and Magnuson-Moss warranty issues), *reconsideration granted in part* by 205 F.R.D. 503 (S.D. Ind. 2001), *rev'd in part* by 288 F.3d 1013 (7th Cir. 2002); *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation*, 199 F.R.D. 304 (S.D. Ind. 2001) (allowing plaintiff to voluntarily dismiss federal action and pursue state action if she paid defendants any filing fees they incurred); *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation*, 131 F. Supp. 2d 1027 (S.D. Ind. 2001) (finding plaintiffs entitled to discovery about defendants' motions to dismiss on forum non conveniens grounds); *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation*, 129 F. Supp. 2d 1207 (S.D. Ind. 2001) (determining case management procedures); *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation*, 129 F. Supp. 2d 1202 (S.D. Ind. 2001) (denying plaintiffs' request to join tire dealer who would defeat diversity jurisdiction); *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation*, 198 F.R.D. 654 (S.D. Ind. 2001) (allowing press to intervene in case, but limiting intervention to responses to motions for protective orders); *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation*, 128 F. Supp. 2d 1198 (S.D. Ind. 2001) (denying plaintiffs' motion to remand case to state court); *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation*, 128 F. Supp. 2d 1196 (S.D. Ind. 2001) (refusing to issue suggestion for remand of case to state court); *Szabo v. Bridgeport Machines, Inc.*, 199 F.R.D. 280 (N.D. Ind. 2001) (addressing, in a case involving the manufacture of an allegedly defective machine, class certification, choice of law, and misrepresentation); *Ray-Hayes v. Heinemann*, 743 N.E.2d 777 (Ind. Ct. App. 2001) (holding, in product liability case alleging defective passenger vehicle restraint, that trial court erred by dismissing plaintiffs' cause of action despite the fact that the summonses were filed after the expiration of the statute of limitations period), *vacated by* 760 N.E.2d 172 (Ind.), *rev'd on reh'g*, 768 N.E.2d 899 (Ind. 2002); *Allstate Ins. Co. v. Dana Corp.*, 737 N.E.2d 1177 (Ind. Ct. App. 2000) (insured manufacturer did not own contaminated groundwater within the meaning of insurance policy's exclusion), *aff'd in part and vacated in part*, 759 N.E.2d 1049 (Ind. 2001).

There are also several helpful opinions, by federal district judges, that are available from sources other than official reporters. Note that those cases made available to the public only by way of the Southern District of Indiana's web site are not intended for publication either electronically or in paper form. Aside from the law of the case doctrine, federal district judges' decisions have no precedential authority and are not binding on other courts, other judges within the district, or even other cases before the same judge. *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, No. I/P 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at *1 n.1 (S.D. Ind. Dec. 19, 2000); *see also* *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 359 (7th Cir. 1998); *Malabarba v. Chi. Tribune Co.*, 149 F.3d 690, 697 (7th Cir. 1998); *Old Republic Ins. Co. v. Chuhak & Tecson, P.C.*, 84 F.3d 998, 1003 (7th Cir. 1996). There are a number of federal cases that might be helpful to practitioners but are not available in the official reporter system. *See Chubb Group of Ins. Cos. v. Buddy Gregg Motor Homes, Inc.*, No. IP 00-1378-C H/G, 2001 U.S. Dist. LEXIS 5040 (S.D. Ind. Apr. 17, 2001) (dismissing manufacturer's cross-claim against seller finding that Indiana allows implied indemnification only under narrow exceptions that the cross-claim did not meet); *In re Lawrence*

A. Recovery of Damage to Defective Product

Two related cases decided on June 6, 2001, by the Indiana Supreme Court reaffirm that the IPLA does not allow a claimant to recover for damages to the defective product itself even when "other property" is damaged in the event or accident that also destroys or damages the defective product.

In the first case, *Progressive Insurance Co. v. General Motors Corp.*,¹⁷ three insurance companies sued General Motors and Ford in subrogation in five separate cases after vehicles were destroyed in fires allegedly caused by defects in the wiring, the fuel lines, and transmission line.¹⁸ Because the vehicles themselves were the only property the fires allegedly damaged, the manufacturers filed motions for summary judgment in the trial court.¹⁹ They argued, in part, that the owners, and therefore their subrogees, may not recover damages in product liability claims under the IPLA.²⁰ The trial courts granted summary judgments to the manufacturers in two of the cases and denied them in the other three.²¹

Considering itself bound by precedent in *Martin Rispens & Son v. Hall Farms, Inc.*²² and *Reed v. Central Soya Co.*,²³ the court of appeals affirmed those decisions in the consolidated appeal that ensued.²⁴ In doing so, the court of appeals, in the language of Justice Boehm, expressed the view that "policy considerations favored the plaintiffs' claims under the [IPLA]."²⁵ Because the

W. Inlow Accident Litig., No. IP 99-0830-C H/G, 2001 U.S. Dist. LEXIS 2747, Prod. Liab. Rep. (CCH) ¶ 16,044 (S.D. Ind. Feb. 7, 2001) (discussing indemnification and contribution, compliance with Local Rule 56.1, personal knowledge required for an affidavit, exclusivity provision in the Indiana Worker's Compensation Act, federal preemption pursuant to the Federal Aviation Act, and the quantum of evidence necessary to defeat summary judgment motion); Land v. Yamaha Motor Corp., No. IP 00-220-C H/G, 2000 U.S. Dist. LEXIS 20117 (S.D. Ind. Dec. 20, 2000) (denying plaintiff's attempt to add non-diverse defendants to defeat federal jurisdiction); *N.H. Ins. Co.*, 2000 U.S. Dist. LEXIS 19502 (deciding tort, contract claims arising out of installation of ventilation system in hog breeding facility).

17. 749 N.E.2d 484 (Ind. 2001).

18. *See id.* at 486. The three insurers were Progressive Insurance Co., United Farm Bureau Insurance Co., and Foremost Insurance Co. *See id.* at 486 n.1.

19. *See id.* at 486.

20. *See id.*

21. *See id.* at 491.

22. 621 N.E.2d 1078 (Ind. 1993).

23. 621 N.E.2d 1069 (Ind. 1993), *modified on reh'g*, 644 N.E.2d 84 (Ind. 1994).

24. The court of appeals affirmed the two cases where summary judgment was granted and reversed the three where it had been denied. *See Progressive Ins. Co. v. Gen. Motors Corp.*, 730 N.E.2d 218 (Ind. Ct. App. 2000), *vacated*, 749 N.E.2d 484 (Ind. 2001).

25. *Progressive Ins. Co.*, 749 N.E.2d at 486. Although acknowledging the decisions in *Martin Rispens* and *Reed*, the court of appeals nevertheless seemed troubled by the proposition that

issue was "a recurring subject of transfer petitions," the Indiana Supreme Court granted transfer and reaffirmed the position in *Martin Rispens* and *Reed* that there is no recovery under the [IPLA] where the claim is based on damage to the defective product itself.²⁶

The IPLA provides, in relevant part:

[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:

(1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition;

(2) the seller is engaged in the business of selling the product; and

(3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.²⁷

"Physical harm" for purposes of the IPLA means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. . . . The term does not include gradually evolving damage to property or economic losses from such damage."²⁸

Justice Boehm's opinion in *Progressive* framed the issue as whether the IPLA "imposes liability when the 'harm' caused by a 'product' is damage to the product itself, and not personal injury or damage to other property."²⁹ The insurance companies argued that the term "property" includes the "product," pointing out that the user or consumer "presumably views the product that self-destructs as his or somebody else's property."³⁰ In response, the court wrote that "[a]lthough it is undoubtedly true that 'products' are ordinarily somebody's 'property,' we think that 'property' as used in the [IPLA] does not embrace the product itself."³¹

In its earlier *Reed* decision, the Indiana Supreme Court concluded that the legislature already had determined that the plaintiff's only remedy lay in contract

a consumer may not recover under the IPLA for damage caused by a defective product unless the product also damages other property or injures a person. See *Progressive Ins. Co.*, 730 N.E.2d at 220-21. Because the court of appeals recognized its inability to "recast" the *Martin Rispens* and *Reed* opinions, it was constrained to affirm the trial court's entry of summary judgment for GM in two of the cases and to reverse the denials of summary judgment in the other three. *Id.* at 221.

26. *Progressive Ins. Co.*, 749 N.E.2d at 486.

27. IND. CODE § 34-20-2-1 (1998).

28. *Id.* § 34-6-2-105.

29. *Progressive Ins. Co.*, 749 N.E.2d at 487.

30. *Id.*

31. *Id.*

law “where the loss is purely economic,^[32] and there is no damage to other property and no personal injury.”³³ Also significant to the *Progressive* court was the fact that the General Assembly did not provide for recovery for injury to the product itself even though it amended the IPLA in 1995, well after the Indiana Supreme Court’s rulings in *Reed* and *Martin Rispens*:

[T]he legislature has not acted in the face of two opinions from this Court concluding that the legislature did not intend that damage to the product itself be recoverable under the [IPLA]. That silence is not insignificant.

Rejection of a tort claim for self-inflicted damage to a product is a choice the legislature is plainly free to make. It is grounded in the distinction between tort and contract law. It also involves a number of different policy considerations. As a general matter, when the product does not operate up to expectations and deprives its user of the benefit of the bargain, commercial law sets forth a comprehensive scheme governing the buyer’s and seller’s rights.³⁴

The insurance companies also argued that the fire damage was “sudden” and therefore covered by the IPLA, whereas the injury suffered in *Martin Rispens* (damage to a watermelon crop) developed over time.³⁵ The *Progressive* court rejected any distinction between the situation before it and the one before the court in *Martin Rispens*. The majority rejected the argument that “the issue turns on whether ‘sudden, major’ damage is incurred”³⁶ noting “[t]hat may be the case in many product malfunctions, including those involving no fire or other self-destructive result. It may be a necessary component of a products liability claim, but it is not itself sufficient.”³⁷

Near the conclusion of the opinion, the *Progressive* court addressed additional policy arguments raised by the insurance companies, including that it

32. Justice Boehm’s majority opinion acknowledges that “‘property damage’ is distinct from ‘economic damage . . .’” from the point of view of the policyholder’s insurance coverage. *Id.* at 488. The opinion also notes:

However, when addressing the validity vel non of a tort or products liability claim based on failure of a product, the self-destruction of the product through property damage, if caused by an external force, is indistinguishable in consequence from the product’s simple failure to function. In both cases, the owner’s loss is the value of the product. Thus, the United States Supreme Court and others refer to damage to the product itself as “economic loss” even though it may have a component of physical destruction. Viewing such a loss as purely “economic loss” and not personal or property damage loss is consistent with Indiana law in other contexts as well.

Id.

33. *Id.* (citing *Reed v. Cent. Soya Co.*, 621 N.E.2d 1069 (Ind. 1993)).

34. *Id.* at 489.

35. *See id.* at 489-90.

36. *Id.* at 490.

37. *Id.* (footnote omitted).

is simply unfair for them to bear the burden of the cost of compensating consumers for products that are defective. In response, the court observed that:

[t]he insurers can rewrite their policy exclusions to deal with this if they choose. Presumably competitive forces compel them to cover these risks, but if some insurers seek to write the coverage out of their policies, this is their choice. To the extent insurance regulators insist on such coverage, the fairness of that position is not an issue for this Court. [O]ne efficient way for economic losses to be managed is through insurers because they have the ability to adjust their rates to reflect their loss experience The legislative policy to favor this means of addressing the problem is entirely rational. If it is to be changed, the General Assembly must make that determination.³⁸

Justice Rucker concurred in the result in a separate opinion in which Justice Dickson joined. The concurring opinion merely states that the doctrine of *stare decisis* compelled the outcome, citing *Martin Rispens* and *Reed*.³⁹

In the second case decided on June 6, 2001, *Fleetwood Enterprises, Inc. v. Progressive Northern Insurance Co.*,⁴⁰ the court disposed of essentially the same issue as in *Progressive*, but in a case in which the product defect at issue allegedly damaged both the product itself and other property. The *Fleetwood* court held that personal injury and property damage to other property from a defective product are actionable under the IPLA, but that their presence does not create a claim for damage to the product itself.⁴¹

In *Fleetwood*, a fire destroyed a motor home that Fleetwood manufactured and some of the owner's personal property inside the motor home. Progressive Insurance had issued a homeowner's policy covering the motor home and reimbursed the owner for the value of the motor home and the personal property.⁴² As subrogee, Progressive sued Fleetwood under a product liability theory to recover its losses. The trial court refused to give Fleetwood's tendered jury instruction stating that the only amount of damages it could consider was the loss of personal property. Instead, the trial court read the Indiana pattern jury instruction allowing for recovery of fair market value of destroyed property at the time of its destruction.⁴³ The jury awarded Progressive the full value of the motor home and the personal property plus prejudgment interest.⁴⁴

The Indiana Supreme Court began its discussion by citing *Progressive* for the proposition that the IPLA does not provide recovery when the only damage is to

38. *Id.* at 491 (citation omitted).

39. *See id.* at 491-92 (Rucker, J., concurring).

40. 749 N.E.2d 492 (Ind. 2001).

41. *Id.* at 493.

42. The homeowner's insurance policy "paid the owner \$162,500 for damages to the motor home and \$6,587.89 for damages to other personal property in the home." *Id.*

43. *Id.* The trial court chose to read Indiana Pattern Jury Instruction No. 11.40. *Id.*

44. The total judgment for Progressive was \$215,969.24. *Id.*

the defective product itself.⁴⁵ The court acknowledged, however, that other decisions, including its *Reed* decision, “have discussed that doctrine in language suggesting that damage to the product might be recoverable under a products liability theory if the defective product also causes personal injury or damage to other property.”⁴⁶ Whether damage to the defective product itself is recoverable in product liability where it is accompanied by damage to other property or personal injury is a question about which the *Fleetwood* court found a paucity of authority. The *Fleetwood* court discussed only one relevant case, *Dutsch v. Sea Ray Boats, Inc.*,⁴⁷ an Oklahoma decision in which the court permitted recovery of damage to the defective product when accompanied by damage to other property even though Oklahoma is a state that does not permit recovery when the only damage is to the defective product itself.

In the case before it, the *Fleetwood* court recognized that there was damage to “other” personal property in the motor home. There is no question that the IPLA contemplates recovery for such “other” personal property. “However,” the court wrote, “we find no persuasive reason to sustain a products liability claim for damage to the product if it is accompanied by personal injury or damage to other property when there is no products liability claim if that other damage is absent.”⁴⁸ On that point, the *Fleetwood* court commented that the reason given in *Dutsch* for its contrary finding (avoidance of dual theory trials) did “not seem very forceful.”⁴⁹ The court, recognizing that a product liability claim in Indiana, unlike Oklahoma, is governed by statute and that there is no support in the IPLA for the result reached in *Dutsch*, reasoned that

[p]recedent from this Court has not regarded the “product” whose defect gives rise to liability as “property” whose damage gives rise to a claim under the [IPLA]. That result, apparently accepted by the legislature, dictates disallowance of the claim for damage to the defective product, whether or not accompanied by other damage. Thus, for the same reasons given in *Progressive*, we hold that damage caused to other property by a defective product does not create a claim for damage to the product itself. We also think there are other persuasive reasons to reject the *Dutsch* rule. If recovery hinges on the presence of other damage, many cases will be launched into quests for some collateral damage. An oil stain on a garage floor from a failed engine or a burnt blade of grass

45. *Id.*

46. *Id.* In *Reed*, the court wrote that, “where the loss is solely economic in nature, as where the only claim of loss relates to the product’s failure to live up to expectations, and *in the absence of damage to other property or person*, then such losses are more appropriately recovered by contract remedies.” *Reed v. Cent. Soya Co.*, 621 N.E.2d 1069, 1074-75 (Ind. 1993), *modified on reh’g*, 644 N.E.2d 84 (Ind. 1994).

47. 845 P.2d 187 (Okla. 1992).

48. *Fleetwood*, 749 N.E.2d at 495.

49. *Id.*

from a fire should not create a claim where none existed.⁵⁰

Accordingly, the court determined that the trial court erred in failing to instruct the jury that damage to the product itself was not recoverable under the IPLA.⁵¹

As in *Progressive*, Justice Rucker concurred in the result in a separate opinion in which Justice Dickson joined. The concurring opinion states that the doctrine of stare decisis compelled the outcome, citing *Martin Rispens* and *Reed*.⁵²

B. Bystanders

The opinion of the court of appeals in *Stegemoller v. ACandS, Inc.*,⁵³ raised an interesting definitional question and, in the process of answering it, confirmed that the IPLA has subsumed "common law" negligence in Indiana product liability cases. At issue in *Stegemoller* was whether the plaintiff qualified as a "user" or a "consumer" of an allegedly defective product and, if she did not, whether she could maintain a separate "common law" negligence claim, that was not within the IPLA's purview.⁵⁴ According to the Indiana Court of Appeals, the answer to both questions is "no."⁵⁵ The Indiana Supreme Court has since reversed the court of appeals' opinion.⁵⁶ This survey Article reviews the court of appeals decision. The opinion of the Indiana Supreme Court will presumably be treated in next year's survey Article.

In *Stegemoller*, Lee Stegemoller worked for several years as a union insulator for many different companies and, during the course of his career, worked with asbestos products.⁵⁷ He and his wife, Ramona, contended that some of the asbestos dust remained on his clothes when he left the various jobsites and that

50. *Id.* (citation omitted).

51. *See id.* The court determined that the trial court's failure to read the appropriate jury instruction gave the jury "the mistaken impression that it should award full damages for the motor home . . . if it determined that Fleetwood was liable." *Id.* The court ultimately affirmed the jury's award of damages in the amount of \$6,587.89 for the personal property, but reversed the damages award in the amount of \$162,500 for the motor home. *See id.* at 496.

52. *See id.* (Rucker, J., concurring). The same issues were raised and addressed by the court of appeals in *Hitachi Construction Machinery Co. v. AMAX Coal Co.*, 737 N.E.2d 460 (Ind. Ct. App. 2000). On August 28, 2001, the Indiana Supreme Court denied appellee's and cross-appellant's petition to transfer. *See Hitachi Constr. Mach. Co. v. AMAX Coal Co.*, 761 N.E.2d 416 (Ind. 2001).

53. 749 N.E.2d 1216 (Ind. Ct. App.), *trans. granted*, 761 N.E.2d 423 (Ind. 2001), *rev'd*, 767 N.E.2d 974 (Ind. 2002).

54. *See id.* at 1218.

55. *See id.* at 1219-20.

56. *See Stegemoller v. ACandS, Inc.*, 761 N.E.2d 423 (Ind. 2001), *rev'd*, 767 N.E.2d 974 (Ind. 2002); *see also* *Camplin v. ACandS, Inc.*, 768 N.E.2d 428, 429 (Ind. 2002); *Martin v. ACandS*, 754 N.E.2d 52 (Ind. Ct. App. 2001), *trans. granted*, 2002 Ind. LEXIS 158 (Ind. Feb. 15, 2002).

57. *See Stegemoller*, 749 N.E.2d at 1217-18.

she inhaled the dust that he brought home from his workplace.⁵⁸ Ramona “was diagnosed with colon cancer, pulmonary fibrosis and pleural thickening,” which she alleged was caused by inhalation of asbestos fibers, specifically “as the result of interacting with [her husband] and laundering his work uniforms.”⁵⁹

The Stegemollers sued several entities believed to be responsible for Ramona’s condition because they were either involved in the manufacture or sale of asbestos-containing products, are the successors-in-interest to such entities, or had some other alleged responsibility for her physical condition.⁶⁰ Several of those entities filed motions to dismiss, asserting that Ramona was not a “user” or “consumer” as defined by the IPLA and therefore had no cause of action.⁶¹ The trial court agreed and dismissed her claims because she did not fall within the IPLA and, further, because there is no common law negligence claim for a user or consumer who sues a seller or a manufacturer for that which the IPLA contemplates and governs.⁶²

The court of appeals affirmed the trial court’s decision on both grounds.⁶³ With respect to the definitional matter, the salient question was whether Ramona qualified as a “user” or a “consumer” of an asbestos product under the IPLA. For purposes of application 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.⁶⁴

“User” means the same as “consumer.”⁶⁵

Because the Stegemollers did not establish that Ramona either used, consumed, possessed, or controlled any of the asbestos products with which Lee worked, the only claim they could make was that Ramona was a “bystander.”⁶⁶ In order to be considered a “bystander,” however, the *Stegemoller* court recognized that Stegemollers had to prove that Ramona was a person reasonably expected to be in the vicinity of asbestos products during their use in an

58. *Id.* at 1218.

59. *Id.*

60. Specifically, the Stegemollers argued that the asbestos material originated from the products attributable to those entities or from the premises for which they were responsible. *Id.* They also alleged that some of the defendants “participated in a conspiracy to conceal the known hazards of asbestos from the public.” *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1220.

64. IND. CODE § 34-6-2-29 (1998).

65. *Id.* § 34-6-2-147.

66. *Stegemoller*, 749 N.E.2d at 1219.

“industrial setting.”⁶⁷ She was not. Indeed, the Stegemollers never argued that Ramona was present at any of the sites where Lee came into contact with asbestos or that she was in the vicinity when the products were being used as industrial insulation products in an industrial setting.⁶⁸

The *Stegemoller* court rejected the argument that Ramona may recover simply because the appellees reasonably should have foreseen that she would be in the vicinity of the asbestos-containing products during their expected use in an industrial setting.⁶⁹ According to the court, such an argument ignores the plain meaning of the IPLA because Ramona could not “meet the requirement that she was an individual who would have reasonably been expected to be in the vicinity of asbestos-containing insulation material meant for industrial purposes during the reasonably expected use of the product.”⁷⁰

Alternatively, the Stegemollers argued that Ramona should be able to maintain “a separate claim under the common law of negligence even though she may not qualify as a user, consumer or bystander” under the IPLA.⁷¹ The court rejected the argument that an independent common law negligence theory is viable in Indiana apart from the IPLA under the circumstances presented.⁷² The *Stegemoller* court first pointed out that “the IPLA governs all actions brought to recover for personal injury caused by a product regardless of the substantive legal theory.”⁷³ The court next reviewed two important Indiana cases in this regard, *Dague v. Piper Aircraft Corp.*⁷⁴ and *Interstate Cold Storage, Inc. v. General Motors Corp.*⁷⁵ The *Interstate* decision makes it clear that the IPLA governs both strict liability and negligence claims.⁷⁶

C. The IPLA's “Product” Requirement

The IPLA governs all claims users or consumers file in Indiana against manufacturers and sellers for physical harm that a product causes. As used in

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.* at 1220.

73. *Id.* at 1219 (citing IND. CODE § 34-20-1-1 (1998)). The court also pointed to Indiana Code section 34-6-2-115, which provides that “[p]roduct liability action” means one that is brought “(1) against a manufacturer or seller of a product; and (2) for or on account of physical harm; regardless of the substantive legal theory or theories upon which the action is brought.” *Id.* (citing IND. CODE § 34-6-2-115 (1998)).

74. 418 N.E.2d 207 (Ind. 1981). The *Dague* court observed that “it seems clear the legislature intended that the act govern *all* product liability actions, whether the theory of liability is negligence or strict liability in tort The [IPLA] expressly applies to all product liability actions sounding in tort, including those based upon the theory of negligence” *Id.* at 212.

75. 720 N.E.2d 727 (Ind. Ct. App. 1999).

76. *See Stegemoller*, 749 N.E.2d at 1220 (citing *Interstate*, 720 N.E.2d at 730).

Indiana Code section 34-20-2-1, a “product” is “any item or good that is personalty at the time it is conveyed by the seller to another party.”⁷⁷ The term “does not apply to a transaction that, by its nature, involves wholly or predominately the sale of a service rather than a product.”⁷⁸ Thus, whether the sale of a “product” occurred can be a dispositive threshold question because only manufacturers or sellers who place “products” into the stream of commerce may be liable under the IPLA. Such was the case in *R.R. Donnelley & Sons Co. v. North Texas Steel Co.*,⁷⁹ an opinion that is significant to Indiana practitioners for a number of reasons.

The *R.R. Donnelley* case involved the collapse of large metal storage racks at the R.R. Donnelley & Sons Co. (“RRD”) facility in Warsaw, Indiana.⁸⁰ RRD purchased the racks from Associated Material Handling Industries, Inc. (“Associated”). Associated purchased the racks from Frazier Industrial Co. (“Frazier”). Frazier designed the racks and contracted with North Texas Steel Co. (“NTS”) to manufacture the component parts.⁸¹

Frazier gave NTS written instructions on how to manufacture [the] parts. NTS received raw steel from the steel mill, and then cut, punched, welded, and painted the steel. Frazier instructed NTS to ship the component parts of the storage racks from its Texas plant to RRD’s plant in Warsaw, . . . where the racks were . . . erected. Associated supervised the installation of the racks⁸²

RRD sued NTS, Associated, and Frazier, claiming more than \$12 million in economic loss as a result of the collapsed racks and asserting product liability, breach of contract, and negligence claims.⁸³ Associated and Frazier settled with RRD before trial. The trial court “granted summary judgment to NTS on the breach of contract and negligence claims,” leaving the parties to try only the product liability claim against NTS.⁸⁴ At trial, RRD argued that NTS defectively welded the rack’s component parts.⁸⁵ “NTS countered that the welds were sufficient to hold the load” and “did not cause the collapse,” and argued that Frazier defectively designed the system.⁸⁶ According to the court, the trial

77. IND. CODE § 34-6-2-114(a) (1998).

78. *Id.* § 34-6-2-114(b).

79. 752 N.E.2d 112 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 433 (Feb. 22, 2002).

80. *See R.R. Donnelley*, 752 N.E.2d at 120. RRD used the racks to store catalogs. The racks collapsed on June 14, 1994, during a shift change. *Id.* Because the accident occurred before June 30, 1995, the 1995 amendments to the IPLA did not apply.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

“amounted to a battle of the experts as to the cause of the accident.”⁸⁷ The jury returned a defense verdict.⁸⁸

RRD appealed all claims, and NTS cross-appealed regarding the trial court’s denial of its summary judgment on the product liability claim.⁸⁹ The court of appeals handled the product liability claim first. The “product liability” issue was whether “NTS created a product sufficient to invoke the [IPLA] by cutting, punching, welding and painting” the steel Frazier provided.⁹⁰ NTS argued that it merely provided labor and that the work it performed for Frazier “was predominately the sale of a service and, therefore, not subject” to the IPLA.⁹¹ NTS supported its argument by pointing out that it “billed Frazier based on the number of production hours required, and that the purchase order reflected that NTS was billing for ‘labor costs.’”⁹² Relying on the court of appeals’ 1998 decision in *Lenhardt Tool & Die Co. v. Lumpe*,⁹³ RRD argued that NTS was subject to liability under the IPLA.⁹⁴

The *R.R. Donnelley* court found *Lenhardt* “instructive” and cited it for the proposition that “where an entity reconditions, alters, or modifies a product or raw material to the extent that a new product has been introduced into the stream of commerce, the entity is a manufacturer and provider of products under the [IPLA].”⁹⁵ In the court’s view, NTS “modified a raw material, steel, to produce the component parts of the RRD rack system” and, in so doing, transformed the steel into a “‘new product’ that [was] substantially different from the raw material used.”⁹⁶ Accordingly, the *R.R. Donnelley* court concluded that “NTS introduced a new product into the stream of commerce and provided products,” not merely services to RRD.⁹⁷

Judge Tinder’s unpublished federal order⁹⁸ in *New Hampshire Insurance Co.*

87. *Id.* at 120-21.

88. *Id.* at 121 n.1.

89. *Id.* at 121. The trial court denied NTS’s motion for summary judgment on the product liability issue and, at the same time, granted RRD’s cross-motion for summary judgment on the same issue. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* NTS cited deposition testimony by a Frazier employee stating that, when Frazier subcontracts for its work, it buys labor from the contract fabricators. *Id.*

93. 703 N.E.2d 1079 (Ind. Ct. App. 1998).

94. *R.R. Donnelley*, 752 N.E.2d at 121-22.

95. *Id.* at 122 (quoting *Lenhardt*, 703 N.E.2d at 1085). *Lenhardt* involved a plant that “would ship solid blocks of metal” to the defendant along “with drawings and specifications.” *Id.* The defendant “would then machine the block of metal into molds per the designs found in the drawings and specifications.” *Id.*

96. *Id.*

97. *Id.* Accordingly, NTS was a “manufacturer” and “provider” of products under the IPLA, and the trial court “did not err in denying NTS’s Motion for Summary Judgment” on that issue. *Id.*

98. As noted earlier, unpublished federal orders have extremely limited precedential value. See *supra* note 16. Such decisions are included in this survey because they are instructive for

*v. Farmer Boy AG, Inc.*⁹⁹ also is instructive to practitioners on this issue. That order, among other things, reaffirms that a prima facie case under the IPLA requires that the party pursuing the claim show that a “product” is involved.¹⁰⁰ In that case, Clark Electric Heating and Cooling (“Clark”) installed a custom ventilation system and related electrical materials at a hog breeding facility. Less than one year later, lightning struck the facility, disabled the ventilation system, and resulted in the loss of 188 pregnant sows. The insurance carrier, as subrogee for the owner of the facility, sued Clark, alleging that its improperly designed electrical system caused the ensuing property loss.¹⁰¹

In a similar case, *Sapp v. Morton Buildings, Inc.*,¹⁰² the Seventh Circuit Court of Appeals, applying Indiana law, held that the remodeling of a barn into a stable was a transaction involving predominately the sale of a service rather than a product.¹⁰³ In light of *Sapp*, Judge Tinder agreed that Clark’s installation of a custom-fit electrical system involved “wholly or predominately the sale of a service rather than a product.”¹⁰⁴ It is also interesting to note that Clark argued that it was entitled to summary judgment on the breach of warranty claim to the extent the plaintiffs were pursuing a claim for breach of implied warranty in tort.¹⁰⁵ Judge Tinder agreed, concluding that “[t]he theory of breach of implied warranty *in tort* is a theory of strict liability in tort and, therefore, has been superseded by the theory of strict liability.”¹⁰⁶ However, the plaintiff could proceed on a warranty theory so long as it was limited to a contract theory.¹⁰⁷

D. Strict Liability in Inadequate Warning Cases

Although it is not published in an official federal reporter and has very limited precedential value,¹⁰⁸ Judge Young’s decision in *Eve v. Sandoz Pharmaceutical Corp.*¹⁰⁹ illustrates why inadequate warning cases are challenging and confusing when both negligence and strict liability theories are used. Ellen and Matthew Eve claimed that Ellen suffered serious and disabling injuries after she was administered several doses of two pharmaceuticals in the days following the delivery of her second child.¹¹⁰ Sandoz Pharmaceutical Corp.

practitioners despite the fact that they may not be binding.

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

100. *Id.* at *7.

101. *See id.* at *3-*4.

102. 973 F.2d 539 (7th Cir. 1992).

103. *Id.* at 541.

104. *N.H. Ins. Co.*, 2000 U.S. Dist. LEXIS 19502 at *7-*8 (citation omitted).

105. *See id.* at *9-*10.

106. *Id.* at *9.

107. *Id.* at *10.

108. *See supra* note 16.

109. No. IP 98-1429-C-Y/S, 2001 U.S. Dist. LEXIS 4531 (S.D. Ind. Mar. 7, 2001).

110. Ellen received seven oral doses of Methergine in the hospital in the three days following delivery. *See id.* at *4. Methergine is “used to reduce the size of the uterus and postpartum

(now known as Novartis Pharmaceutical Corp.) manufactured the drugs, both of which contained package inserts containing warnings, precautions, indications, instructions, and other material required and approved by the United States Food and Drug Administration.¹¹¹

Novartis requested partial summary judgment on many of the plaintiffs' claims, one of which was their strict liability claim. Novartis argued that, under Indiana law, product liability failure-to-warn cases are governed by negligence standards, regardless of the causes of action formally pled.¹¹² Plaintiffs responded by arguing that, "although strict liability product claims and negligence claims involve similar analysis, that fact alone" should not be the basis for summary judgment.¹¹³ After reviewing the briefs and the law, Judge Young concluded that he found "no definitive answer" to the question presented and, accordingly, found "no clear reason" why Novartis' motion should be granted.¹¹⁴

With respect to the "law" reviewed in *Eve*, it appears to be limited to case law and, specifically, to *Ortho Pharmaceutical Corp. v. Chapman*.¹¹⁵ After a brief review of the differences between failure-to-warn cases based on strict liability and failure-to-warn cases based on negligence, the court determined that "'there is no practical difference between the two theories in [the failure-to-warn] context' because the ordinary negligence concept of duty-to-warn governs."¹¹⁶ Having so stated, Judge Young recognized that the *Chapman* court also referenced an Oregon case that distinguished the two theories and summarized:

[T]he main difference between the two theories is that with strict liability cases, the dangerousness of the drug is at issue whereas with negligence cases the seller's culpability is at issue, or as it has been described, "the distinction lay in 'the manner in which the decisional functions are distributed between the court and the jury.'" . . . In other words, the difference is that with strict liability cases, "actual or constructive knowledge need not be proved. Otherwise the tests of culpability and dangerousness are identical."¹¹⁷

hemorrhage." *Id.* at *2. Ellen "received six doses of Parlodel in the hospital" and was sent home with more. *Id.* at *5. Parlodel is used to inhibit postpartum lactation. *Id.* at *2.

111. *Id.* at *2, *29-*31.

112. *See id.* at *89-*90.

113. *Id.* at *90.

114. *Id.*

115. 388 N.E.2d 541 (Ind. App. 1979).

116. *Eve*, 2001 U.S. Dist. LEXIS 4531 at *90-*91 (quoting *Chapman*, 388 N.E.2d at 550) (alteration by court).

117. *Id.* at *91-*92 (citations omitted) (discussing *Chapman*'s citation to *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033 (Or. 1974)). The specific language *Chapman* borrowed from *Phillips* is as follows:

In a strict liability case we are talking about the condition (dangerousness) of an article which is sold without any warning, while in negligence we are talking about the

The *Chapman* court also cited a California decision stating that strict liability had yet not been applied to a failure-to-warn pharmaceutical case in that state.¹¹⁸

Judge Young's order briefly discusses *Chapman*'s explanation about why, from a jury instruction standpoint, it is to a plaintiffs' advantage to bring both a strict liability and a negligence claim, stating that:

At some points the *Chapman* court indicates it is to plaintiffs' benefit to pursue only one theory and in other points, the court indicates that it is to plaintiffs' benefit to pursue both theories. Thus, the most that can be taken from this opinion is that it may behoove a plaintiff to elect one of the two theories—strict liability failure to warn or negligence—yet the court does not mandate that proposition.¹¹⁹

Judge Tinder's opinion, in *Spangler v. Sears, Roebuck & Co.*,¹²⁰ appears to admonish counsel against pursuing claims based on both strict liability and negligence in the same case:

Cases in which recovery is sought under the alternative theories of strict liability and negligence are marked by necessity of confusing and inconsistent jury instructions regarding such matter as comparative fault and the open and obvious danger defense. The failure to elect one or the other of these theories can result in an unnecessarily lengthy trial, a confused and unconvinced jury and a disappointed plaintiff.¹²¹

Following the lead of Judge Tinder in *Spangler*, Judge Young ultimately concluded in *Eve* that it might be in plaintiffs' best interest to elect to pursue only one theory when the case goes to trial, but that he simply could not grant Novartis' motion for summary judgment at the time it was presented.¹²²

Because Judge Young's decision does not specifically address the point, readers must assume that the court and the parties acknowledged that the post-1995 statutory language was inapplicable because *Eve*'s claim accrued in the days after *Eve* delivered her second child in October 1989, nearly six years

reasonableness of the manufacturer's action in selling the article without a warning. The article can have a degree of dangerousness because of a lack of warning which the law of strict liability will not tolerate even though the actions of the seller were entirely reasonable in selling the article without a warning considering what he knew or should have known at the time he sold it.

Phillips, 525 P.2d at 1039.

118. See *Eve*, 2001 U.S. Dist. LEXIS 4531 at *92-*93. The California case cited in *Chapman* is *Love v. Wolf*, 38 Cal. Rptr. 183, 197-98 (Ct. App. 1964).

119. *Eve*, 2001 U.S. Dist. LEXIS 4531 at *95.

120. 752 F. Supp. 1437 (S.D. Ind. 1990), *aff'd on reconsideration*, 759 F. Supp. 1337 (S.D. Ind. 1991).

121. *Eve*, 2001 U.S. Dist. LEXIS 4531 at *95-*96 (quoting *Spangler*, 752 F. Supp. at 1441 n.3).

122. *Id.* at *96.

before the 1995 amendments to the IPLA took effect.¹²³ The General Assembly's 1995 amendments to the IPLA, which eliminate strict liability as a theory of product liability recovery in warning defect and design defect cases, should clear up the confusion in cases such as *Eve*. Indiana Code section 34-20-2-2 now provides that strict liability remains only in cases in which the theory of liability is a manufacturing defect.

II. LIMITATIONS AND REPOSE ISSUES

A. Limitations Issues

A claimant filing a tort-based product liability claim in Indiana must do so within two years after the cause of action "accrues."¹²⁴ The IPLA does not define the meaning of "accrues," but Indiana courts have adopted a discovery rule for the accrual of tort-based damage claims caused by an allegedly defective product.¹²⁵ Under the discovery rule a cause of action accrues when the claimant knew or should have discovered that he or she "suffered an injury or impingement, and that it was caused by the product or act of another."¹²⁶

On March 16, 2001, the Indiana Supreme Court issued a much-anticipated decision in *Degussa Corp. v. Mullens*.¹²⁷ The decision confirms that the date upon which a product liability claim accrues may depend upon a subjective analysis of a patient's communications with his or her doctor about when a causal link between a disease and the defendant's product is established. Lenita Mullens was an employee of an animal feed company,¹²⁸ "whose responsibilities

123. The 1995 amendments to the IPLA apply to causes of action that accrue after June 30, 1995. See Pub. L. No. 278-1995, § 16, 1995 Ind. Acts 4051, 4062. The important events triggering the claim in *Chapman* occurred between 1968 and 1970, several years before Indiana first enacted the IPLA in 1978. In deciding the issues before it, the *Chapman* court had to rely entirely upon the Restatement (Second) of Torts and other case law. As discussed above, the IPLA encompassed and governed both strict liability and negligence theories until 1983, when it was amended to govern only strict liability cases. In 1995, the legislature amended the IPLA to once again encompass and govern strict liability theories (for manufacturing defects) and negligence theories (for design defect and inadequate warnings).

124. IND. CODE § 34-20-3-1 (1998).

125. For an excellent discussion of accrual issues, see Nelson A. Nettles, *When Does a Product Liability Claim "Accrue"? When Is It "Filed"?*, IND. LAW., May 9, 2001, at 23.

126. *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84, 87-88 (Ind. 1985).

127. 744 N.E.2d 407 (Ind. 2001).

128. "Mullens began work for Grow Mix, a company formed by Richard Martin and Agritek Bio Ingredients, Inc. . . . to produce feed additive products for Agritek." *Id.* at 409. According to the court, there was some dispute about "whether Mullens was employed by Grow Mix or Gro-Tec," two separate companies "housed in the same building." *Id.* at 409 n.1. A significant portion of the opinion is related to Mullens' employment status in connection with application of the exclusive remedy for tort claims provided by the Indiana Worker's Compensation Act. The employment-related issues are not addressed in this survey.

included the physical mixing of liquid and dry ingredients to make animal feeds."¹²⁹ Three to four months after starting her job on September 4, 1990, "Mullens experienced a persistent cough that would diminish after she went home from work and on weekends."¹³⁰

Within the next year or so, Mullens sought treatment for what the treating physicians determined was bronchitis.¹³¹ After the antibiotics prescribed during her second trip to the emergency room did not clear up her condition, Mullens saw her general practitioner on March 17, 1992. During that visit, her general practitioner "told Mullens that it was possible that her coughing and breathing problems were work-related, but that there were several other potential causes."¹³² A few days later, on March 26, 1992, Mullens saw a pulmonary specialist who repeated that it was possible that work-related chemical exposure "was triggering an injury caused by something else." A follow-up with the same specialist on June 11, 1992, revealed that Mullens' "airflow obstruction and its relationship to her work environment" was still "unclear."¹³³ Mullens saw yet another pulmonary specialist in June 1992, who repeated what her general physician and her first specialist had said: "that chemical exposure at work *might* be related to her ailments but that other causes were possible."¹³⁴

On March 25, 1994, Mullens filed suit against her alleged employer and manufacturers, sellers, and suppliers of various chemical ingredients used in the animal feed. It was not until March 1994 that Mullens and her attorney "received the first unequivocal statement from any doctor that her lung disease was caused by exposure to chemicals consistent with those" used at her workplace.¹³⁵ The defendants joined in a motion for summary judgment, arguing that Mullens failed to assert her claims within the two-year statute of limitations.¹³⁶ The trial court

129. *Id.* at 409.

130. *Id.*

131. *See id.* Mullens was treated for bronchitis in March 1991 and again in February 1992. *Id.*

132. *Id.*

133. *Id.* While Mullens was working with the pulmonary specialist in April of 1992, representatives of Degussa Corporation "visited her at work and told her that their product could not be causing her medical problems." *Id.* Degussa produced "one of the ingredients used in making the feeds." *Id.* at 409 n.2.

134. *Id.* at 409 (emphasis added).

135. *Id.* at 409-10.

136. Agritek also filed a motion to dismiss Mullens' tort claims against it, claiming that Mullens was an employee and, therefore, "the Indiana Worker's Compensation Act provided her exclusive remedies for work-related injuries on the job." *Id.* at 410. The trial court's denial of Agritek's separate motion is also the subject of a large portion of the opinion. Interestingly, Justice Rucker did not participate because he had been part of the court of appeals panel that decided the case at that level. That turned out to be significant because the justices split two to two on the question of whether the Worker's Compensation Act precluded Agritek's tort liability to Mullens. *Id.* at 409. As such, the trial court's denial of Agritek's motion to dismiss was affirmed. *Id.* As explained *supra*, this survey does not address the employment-related issues. *See supra* note 128.

denied the motions, but the court of appeals reversed after concluding that Mullens failed to file her claims within the limitations period.¹³⁷ The Indiana Supreme Court affirmed the trial court, concluding that Mullens' timely filed her claim because it accrued sometime after she began seeing the second specialist.¹³⁸

The *Degussa* court began its analysis by drawing a comparison between the facts before it and those presented in recent medical malpractice cases. The court initially agreed with the court of appeals that "a plaintiff need not know with certainty that malpractice caused his injury, to trigger the running of the statutory time period."¹³⁹ According to the court, "[o]nce a plaintiff's doctor expressly informs the plaintiff that there is a 'reasonable possibility, if not a probability' that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law."¹⁴⁰ The *Degussa* court further explained that

[w]hen a doctor so informs a potential plaintiff, the plaintiff is deemed to have sufficient information such that he or she should promptly seek "additional medical or legal advice needed to resolve any remaining uncertainty or confusion" regarding the cause of his or her injuries, and therefore be able to file a claim within two years of being informed of a reasonably possible or likely cause. An unexplained failure to seek additional information should not excuse a plaintiff's failure to file a claim within the statutorily defined time period.

Although "events short of a doctor's diagnosis can provide a plaintiff with evidence of a reasonable possibility that another's" product caused his or her injuries, a plaintiff's mere suspicion or speculation that another's product caused the injuries is insufficient to trigger the statute.¹⁴¹

In applying the foregoing standard to the case before it, the court recognized that although Mullens "might have suspected that a chemical from work was the cause of her problems when she first visited" her general practitioner on March 17, 1992, the best that the doctor could do was emphasize that there was "a range of potential causes."¹⁴² Indeed, telling a patient that a particular product or act is but one of several possible causes of an injury triggers a "complex of factually and legally relevant questions about how the physician conveyed the information to the patient and what emphasis the physician placed on the potentially tortious cause over other causes."¹⁴³ It was undoubtedly important to the court that Mullens "diligently followed" her doctor's recommendations, "undergoing further tests and attempting to gather information" about her condition and its

137. *Degussa*, 744 N.E.2d at 410.

138. *Id.* at 408-09.

139. *Id.* at 411.

140. *Id.* (quoting *Van Dusen v. Stotts*, 712 N.E.2d 491, 499 (Ind. 1999)).

141. *Id.* at 411 (citations omitted).

142. *Id.*

143. *Id.*

possible cause or causes before filing suit.¹⁴⁴ The *Degussa* court concluded that

[o]n March 17, 1992, Mullens merely suspected that work products had something to do with her illness and [her general practitioner] said nothing to confirm, deny, or even strengthen her suspicions. In light of the ongoing medical consultation that Mullens undertook between March 17, 1992, and March 25, 1994, the date Mullens filed her complaint, we do not believe that the statute was triggered as late as March, 1994, as argued by Mullens. However, we also see nothing in the record to indicate that on March 17, 1992 (or even in the following eight days that would have been outside of the statutory period), Mullens's physicians had yet informed her that there was a reasonable possibility, if not probability, that her ailments were caused by work chemicals.¹⁴⁵

In addition to the important holding in *Degussa*, practitioners should be aware that judges on the Indiana Court of Appeals continue to disagree about whether the filing of a summons after the expiration of the statute of limitations constitutes the timely filing of the lawsuit. In *Ray-Hayes v. Heinemann*,¹⁴⁶ the parent and natural guardian of a child injured in an automobile accident sued both the driver of the vehicle and two entities allegedly involved in its manufacture and design. The plaintiff alleged that her daughter was injured while riding as a passenger in a 1991 Nissan Sentra driven by the defendant, Heinemann. She contended that Heinemann fell asleep at the wheel, resulting in a collision with a cement culvert wall.¹⁴⁷ The accident occurred on October 21, 1997. Plaintiff filed the initial complaint against Heinemann on July 22, 1998. On September 13, 1999, plaintiff amended her complaint to include two entities alleged to be responsible for a defective restraint system, Nissan North America, Inc. and Nissan Motor Company, Ltd. (the "Nissan defendants"). The summonses for those two defendants were not filed with the court until January 21, 2000.¹⁴⁸

The Nissan defendants filed a motion to dismiss because Hayes failed to file the summons relating to them until after the statute of limitations had expired (on October 21, 1999). Citing *Fort Wayne International Airport v. Wilburn*,¹⁴⁹ the trial court agreed and dismissed the Nissan defendants. The court of appeals reversed, pointing out that Rule 3 of the Indiana Rules of Trial Procedure provides that "[a] civil action is commenced by filing a complaint with the court or such equivalent pleading or document as may be specified by statute."¹⁵⁰ Because the plaintiff in *Ray-Hayes* filed her complaint within the applicable

144. *Id.*

145. *Id.* at 411-12.

146. 743 N.E.2d 777 (Ind. Ct. App. 2001), *vacated by* 760 N.E.2d 172 (Ind.), *rev'd on reh'g*, 768 N.E.2d 899 (Ind. 2002).

147. *Id.*

148. *Id.* at 777-78.

149. 723 N.E.2d 967 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 237 (Ind. 2000).

150. *Ray-Hayes*, 743 N.E.2d at 779-80 (alteration by court).

statutory time period governing accrual of product liability actions,¹⁵¹ the majority determined that she complied with Rule 3 and that the trial court erred in dismissing her cause of action.¹⁵²

The majority opinion in *Ray-Hayes* is openly at odds with *Wilburn*, which earlier held that a plaintiff must tender the complaint, the summons, and the fee before the statute of limitations expires for the action to be deemed commenced. The dispute centers around the Indiana Supreme Court's decision in *Boostrom v. Bach*.¹⁵³ The *Wilburn* court overly relied upon *Boostrom* when it stated that "[t]he plaintiff, of course, controls the presentation of *all the documents necessary to commencement of a suit*: the complaint, the summons, and the fee. . . . [Plaintiff] thus filed two of the three items necessary to the commencement of her action."¹⁵⁴ The *Wilburn* court interpreted the *Boostrom* footnote to mean that commencement of all actions requires the presentation of a complaint, summons, and a fee before the statute of limitations expires.¹⁵⁵ The majority in *Ray-Hayes* disagreed, pointing out that *Boostrom* "involved a small claims action" and that it "should be limited . . . to its facts."¹⁵⁶ In addition, the *Ray-Hayes* court recognized that Rule 3 of the Indiana Rules of Trial Procedure contains no language requiring that the summons be filed before the statute of limitations expires.¹⁵⁷

Judge Sullivan's dissent in *Ray-Hayes* crystallizes the discord because, in his view, it is not within the court of appeals' prerogative to overrule what he termed "a clear and unmistakable ruling of the Indiana Supreme Court."¹⁵⁸ Judge Sullivan wrote that the court in *Wilburn* recognized that *Boostrom* was a small claims matter, but pointed out that the rules governing small claims actions consider the complaint or the notice of claim to be the summons, and, as such, the plaintiff in small claims litigation "is not required to tender a separate summons to the court for issuance by the Clerk."¹⁵⁹

151. "[A] product liability action must be commenced: (1) within two (2) years after the cause of action accrues" IND. CODE § 34-20-3-(b) (1998).

152. *Ray-Hayes*, 743 N.E.2d at 780. The majority in *Ray-Hayes* acknowledged that Rule 4(B) requires the filing of a summons contemporaneously with the filing of a complaint. *Id.* The majority also acknowledged that *Ray-Hayes* failed to comply with Rule 4(B)'s contemporaneous filing requirement. *Id.* However, the trial court had explicitly dismissed the case pursuant to the holding in *Wilburn* and the court of appeals' failure to tender the summonses within the limitations period was technically not a per se violation of Rules 3 and 4(B). *See id.*

153. 622 N.E.2d 175 (Ind. 1993).

154. 723 N.E.2d at 968 (emphasis and omission by court) (quoting *Boostrom*, 622 N.E.2d at 177 n.2).

155. *See id.*

156. *See Ray-Hayes*, 743 N.E.2d at 779.

157. *Id.* at 779-80.

158. *Id.* at 781 (Sullivan, J., dissenting).

159. *Id.*

Judge Sullivan wrote:

Nevertheless, our Supreme Court clearly and unmistakably used terminology applicable to commencement of a suit under the Rules of Trial Procedure. In doing so, it left no doubt that in normal civil litigation the 'documents necessary to the commencement of a suit: the complaint, *the summons*, and the fee' must all be filed.¹⁶⁰

Judge Sullivan concluded that the plaintiff simply failed to commence suit without the tender of a summons to the court for issuance and that the statute of limitations barred plaintiffs' claim because it expired before they "commenced" suit.¹⁶¹

On January 2, 2002, the court granted transfer of the *Ray-Hayes* case. The court of appeals' decision in *Ray-Hayes* was vacated, the trial court's dismissal affirmed, and the supreme court reversed itself on rehearing.¹⁶²

B. Repose Issues

Indiana Code section 34-20-3-1 provides, in relevant part, that "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."¹⁶³ Practitioners generally refer to the latter of those clauses as the product liability statute of repose. In last year's decision in *McIntosh v. Melroe Co.*,¹⁶⁴ the Indiana Supreme Court held that application of the statute of repose does not violate the Indiana Constitution.¹⁶⁵ In the wake of that landmark pronouncement, several court of appeals opinions addressed statute of repose issues during the survey period. All of those opinions involved product liability cases alleging injury as the result of exposure to asbestos products. In January 2002, the Indiana Supreme Court heard oral argument in the case of

160. *Id.* (quoting *Boostrom v. Bach*, 622 N.E.2d 175, 177 n.2 (Ind. 1993)) (emphasis by court).

161. *Id.* at 782 (Sullivan, J., dissenting).

162. *See* 760 N.E.2d 172 (Ind.), *rev'd on reh'g*, 768 N.E.2d 899 (Ind. 2002).

163. IND. CODE § 34-20-3-1(b) (1998). The same section also provides that "if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues." *Id.* § 34-20-3-1. As the statute makes clear, a claimant must bring a product liability action in Indiana within two years after it accrues, but in any event, not longer than ten years after the product is first delivered to the initial user or consumer. Such is true unless the action accrues in the ninth or tenth year after delivery, in which case the full two-year period is preserved, commencing on the date of accrual. Accordingly, the longest possible time period in which a claimant may have to file a product liability claim in Indiana is twelve years after delivery to the initial user or consumer, assuming accrual at some point in the twelve months immediately before the tenth anniversary of delivery.

164. 729 N.E.2d 972 (Ind. 2000).

165. *Id.* at 973.

Allied Signal, Inc. v. Ott. Practitioners anticipate that the *Ott* decision will help resolve the repose issue once and for all. This survey reviews those court of appeals decisions handed down during the survey period. Next year's survey period promises some more definitive answers in this area.

Product liability cases involving asbestos products are unique in several ways, not the least of which is the manner in which the legislature chose to address the applicable repose period. Indiana Code section 34-20-3-2 provides that "[a] product liability action that is based on: (1) property damage resulting from asbestos; or (2) personal injury, disability, disease, or death resulting from exposure to asbestos; must be commenced within two (2) years after the cause of action accrues."¹⁶⁶ That exception applies, however, "only to product liability actions against: (1) persons who mined and sold commercial asbestos; and (2) 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."¹⁶⁷

The crux of the continuing controversy is the phrase "persons who mined and sold commercial asbestos." Plaintiffs argue that the "and" should be read as an "or," while defendants contend that the statute creates an exception to the limitations and repose periods only for claims against those entities that *both* mined *and* sold commercial asbestos.¹⁶⁸ There is also a debate about the intended meaning of the term "commercial asbestos."

In the statute of repose context, courts have answered nearly all of the questions raised in favor of the plaintiffs. *Black v. ACandS, Inc.*,¹⁶⁹ *Poirier v. A.P. Green Services, Inc.*,¹⁷⁰ *Fulk v. Allied Signal, Inc.*,¹⁷¹ *Parks v. A.P. Green*

166. IND. CODE § 34-20-3-2(a) (1998). The statute further provides that an action "accrues on the date when the injured person knows that the person has an asbestos related disease or injury" and that the "subsequent development of an additional asbestos related disease or injury . . . is a separate cause of action." *Id.* § 34-20-3-2(a)(2)-(b).

167. *Id.* § 34-20-3-2(d).

168. Three years ago, in *Sears Roebuck & Co. v. Noppert*, 705 N.E.2d 1065 (Ind. Ct. App. 1999), the court of appeals addressed the applicability of the ten-year product liability statute of repose in the context of a claim for alleged exposure to asbestos. The *Noppert* court did so as part of a larger discussion about the timeliness of a motion to correct errors pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure. Part of the *Noppert* court's analysis concluded that, "as a matter of law, the Nopperts [did] not have a meritorious defense" because the exception to the ten-year product liability statute of repose contained in Indiana Code section 34-20-3-2 applies only to claims against persons who mined and sold commercial asbestos and against funds described in that section. *Id.* at 1067-68 & n.6. With respect to the first category of defendants (miners and sellers), the court made it clear that the entities to which the statute applies are entities that both mined *and* sold commercial asbestos, stating that "while courts in Indiana have on occasion construed an 'and' in a statute to be an 'or,' we find that there is no ambiguity in this statute requiring such an interpretation." *Id.* at 1068.

169. 752 N.E.2d 148 (Ind. Ct. App. 2001).

170. 754 N.E.2d 1007 (Ind. Ct. App. 2001).

171. 755 N.E.2d 1198 (Ind. Ct. App. 2001).

Industries, Inc.,¹⁷² and *Allied Signal, Inc. v. Herring*¹⁷³ all involve workers or their estates who claimed injury or death as the result of working with or around asbestos-containing products. Those claimants sued sellers of asbestos-containing products, alleging damages caused by inhalation of asbestos dust. In each case, a majority of the judges held that the exception to the IPLA repose period, created by section 34-20-3-2, applies to entities that mine commercial asbestos, even if they do not sell it, and to entities that sell commercial asbestos, even if they do not mine it. The following language from the majority opinion in *Black* provides the underpinning for the rulings:

Clearly, the intent of the legislature in enacting § 34-20-3-2 was at least in part to acknowledge the long latency period of asbestos-related injuries. Without the § 34-20-3-2 exception, the statute of limitations and statute of repose would be meaningless for the vast majority of people harmed by exposure to asbestos. Asbestos-related injuries would truly be a wrong without a remedy. Equally clear is that the legislature thus could not have intended by enacting § 34-20-3-2 to so severely limit the means of recovery.¹⁷⁴

Judge Mathias authored a lengthy dissenting opinion in *Black*, concluding that the statute of repose on its face is unambiguous and clearly applies only to those companies who both mined and sold commercial asbestos, not all sellers of asbestos-containing products.¹⁷⁵ In doing so, Judge Mathias found two recent

172. 754 N.E.2d 1052 (Ind. Ct. App. 2001).

173. 757 N.E.2d 1030 (Ind. Ct. App. 2001).

174. 752 N.E.2d at 154. While the court of appeals was considering the *Black* case, groups interested in the issues raised in that and other related cases sought to address it in the General Assembly. House Bill 1757, first introduced in the Indiana House of Representatives on January 17, 2001, was designed to change the asbestos statute of repose in Indiana Code section 34-20-3-2. The proposed modifications sought to expand the potential pool of asbestos defendants by allowing claims against mere sellers of asbestos-containing products as opposed to “persons who mined and sold commercial asbestos.” The bill went to House committee where it passed unopposed and then passed the House of Representatives on March 6, 2001. When members of the defense bar learned about the bill, they opposed it in the Senate. The proposed legislation failed in Senate committee.

175. *Id.* at 158 (Mathias, J., dissenting). Judge Mathias wrote:

The two verbs “mined” and “sold” are conjoined by the coordinating conjunction “and.” The use of “and” alone is enough to, and does, conjoin the verbs “mined” and “sold” into a single verb element within the statute’s complex noun phrase. The conjoined verbs “mined and sold” modify “persons” through the relative pronoun “who,” which specifies the action related to, and thereby helps to define, the “persons” that are the subject of the complex noun phrase. In light of its language and grammatical structure, I conclude that section two is unambiguous.

In contrast, the majority alters the statutory language at issue by inserting the phrase “persons who” before the statute’s existing language, “sold commercial asbestos.” Only when words are considered to have been palpably omitted should the court add those words into the statute. I cannot reach that conclusion here. The

court of appeals' opinions "instructive,"¹⁷⁶ distinguished an opinion written by the Indiana Supreme Court,¹⁷⁷ and asserted that it was not the court's prerogative to adjudicate legislative policy determinations.¹⁷⁸ In addition, Judge Mathias concluded that Indiana Code section 34-20-3-2 does not violate either article I, section 12 or article I, section 23 of the Indiana Constitution.¹⁷⁹

Judge Mathias also dissented from the majority's opinions in *Poirier* and in *Fulk* for the same reasons stated in his dissent in *Black*.¹⁸⁰

The opinion in *Jurich v. Garlock, Inc.*¹⁸¹ ultimately determines that the statute of repose is inapplicable but gets there in a peculiar way. Although the

majority's grammatical interpretation is not the product of divination of "clearly contrary legislative intent" so as to properly fall within the extremely limited sanction of *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 526, 418 N.E.2d 207, 211 (1981).

Id. at 158-59 (citations omitted).

176. *Id.* at 159. The two cases that Judge Mathias found "instructive" were *Novicki v. Rapid-American Corp.*, 707 N.E.2d 322 (Ind. Ct. App. 1999), and *Sears Roebuck & Co. v. Noppert*, 705 N.E.2d 1065 (Ind. Ct. App. 1999). The *Noppert* court determined that defendant "Sears was not a miner of asbestos" and that "the statutory exception to the statute of repose for asbestos-related claims applies only when the defendants are 'miners and sellers of commercial asbestos.'" *Black*, 752 N.E.2d at 159 (Mathias, J., dissenting) (quoting *Noppert*, 705 N.E.2d at 1068) (emphasis by court). Similarly, the *Novicki* court determined that the asbestos statute of repose applies "only to cases in which the defendant both mined and sold commercial asbestos." *Id.* (quoting *Novicki*, 707 N.E.2d at 324). Judge Mathias disagreed with the majority's characterization of the determinations as "dicta." *Id.*

177. Judge Mathias distinguished *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989), because IND. CODE § 33-1-1.5-5.5 (1993) (the predecessor of IND. CODE § 34-20-3-2 (1998)) went into effect after the facts giving rise to the decision arose and because it was limited by its own terms "to the precise factual pattern presented," i.e., an action against an asbestos mining company filed prior to the enactment of [IND. CODE § 34-20-3-2]." *Black*, 752 N.E.2d at 160 (Mathias, J., dissenting).

178. *Id.* On this point, Judge Mathias wrote:

Neither the majority nor I can rightfully claim to fully know what the General Assembly "clearly" intended when it drafted, considered and enacted the statutory language at issue. However, I must reiterate that when a statute is unambiguous, "we may not ignore the clear language of a statute, regardless of our view as to its wisdom." The legislature has wide latitude in determining public policy, and we may not substitute our own policy judgment for that of the legislature. "To the contrary, it is the duty of the courts to interpret a statute as they find it, without reference to whether its provisions are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill conceived."

Id. at 160-61 (citations omitted).

179. *Id.* at 161-62.

180. See *Fulk v. Allied Signal, Inc.*, 755 N.E.2d 1198, 1207 (Ind. Ct. App. 2001) (Mathias, J., dissenting); *Poirier v. A.P. Green Servs., Inc.*, 754 N.E.2d 1007, 1013 (Ind. Ct. App. 2001) (Mathias, J., dissenting).

181. 759 N.E.2d 1066 (Ind. Ct. App. 2001).

court recognized as “reasonable” the *Black* majority’s conclusion, it disagreed that the defendants sold “commercial asbestos.”¹⁸² The *Jurich* court determined that the defendants sold asbestos-containing products, not “commercial asbestos,” which, in its view, “refers to either ‘raw’ or processed asbestos that is incorporated into other products.”¹⁸³ Accordingly, the *Jurich* court concluded that the General Assembly did not intend the exception to the IPLA’s statute of repose to apply to defendants that merely sold asbestos-containing products.¹⁸⁴

The *Jurich* court nevertheless concluded that the defendants could not use the IPLA’s statute of repose to bar the claim because it violates article 1, section 12 of the Indiana Constitution as applied.¹⁸⁵ The salient constitutional question was whether the Jurichs had a vested right in their claim.¹⁸⁶ The *Jurich* court determined that they did, although it recognized what it called the “axiomatic principle” that there is no vested or property right in any common law rule and that “the General Assembly can make substantial changes to the existing law without infringing on citizen rights.”¹⁸⁷ The “key distinction,” according to the *Jurich* court, was that the Jurichs had a vested right, but “not in a rule of common law in the abstract.”¹⁸⁸ Rather, the claim was vested because Nicholas Jurich had been injured by the defendant’s products “at a time when Indiana courts recognized common law product liability actions without an equivalent to the later-enacted [I]PLA’s statute of repose and thus without reference to the length of time a product had been in the stream of commerce.”¹⁸⁹ The court further explained:

Mr. Jurich allegedly inhaled and was injured by asbestos dust from defendants’ products for at least twenty-five years before the [I]PLA’s effective date, from 1953 to 1978. During this period of protracted exposure to asbestos, there was no equivalent to the [I]PLA’s statute of repose, which places a strict time limitation on bringing product liability claims based on a product’s age that did not exist at common law. To the extent his twenty-five years of asbestos exposure before the [I]PLA’s effective date contributed to Mr. Jurich’s later development of mesothelioma, the statute of repose cannot constitutionally be used to bar claims stemming from that exposure. Otherwise, the Jurichs’ valid claims under common law, which could not be known for many years, would be effectively retroactively barred by the [I]PLA and their vested right to a complete tort remedy would be taken away by the legislature.

... Such a time limitation is an unreasonable legislative impediment

182. *Id.* at 1069-71.

183. *Id.* 1071.

184. *Id.*

185. *Id.* at 1077.

186. *See id.* at 1074-75.

187. *Id.* at 1075-76 (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 978 (Ind. 2000)).

188. *Id.* at 1076.

189. *Id.*

on the bringing of an otherwise valid claim, due to the very long latency period of the development of asbestos-related diseases and the impossibility of the plaintiff's knowing whether such a disease is slowly progressing in his or her body. This represents a denial of justice that is inconsistent with Article I, Section 12 of the Indiana Constitution, as interpreted by *Martin v. Richey*.¹⁹⁰

As of this writing, these issues are either before the Indiana Supreme Court or are pending a decision on transfer in *Black, Jurich, and Herring*.¹⁹¹ As noted earlier, on November 20, 2001, the Indiana Supreme Court in the case of *Allied Signal, Inc. v. Ott*¹⁹² accepted jurisdiction of an Allen Superior Court interlocutory order denying motions for summary judgment after finding, like *Jurich*, that Indiana Code section 34-20-3-2 violates article I, sections 12 and 23, "as applied to asbestos cases only."¹⁹³ In light of the reasoning and implications of these decisions, as well as the discord among court of appeals judges, highlighted by Judge Mathias's dissents in *Black, Poirier, and Fulk*, the Indiana Supreme Court has agreed to consider the constitutionality of the asbestos statute of repose. For those same reasons, it seems likely that the Indiana Supreme Court will consider and resolve the statutory construction issue as well.

Two unpublished federal decisions also may be helpful to Indiana practitioners who have cases that involve repose issues. In the first case, *Miller v. Honeywell International Inc.*,¹⁹⁴ a Bell UH-1 helicopter crashed on March 1, 1997, while on an Indiana National Guard training mission. The plaintiffs are the crew members aboard the helicopter as well as the estate of the pilot killed in the crash. Plaintiffs alleged that "the failure of the forward reduction gear assembly

190. *Id.* at 1076-77.

191. In *Black*, the court of appeals denied appellees joint petition for rehearing on December 10, 2001, and on January 15, 2002, the case was transmitted on transfer to the Indiana Supreme Court. In *Jurich*, the petition to transfer was filed on November 19, 2001. The court of appeals in *Herring* denied appellants' petition for rehearing on January 14, 2002, and thereafter appellants filed a petition to transfer on February 13, 2002. The same issues are pending transfer in yet another case, *Harris v. A.C. & S., Inc.*, 766 N.E.2d 383 (Ind. Ct. App. 2002), a case decided after the survey period.

192. Supreme Court Cause Number 02S04-0110-CV-599; Court of Appeals Cause Number 02A04-0110-CV-462.

193. Order at 1 (Nov. 20, 2001). The trial judge entered his order on July 20, 2001. *Id.* Pursuant to Appellate Rule 14(B)(1), the trial court on September 26, 2001, certified its July 20 order for interlocutory appeal. *Id.* In accordance with Appellate Rules 5(B) and 14(B)(2), Allied Signal filed a motion asking the court of appeals to accept the interlocutory appeal and a petition to have the Indiana Supreme Court assume immediate jurisdiction over the matter pursuant to Appellate Rule 56(A). *Id.* In the supreme court's order accepting jurisdiction, the court noted that had the order "been entered as a final judgment," there would have been jurisdiction pursuant to Appellate Rule 4(A)(1)(b). *Id.*

194. IP 98-1742 C-M/S, 2001 U.S. Dist. LEXIS 5574, Prod. Liab. Rep. (CCH) ¶ 16,095 (S.D. Ind. Mar. 7, 2001).

component of the helicopter's engine" caused the accident.¹⁹⁵ That component contained "three planetary gears, . . . all mounted in a carrier assembly unit."¹⁹⁶ One of the planetary gears allegedly failed, "breaking into several pieces and causing the crash."¹⁹⁷

Honeywell Corporation is the successor-in-interest to the company that originally built the engine in 1971 and sold it to the U.S. Army.¹⁹⁸ In 1977, the Army inspected the carrier assembly involved in the crash before placing it in inventory until 1990, when the Army installed it in the helicopter that crashed during a rebuild of the engine.¹⁹⁹ The Missouri National Guard overhauled the engine again in 1996, installing "new planetary gears and roller bearings."²⁰⁰

Honeywell argued first that it could not be held liable for alleged design or manufacturing defects involving engine components that it manufactured before 1987 because the IPLA precludes causes of action that accrue "more than ten years after a product is sold."²⁰¹ Honeywell also argued that it could not be held liable for "alleged defects in the planetary gears that were used as replacement parts within the ten year" repose period "because it neither manufactured nor sold those replacement gears to the Army."²⁰² Plaintiffs countered that the IPLA does not bar their cause of action against the original manufacturer because the engine involved was rebuilt within ten years of the accident.²⁰³ Plaintiffs also argued that "even if Honeywell was not the primary manufacturer of the replacement planetary gears, [it] was still responsible for providing, and then revising, the design specifications that were used in making them."²⁰⁴

The *Miller* court agreed with Honeywell's first argument, holding that the IPLA bars all of plaintiffs' claims "that are based solely on alleged pre-sale defects in the engine or carrier assembly."²⁰⁵ The court disagreed with Honeywell's second argument, however, denying its motion for summary judgment regarding defects "in the replacement planetary gears or any alleged duty to warn regarding potential dangers to plaintiffs who use the replacement gears in the expected manner."²⁰⁶

The *Miller* decision is helpful to practitioners because it effectively delineates the difference between the repose and limitations periods. It also recognizes the two situations in which a manufacturer can be liable even beyond the ten years after delivery to the initial user or consumer: (1) when the

195. *Id.* at *4.

196. *Id.* at *4-*5.

197. *Id.* at *5.

198. *Id.*

199. *Id.* at *6.

200. *Id.* at *6-*7.

201. *Id.* at *2.

202. *Id.* at *2-*3.

203. *Id.* at *3.

204. *Id.*

205. *Id.* at *3-*4.

206. *Id.* at *4.

manufacturer supplies replacement parts for the product and the replacement parts are the cause of the plaintiff's injury;²⁰⁷ and (2) when the manufacturer rebuilds the product, to the point of significantly extending the life of the product and rendering it in like-new condition.²⁰⁸

In the case before the court, Honeywell sold the engine in question to the Army in 1971, which is when the statute of repose began to run. The facts did not establish that Honeywell rebuilt the engine and then reinjected it into the stream of commerce or that Honeywell exercised any significant control over the rebuilding process.²⁰⁹ Indeed, the Army rebuilt the engine and continued to use it for its own purposes. As such, the court rejected plaintiffs' argument that the original manufacturer should be held liable for defects in the rebuilt product and therefore "the statute of repose clock should begin to run again from the time the rebuilt product is delivered to its initial consumer."²¹⁰ Even if the service performed on the carrier assembly in 1977 constituted a rebuild and that Honeywell's predecessor "exercised significant control over the rebuilding process," the statute of repose would have expired by 1987.²¹¹ Thus, Honeywell could not be liable for pre-sale alleged defects in the engine or carrier assembly notwithstanding the 1990 and 1996 rebuilds.

The planetary gears, however, were a different story because they were replacement parts.²¹² Because a replacement part is a manufactured product in its own right, Honeywell and its co-defendants could be held liable "to the extent that [they were] a manufacturer of the replacement planetary gears and the planetary gears themselves were defective."²¹³ Because issues of fact remained concerning supply, exercise of control, inspection, and design specifications of the planetary gears, Judge McKinney denied summary judgment to the defendants on the statute of repose issue with respect to the planetary gears.²¹⁴

Judge McKinney was, nevertheless, "troubled by the possibility implicit in [its] discussion that a designer of a product could find itself faced with unending liability for its original design, contrary to the Indiana legislature's apparent intent."²¹⁵ Judge McKinney continued:

207. In such a situation, the ten-year statute of repose begins to run from the time the manufacturer supplied the parts. *See Richardson v. Gallo Equip. Co.*, 990 F.2d 330, 331 (7th Cir. 1993); *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1284 (7th Cir. 1985).

208. In this situation, the statute of repose begins to run from the time the rebuilt product is delivered into the stream of commerce. *Miller*, 2001 U.S. Dist. LEXIS 5574 at *19 (citing *Whitaker v. T.J. Snow Co.*, 953 F. Supp. 1034 (N.D. Ind. 1997), *aff'd*, 151 F.3d 661 (7th Cir. 1998); *Denu v. W. Gear Corp.*, 581 F. Supp. 7 (S.D. Ind. 1983)).

209. *See id.* at *21-*22.

210. *Id.* at *21-*23.

211. *Id.* at *24.

212. *See id.* at *27.

213. *Id.*

214. *Id.* at *31-*35.

215. *Id.* at *30.

If, for example, a third party manufacturer bought the design rights, and then the original designer had nothing more to do with the manufacturing of the product from that day on, it would seem to defeat the whole point of the statute of repose for the original designer to continue to be held responsible indefinitely for actions by the third party over which it had no further control

However, this case does not present the proper set of facts with which to test the issue under Indiana law. Although the precise contractual relations and obligations between the Army, Precision Gear, and [Honeywell] are unclear to the Court, it is evident from the record that all three parties continued to cooperate in manufacturing and testing the safety of the planetary gears that Precision was producing. It is simply not the case that [Honeywell] provided the Revision AK blueprints in 1986 and then had nothing more to do with manufacturing the planetary gears.²¹⁶

One final point unrelated to the repose issues should be made. According to the court, Honeywell's motion "encompasses liability for defects in design and manufacture, as well as liability for the duties to warn or to instruct about the proper use of these products."²¹⁷ In discussing the elements of and requirements for a cause of action under the IPLA, the court recognized that a plaintiff maintains a "strict liability" action against a product manufacturer if the product contains a defective²¹⁸ condition unreasonably dangerous to the user or

216. *Id.* at *30-*32. Judge McKinney added a few words about the interaction between the IPLA's statute of repose and the post-sale duty to warn. Although plaintiffs did not state it explicitly, according to Judge McKinney, plaintiffs seemed to be suggesting that the law should impose upon Honeywell a post-sale duty "to warn the Army of the problem" with the planetary gears and that "the statute of repose should begin to run from the moment" that Honeywell's predecessor "discovered what the problem was." *Id.* at *35. Judge McKinney wrote that the IPLA statute of repose "cannot be circumvented by asserting that the manufacturer continued to be negligent (indefinitely) for failing in its duty to warn of known dangers after the product was delivered to its initial user." *Id.* at *35-*36 (citing *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981)). He continued:

Therefore, the statute of repose for those defects began to run from the time that the defective product was delivered to the initial user. It follows that an inquiry into when [Honeywell] discovered the defect can have no relevance with regard to whether [its] exposure to liability for failure to warn has expired. All that matters is: when was the product, to which the duty to warn attached, first placed into the stream of commerce?

Id. at *36.

217. *Id.* at *2.

218. A product is considered defective under the IPLA if it contains physical flaws but also if the seller "fails to . . . give reasonable warnings of danger about the product; or give reasonably complete instructions on [its] proper use . . ." IND. CODE § 34-20-4-2 (1998); accord *Miller*, 2001 U.S. Dist. LEXIS 5574 at *15-*16.

consumer.²¹⁹ The court likewise recognized that before a manufacturer may be held "strictly liable," the user must have been "in the foreseeable class of persons who might be harmed, . . . the product must have reached the user without substantial alteration," and "the defective condition must have been present in the product at the time it was conveyed to the initial user or consumer."²²⁰ Because the court's explanation is intended to address those situations in which a manufacturer may be "strictly liable" and because the case before it involved alleged defects in manufacturing, design, and by virtue of inadequate warnings, the court's summary of Indiana law needs to be augmented. As noted in previous sections, the IPLA provides that claimants may pursue a "strict liability" theory only in cases in which the theory of liability is a manufacturing defect.²²¹ Thus, the court's discussion nicely sets out the elements of proof in a product liability case, but practitioners should not interpret those elements as applying only in "strict liability" (i.e., manufacturing defect) cases.

In the other federal case, *Land v. Yamaha Motor Corp.*,²²² the estate of a man who was killed in an explosion while trying to start a WaveRunner sued the manufacturer. The WaveRunner involved "was first sold or delivered to a consumer on July 28, 1987, more than ten years before the explosion," which occurred on June 25, 1998.²²³ After determining that Indiana law applied, the court held that the IPLA's ten-year statute of repose barred the claim.²²⁴ In doing so, the court rejected plaintiffs' attempt to circumvent the statute of repose by arguing that defendants breached duties to warn users of dangerous defects in the WaveRunner long after the original sale.²²⁵ Citing *McIntosh v. Melroe Co.*,²²⁶ Judge Hamilton also rejected plaintiffs' argument that the statute of repose violates article I, section 23 of the Indiana Constitution.²²⁷

III. TOXIC EXPOSURE SUMMARY JUDGMENT STANDARD

Indiana appellate courts handed down five important decisions addressing the summary judgment standard in cases in which product liability defendants argued that they were entitled to summary judgment because of a lack of evidence of exposure to their product. As was true with statute of repose issues, cases involving exposure to asbestos products are in the vanguard.

219. *Id.* at *14-*15.

220. *Id.* at *15.

221. See IND. CODE § 34-20-2-2 (1998).

222. No. IP 00-220-C H/G, 2001 U.S. Dist. LEXIS 2732, Prod. Liab. Rep. (CCH) ¶ 16,045 (S.D. Ind. Mar. 8, 2001), *aff'd*, 272 F.3d 514 (7th Cir. 2001).

223. *Id.* at *1.

224. *Id.* at *2.

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

226. 729 N.E.2d 972 (Ind. 2000).

227. *Land*, 2001 U.S. Dist. LEXIS 2732 at *10-*11. The Seventh Circuit affirmed Judge Hamilton in *Land v. Yamaha Motor Corp.*, 272 F.3d 514 (7th Cir. 2001), which was decided beyond the survey period.

In the asbestos context, claimants must properly identify the products to which they claim exposure in order to satisfy both the legal and factual causation requirements necessary for sustenance of their cases. Most practitioners refer to that threshold evidentiary process as "product identification." In this regard, resolution of a product identification summary judgment motion requires the court to determine whether there is, as a matter of law, sufficient product identification evidence for the trier of fact to sustain a finding of causation against a given defendant.

On September 10, 2001, the Indiana Supreme Court addressed the product identification issue in *Owens Corning Fiberglass Corp. v. Cobb*.²²⁸ Cobb, a former pipe fitter, sued more than thirty manufacturers or distributors of asbestos-containing products. As the case progressed toward trial, Cobb settled with some defendants and other defendants were otherwise dismissed.²²⁹ Cobb and Owens Corning Fiberglass Corp. ("OCF") filed cross-motions for summary judgment. Cobb's motion for summary judgment argued that OCF had not presented sufficient evidence to support its affirmative defenses, including its non-party defense.²³⁰ OCF's motion for summary judgment argued that "Cobb had failed 'to provide any evidence that he was exposed to asbestos-containing products manufactured or distributed' by [OCF]."²³¹ The trial court "denied without comment" OCF's motion for summary judgment.²³²

After suffering an adverse judgment at trial, OCF appealed the trial court's denial of summary judgment with respect to its product identification motion and the trial court's partial denial of its nonparty affirmative defense. The Indiana Court of Appeals reversed, remanding the case to the trial court with instructions to vacate the damage awards and to enter summary judgment in favor of OCF.²³³ On transfer, the Indiana Supreme Court affirmed the trial court's denial of OCF's motion for summary judgment.²³⁴

OCF argued that Cobb did not provide any evidence to prove that he had been exposed to asbestos-containing products that OCF manufactured or distributed. According to OCF, the record showed that "Cobb could not identify a single occasion at [sic] which he had been exposed to [OCF's] product."²³⁵ Cobb testified in his deposition that he had been on several job sites where Kaylo (the brand name of a line of OCF's insulation products) was used while he

228. 754 N.E.2d 905 (Ind. 2001).

229. *Id.* at 907, 914.

230. *See id.* at 907-08.

231. *Id.* at 908.

232. *Id.*

233. *See Owens Corning Fiberglass Corp. v. Cobb*, 714 N.E.2d 295, 303-04 (Ind. Ct. App. 1999), *trans. granted*, 735 N.E.2d 219 (Ind. 2000), and *vacated by* 754 N.E.2d 905 (Ind. 2001). The court of appeals' ruling rendered moot the nonparty defense issue.

234. 754 N.E.2d at 916. On the nonparty issue, the court reversed the trial court's grant of Cobb's motion for summary judgment with respect to co-defendant Sid Harvey, Inc., and it reversed the trial court's judgment in favor of Cobb. *Id.*

235. *Id.* at 909.

worked for Indianapolis Public Schools.²³⁶ He recalled seeing the boxes of Kaylo at some of the sites, but he never personally installed the products and he could not recall at which job sites he saw the boxes or the Kaylo being installed.²³⁷ Although Cobb did not install asbestos products, he testified that "he worked near others who did."²³⁸ Cobb also testified that he occasionally removed and repaired pipe covering previously installed by other crews, but he did not know what company manufactured the pipe covering he removed and repaired.²³⁹

According to the *Cobb* court, such evidence was sufficient to establish a genuine issue of material fact with respect to whether OCF's asbestos caused Cobb's injuries:

Cobb's testimony established that Cobb worked at multiple sites where asbestos products were used; Cobb worked near people installing pipe insulation containing asbestos; and boxes of Kaylo pipe insulation products were present on the work sites. We find it to be a reasonable inference, not conjecture or speculation, that the insulation from the Kaylo boxes was being installed at the worksites where it was present and not simply being stored there.²⁴⁰

Before the Indiana Supreme Court decided *Cobb* in September, the court of appeals already had issued two "product identification" opinions and handed down a third one just days after the release of the opinion in *Cobb*. Those cases

236. *Id.* at 909-10.

237. *Id.*

238. *Id.* at 909.

239. *Id.* at 910 & n.3.

240. *Id.* at 910. Because the court determined that Cobb presented sufficient evidence to establish a genuine issue of material fact "as to exposure," the court did not address whether OCF demonstrated "the absence of any genuine issue of fact as to a determinative issue." *Id.* at 909. (citing *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994)). The *Jarboe* citation is a significant occurrence because it will be interesting to see whether the Indiana Supreme Court is willing to modify the *Jarboe* standard in a toxic exposure case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the case out of which the now-famous federal summary judgment standard arose, was an asbestos case. As many product liability practitioners well know, such cases nearly always hinge on a claimant's ability to properly identify or recall the allegedly-offending product or products that caused or contributed to his or her injuries. The *Celotex* standard is helpful in achieving some judicial control over that type of litigation. Indiana's disavowal of *Celotex* occurred in a more "traditional" setting. Indeed, *Jarboe* was a wrongful discharge case. Thus, in cases in which product identification is an essential, threshold issue, Indiana courts may need to examine the propriety and utility of continuing to adhere to a *Jarboe* summary judgment standard. Clearly, the *Cobb* court did not need to address the issue in light of its ultimate conclusion. Practitioners should, however, be attuned to the fact that the justices are cognizant that the threshold evidence necessary to shift the movant's initial burden is a question separate and apart from the sufficiency of the non-movant's evidence to prove legal and factual causation.

are *Black v. ACandS, Inc.*,²⁴¹ *Poirier v. A.P. Green Services, Inc.*,²⁴² and *Parks v. A.P. Green Industries, Inc.*²⁴³ In all three instances, the courts did not have the benefit of the *Cobb* analysis. In all three instances, the court of appeals affirmed lower court decisions to grant summary judgment to defendants in cases presenting facts that are in some instances similar to *Cobb* and in some instances dissimilar.

The court in *Black* affirmed summary judgment with respect to four defendants that had filed product identification summary judgment motions.²⁴⁴ In doing so, the court of appeals articulated the following standard: "To avoid summary judgment, a plaintiff must produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product."²⁴⁵ That standard is consistent with the Seventh Circuit's standard found in *Peerman v. Georgia-Pacific Corp.*²⁴⁶ The panels in both *Poirier* and *Parks* used the same standard in determining, like *Black*, that the evidence against each defendant was speculative and insufficient to support the inference that the workers involved inhaled dust from any of the defendants' products.²⁴⁷

In the only case decided after *Cobb* during the survey period, *Fulk v. Allied Signal, Inc.*,²⁴⁸ nothing appears to have changed. On the product identification issue, the *Fulk* court cited the *Peerman* summary judgment standard in exactly the same manner as did the other panels in *Black*, *Poirier*, and *Parks*: the *Fulk* court required the plaintiff to "produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product."²⁴⁹ The

241. 752 N.E.2d 148 (Ind. Ct. App. 2001).

242. 754 N.E.2d 1007 (Ind. Ct. App. 2001).

243. 754 N.E.2d 1052 (Ind. Ct. App. 2001).

244. See 752 N.E.2d at 155, 157. The four defendants were Rapid-American Corp., Universal Refractories, ACandS, Inc., and Brand Insulations, Inc. The trial court's summary judgment was affirmed with respect to Rapid-American because the plaintiffs failed to timely respond to its motion. *Id.* at 155 n.8. For a more detailed explanation of the product identification evidence before the *Black* court with respect to the other three defendants, see *id.* at 155-56.

245. *Id.* at 155.

246. 35 F.3d 284, 287 (7th Cir. 1994) (applying Indiana law).

247. See *Poirier*, 754 N.E.2d at 1010-11; *Parks*, 754 N.E.2d at 1056-57. Just as in *Black*, the trial courts in *Poirier* and *Parks* granted summary judgment in favor of four separate defendants in each case on product identification grounds. The four defendants in *Poirier* were North American Refractories, ACandS, Inc., Kaiser Aluminum & Chemical, and Plibrico Sales & Services. 754 N.E.2d at 1013. For a more detailed explanation of the product identification evidence before the *Poirier* court with respect to each defendant, see *id.* at 1010-12. The four defendants in *Parks* were B.M.W. Constructors, Inc., Chicago Firebrick Co., Hunter Corp., and Morrison Constr. Co. 754 N.E.2d at 1061. For a more detailed explanation of the product identification evidence before the *Parks* court with respect to each defendant, see *id.* at 1056-58.

248. 755 N.E.2d 1198 (Ind. Ct. App. 2001). The court of appeals decided *Fulk* on September 14, 2001, only four days after the Indiana Supreme Court rendered its decision in *Cobb*. It is clear from the *Fulk* opinion that the panel was unaware of the *Cobb* decision.

249. *Id.* at 1203.

Fulk court took it one step further, however, by further explaining the inference necessary to establish causation: "This inference can be made only if it is shown the product, as it was used during the plaintiff's tenure at the job site, could possibly have produced a significant amount of asbestos dust and that the plaintiff might have inhaled the dust."²⁵⁰ The *Fulk* court ultimately affirmed the trial court's grant of summary judgment to all nine of the defendants against whom the issue was raised on appeal.²⁵¹ As was true in *Black, Poirier, and Parks*, plaintiff's product identification was "at best conjectural and insufficient to support the inference that the decedent inhaled dust from any of the defendants' products."²⁵²

The *Cobb* court seems conspicuously to have refused to articulate a specific summary judgment standard for asbestos toxic exposure cases. Whether the *Peerman* standard is close to what the *Cobb* court ultimately did probably is debatable. Regardless, the *Cobb* court appears to have missed an opportunity to provide a bit more stability for courts and practitioners who are handling toxic exposure cases. Although *Cobb* did not articulate a standard, the *Cobb* decision does not seem to dictate results different from those reached in the four cases decided by the court of appeals in *Black, Poirier, Parks, and Fulk*. Thus, practitioners and courts in the aftermath of *Cobb* simply will have to compare the facts of their individual cases to the facts in each of the five relevant cases, *Cobb, Black, Poirier, Parks, and Fulk*, and then either distinguish or favorably compare those facts to the ones at issue.

IV. EXPERT WITNESS EVIDENTIARY ISSUES

The significance of opinion witnesses in product liability cases is manifest. Opinion witnesses routinely testify about liability and medical causation issues in product liability litigation. As a result, product liability practitioners are quite interested in cases that address the evidentiary exclusion or admission of opinion witnesses. Arguably the leading Indiana case during the survey period that addressed opinion witness evidentiary issues is *Sears Roebuck & Co. v. Manuilov*.²⁵³ Three other cases decided during the survey period that are

250. *Id.*

251. *See id.* at 1206-07.

252. *Id.* at 1203. The nine defendants in *Fulk* were Allied Signal, Inc., Armstrong World Industries, A.O. Smith Corp., Bondex International, Combustion Engineering, Inc., Harbison-Walker Refractories, W.R. Grace & Co.-Conn., W.A. Pope & Co., and U.S. Gypsum. *Id.* at 1206-07. For a more detailed explanation of the product identification evidence before the *Fulk* court with respect to each defendant, see *id.* at 1203-06.

253. 742 N.E.2d 453 (Ind. 2001). In *Manuilov*, a jury awarded a high-wire performer \$1.4 million after he was injured in a fall at a Sears store. The court held that admission of testimony from two medical professionals on post-concussion syndrome, brain damage, causation, and vocational impairment issues was not an abuse of the trial court's discretion. *Id.* at 455, 457-59, 461-62. Importantly, the Indiana Supreme Court did not fully endorse a *Daubert* analysis, preferring to require only that the trial judge be satisfied that the testimony will assist the jury and

instructive on opinion witness issues are *Lennon v. Norfolk & Western Railway*,²⁵⁴ *Ollis v. Knecht*,²⁵⁵ and *Court View Centre, LLC v. Witt*.²⁵⁶ Because those cases do not involve substantive product liability issues, this survey does not address them in detail here. Nevertheless, practitioners in Indiana who have product liability cases that turn on opinion witness issues should be aware of *Manuilov, Lennon, Ollis, and Witt*.²⁵⁷

Product liability practitioners who wrestle with opinion witness issues should pay special attention to the court of appeals' opinion in *R.R. Donnelley & Sons Co. v. North Texas Steel Co.*²⁵⁸ In addition to the "sale of a product" issue

that the witness's general methodology is based on reliable scientific principles. *Id.* at 461. Beyond that, the accuracy, consistency, and credibility of an expert opinion is left for lawyers to argue and the jury to weigh. *Id.* With respect to the opinion witness issues, it is important to note that only two justices concurred in the plurality that ended up being the majority opinion. *Id.* at 463. Justice Sullivan concurred in result only. *Id.*

254. 123 F. Supp. 2d 1143 (N.D. Ind. 2000). In *Lennon*, the court excluded an opinion witness's testimony that trauma was not related to onset or exacerbation of multiple sclerosis (MS) because he did not conduct research or studies on MS, nor did he research the association between trauma and MS.

255. 751 N.E.2d 825 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 431 (Feb. 22, 2002). In *Ollis*, a jury awarded \$2.8 million to a plaintiff in a wrongful death action in which the defendant admitted liability. *Id.* at 827. The trial court excluded an economist offered by the defendant who was set to offer an opinion about loss of income using the "mirror image" approach. *Id.* at 830. The defendant argued on appeal that the economist's testimony was improperly excluded because it met the requirements of Rule 702(b), case law established that the discount rates were appropriate, his methodology had been published, and it was generally accepted by economists. *Id.* at 828-29. Although the court agreed that Rule 702(b) could apply to social sciences that follow the scientific method, the court did not believe that the defendant presented sufficient evidence supporting the economist's approach. *See id.* at 828-31.

256. 753 N.E.2d 75 (Ind. Ct. App. 2001). *Witt* is important because, although it is not a product liability case, it limits the long-standing rule that an owner of property is competent to give an opinion about the value of the property owned. There, the owner of a building destroyed in a fire sued the building's insurer, contending that the building's actual cash value exceeded \$1.5 million and that the insurer was liable for damages in excess of the \$750,000 paid. *Id.* at 78. The court of appeals held that the owner can testify about the value of property, but "there must be a basis for that valuation." *Id.* at 82. The court of appeals also held that the trial court properly excluded an expert's testimony as to value because he admitted on cross-examination that he lacked specific data on which to form an opinion about the actual cash value of the building, and because he had never been inside the building, nor had he examined the building's foundation, framing, or excavation report. *See id.* at 85-86. He admitted that his value was an approximation based on photos of the building, the comments of others, and guesswork. *Id.*

257. Although it is not published and has very limited precedential value, Judge Young's decision in *Eve v. Sandoz Pharmaceutical Corp.*, No. IP 98-1429-C-Y/S, 2001 U.S. Dist. LEXIS 4531 (S.D. Ind. Mar. 7, 2001), contains a quality discussion about *Daubert* issues and medical causation that practitioners may find useful. *See id.* at *40-*76.

258. 752 N.E.2d 112 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 433 (Feb. 22,

discussed *supra*, Part I.C, the court addressed several other important questions, including three that involve opinion witnesses. Recall that the *R.R. Donnelley* case involved the collapse of large metal storage racks at the R.R. Donnelley & Sons Co. ("RRD") facility in Warsaw, Indiana.²⁵⁹ RRD purchased the racks from Associated Material Handling Industries, Inc. ("Associated"), who had in turn purchased them from Frazier Industrial Co. ("Frazier"). Frazier designed the racks and contracted with North Texas Steel Co. ("NTS") "to manufacture the component parts."²⁶⁰ Frazier provided NTS with

written instructions on how to manufacture these parts. NTS received raw steel from the steel mill, and then cut, punched, welded, and painted the steel. Frazier instructed NTS to ship the component parts of the storage racks from its Texas plant to RRD's plant in Warsaw, Indiana, where the racks were to be erected. Associated supervised the installation of the racks²⁶¹

RRD sued NTS, Associated, and Frazier, claiming more than \$12 million in economic loss as a result of the collapsed racks and asserting product liability, breach of contract, and negligence claims.²⁶² Associated and Frazier settled before trial. The trial court granted summary judgment to NTS on the breach of contract and negligence claims, leaving the parties to try only the product liability claim against NTS.²⁶³ At trial, RRD argued that NTS defectively welded the rack's component parts.²⁶⁴ "NTS countered that the welds were sufficient to hold the load" and that the racks collapsed because "Frazier defectively designed the . . . system."²⁶⁵

The first opinion witness issue on appeal involved the testimony of an NTS witness named Raymond Tide.²⁶⁶ "Tide testified that the welds were not a primary cause of the rack collapse."²⁶⁷ Associated originally hired Tide as an expert but "did not designate him as a witness for trial" because it settled the case "before filing a witness list."²⁶⁸ "Before Associated settled, it gave a copy of Tide's preliminary report to counsel for NTS, RRD, and Frazier."²⁶⁹ Associated hired Tide as a consultant to review file materials and the collapse site, and to

2002).

259. *Id.* at 120. RRD used the racks to store catalogs. Most of the racks collapsed on June 14, 1994, during a shift change. *Id.* Because the accident occurred before June 30, 1995, the 1995 amendments to the IPLA do not apply.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *See id.* at 130.

267. *Id.*

268. *See id.* at 130-31.

269. *Id.* at 131.

evaluate RRD's potential claims against it.²⁷⁰ Tide's preliminary report "contained his analysis and conclusions regarding the cause of the rack collapse."²⁷¹ Associated distributed the report to further settlement negotiations.²⁷² After a hearing on the discoverability of Tide's opinion, the trial court "concluded that NTS had full discovery rights regarding Tide."²⁷³ RRD filed a motion in limine and objected to NTS using Tide as a witness.²⁷⁴ The trial court allowed Tide to testify.²⁷⁵

The court of appeals disagreed with the trial court's decision, determining that the trial court should have excluded Tide's testimony because it was based on a preliminary report he prepared for settlement negotiations and because its admission violated Rule 26(B)(4) of the Indiana Rules of Trial Procedure.²⁷⁶ With respect to its first conclusion, the court cited favorably the Fifth Circuit Court of Appeals' opinion in *Ramada Development Co. v. Rauch*.²⁷⁷ There, the court "upheld the district court's exclusion of a report that represented a collection of statements made in the course of compromise" negotiations.²⁷⁸ Although the court does not specifically refer to Rule 408 of the Indiana Rules of Evidence²⁷⁹ in the portion of the opinion discussing Tide's testimony, it is clear that the rule is one of the two bases for the court of appeals' conclusion that Tide's testimony was inadmissible.

The other basis for the court's decision is Indiana Trial Rule 26(B)(4). For "consulting experts" under Rule 26(B)(4)(b), the court wrote that "no discovery is permitted without 'a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.'"²⁸⁰ RRD argued that the "policy" behind Rule 26(B)(4)(b) "encourages parties to consult experts, discard experts should they choose to, and place those discarded experts beyond the reach of an opposing party."²⁸¹ After a review of *Reeves v. Boyd & Sons, Inc.*²⁸² and Professor

270. *Id.* Associated's counsel executed an affidavit explaining the purpose of Tide's engagement. *Id.* RRD submitted that affidavit in support of its motion in limine to exclude Tide's testimony. *Id.* Associated's counsel distributed Tide's preliminary report to counsel for RRD, Frazier, and NTS before RRD ever filed suit. *Id.*

271. *Id.*

272. *See id.* Associated's counsel stated in his affidavit that he took Tide to the mediation with him and distributed Tide's report to assist in the technical issues of the case and "in presenting arguments on behalf of Associated . . . during settlement negotiations." *Id.* (omission by court).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. 644 F.2d 1097 (5th Cir. 1981).

278. *R.R. Donnelley*, 752 N.E.2d at 131.

279. IND. EVIDENCE RULE 408.

280. *R.R. Donnelley*, 752 N.E.2d at 131.

281. *Id.* at 131-32.

282. 654 N.E.2d 864 (Ind. Ct. App. 1995), *trans. denied.*

Harvey's well-known treatise on Indiana practice,²⁸³ the *R.R. Donnelley* court agreed that Indiana requires a showing of exceptional circumstances before judges may allow discovery aimed at an expert who is not expected to be called as a witness at trial.²⁸⁴ In doing so, the court recognized that the purpose of Rule 26 was "largely developed around the doctrine of unfairness—designed to prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation."²⁸⁵ The court concluded that Tide was an advisory witness under Rule 26(B)(4)(b) because he "was retained by Associated in anticipation of litigation, but was never added to Associated's witness list because Associated settled" before filing one.²⁸⁶ In order to use Tide at trial, the court held that NTS had to show "exceptional circumstances," which NTS did not do.²⁸⁷

The second of the three opinion witness issues on appeal involved the trial court's exclusion of rebuttal testimony the plaintiff sought to offer through a witness named Daniel Clapp. Plaintiff's offered Clapp to rebut NTS's theory offered by one of NTS's witnesses that "the collapse was the result of a design defect" (the lack of tower bracing) and not poor welds.²⁸⁸ The trial court excluded Clapp's testimony because RRD failed to disclose timely that it would use Clapp, and rebuttal testimony "would violate the trial court's summary jury trial orders limiting the parties to theories presented at the summary jury trial."²⁸⁹

RRD first argued that it designated Clapp as an expert witness over a year before the parties engaged in a summary jury trial. NTS deposed Clapp before the summary jury trial. RRD claimed that it did not know about NTS's design expert until one week before the summary jury trial. Thereafter, RRD supplemented its expert interrogatory response, identifying Clapp as a rebuttal witness, after which NTS deposed Clapp a second time.²⁹⁰ RRD also argued that it did not violate the trial court's summary jury trial order because using Clapp to rebut NTS's theory (which it advanced for the first time at the summary jury trial) did not constitute the presentation of a new theory.²⁹¹ Rather, RRD argued that it could not have formulated its rebuttal any earlier than the summary jury trial because that is when it first became aware of NTS's design theory.²⁹² Finally, RRD argued that exclusion of evidence was too harsh a sanction because it did not engage in "deliberate or other reprehensible conduct" that prevented NTS from receiving a fair trial.²⁹³

283. See WILLIAM F. HARVEY, INDIANA PRACTICE § 26.14 (3d ed. 2000).

284. 752 N.E.2d at 132.

285. *Id.* (quoting *Reeves*, 654 N.E.3d at 875).

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 132-33.

291. *Id.* at 133.

292. *Id.*

293. *Id.*

Because plaintiff proffered Clapp for rebuttal testimony, and not to espouse a new theory, the court of appeals disagreed with the trial court's characterization of RRD's disclosure of the content of Clapp's testimony as untimely, "especially in light of the fact that Indiana Trial Rule 26(E) only requires a duty to 'seasonably' supplement discovery responses, rather than requiring immediate supplementation."²⁹⁴ The court pointed out that Clapp could not formulate his rebuttal testimony until after he was aware of NTS's design theory, of which he first became aware at the summary jury trial.²⁹⁵ The court also noted that RRD identified Clapp as a rebuttal witness within three weeks of discovering the substance of NTS's expert's testimony and that NTS deposed Clapp thereafter.²⁹⁶ Under those circumstances, the court of appeals believed that exclusion of Clapp's testimony was too harsh a sanction because RRD did not commit any "deliberate or other reprehensible conduct . . . that prevented NTS from receiving a fair trial."²⁹⁷

The third opinion witness issue addressed by the court in *R.R. Donnelley* involved the trial court's failure to exempt opinion witnesses from its separation order. The trial court granted NTS's motion for a separation of witnesses and "denied RRD's request to have experts in the courtroom in order to assist counsel."²⁹⁸ The critical issue was whether the trial court erred in not finding RRD's opinion witnesses to be "essential to the presentation of [its] cause" under Indiana Rule of Evidence 615(3).²⁹⁹ "Given the complexities of [the] case," the court of appeals wrote, "it appears that the use of experts was essential."³⁰⁰ The court also concluded that it would be necessary for the plaintiff's opinion witnesses "to be present in the courtroom to witness the testimony or be provided with daily transcripts" in order to rebut any theory the defense proffered.³⁰¹ Because the trial court denied RRD that opportunity, the court of appeals held that "the trial court abused its discretion by failing to exempt experts from the Separation Order."³⁰²

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 134. Rule 615(3) of the Indiana Rules of Evidence provides that witnesses whose presence is shown to be "essential to the presentation of the party's cause" are exempt. *Id.* To be exempted from separation orders, the witness must possess "such specialized expertise or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness." *Id.* (quoting *Hernandez v. State*, 716 N.E.2d 948 (Ind. 1999)).

300. *Id.*

301. *Id.* at 134-35.

302. *Id.* at 135. The *R.R. Donnelley* opinion also addresses the admissibility of settlement information, a demonstration used to clarify a scientific principle, and the appropriateness of instructing the jury on proximate cause. For additional analysis of the case by one of the lawyers who argued the case, see Nelson Nettles, *Important Expert and Mediations Issues Addressed in Recent Product Liability Case*, IND. LAW., Sept. 26, 2001, at 25.

V. PREEMPTION

Three published decisions from Indiana courts examined the federal preemption doctrine as it relates to various types of product liability claims.³⁰³ On August 23, 2001, the Indiana Supreme Court issued an important unanimous preemption decision in *Dow Chemical Co. v. Ebling*.³⁰⁴ The *Ebling* decision addresses preemption pursuant to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). In *Ebling*, plaintiffs alleged physical symptoms after application of an EPA-accepted pesticide known as "Dursban 2E"³⁰⁵ in their apartment. The plaintiffs sued, inter alia, Dow Chemical Co.,³⁰⁶ the pesticide manufacturer, Affordable Pest Control, Inc., the pesticide applicator, and Louisville Chemical Company, the distributor of another pesticide that was used in the apartment.³⁰⁷ Among other claims, plaintiffs contended that the pesticide

303. In addition to the three cases treated in this survey, practitioners should be aware of last year's court of appeals' opinion in *Rogers ex rel. Rogers v. Cosco, Inc.*, 737 N.E.2d 1158 (Ind. Ct. App. 2000) (addressing preemption issues involving the National Traffic Motor Vehicle Safety Act and Federal Motor Vehicle Safety Standard 213), *trans. denied*, 761 N.E.2d 419 (Ind. 2001).

304. 753 N.E.2d 633 (Ind. 2001).

305. "Dursban" is a trademark of Dow AgroSciences LLC.

306. The proper defendant in this lawsuit was not the Dow Chemical Company, but rather Dow AgroSciences, LLC, which was formerly known as DowElanco, Inc. This survey Article will simply refer to the manufacturer as "Dow."

307. Justice Boehm's opinion refers to the court of appeals' opinion for a more detailed recitation of the facts. The court of appeals' opinion is *Dow Chemical Co. v. Ebling*, 723 N.E.2d 881 (Ind. Ct. App. 2000), *aff'd in part and vacated in part by* 753 N.E.2d 633 (Ind. 2001). A review of the facts set forth in the court of appeals' opinion in *Ebling* reveals that Christina and Alex Ebling began experiencing seizures shortly after they and their parents moved into an apartment at the Prestwick Square Apartments. In April 1993, Prestwick Square "entered into a pest control service agreement" with Affordable Pest Control ("Affordable"), which obligated Affordable to "provide regular pest control for roaches, ants, silverfish, mice and rats." *Id.* at 889-909. Affordable applied Dursban "on a preventive basis." *Id.* at 890. The Eblings moved into their apartment in February 1994. "In April of 1994, Prestwick Square canceled its service agreement with Affordable and began using its own maintenance personnel to apply Creal-O, a ready-to-use pesticide" formulated by Louisville Chemical. *Id.*

DowElanco, now known as Dow AgroSciences, manufactured and distributed Dursban pesticide products pursuant to registrations with the United States Environmental Protection Agency (EPA). *See id.* at 889. As part of the registration process, the EPA provided Dow with stamped and accepted labels for its Dursban pesticide products, which the EPA authorized "for use in and around residential structures," including apartments and apartment complexes. *Id.* As part of the registration process for Creal-O, the EPA permitted Louisville Chemical to "adopt and incorporate the safety and toxicological data submitted by the manufacturers of Creal-O's active and inert ingredients. The EPA registered Creal-O and authorized its use in and around residential structures, including apartments and apartment complexes." *Id.*

Affordable did not provide the Eblings or Prestwick Square with any of Dursban's EPA-

applicator breached a duty to provide the plaintiffs with the pesticide's EPA-accepted warnings and labeling information.³⁰⁸

The court of appeals held in part that the manufacturer, applicator, and distributor all were entitled to summary judgment with respect to plaintiffs' failure to warn claims.³⁰⁹ Plaintiffs sought transfer, challenging the court of appeals' decision only on the FIFRA preemption issue.³¹⁰ On transfer, the Indiana Supreme Court summarily affirmed the court of appeals' decision that FIFRA expressly preempts state common law tort claims against pesticide manufacturers such as Dow and Louisville Chemical.³¹¹ The *Ebling* court disagreed, however, with the court of appeals concerning Affordable, the pesticide applicator, holding that FIFRA does not preempt state common law failure to warn claims against Affordable.³¹² In doing so, the *Ebling* court rejected, in part, the court of appeals' 1996 decision in *Hottinger v. Truegreen Corp.*³¹³

The plaintiffs argued that FIFRA did not preempt their state common law claim, "asserting that Affordable's duty of reasonable care included an obligation

approved warnings and labeling information. *Id.* at 890. Although Louisville Chemical "provided Prestwick Square with the EPA-approved labeling for Creal-O," it did not provide the Eblings with the label until after their exposure to it. *Id.*

308. *Id.* at 898.

309. *See id.* at 910. The plaintiffs alleged various theories of recovery, including "failure to warn, strict liability, negligence, and willful/wanton misconduct." *Ebling*, 753 N.E.2d at 636. The trial court granted motions for summary judgment filed by Dow and Louisville Chemical. The trial court denied Affordable's motion. *Id.* All three defendants filed interlocutory appeals. *See Ebling*, 723 N.E.2d at 888. The court of appeals held that FIFRA expressly preempts all of the plaintiffs' claims against Dow and Louisville Chemical that relate to the product's labeling, *id.* at 910, which was everything except design defect claims. The court of appeals also held that FIFRA precluded plaintiffs' claim that it had an obligation to warn plaintiffs about the potential adverse effects of Dursban. *Id.* The court of appeals further held that "Affordable was entitled to summary judgment on the plaintiffs' claims for strict liability under both the IPLA and common law strict liability for ultra-hazardous activity" because the transaction was predominately for the sale of a service rather than a product. *Ebling*, 753 N.E.2d at 636. With respect to Affordable's negligence claim, however, the court of appeals held that summary judgment was properly denied because genuine issues of material fact existed regarding whether Affordable breached its duty of reasonable care by applying an excessive amount or concentration, by failing to properly ventilate the plaintiff's apartment, and by spraying Dursban in an area near the children's clothes and toys." *Id.* In addition, the court of appeals affirmed the denial of summary judgment concerning "the plaintiffs' request for punitive damages against Affordable." *Id.* On transfer, plaintiffs challenged only the FIFRA preemption issue. For further discussion about the court of appeals' decision, see Alberts & Henn, *supra* note 16, at 911-17.

310. *Ebling*, 753 N.E.2d at 636.

311. *See id.* at 635-36.

312. *Id.* at 636.

313. 665 N.E.2d 593 (Ind. Ct. App. 1996), *overruled by* Dow Chem. Co. v. Ebling, 753 N.E.2d 633 (Ind. 2001).

to provide them with the information contained in the EPA-accepted Dursban label."³¹⁴ Relying upon *Hottinger*, Affordable countered that the principles of preemption for failure to warn claims apply to pest control applicators "just as they do to manufacturers."³¹⁵ According to Justice Boehm's opinion, the court of appeals in *Hottinger* "summarily concluded" that FIFRA preempts state common law strict liability and negligence claims that are based upon alleged inadequacy of warnings on products that FIFRA regulates.³¹⁶ The *Ebling* court overruled that determination insofar as pesticide applicators are concerned.³¹⁷

As part of an analysis dating to *McCulloch v. Maryland*,³¹⁸ the *Ebling* court recognized that there are three distinct types of federal preemption:

A federal statute may now preempt state law [1] by express language in a congressional enactment^[319] ["express preemption"] . . . [2] by implication from the depth and breadth of a congressional scheme that occupies the legislative field^[320] ["field preemption"] . . . or [3] by implication because of a conflict with a congressional enactment^[321] ["implied conflict preemption"].³²²

With respect to the third type, "implied conflict preemption," the *Ebling* court aptly noted that the "reach of federal preemption was increased" with the U.S. Supreme Court's decision in *Geier v. American Honda Motor Co.*³²³

314. *Ebling*, 753 N.E.2d at 636.

315. *Id.*

316. Justice Boehm's opinion makes a point of stating that the supreme court never reviewed that conclusion when it denied Trugreen's petition to transfer in that case:

Although finding FIFRA preemption applicable to some of *Hottinger*'s claims, the court held that erroneous exclusion of expert opinion evidence required reversal of the summary judgment as to the remaining claims. Transfer to this Court was sought only by appellee Trugreen, whose petition to transfer was denied. To the extent that *Hottinger v. Trugreen Corp.* is inconsistent with our opinion herein, it is overruled.

Id. at 636 n.3.

317. *Id.*

318. 17 U.S. (4 Wheat.) 316, 427 (1819).

319. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

320. See, e.g., *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

321. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-74 (2000).

322. 753 N.E.2d at 637.

323. 529 U.S. 861 (2000). "Before *Geier*," the *Ebling* court wrote, "if a federal law had an express preemption clause, the reach of the preemption was limited to the domain expressly preempted." 753 N.E.2d at 637 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). After *Geier*, the *Ebling* court recognized that "even though a state law is not within the domain expressly preempted, the state law may yet be preempted if it frustrates the purpose of the federal law or makes compliance with both impossible." *Id.* The *Ebling* court's recognition of implied conflict preemption and its quality analysis of how it is different from the other two types of federal preemption are not insignificant because courts often confuse the principles and the underlying

After identifying the three types of federal preemption generally, the *Ebling* court turned its attention to FIFRA, discussing some of the structure and purpose of FIFRA as well as some of the pre-*Geier* U.S. Supreme Court decisions that addressed FIFRA preemption.³²⁴ In an attempt to ensure uniformity, Congress included within FIFRA an express preemption provision that prevents a state from “impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].”³²⁵ Indeed, the *Ebling* court noted “agreement among a majority of jurisdictions” that the phrase “any requirements” in FIFRA’s express preemption provision “is sufficiently expansive to include both positive enactments of state law-making bodies and common law duties enforced in actions for damages.”³²⁶ Accordingly, the *Ebling* court pointed out that “[t]he law is fairly settled that when a pesticide manufacturer ‘places EPA-approved warnings on the label and packaging of its products, its duty to warn is satisfied, and the adequate warning issue ends.’”³²⁷ That conclusion compelled an affirmance of the court of appeals’ decision with respect to Dow and Louisville Chemical because claims against those two entities were expressly preempted.

The remainder of the court’s decision addresses why the law mandates a different result with respect to Affordable, the pesticide applicator. First, with respect to express preemption, the court pointed out that there is no “affirmative FIFRA labeling requirement for *applicators*.”³²⁸ As such, according to the *Ebling* court, “the alleged state tort law duty imposed upon applicators to convey the information in the EPA-approved warnings to persons placed at risk does not constitute a requirement additional to or different from those imposed by FIFRA.”³²⁹

Second, with respect to field preemption, the *Ebling* court concluded that FIFRA does not preclude the state-law imposition of a duty to warn on

bases therefor. In this area of law, practitioners should be aware of *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341 (2001) (Food, Drug & Cosmetic Act and Medical Device Amendments) (holding that state law fraud on the FDA claims were preempted); *see also* Nathan Kimmel, Inc. v. DowElanco, 275 F.3d 1199 (9th Cir. 2002) (FIFRA) (holding that state law fraud on the EPA claims were preempted); Raymond M. Williams & Anita Jain, *Preemption of State “Fraud-on-the-FDA” Claims*, FOR DEF., June 2001, at 23.

324. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991).

325. *Ebling*, 753 N.E.2d at 638 (quoting 7 U.S.C. § 136v(b) (2000)).

326. *Id.* A lengthy footnote contains an impressive string citation to the state and federal courts that have found “any requirements” to include common law actions. *See id.* at 638 n.4.

327. *Id.* at 639 (quoting *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993)).

328. *Id.* (emphasis in original).

329. *Id.* Although the *Ebling* court acknowledged that the *Hottinger* court as well as courts in other jurisdictions have concluded that FIFRA expressly preempts duty to warn claims against applicators, their findings were not persuasive to the claims against Affordable because they failed to “consider the distinctions between pesticide manufacturers and applicators.” *Id.* The opinion does not provide further explanation about the specifics of those distinctions.

applicators.³³⁰ In doing so, the court relied on the U.S. Supreme Court's decision in *Wisconsin Public Intervenor v. Mortier*,³³¹ which "declined to extend FIFRA preemption to preclude local regulations requiring a pesticide applicator to give notice of pesticide use and of label information prescribing a safe reentry time and imposing fines in the event of violations."³³² From *Mortier*, the *Ebling* court discerned that, "like a state or local regulatory scheme that requires permits and notice to the non-user consumer/bystander and imposes penalties, the imposition of a duty to warn on applicators is not preempted by FIFRA."³³³

The court also used *Mortier* as the basis for its decision that implied conflict preemption does not preclude plaintiffs' claims. In the *Ebling* court's view, "Affordable's alleged failure to communicate label information to persons placed at risk" does not frustrate the purposes of FIFRA nor does it render "compliance with both state and federal law impossible."³³⁴ According to the court,

The plaintiffs' claim that Affordable should have communicated the label information is entirely consistent with the objectives of FIFRA. The use of state tort law to further the dissemination of label information to persons at risk clearly facilitates rather than frustrates the objectives of FIFRA and does not burden Affordable's compliance with FIFRA.³³⁵

A published federal trial court order by Judge Barker is also an important one for Indiana practitioners in the preemption area. The order stems from the Firestone/Ford Explorer "rollover" cases that are consolidated before Judge Barker in Indianapolis. The reported preemption order is styled *In re Bridgestone/Firestone, Inc., ATX, ATX II, & Wilderness Tires Products Liability Litigation*.³³⁶ The specific issue that the preemption order covers involves that part of the plaintiffs' master complaint requesting the court to recall, buy back, and/or replace the allegedly defective tires. The defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that plaintiffs' request for a recall is preempted by the Motor Vehicle Safety Act ("MVSA").³³⁷ Judge Barker agreed that the recall requests were preempted and dismissed

330. *Id.* at 639-40.

331. 501 U.S. 597 (1991).

332. *Ebling*, 753 N.E.2d at 640.

333. *Id.*

334. *Id.*

335. *Id.*

336. 153 F. Supp. 2d 935 (S.D. Ind. 2001).

337. The MVSA is found at 49 U.S.C.A. §§ 30101-30170 (West 1997 & Supp. 2001). As Judge Barker noted in a later footnote, the discussion of preemption "presupposes that there is a state law providing for the claim at the heart of the lawsuit." 153 F. Supp. 2d at 940 n.6. On that point, Judge Barker wrote that it was not clear that the plaintiffs had met that prerequisite. *Id.* Only one case, *Howard v. Ford Motor Co.*, No. 7683785-2 (Cal. Super. Ct. Oct. 11, 2000), has ever granted a plaintiff's request for a recall of a motor vehicle safety defect, and "that case is not persuasive in establishing that California law authorizes a nationwide recall." *Id.*

them.³³⁸ She then, *sua sponte*, certified the issue for interlocutory appeal.³³⁹

After first determining that a ruling on the issue was not premature,³⁴⁰ Judge Barker's overview of preemption recognized, just as did the Indiana Supreme Court in *Ebling*, that there are at least three distinct types of federal preemption: express preemption,³⁴¹ implied field preemption,³⁴² and implied conflict preemption.³⁴³ Because of what she determined to be a "significant history of activity" in the area of vehicle safety recalls, Judge Barker concluded that no presumption against preemption should be applied.³⁴⁴ She also aptly recognized that neither express preemption nor field preemption was at issue.³⁴⁵

338. Judge Barker's order disposed of the request for a recall of the tires in plaintiffs' preliminary injunction filing. *Id.* at 938. The ruling also rendered moot plaintiffs' request for preliminary injunctive relief against Ford to the extent that it sought "an immediate safety recall, replacement, or refund" of all model year 1991-2001 Ford Explorers. *Id.*

339.

[B]ecause this decision turns on a difficult and controlling question of law as to which there is substantial ground for difference of opinion and because a final resolution of this question may materially advance the ultimate completion of this litigation, the Court *sua sponte* certifies its order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b).

153 F. Supp. 2d at 938.

340. The plaintiffs argued that a dismissal on the basis of preemption was premature because the court lacked "the benefits of full briefing and an evidentiary hearing on the preliminary injunction motion." *Id.* at 939. Judge Barker disagreed, writing that "a resolution of the preemption issue is entirely feasible and, indeed, appropriate at this stage. Whether federal law preempts state law-based judicial authority to order a tire or motor vehicle recall is a legal issue, not a factual one." *Id.* at 940 (citing *Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 966 (7th Cir. 2000), *aff'd*, 2002 WL 1337696 (U.S. June 20, 2002)).

341. "Congress occasionally preempts the operation of state law in the express language of a statute. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 (1992) (noting that statutory language 'no statement relating to smoking and health shall be required in the advertising of . . . cigarettes' expressly prohibited states from mandating particular cautionary statements in cigarette advertisements)." 153 F. Supp. 2d at 940.

342. "When federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it," it is referred to as 'field preemption.'" 153 F. Supp. 2d at 940 (quoting *Cipollone*, 505 U.S. at 516).

343. "A third form of preemption, 'conflict preemption,' occurs when requirements of state law and federal law make it impossible for a party to comply with both laws or when state law 'prevent[s] or frustrate[s] the accomplishment of a federal objective.'" 153 F. Supp. 2d at 940 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000)) (alterations by court).

344. 53 F. Supp. 2d at 942-43.

345. Express preemption was not an issue because no provision of the MVSA explicitly supersedes state-law-based injunctive relief and because the MVSA's express preemption did not apply. The MVSA's express preemption provision states that "'when a motor vehicle safety standard is in effect . . . , a State . . . may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this [Act].'" 153 F. Supp. 2d at 943 (quoting 49 U.S.C.

Turning her attention to conflict preemption, Judge Barker noted that it exists when “it is impossible for a private party to comply with both state and federal law and where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁴⁶ The defendants argued that a “parallel, competing system of court-ordered and supervised recalls would undermine and frustrate the [MVSA’s] objectives of prospectively protecting the public interest through a scheme of administratively enforced remedies.”³⁴⁷ On that issue, Judge Barker found two U.S. Supreme Court cases instructive, *International Paper Co. v. Ouellette*³⁴⁸ and *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*³⁴⁹ In both of those cases, the Supreme Court considered a number of factors establishing the comprehensive nature of the federal administrative scheme at issue. In *International Paper*, an important consideration was the fact that the Clean Water Act mandated detailed procedures for obtaining a permit to emit possible pollution.³⁵⁰ The MVSA likewise sets forth a “comprehensive scheme for prospective relief from dangerous features in vehicles,” which incorporates a detailed notification procedure when the Secretary of Transportation determines that a vehicle model or its equipment “contains a defect or does not comply with other safety standards.”³⁵¹ According to Judge Barker, “The detail contained in the [MVSA] suggests a clear congressional intent to limit encroachment on the agency’s work.”³⁵²

Citing *Kalo Brick*, Judge Barker recognized that another statutory feature indicating congressional intent to preempt state-law-based intrusions into an agency’s work is the grating of discretion to the agency in its decision-making.³⁵³ On that issue, Judge Barker wrote that the MVSA “affords the Secretary [of Transportation] much discretion to determine the need for notification or remedy

§ 30103(b)(1) (1994 & Supp. V 1999)). “Though the Department of Transportation has promulgated a number of Federal Motor Vehicle Safety Standards (FMVSS), there is no standard that prescribes performance requirements for tires or sets a rollover standard for vehicles.” *Id.*

On the field preemption issue, Judge Barker wrote that it was “clear” that “Congress in the [MVSA] plainly did not intend to occupy the field of motor vehicle safety.” *Id.* (quoting *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398, 400 (8th Cir. 2000)). It was less clear whether Congress ever intended to occupy the field in connection with the issues before the court. “Whether Congress intended to occupy the field with regard to recalls (as opposed to motor vehicle safety standards generally) remains an open question—one we need not address today because the parties focus their arguments on conflict preemption, which the Court finds dispositive.” *Id.*

346. 153 F. Supp. 2d at 943-44 (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000)).

347. *Id.* at 944 (citation omitted).

348. 479 U.S. 481 (1987).

349. 450 U.S. 311, 326 (1981).

350. 479 U.S. at 492.

351. 153 F. Supp. 2d at 944-45.

352. *Id.* at 945.

353. *Id.*

of a defect or failure to comply with safety regulations.”³⁵⁴ The National Highway Traffic Safety Administration’s “broad discretion,” coupled with “the specificity of the sections of the [MVSA] dealing with notification and remedies” caused Judge Barker to conclude that “Congress intended to establish comprehensive administrative regulation of recalls to promote motor vehicle safety.”³⁵⁵ As such, Judge Barker determined that “the comprehensiveness of the [MVSA] with regard to recalls demonstrates convincingly that any state law providing for a motor vehicle safety recall would frustrate the purposes of the [MVSA].”³⁵⁶

Finally, although it is not reported in the federal reporter system and of very limited precedential value, practitioners may find interesting and helpful the preemption analysis Judge Hamilton conducted in the case captioned *In re Inlow Accident Litigation*.³⁵⁷ That case involved the accidental death of Lawrence Inlow, the former general counsel for Consec, Inc. and related entities. Inlow was killed when he was hit in the head by a helicopter rotor blade after he disembarked from the company’s helicopter.³⁵⁸ As a result, representatives of Inlow’s estate sued “three distinct sets of defendants.”³⁵⁹ One defendant was CIHC, Inc., a subsidiary of Consec, Inc. alleged to have negligently operated the helicopter in question. Inlow’s representatives also sued CIHC, Inc., “in its role as sublessor of the helicopter to Consec, Inc.,” for alleged negligence in failing to warn of a dangerously defective product.³⁶⁰

The preemption issue was just one of several Judge Hamilton addressed in his order. CIHC argued that the Federal Aviation Act shields it from liability in its role as the lessor of the helicopter because the “limitation of liability” section of the FAA provides that “an aircraft lessor can be liable for personal injuries caused by the aircraft only if the lessor is in actual possession or control of the

354. *Id.* In more fully explaining the level of federal involvement, Judge Barker wrote:

As an example, the Secretary has the authority to decide that notification by first class mail alone is insufficient and order that “public notices shall be given in the way required by the Secretary” after the Secretary has consulted with the manufacturer. The Secretary also has authority to disapprove the date set by the manufacturer as the earliest date that parts and facilities reasonably can be expected to be available to remedy the defect or noncompliance. As long as the Secretary permits public input through established procedures, the Secretary can even “decide [that] a defect or noncompliance is inconsequential to motor vehicle safety,” and exempt the manufacturer from providing notification or a remedy.

Id. (citations omitted) (alteration by court).

355. *Id.*

356. *Id.*

357. No. IP 99-0830-C H/G, 2001 U.S. Dist. LEXIS 2747, Prod. Liab. Rep. (CCH) ¶ 16,044 (S.D. Ind. 2001).

358. *Id.* at *2-*3.

359. *Id.* at *3.

360. *Id.*

aircraft.”³⁶¹ After a close analysis of the applicable law and facts, including a detailed review of the controlling lease agreement, Judge Hamilton determined that no genuine issue of material fact existed that could support a conclusion that CIHC “controlled” the helicopter at the time of the accident.³⁶²

CONCLUSION

Indiana courts and practitioners continue to define, re-define, develop, and refine Indiana product liability law. The survey period has once again proved that product liability practice in Indiana is as rich in its adversarial tradition as it is proud of its practitioners and adjudicators. As Mr. Shakespeare so well put it many years ago, our charge remains simple: “And do as adversaries do in law—Strive mightily, but eat and drink as friends.”³⁶³

361. *Id.* at *43. The relevant provision of the Federal Aviation Act is 49 U.S.C. § 44112 (1994).

362. *See id.* at *54-*48.

363. WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW*, act I, sc. 2.