VOLUME VI 2009 NUMBER 1

INDIANA CIVIL LITIGATION REVIEW

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Indiana Civil Litigation Review

VOLUME VI 2009 NUMBER 1

ARTICLES & NOTES

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DEFENSE TRIAL COUNSEL OF INDIANA

BODILY INJURY RESTRICTION UPHELD FOR BOTH LIABILITY AND UNINSURED MOTORIST COVERAGES

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On May 13, 2009, the Indiana Supreme Court issued the opinion in *Bush v. State Farm Mutual Automobile Insurance Co.*[1] holding as follows:

> We hold that an uninsured motorist policy restricting coverage to bodily injury or death sustained by an insured does not violate Indiana's uninsured motorist statute.[2]

I. Introduction

With the addition of the *Bush* decision, the Indiana Supreme Court has more clearly defined the coverage issues for emotional distress claims in both first-party and third-party liability situations. *Bush* serves as the latest decision from the Indiana Supreme Court concerning these issues. The following cases, decided by the supreme court in 2008, also concern coverage for emotional-distress damages: *State Farm Mutual Automobile Insurance Co. v. Jakupko*,[3] *Elliott v. Allstate Insurance Co.*,[4] and *State Farm Mutual Automobile Insurance Co. v. D.L.B.*[5] This article will discuss the reasoning and impact of these decisions.

With these decisions, the Indiana Supreme Court has addressed the question of whether to apply the "per person" or "per occurrence" insurance policy limits when a claimant alleges emotional distress as a result of witnessing an injury to a loved one. In addition, the court addressed the meaning of the term *bodily injury*, which was defined by the insurance policies to include any damages to others that arose out of one physical injury.

* Mr. Oberman and Mr. Crabill are attorneys with State Farm Litigation Counsel and are members of the Defense Trial Counsel of Indiana. Research for this article is current as of May 15, 2009. This article does not represent the views of State Farm Litigation Counsel, nor is anything contained herein intended to constitute legal advice.

1 No. 71S03-0810-CV-558. The page citations throughout this article on the *Bush* supreme court case come from the opinion published by the Indiana courts web page, http://www.in.gov/judiciary.

2 *Id.* at 1.

3 881 N.E.2d 654 (Ind. 2008).

4 881 N.E.2d 662 (Ind. 2008).

5 881 N.E.2d 665 (Ind 2008).

II. *STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. JAKUPKO* (FIRST-PARTY CASE)

The Indiana Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Jakupko*, greatly expanded the amount of exposure to an insurer who has issued an uninsured/underinsured motorists policy.[6]

In *Jakupko*, a wife and her children claimed to have suffered emotional distress from being in the vehicle when their husband-father suffered severe injuries.[7] State Farm argued that emotional distress of the spouse and children failed to meet the definition of *bodily injury* under its policy and that any emotional distress covered by the policy would fall under the limits of liability of the father.[8]

The State Farm policy defined *bodily injury* to mean "bodily injury to a person and sickness, disease or death that results from it."[9] The liability limits provisions of the State Farm policy provided that the limit of liability for one person was $100,000 and "[b]odily injury to one person includes all injury and damages to others resulting from this bodily injury."[10]

The supreme court in *Jakupko* cited with support the court of appeals decision in *Wayne Township Board of School Commissioners v. Indiana Insurance Co*.[11] that had equated emotional distress to sickness, as listed in the definition of *bodily injury*.[12] Therefore (and unlike a consortium claim, which is excluded from the definition of *bodily injury)*, emotional distress fit the meaning of *sickness* under the *bodily injury* definition, so a claimant was then entitled to a separate per-person bodily injury limit.[13]

However, *Jakupko* also cited with support to *Wayne Township* for the holding that for an emotional distress claim to meet the definition of *bodily injury* under the policy, the emotional distress must result from a bodily touching.[14] This distinction would play a key part in the *D.L.B.* and *Bush* decisions.

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6 881 N.E.2d 654 (Ind. 2008).

7 *Id.* at 665. The severe injuries to the father included quadriplegia and permanent mental deficits.

8 *Id.* at 657.

9 *Id.* at 656.

10 *Id.*

11 650 N.E.2d 1205 (Ind. Ct. App. 1995), *trans. denied*.

12 881 N.E.2d at 658 (citing *Wayne Township*, 650 N.E.2d at 1210 (bodily touching inherent to child molestation and the emotional distress that results is a bodily injury)).

13 *Id.* at 657-58.

14 *Id.* (citing *Wayne Township*, 650 N.E.2d at 1210). *Wayne Township* was also cited for support in *Armstrong v. Federated Mutual Insurance Co.*, 785 N.E.2d 284 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 750 (Ind. 2003), which denied recovery for the loss of love and companionship to the parents of a nineteen- year-old killed in an automobile accident by an uninsured motorist because the parents, not involved in the accident, had suffered no physical impact. 785 N.E.2d at 293. Although the *Jakupko* court recognized that *Armstrong* was good law, the court differentiated the earlier decision by noting that, unlike the plaintiffs in *Armstrong*, the *Jakupko* plaintiffs were directly involved in the accident

The court in *Jakupko* then found that Indiana's uninsured motorist statute distinguished the first-party claims for uninsured or underinsured coverage from a third-party claim.[15] The statute requires that each automobile insurance policy provide "coverage . . . for the protection of persons insured under the policy who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness or disease."[16]

The court then held that the insuring agreement provided a recovery to the wife and children separately, since they were legally entitled to recovery emotional distress damages from the uninsured motorist.[17] However, State Farm's insuring agreement impermissibly limited these emotional distress claims from having separate, per-person limit.[18]

> But the "includes all injury and damages to others resulting from this bodily injury" clause in the policy effectively reduces the amount of damages Patricia, Nicholas, and Matthew are entitled to by the amount, if any, of damages that Richard is entitled to. The statute does not authorize conditioning or limiting Patricia's, Nicholas's, and Matthew's damages in this way.[19]

The supreme court rejected State Farm's argument that pursuant to its policy any emotional distress suffered by the wife and children were subject to the per-person policy limit of the husband-father.[20] The court held that the wife and children were entitled to a separate per-person limit of coverage.[21]

In the court's analysis, the important facts were, first, that all the plaintiffs were insureds as defined by State Farm policy.[22] Second, citing *Shaumber*, they were legally entitled to pursue negligent infliction of emotional distress claims because they were all inside the vehicle at the time of impact.[23]

The court construed State Farm's decision to pay claims of the father, wife, and children under one per-person limit constituted a denial of the

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that gave rise to their claim. The *Jakupko* court did not hold that the coverage limitations discussed in *Armstrong* would fail to pass muster under its interpretation of the Uninsured Motorist Act.

15 *Id.* at 660-61.

16 I.C. § 27-7-5-2(a)(1).

17 881 N.E.2d at 661-62.

18 *Id.* at 661

19 *Id.*

20 *Id.*

21 *Id.* at 661-62.

22 *Id.* at 655-56. The father and wife were named insureds and his children were likely resident relatives.

23 *Id.* (citing *Shuamber*, 579 N.E.2d at 456).

claims of the wife and children.[24] However, in the court's analysis, it distinguished between damages that are related to an insured's physical injuries and those that are not.

> Nor do the Jakupkos present us with damages unrelated to an insured's physical injury. In fact, because damages for emotional distress unrelated to an insured's physical injury are not recoverable in Indiana, Wayne Township, 650 N.E.2d 1205; Armstrong, 785 N.E.2d 284; *failing to provide a separate per person limit of liability for damages unrelated to an insured's physical injury would not violate our statute, either*.[25]

III. *ELLIOTT V. ALLSTATE INSURANCE CO.* (FIRST-PARTY CASE)

In a separate decision issued on the same day as *Jakupko*, the supreme court in *Elliott v. Allstate Insurance Co.*[26] applied the same reasoning as found in *Jakupko*. The Elliotts were claiming emotional distress as a result of witnessing injuries to loved ones.[27] Similar to *Jakupko*, the claimants in *Elliott* were in the car with the injured family member when the impact occurred and, so, were directly involved in the accident.[28] The at-fault driver was uninsured, so the claimants were seeking coverage for their emotional distress claims under their policy with Allstate.[29] The supreme court determined that each claimant had his own bodily injury claim and each of the claimants was an "insured" under each respective UM/UIM policy.[30]

Although the policy language in the Allstate uninsured motorist policy was slightly different from the State Farm policy language analyzed in *Jakupko*, the court found that its effect was the same.[31] The court found that one person's bodily injury limit, as defined in the policy, would include

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[24] *Id.* at 661-62. It appears that State Farm paid $100,000 for the claims of all the plaintiffs. The court stated:

> The crux of this case is whether, as a matter of underinsured motorist and contract law, Patricia's, Nicholas's, and Matthew's claims are included within Richard's "each person" limitation on liability or are entitled to their own. The significance of this is obvious—State Farm contends that Patricia's, Nicholas's, and Matthew's claims are subject to the $100,000 "each person" limit of liability applicable to Richard's injuries. Because it has already paid Richard $100,000, State Farm argues that it has exhausted its liability for Patricia's, Nicholas's, and Matthew's emotional distress claims.

Id. at 656.

[25] *Id.* at 661 (emphasis added).

[26] *Id.* at 662.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 664.

[31] *Id.*

emotional distress suffered by others.[32] The court, as in *Jakupko*, again found that this language was not enforceable in the uninsured motorist setting:

> This provision effectively reduces the damages Amber [sister] and Austin [son] are "legally entitled to recover from the owner or operator of an uninsured auto" because of their emotional distress by the amount of damages that Amanda [sister and mother] recovered. Because a clause in derogation of the Indiana uninsured motorist statute is unenforceable, Amber and Austin are entitled to a separate per person limitation of $25,000, subject, however, to the per accident limitation of $50,000.[33]

IV. *State Farm Mutual Automobile Insurance Co. v. D.L.B.* (Third-Party Claim)

In *State Farm Mutual Automobile Insurance Co. v. D.L.B.*,[34] D.L.B., a four-year-old out on a bike ride with his six-year-old cousin watched his cousin being struck and killed by a State Farm insured.[35] D.L.B. suffered no physical injury but claimed post-traumatic stress disorder as a result of seeing his cousin struck by a car.[36] The minor claimant made a *third-party claim* for emotional distress damages against the at-fault driver's liability coverage.

The court first cited to *Jakupko* to note that the term *bodily injury* does not include emotional distress damages unless resulting from a bodily touching [37] D.L.B. argued unsuccessfully that his physical manifestations from the distress should be enough to meet the definition of *bodily injury*.[38] The court required that the physical manifestations must result from an "impact, force or harm" to D.L.B.'s body.[39] Since the supreme court in *D.L.B.* did not find that D.L.B. had suffered a bodily injury, the court did not address whether in a third-party case, a plaintiff who has suffered a physical touching, would have a separate per-person limit.[40] However, based on the reasoning of these decisions, a limit of liability section of a

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[32] *Id.*

[33] *Id.* at 664-65 (citations omitted).

[34] 881 N.E.2d 665 (Ind. 2008)

[35] *Id.*

[36] *Id.*

[37] *Id.* at 666.

[38] *Id.*

[39] *Id.*

[40] The vacated court of appeals opinion in *State Farm Mutual Automobile Insurance Co. v. D.L.B.,* 862 N.E.2d 678 (Ind. Ct. App. 2007), *vacated,* sided with the claimant finding that a witness's emotional distress was a separate compensable injury, opening up another $100,000 in per-person coverage for his emotional distress claims. *Id.*

policy that included the damages of all other parties as part of a per-person coverage would likely be upheld because there would be no statute to contravene.

V. *BUSH v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.*

On May 13, 2009, just a few days before the submission of this article for publication, the Indiana Supreme Court issued *Bush v. State Farm Mutual Automobile Insurance Co.,*[41] an opinion not only upholding language in a State Farm policy limiting claims for uninsured motorists benefits to those who have suffered a bodily injury, but going further by stating that Indiana's uninsured motorist statute *contemplates* that injury be sustained by an insured.[42]

In *Bush*, the plaintiffs' adult nonresident son was killed in a motor vehicle accident.[43] The at-fault driver was uninsured.[44] The Bushes lived in Indiana, while the accident involving their son occurred in New Mexico.[45] The Bushes were not in the accident and suffered no physical impact.[46]

The Bushes submitted a claim to State Farm for uninsured motorist benefits to compensate them for the damages (loss of love and companionship) they suffered as a result of the loss of their son.[47] At the trial court level, State Farm successfully argued that the Bushes did not have a claim under its uninsured motorist policy because (1) their son was not an insured under the policy and (2) the parents did not suffer a bodily injury, which is a prerequisite for a claim.[48]

The court of appeals reversed,[49] holding that under Indiana's Uninsured Motorist Act, an insurer is required to offer uninsured motorist coverage "insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person and for injury to or destruction of property to others arising from the ownership, maintenance, or use of a motor vehicle . . . ."[50] The court of appeals reasoned that the uninsured motorists statute contained no language that would limit the required coverage to only bodily injury claims, and that State Farm's attempt to so limit its cov-

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41 No. 71S03-0810-CV-558. The page citations throughout this article on the *Bush* supreme court case come from the opinion published by the Indiana courts web page, http://www.in.gov/judiciary.

42 *Id.* at 1, 4.

43 *Id.* at 2.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* at 3.

49 Bush v. State Farm Mut. Auto. Ins. Co., 882 N.E.2d 821 (Ind. Ct. App. 2008).

50 *Bush*, 882 N.E.2d at 824 (quoting I.C. § 9-25-4-5).

erage was against public policy.[51] Accordingly, the parents would have had a right to recover for their own losses under their own policy.[52]

The court of appeals in *Bush* made no reference to the supreme court decisions that had been published just about a month before the *Bush* opinion and that addressed similar issues. Significantly, in *Jakupko* and *D.L.B.,* the supreme court cited, with apparent approval, the court of appeals earlier decision in *Armstrong v. Federated Mutual Insurance Co*.[53] *Armstrong* specifically disallowed the parents' claim for underinsured motorist benefits for damages sustained as a result of the death of their daughter.[54] In fact, the *D.L.B.* court also relied upon *Armstrong* and found that its holding was dispositive, stating:

> The *Armstrong* case is particularly on point as it held that the parents of a child killed in an automobile accident could not recover under the uninsured motorist coverage of their insurance policy because they had not "suffered a physical impact in the accident that took [their daughter's] life." [55]

The *Bush* court, however, noted that the *Armstrong* decision analyzed only the insurance policy language and had not addressed the issue of whether the Uninsured Motorist Act required coverage in these circumstances.[56]

In rendering its *Bush* decision, the Indiana Supreme Court was clear in its holding that a limitation on uninsured claims to those insureds that suffered bodily injury does not violate Indiana's uninsured motorists statute.[57]

The supreme court found that State Farm's policy was consistent with the uninsured motorist statute, which limited coverage to an insured's bodily injury.[58] The court first cited to Indiana Code § 27-7-5-2 and then to Indiana Code § 27-7-5-5(c), which defines the "maximum amount payable for bodily injury under uninsured or underinsured motorists coverage" by reference to "the insured's bodily injury."[59] The court added that "[t]he statute itself makes clear that it contemplates uninsured motorist coverage only for the insured's bodily injury."[60] Therefore, the uninsured motorist

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51 *Id.* at 824-25.

52 *Id.*

53 785 N.E.2d 284 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 750 (Ind. 2003).

54 *Id.*

55 881 N.E.2d at 666.

56 882 N.E.2d at 824.

57 *Bush* supreme court opinion, at 1, 6, and 7.

58 *Id.* at 4.

59 *Id.*

60 *Id.*

statute not only would allow State Farm to require bodily injury to an insured, but the statute contemplates uninsured motorist coverage only when an insured had a bodily injury.[61]

The court further rejected the Bushes' argument that the term *bodily injury* contained in State Farm's policy was ambiguous, finding that *Jakupko* foreclosed such an argument.[62] *Jakupko* interpreted the same *bodily injury* term, finding that emotional distress was included in the definition of *bodily injury* only if it arose from a physical touching.[63]

The court in *Bush* also rejected the Bushes' argument that the following language from Indiana Code § 27-7-5-2 applied:

> The insurer shall make available, in each automobile liability or motor vehicle liability policy . . . insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person . . . arising from the ownership, maintenance, or use of a motor vehicle, or in a supplement to such a policy, the following types of coverage . . . .[64]

The court found that this subsection did not describe the scope of uninsured motorist coverage but, rather, described the type of automobile policies that were required to make uninsured motorist coverage available.[65]

The court then rejected the argument that the public policy behind uninsured motorists coverage required coverage for the Bushes.[66] The public policy for uninsured motorist coverage is to protect innocent victims from those who fail to comply with financial responsibility and compulsive insurance laws.[67] The Bushes theorized that State Farm should provide uninsured motorist coverage because if the tort-feasor had liability insurance, they would have legally been entitled to recover from that insurance.[68] However, the court found their assumption incorrect since emotional distress must include a physical touching to meet the definition of *bodily injury*.[69]

After addressing the specific arguments of the Bushes, the court looked to other jurisdictions and found that a "substantial majority" of other states

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61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.* at 5.

65 *Id.*

66 *Id.* at 6.

67 *Id.*

68 *Id.*

69 *Id.*

interpreted their statutes to require injury by an insured for application of uninsured motorist coverage.[70]

The final point made by the court, probably *dicta*, addresses an argument made by the amicus curiae brief of the Insurance Institute of Indiana, Inc. and the National Association of Mutual Insurance Companies.[71] The Bushes' underlying claim for uninsured benefits arose out of the adult wrongful death statute, which allowed only the personal representative to prosecute the claim through the decedent estate.[72]

> This is no mere technicality. If the claim is asserted under the Adult Wrongful Death Act, some proceeds are subjected to creditors of the decedent's estate, and aggregate damages for loss of love and companionship are capped at $300,000.[73]

VI. Impact of *Jakupka*, *Elliott*, *D.L.B.*, and *Bush*

Elliott and *Jakupko* have broadened the risk exposure insurance companies have on uninsured and underinsured motorists claims without the insurers having an opportunity to underwrite that risk and adjust premiums. Before *Elliott* and *Jakupko*, insurers could better manage risks as all damages related to an injury to an insured were paid under one per-person limit. Now, the potential risk on uninsured/underinsured claims essentially depends on the number of people in the same vehicle with the injured insured. A separate per-person limit must be provided to any insured who has a physical impact that results in emotional distress through observing the severe injury or death of another. This emotional distress need not arise from the insured's own injuries as long as there is the requisite physical touching.

The cases limit coverage to an insured who experiences a physical impact. Most uninsured motorist policies include not only the named insured and resident relatives but also any person occupying the insured vehicle (even if not driven by an insured if done so with insured's consent). A person occupying an insured vehicle does not have to be related to any other insured to be defined as an insured under most uninsured motorist policies. As a result, there is a whole category of additional persons, both relatives and nonrelatives of insureds who may be entitled to their own per-person uninsured or underinsured motorist limits without having suffered an injury themselves.

The decision in *D.L.B.* helps to limit insurance companies' exposure under liability coverage to those third parties who have suffered bodily in-

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[70] *Id.*

[71] *Id.* at 2, 7.

[72] I.C. § 34-23-1-2(a), (b).

[73] *Bush* supreme court opinion, at 7 (citing I.C. § 34-23-1-2(d), (e)).

jury, which would exclude some emotional distress claims. The decision has created the potential for Indiana insureds who have the required automobile insurance to have no coverage for liability claims of bystanders who witnessed an accident but experienced no physical impact. The *Groves v. Taylor* decision allows bystanders who have not met the direct-impact test to recover for emotional distress for the death or severe injury of a loved one analogous to a "spouse, parent, child, grandparent, grandchild or sibling."[74] Those bystanders have a viable claim against the insured but the insured would have no coverage because the claimed bodily injury would not involve a physical touching.

For instance, D.L.B. watched his cousin suffer a fatal injury. While the relationship of cousin may not fit the parameters of *Groves*, if the two were brothers, the bystander brother would have a viable emotional distress claim. However, under the *D.L.B.* decision, the insured would have coverage for the bodily injury (death) of the one brother but no coverage for the bystander claim. Death would meet the definition of *bodily injury* but a bystander's emotional distress without physical impact would not.

For now, this gap in insurance coverage presents a potential risk of personal financial liability exposure for the insured tort-feasor. Careful analysis of the underlying facts and appropriate client counseling are called for until such time as this gap is closed by insurance carriers, the legislature, the courts, or a combination of all three.

74 729 N.E.2d 569, 573 (Ind. 2000).

THE NEW FMLA REGULATIONS: OUT WITH THE OLD, IN WITH THE NEW

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I. Introduction

The Family and Medical Leave Act ("FMLA"), enacted in 1993, grants eligible employees up to twelve work weeks of unpaid leave during a twelve-month period.[1] The FMLA covers private and public employers with fifty or more employees working within seventy-five miles of the work site of the employee seeking leave.[2] An employee must have worked for at least 1250 hours during the twelve-month period before leave is to begin.[3]

On November 17, 2008, the U.S. Department of Labor ("DOL") published its final rule amending the regulations interpreting the Family and Medical Leave Act, the first substantive revision to the regulations since 1995.[4] The new regulations were a response, in part, to persistent employer complaints regarding fraud and abuse.[5] The revisions, which took effect on January 16, 2009, make significant changes to the previous provisions, incorporate new regulations granting leave in certain circumstances to eligible family members of personnel on active military duty and eligible family members of seriously ill or injured service members, and reorganize the prior provisions for clarity.[6]

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1 29 U.S.C. §§ 2601, 2612.

2 29 C.F.R. § 825.104(a).

3 29 C.F.R. § 825.110(a)(3).

4 The Family and Medical Leave Act of 1993: Final Rule, 73 Fed. Reg. 67934 (Nov. 17, 2008).

5 *Id*.

6 29 C.F.R. § 825.100, *et seq*. On April 29, 2009, Congresswomen Carol Shea-Porter (D-N.H.), along with 24 cosponsors, introduced H.R. 2161, entitled: "To Nullify Certain Regulations Promulgated Under the Family and Medical Leave Act of 1993 and Restore Prior Regulations and Direct the Secretary of Labor to Revise Certain Regulations Under that Act." The legislation seeks to repeal and restore old regulations regarding intermittent leave, job restoration, notice, and to revise the medical certification form. For a more detailed analysis of the proposed legislation, *see The FMLA Blog,* http://federalfmla.typepad.com/fmla_blog/, by Carl C. Bosland, Esq.

This article summarizes some of the new regulations that the authors believe are most pertinent.

II. COVERAGE ISSUES

A. JOINT EMPLOYER COVERAGE

In some instances, two or more businesses may exercise enough control over the work or working conditions of the employee so as to constitute joint employers under the FMLA.[7] The final rule refers to the two main categories of employment agencies: temporary placement agencies and professional employer organizations ("PEOs").[8] Typically, a temporary placement agency supplies employees to a second employer, and a PEO contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies.[9] All facts and circumstances in each situation must be evaluated to assess whether joint employment exists, and if so, which employer is the primary employer.[10] The determination of the primary employer is important because "only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits."[11]

A PEO is not a joint employer if it simply performs administrative functions (*i.e.*, payroll, benefits, regulatory paperwork).[12] The DOL has determined that an "economic realities" analysis is the proper standard for assessing whether a PEO is a joint employer (this analysis is similar to that used by the courts under the Fair Labor Standards Act).[13] Accordingly, whether an employer is a joint employer is to be determined in light of the economic realities of the situation, specifically, whether the PEO: (1) exercises control over the client company's employee; (2) has authority to hire, fire, or supervise employees; or (3) benefits from work performed by the client's employees.[14] Unlike the situation involving traditional placement agencies, the client employer most commonly would be the primary employer in a joint employment relationship with a PEO.[15]

The work site of a jointly employed employee is the primary employer's office from which the employee is assigned or reports unless the employee has physically worked for at least one year at a facility of the secondary

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7 29 C.F.R. § 825.106(a).

8 29 C.F.R. § 825.106(b)(1) and (2).

9 *Id*.

10 29 C.F.R. § 825.106(c).

11 *Id*.

12 29 C.F.R. § 825.106(b)(1).

13 29 C.F.R. § 825.106(b)(2).

14 *Id*.

15 *Id*.

employer.[16] In that case, the secondary employer's location will be deemed the employee's work site for determining whether the fifty-employee and seventy-five-mile rules have been satisfied.[17]

B. EMPLOYEE ELIGIBILITY

Employees are eligible to take FMLA leave only if they have been employed by an employer for at least twelve months and have worked at least 1250 hours in the twelve-month period preceding the leave.[18] The new regulations make certain changes and clarifications with regard to how these measures are calculated.

- The twelve months of employment need not be consecutive, but employers need not count a break-in-service of seven years or more in determining whether an employee has been employed for at least twelve months.[19] The FMLA, however, requires employers to keep records for only three years.[20] An employer may base its initial determination of the employee's eligibility for leave on those records.[21]

The final rule adopts two exceptions to the seven-year-break-in-service rule: (1) time spent in military service and (2) a period of approved absences or unpaid leave, such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee.[22] If either circumstance exists, the employee's prior employment would count toward the twelve months of employment regardless of how much time has elapsed between the two periods of employment.

- In order to comply with the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), time spent fulfilling an employee's military service obligations (National Guard or Reserve) is counted in determining whether the employee has been employed for at least twelve months.[23]
- Pursuant to USERRA, an employee returning from military leave shall be credited with the hours of service that would have been performed *but for* the period of military service in determining whether

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16 29 C.F.R. § 825.111(a)(3).

17 *Id*.

18 29 C.F.R. § 825.110(a)(1) and (2).

19 29 C.F.R. § 825.110(b)(1). Employers, however, may choose to voluntarily consider employment before a continuous break in service of more than seven years as long as it does so uniformly with respect to all employees with similar breaks in service. 29 C.F.R. § 825.110(b)(4).

20 29 C.F.R. § 825.500.

21 *Id*.

22 29 C.F.R. § 825.110(b)(2)(i) and (ii).

23 29 C.F.R. § 825.110(b)(2)(i).

the employee worked the 1250 hours of service.[24] In order to determine the hours that would have been worked but for the employee's military service, the employee's preservice work schedule is generally to be used.[25]

C. SERIOUS HEALTH CONDITION AND CONTINUING TREATMENT

The FMLA defines *serious health condition* as either an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.[26]

In order to establish continuing treatment by a health care provider, an employee must experience a period incapacity of more than three consecutive full calendar days, and (1) receive treatment at least twice within thirty days of the first day of incapacity, unless extenuating circumstances exist, and must visit the heath care provider in person; or (2) must be treated by a health care provider in person on at least one occasion and receive a regimen of continuing treatment under the supervision of the health care provider.[27]

In order for a chronic condition to be considered a serious health condition under the FMLA, the new rule now requires employees to visit a health care provider at least twice a year.[28] The chronic condition must also continue over an extended period of time and may cause an episodic, rather than a continuing, period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc*.).[29]

D. LEAVE FOR PREGNANCY OR BIRTH, ADOPTION, OR FOSTER CARE

The new regulations consolidate a variety of provisions into a series of comprehensive sections concerning leave for pregnancy or birth and leave for adoption or foster care. Both the mother and father are entitled to FMLA leave for the birth of their child.[30] Both the mother and father are entitled to FMLA leave to be with a healthy newborn child (bonding time).[31]

An employer who employs both a husband and wife may limit their FMLA leave to a combined total of twelve weeks during any twelve-month period if the leave is taken for (1) birth of the employee's child or to care for the child after birth, (2) for placement of a child with the employee for adop-

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[24] 29 C.F.R. § 825.110(c)(2).

[25] *Id*.

[26] 29 C.F.R. § 825.113(a).

[27] 29 C.F.R. § 825.115(a)(1) and (2). The first in-person treatment must be within seven days of the first day of incapacity. 29 C.F.R. § 825.115(a)(3).

[28] 29 C.F.R. § 825.115(c).

[29] 29 C.F.R. § 825.115(c)(1) and (2).

[30] 29 C.F.R. § 825.120(a)(1).

[31] 25 C.F.R. § 825.120(a)(2).

tion or foster care or to care for the child after placement, or (3) for care of the employee's parent who has a serious health condition.[32] If one spouse is ineligible for FMLA leave, however, the other spouse will be entitled to the full twelve weeks of FMLA leave.[33] If the husband and wife both use a portion of the twelve-week FMLA leave entitlement for the birth of a child, placement for adoption or foster care, or to care for a parent, the husband and wife shall each be entitled to the difference between the amount they have taken individually and twelve weeks FMLA leave for other purposes.[34]

An expectant mother may take FMLA leave before the birth of her child for prenatal care or if her condition makes her unable to work,[35] and both a mother and father may take up to twelve weeks of leave to care for a newborn child with a serious health condition even if both are employed by the same employer.[36]

A husband may also take FMLA leave to care for his expectant spouse if she is incapacitated.[37] The new regulations codify a husband's right to FMLA leave to care for his pregnant spouse.[38] However, only a spouse may receive FMLA leave to care for a pregnant woman; a boyfriend, fiancé, or even the father of the child may not.[39]

Leave for adoption or foster care may begin before the actual adoption or placement for foster care if an absence from work is required for the placement to proceed.[40] FMLA protected leave for adoption must be completed within a year from the placement, and husbands and wives working for the same employer are limited to a combined twelve weeks of leave for purposes of bonding with the healthy adopted or foster child, and to care for the healthy child following birth.[41] Each spouse may take a full twelve weeks

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32 29 C.F.R. § 825.120(a)(3). This limitation applies even if the spouses are employed at two different work sites of an employer located more than 75 miles from each other, or by two operating divisions of the same company. *Id.*

33 *Id.*

34 *Id.* For example, if each spouse takes six weeks leave to care for a healthy newborn, each could use an additional six weeks due to their own serious health condition.

35 In the case of incapacity due to pregnancy, the mother is entitled to FMLA leave even if she does not receive treatment from a health care provider and even if the absence does not last for more than 3 consecutive calendar days, as in the case of severe morning sickness. 29 C.F.R. § 825.120(a)(4).

36 29 C.F.R. § 825.120(a)(4),(6). The husband and wife may each take twelve weeks of FMLA leave if needed to take for their newborn with a serious health condition, even if both are employed by the same employer, provided they have not already exhausted their FMLA leave for that twelve-month period. 29 C.F.R. § 825.120(a)(6).

37 29 C.F.R. § 825.120(a)(5).

38 29 C.F.R. § 825.112(a)(3).

39 29 C.F.R. § 825.122(a).

40 29 C.F.R. § 825.121(a)(1).

41 29 C.F.R. § 825.121(a)(2);(3).

of leave to care for an adopted or foster child with a serious health condition, regardless of whether both are employed by the same employer.[42]

E. DEFINITIONS

The new regulations made minor changes to the definition section of the regulations. The new regulations clarify that the term *parent* includes a biological, adoptive, step- or foster-mother or father, as well as a person who has assumed parental rights and duties for a minor (in loco parentis).[43] A definition of *adoption* has also been added. Under the new regulations, *adoption* means legally and permanently assuming the responsibility of raising a child as one's own.[44] The source of the adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave.[45]

The regulations also clarify that the definition of *son or daughter* in determining eligibility for FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, is "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and 'incapable of self-care because of a mental or physical disability' at the time FMLA leave is to commence."[46]

To reflect the incorporation of the National Defense Authorization Act ("NDAA"), the new regulations include definitions of *next of kin of a covered service member*, *son or daughter of a covered service member*, and *parent of a covered service member*.[47]

Finally, for the purposes of confirming family relationships, employers may require an employee giving notice of the need for FMLA leave to provide reasonable documentation to support a claim of family relationship.[48] Reasonable documentation may include a simple statement from the employee, a birth certificate, or a court document.[49]

F. CARING FOR A FAMILY MEMBER

The FMLA does not permit an employer to add requirements for family leave, for example, a requirement that the employee furnish information about the availability of other caregivers. The new regulations clarify that an employee is entitled to use FMLA leave to care for a family member,

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42 29 C.F.R. § 825.121(a)(4).

43 29 C.F.R. § 825.122(b).

44 29 C.F.R. § 825.122(e).

45 *Id.*

46 29 C.F.R. § 825.122(c).

47 29 C.F.R. § 825.(d),(g),(h),(i).

48 29 C.F.R. § 825.122(j).

49 *Id.*

assuming the eligibility and procedural requirements are met, no matter how many other family members, friends, or caregivers may be available to provide this care.[50]

G. DEFINITION OF A HEALTH CARE PROVIDER

The new regulations add physician assistants to the list of recognized health care providers, provided they are authorized to practice under state law and are performing within the scope of their practice as defined by state law.[51] They join previously recognized providers such as nurse practitioners, nurse-midwives, and clinical social workers.[52]

III. EMPLOYEE LEAVE ENTITLEMENTS

A. COMPUTING FMLA LEAVE DURING HOLIDAY WEEK

Eligible employees are entitled to a total of twenty-six work weeks of FMLA leave.[53] In the new regulations, the DOL clarifies its enforcement position on how to count holidays in cases where an employee takes leave in increments of less than a full work week. Whether an employee is charged FMLA leave for a holiday depends on whether he needs to take FMLA leave for a full or partial work week. If an employee needs less than a full week of FMLA leave, and a holiday falls within that partial week of leave, the hours that the employee does not work on the holiday cannot be counted against his leave entitlement if the employee would not otherwise have been required to report for work on that day.[54] Conversely, an employee taking a full week of FMLA leave during a week containing a holiday will have the holiday counted against his FMLA entitlement.[55]

B. SCHEDULING INTERMITTENT OR REDUCED SCHEDULE LEAVE

The scheduling of intermittent or reduced schedule leave has long been the bane of employers in administering the FMLA. Employees who take intermittent leave for planned medical treatment when medically necessary have a statutory obligation to make a reasonable effort to schedule treatment so as not to unduly disrupt an employer's operations.[56] In the new regulations, *reasonable effort* replaces the word *attempt.* However, the scheduling of planned medical treatment is ultimately a medical determination within the purview of the health care provider.[57] While the em-

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50 29 C.F.R. § 825.124.

51 29 C.F.R. § 825.125(b)(2).

52 *Id.*

53 29 C.F.R. § 825.200(g).

54 29 C.F.R. § 825.200(h).

55 *Id.*

56 29 C.F.R. §§ 825.203, 825.302(e).

57 29 C.F.R. § 825.303(e),(F).

ployee must make a reasonable effort when scheduling leave, if the health care provider determines that there is a medical necessity for a particular treatment, the medical determination prevails.[58]

C. TRANSFER OF AN EMPLOYEE TO AN ALTERNATIVE POSITION DURING INTERMITTENT OR REDUCED SCHEDULE LEAVE

An employer may transfer an employee to an alternative position in order to accommodate intermittent or reduced schedule leave that is foreseeable based on planned medical treatment.[59] Such transfers must be temporary in nature, and the employee must be reinstated to his original position upon completion of the recurring leave period.[60] The DOL has determined that there is no statutory basis in the FMLA to permit transfers to an alternative position for those taking unscheduled or unforeseeable intermittent leave.[61]

D. INCREMENTS OF FMLA LEAVE FOR INTERMITTENT OR REDUCED SCHEDULE LEAVE

When an employee takes intermittent or reduced schedule leave, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.[62]

The regulations allow an exception to the minimum increment rule in situations where physical impossibility prevents an employee using intermittent leave or working a reduced leave schedule from accessing the work site after the start of a shift or from departing from the workplace before the end of a shift.[63] In these limited situations an employer may designate the entire shift as FMLA leave and count it against the employee's entitlement.[64] This exception is limited to the period of time in which the physical impossibility exists.[65]

The new regulations also clarify the method for determining the amount of FMLA leave taken by an employee. Employers are to compare the actual hours worked by the employee to the number of hours the employee would have worked in that work week, but for the FMLA leave taken.[66] The per-

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58 *Id.*

59 29 C.F.R. § 825.204(a).

60 *Id.*; 29 C.F.R. § 825.204(e).

61 29 C.F.R. § 825.204(a).

62 29 C.F.R. § 825.205(a)(1).

63 29 C.F.R. § 825.205 (a)(2). For example, a flight attendant scheduled to work aboard an airplane would qualify under this exception.

64 *Id.*

65 *Id.*

66 29 C.F.R. § 825.205(b)(1).

centage of the FMLA work week that the employee has taken can be converted to hours for tracking purposes.[67]

The new regulations also change the rule for calculating an employee's leave entitlement when an employee works a schedule that varies so much from week to week that no normal schedule can be discerned.[68] In these situations the new regulations require the employer to calculate a weekly average over the twelve months before the leave period.[69] The old regulations required the employer to calculate the weekly average over the prior twelve weeks.

Finally, the new regulations address when overtime hours not worked due to FMLA leave can be counted against an employee's FMLA entitlement.[70] The final rule states that where an employee would normally be required to work overtime (mandatory overtime), but cannot do so because of an FMLA-qualifying condition, the hours may be counted against his leave entitlement.[71]

E. SUBSTITUTION OF PAID LEAVE

The FMLA permits an employee to substitute paid leave for otherwise unpaid FMLA leave and also permits an employer to require this substitution.[72] Substitution of paid leave for FMLA purposes means that the unpaid FMLA leave and the paid leave provided by an employer run concurrently.[73]

The regulations require employees, who elect to substitute accrued paid leave of any kind for unpaid FMLA leave, to comply with the terms and conditions of the employer's normal leave policies.[74] Therefore, an employee's right to substitute accrued paid leave is limited by the terms and conditions pursuant to which the applicable leave is accrued, as long as those terms are nondiscriminatory.[75] An employer may limit substitution of paid sick, medical, or family leave to those situations for which the employer would normally provide such paid leave.[76] In all cases, however, the normal procedural rules subject to which the leave was accrued shall apply.[77]

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67 *Id.*

68 29 C.F.R. § 825.205(b)(3).

69 *Id.*

70 29 C.F.R. § 825.205(c)

71 *Id.*

72 29 C.F.R. § 825.207(a)

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

The new regulations clarify that employers are required to notify employees of any additional requirements for the use of paid leave and state that if the employees do not meet or cannot meet those requirements, they remain entitled to unpaid FMLA leave.[78] Information concerning the use of paid leave must be provided to employees in the rights and responsibilities notice (discussed later).

Finally, the new regulations clarify the interaction between FMLA leave, paid disability leave, and worker's compensation benefits by stating that because an employee is not on unpaid leave status while receiving paid disability leave or worker's compensation, the rules pertaining to substitution of paid leave do not apply.[79] However, where an employee's short-term disability or worker's compensation benefits only partially replace his income, the employer and employee may agree to have paid leave supplement such benefits.[80]

F. FAILURE TO MAKE HEALTH INSURANCE PREMIUM BENEFITS

An employer may terminate an employee's health insurance coverage while the employee is on FMLA leave if the employee fails to pay the premiums, the grace period has expired, and the employer provides sufficient and timely notice of termination to the employee.[81] The regulations now provide that if an employer allows an employee's health insurance to lapse because he fails to pay his share of the premium as set forth in the regulations, the employer still has a duty to reinstate the health insurance when the employee returns to work, and the employer may be liable for harm suffered by the employee if it fails to do so.[82]

G. PERFECT ATTENDANCE/PRODUCTION BONUSES

Upon return from FMLA leave, an employee must be restored to an equivalent position held before leave.[83] An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status.[84] The equivalent position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.[85] An employee's use of FMLA leave may neither result in the loss of any employment benefit that the employee

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78 29 C.F.R. § 825.300(c)(1)(iii).

79 29 C.F.R. § 825.207(d),(e)

80 29 C.F.R. § 825.207(d).

81 29 C.F.R. § 825.210; § 825.212.

82 29 C.F.R. § 825.212(c).

83 29 C.F.R. § 825.214.

84 29 C.F.R. § 825.215(a).

85 *Id.*

earned or was entitled to before using FMLA leave nor be counted against the employee under a no-fault attendance policy.[86]

However, an employer may disqualify an employee from a bonus or other payment if the bonus or payment is based on the achievement of a specified goal, such as hours worked, products sold, or perfect attendance, where the employee has not met the goal because of FMLA leave, unless such compensation is otherwise paid to employees on an equivalent leave for a reason that does not qualify as FMLA leave.[87] An employee has no greater right to restoration or to other benefits and conditions of employment than if the employee had been continuously employed.[88]

H. LIGHT DUTY

When an employee voluntarily accepts a light-duty assignment, the employee does not waive his restoration right while working in the light-duty assignment.[89] Likewise, the time an employee works in the light-duty assignment does not count as FMLA leave.[90] The employee's right to restoration is essentially held in abeyance during the period of time an employee performs a light-duty assignment pursuant to a voluntary agreement between the employee and the employer. At the conclusion of the voluntary light-duty assignment, the employee has the right to be restored to the position the employee held at the time the employee's FMLA leave commenced or to an equivalent position, provided that the employee is able to perform the essential functions of such a position.[91] The final rule provides that an employee's right to restoration while in a light-duty assignment expires at the end of the twelve-month period that the employer uses to calculate FMLA leave.[92]

IV. EMPLOYEE AND EMPLOYER RIGHTS AND RESPONSIBILITIES

A. EMPLOYER NOTICE REQUIREMENTS AND DESIGNATION OF LEAVE

The new regulations consolidate the employer notice requirements under the major topics of "general," "eligibility," and "designation" notice. Generally, employers must post a notice approved by the Department of Labor explaining rights and responsibilities under FMLA.[93] An employer that willfully violates this posting requirement may be subject to a fine for each

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86 29 C.F.R. § 825.215(c).

87 *Id.*

88 29 C.F.R. § 825.216(a).

89 29 C.F.R. §§ 825.220(d), 825.702(d)

90 *Id.*

91 *Id.*

92 *Id.*

93 29 C.F.R. § 825.300(a)(1).

separate offense.[94] The amended regulations have increased this fine one hundred and ten dollars per violation.[95] If an employer has a handbook or other written materials concerning benefits and leave, such written materials must include general FMLA notice information. Where such materials do not exist, the regulations require an employer to provide the general notice to new employees upon hire.[96]

When an employee requests FMLA leave or the employer learns that requested leave may be FMLA-eligible, the employer must notify the employee of his eligibility to take leave and inform the employee of his rights and responsibilities under FMLA, within five days of the request.[97] If an employee is ineligible for FMLA leave, the employer's notice to the employee must state at least one reason why the employee is ineligible for the leave.[98] The DOL has created a new form for this requirement, aptly named "notice of eligibility."

The new regulations require an employer to notify the employee whether a leave of absence will be designated as FMLA leave within five business days of when the employer has sufficient information to determine whether the leave is being taken for an FMLA qualifying reason, absent extenuating circumstances.[99] A new form was created by the DOL for this purpose, entitled "designation notice." Only one designation notice is required for each FMLA qualifying reason per leave year.[100] If an employer wants an employee returning from FMLA leave to provide a fitness-for-duty certification, a statement to that effect must be included in the designation notice, along with a list of the employee's essential job functions, which should be provided to the physician responsible for completing the certification.[101] This new designation notice must be in writing.[102]

B. EMPLOYEE NOTICE REQUIREMENTS

An employee must give at least thirty days advanced notice for foreseeable leave.[103] If the employee does not provide adequate notice of foreseeable leave and then contends it was unforeseeable, employees must explain why it was not possible to give thirty days notice of his need for FMLA

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94 *Id.*

95 *Id.*

96 29 C.F.R § 825.300(a)(3).

97 29 C.F.R § 825.300(b).

98 29 C.F.R § 825.200(b)(2).

99 29 C.F.R. § 825.300(d).

100 *Id.*

101 29 C.F.R. § 825.300(d)(3).

102 29 C.F.R. § 825.300(d)(4).

103 29 C.F.R. § 825.302(a).

leave.[104] The regulations make clear that the thirty-day notice requirement applies to FMLA leave taken for an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered service member.[105] If leave is foreseeable less than thirty days in advance, the employee must provide notice as soon as practicable.[106] Employees must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request.[107] Absent unusual circumstances, employees must comply with the employer's usual and customary notice and procedural requirements for requesting leave.[108]

For unforeseeable leave, employees must give notice as soon as practicable under the facts and circumstances of the particular case.[109] It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.[110] For example, if an employer has a call-in policy requiring employees to call in two hours before their shifts start, absent unusual circumstances, employees should comply with such a policy. An employee's failure to comply with his employer's leave procedures can now be grounds for delaying or denying an employee's request for FMLA leave.[111]

C. MEDICAL CERTIFICATION

The FMLA permits employers to require employees to provide certification from their health care providers to support the need for leave due to a serious health condition of the employee or a covered family member.[112] The general time frame for the employer to request the employee to furnish a certification form has been increased to five business days.[113] In addition, the employee must provide the requested certification to the employer within fifteen calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the em-

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104 29 C.F.R. § 825.300(3)(a).

105 29 C.F.R. § 825.302(a).

106 *Id.*

107 29 C.F.R § 825.302(c).

108 29 C.F.R § 825.302(d).

109 29 C.F.R. § 825.303(a).

110 *Id.*

111 29 C.F.R.§§ 825.302(d) and 303(c).

112 29 C.F.R § 825.305(a).

113 29 C.F.R. 825.305(b).

ployee's good faith efforts.[114] An employer may request that an employee provide a medical certification for each leave year, or at least annually.[115]

In a small victory for employers in this area, an employer may now request information about a health care provider's specialization, an employee or family member's diagnosis, certification from a health care provider that intermittent or reduced leave is medically necessary, a statement pertaining to which essential job functions an employee cannot perform, and more detailed information on the anticipated frequency and duration of intermittent and reduced schedule leave.[116]

When an employee submits a medical certification form that is incomplete or insufficient, the employer must advise the employee in writing as to what additional information is needed and give the employee seven calendar days to cure.[117] A certification is considered incomplete if one or more of the entries are left blank or if it contains information that is vague, ambiguous, or unresponsive.[118]

D. AUTHENTICATION AND CLARIFICATION OF MEDICAL CERTIFICATIONS

The new regulations modify the process by which an employer may contact an employee's health care provider to clarify or authenticate a complete and sufficient FMLA application. In the event the employee does not cure the deficiencies in the certification, the employer may now directly contact an employee's health care provider for purposes of authenticating and clarifying such information without first obtaining the employee's permission.[119] The rule specifies that a health care provider, human resources professional, leave administrator, or management official may contact an employee's health care provider on behalf of the employer.[120] But, an employee's direct supervisor is prohibited from calling or writing an employee's health care provider.[121] In addition, whenever individually identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider, the employer must also satisfy HIPAA's privacy requirements, which is generally accomplished by having the employee execute an appropriate authorization.[122]

If an employee does not authorize his employer to call or write his health care provider to clarify or does not himself clarify the requested informa-

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114 *Id.*

115 29 C.F.R. § 825.305(e).

116 29 C.F.R. § 825.306(a)(1)-(8).

117 29 C.F.R § 825.305(c).

118 *Id.*

119 29 C.F.R § 825.307(a).

120 *Id.*

121 *Id*.

122 *Id.*

tion, an employer may deny FMLA leave on grounds that the certification is unclear.[123] The failure to authorize the release of this information is grounds for denying FMLA leave.[124]

Finally, when an employee submits a certification form from a foreign health care provider that is in a language other than English, the employee must provide a written translation of the certification upon request and at his expense.[125]

E. RECERTIFICATION

The general rule is that an employer may request recertification no more often than every thirty days and only in connection with an absence, unless the minimum duration of the condition is more than thirty days.[126] For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for forty days, the employer must wait forty days before requesting recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee.[127] For employees who request intermittent or reduced leave for periods in excess of six months, an employer may request recertification every six months in connection with an employee's absence.

An employer may request recertification in less than thirty days if one of the following circumstances exist: (1) the employee requested an extension of his leave; (2) circumstances stated in the previous certification have changed significantly (*e.g.*, the duration or frequency of the absence, the nature or severity of the illness, complications); or (3) the employer receives information that casts doubt on the continuing validity of the certification. Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on the recertification may be requested.[128]

As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may give the health care provider a record of the employee's absence pattern and ask the health care provider if the claimed serious health condition and need for leave is consistent with such pattern.[129] This provision is useful for those instances where the employee absences raise a suspicion about the authenticity of the leave.

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123 *Id.*

124 *Id.*

125 29 C.F.R § 825.307(f).

126 29 C.F.R. § 825.308(a).

127 29 C.F.R. § 825.308(b).

128 29 C.F.R § 825.308(c)(1)-(3).

129 29 C.F.R § 825.308(e).

F. FITNESS-FOR-DUTY CERTIFICATION

An employer may require an employee to submit a fitness-for-duty certification upon return to work from FMLA leave to specifically address the employee's ability to perform the essential functions of the employee's job.[130] An employee has the same obligation to provide a complete certification or provide sufficient authorization to the health care provider in order for that provider to transmit information directly to the employer in the fitness-for-duty certification process as he does in the initial certification process.[131] If proper notice has been given regarding the need for a fitness-for-duty certification and the employee does not provide said certification, the employee may not be entitled to reinstatement.[132]

The new regulations require an employer to provide the employee with a list of the essential job functions no later than with the designation notice. The employer must indicate in the designation notice that the certification must address the employee's ability to perform the essential function identified.[133]

For employees on intermittent or reduced leave, an employer may require a fitness-for-duty certification to return from such an absence as frequently as once every thirty days if reasonable safety concerns exist regarding an employee's ability to perform his duties. *Reasonable safety concerns* is defined as a reasonable belief of significant risk of harm to the individual employee or others. Employers should consider the nature and severity of the potential harm and its likelihood of occurring.[134]

V. INJURED OR ILL SERVICE MEMBER LEAVE

Former President George W. Bush signed the National Defense Authorization Act ("NDAA"), 29 U.S.C. § 2611(16), on January 28, 2008, amending the FMLA to include provisions for the coverage of service members and their families. The details of those amendments, which were initially published without interpretive regulations, will now be discussed.

A. COVERAGE, DEFINITIONS, AND CERTIFICATION REQUIREMENTS

An employee who is the next of kin of the sick or injured service member is entitled to take up to twenty-six weeks of leave in a single twelve-month period to care for a covered service member with a serious injury or illness.[135] A covered service member is defined as a member of the Armed Forces, including a member of the National Guard or Reserves, who is un-

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130 29 C.F.R. § 825.312(a).

131 *Id.*

132 29 C.F.R. § 825.312(e).

133 29 C.F.R. § 825.312(b).

134 29 C.F.R. § 825.312(f).

135 29 C.F.R. § 825.127(b)(3) and (c).

dergoing medical treatment, recuperation, or therapy, or is otherwise on the temporary disability retired list for a "serious injury or illness."[136] *Serious injury or illness* is defined by the NDAA as an injury or illness suffered by the covered service member in the line of duty on active duty in the armed forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.[137] This leave is applied on a per-covered-service-member, per-injury basis. Employers must designate leave as service member leave when leave qualifies under both this provision and the provision discussed below.[138] A request to take military caregiver leave may be supported by a certification that is completed by an appropriate health care provider.[139]

When leave is taken to care for a covered service member with a serious injury or illness, an employer may require an employee to support his request for leave with a sufficient certification.[140] Under the new regulations, employers are permitted to require certain information to support the request for leave. This certification may be obtained from one of the following authorized health care providers: (1) a DOD health care provider; (2) a Veterans Administration ("VA") health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider.[141]

In connection with the certification process, an employer is permitted to obtain details about the service member's medical condition, such as whether the injury occurred in the line of duty, when it occurred, its probable duration, and the amount of time the service member will require care, as well as certain information from the employee.[142]

An employee may also be required to provide confirmation of his relationship to the injured or ill service member. Confirmation can take the form of a simple statement from the employer, birth certificate, or court document.[143]

VI. QUALIFYING EXIGENCY LEAVE

A. COVERAGE, DEFINITIONS, AND CERTIFICATION REQUIREMENTS

Employers must grant employees up to twelve weeks of leave for certain qualifying exigencies arising out of a covered military member's active duty status, notification of an impending call, or order to active duty status. A

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136 29 C.F.R § 825.127(a).

137 29 C.F.R. § 825.127(a)(1).

138 29 C.F.R. § 825.127(c)(2).

139 29 C.F.R § 825.310(a).

140 *Id.*

141 29 C.F.R. § 825.310(a)(1)-(4).

142 29 C.F.R § 825.319(b).

143 29 C.F.R § 825.310(c).

qualifying exigency includes (1) short-notice deployment; (2) military events and related activities; (3) child care and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) postdeployment activities; and (8) additional activities agreed to by both employer and employee.[144] Leave for a qualifying exigency is intended for use by employees who have a spouse, son, daughter, or parent called to active duty as a part of the Reserve components and the National Guard, or as certain retired members of the regular armed forces. It does not apply to the family of military members who are in the regular armed forces.[145]

In connection with the certification process, an employer may require that the employee provide a copy of the covered military member's active duty orders or other documentation issued by the military, which indicates that the covered military member is on active duty in support of a contingency operation, and the dates of the covered military member's active duty service.[146]

Employees are required to provide a signed statement or description of the facts regarding each qualifying exigency for which FMLA leave is requested and to stipulate that such facts are sufficient to support the need for leave.[147] Where an employee's need for exigency leave is for an intermittent or reduced leave schedule, he may be asked to give beginning and ending dates, as well as an estimate of the frequency or duration of the qualifying exigency.[148]

VII. CONCLUSION

It is certainly out with the old and in with the new as the new regulations and amendments for service members represent a significant change in the FMLA. The regulations are too new, however, to have garnered significant attention from the federal trial and appellate courts. The comments to the final rule, as published in the Federal Register, provide some guidance to practitioners in this area. Overall, the new regulations seem to provide a clearer approach to the FMLA that should benefit employers and their counsel.

144 29 C.F.R. § 825.126(a)(1)-(8).

145 29 C.F.R. § 825.126(b)(2).

146 29 C.F.R § 825.309(a).

147 29 C.F.R § 825.309(b).

148 *Id.*

THE INDIANA SUPREME COURT INSTRUCTS PRACTITIONERS ON THE REQUIREMENTS OF ADMINISTRATIVE RULE 9

Robert L. Gauss*
Brian Bailey*

Summary: In a recent ruling, the Indiana Supreme Court took the opportunity, sua sponte, to instruct and remind lawyers of the requirements of Administrative Rule 9 regarding protective orders. For all those who use protective orders in their practices, specifically protective orders to restrict the dissemination of information produced during discovery, the supreme court reminds them that an agreement to a protecive order during discovery does not shield information from the public record during evidentiary hearings or trial. It is a stark reminder of the openness of our courts and the limited protection offered by agreed protective orders which, for many, are commonplace.

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Assume that parties to a case file documents under seal with a trial court in support of motions for summary judgment. Further assume all the parties stipulate to the confidentiality of the supporting documents, and the trial court approves the stipulation. Assume the documents do not belong to any category of information already protected from disclosure by law. May the public gain access to those documents?

The answer is yes.

Issuing a sua sponte order in a pending appeal, the Indiana Supreme Court made clear that parties must follow the procedures of Indiana Administrative Rule 9(H) before a court record, including any documents filed in the case, may be excluded from public access.[1] In *U.S. Filter*, the parties tendered a stipulation to the trial court seeking a confidentiality order because the litigation "might involve discovery and disclosure of privileged or confidential and sensitive information" and a confidentiality order was desirable.[2] The parties further stipulated that at the conclusion of the liti-

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gation, any material designated as confidential could be retrieved by the party who tendered it or the material would be purged from the trial court's records.[3] On interlocutory appeal from the trial court's partial summary judgment, the parties also filed documents under seal with the court of appeals.[4]

The supreme court vacated the trial court's order of confidentiality in an opinion separate from its ultimate decision on the merits.[5] In doing so, the supreme court explained the defects in the trial court proceedings and elaborated on the process parties must follow to properly exclude court information from public access.

First, the supreme court distinguished between information that parties exchange between themselves during discovery, on the one hand, and information the parties submit to a court, on the other. The former may be protected from disclosure by agreement of the parties, by statute, or by common-law restrictions; the latter (if not already protected from disclosure under Indiana Administrative Rule 9(G)[6]) is accessible to the public. In other words, "public accessibility is the default rule."[7] The supreme court likened the intent of its administrative rule—Rule 9—with the legislature's declared intent in the Access to Public Records Act: "'[A]ll persons are entitled to full and complete information regarding the affairs of government.'"[8] Indeed, Rule 9(A)(1) specifically cites Indiana Code § 5-14-3-4(a)(8), which permits the Indiana Supreme Court to adopt rules declaring public records confidential

Second, the supreme court further distinguished between information that already is excluded from access under law (categories enumerated in Rule 9(G)) and information for which a court order is required to prevent public access. Unless the procedures of Rule 9(H) are followed, a court order may not bar public access to court records. Although not cited by the supreme court, it is important to note that the commentary to Rule 9(H) emphasizes that "information that is otherwise publicly accessible [not protected by Rule 9(G)] is to be excluded from public access" only under "extraordinary circumstances."

What does Rule 9(H) require to prohibit public access to information contained in court records?

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[3] *Id.*

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[6] Rule 9(G) contains an extensive, though not exhaustive, list of information that is excluded from public access. The prudent attorney should review those categories to gain a sense of the goals 9(G) seeks to achieve, then closely examine the list in light of information he has that may be potentially excluded.

[7] *U.S. Filter Corp.*, 895 N.E.2d at 115.

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1) "[A]ny person affected by the release of information" must file a "verified written request to prohibit public access to information in a court record."
2) The written request must demonstrate at least one of the following circumstances:
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3) The requestor must give notice to the parties or other persons as the court directs. Otherwise, the requestor must give reason why the notice could not or should not be given. Anyone wishing to respond must do so within twenty days of service.
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6) The court must balance the public access interests served by the rule and the grounds demonstrated by the requestor. In its order, the court shall state its reasons for granting or denying the request. If the court prohibits access, "it will use the least restrictive means and duration."

Though the supreme court did not enumerate each of these steps in its opinion, the court noted that the trial court did not hold a public hearing before it approved the parties' stipulation, nor did the parties' stipulation or the trial court's order "address the grounds which must exist if access is to be denied."[9]

The only argument advanced to support the trial court's order was that the information was protected by the insurer-insured privilege set forth in *Richey v. Chappell*.[10] (The dispute in *U.S. Filter* involved putative insureds seeking coverage from several insurance companies.) The supreme court was not persuaded that information protected by the insured-insurer privilege justified prohibition of public access. (The dispute involved putative

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The bottom line is that the court records will be prohibited from public access only where the requirements of Rule 9(H) are met. Public accessibility is the default rule. A client whose sensitive information is at stake should be informed of and weigh those risks accordingly. The most effective means to ensure information will be unavailable is to file a motion pursuant to Rule 9(H), being careful to expressly set forth and satisfy all requirements listed therein.

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WAS IT SOMETHING I ATE? HELPING INDIANA DEFENSE PRACTITIONERS STAY IN FRONT OF FOOD LIABILITY LITIGATION

Blaire M. Henley*

"Approximately 76 million illnesses, 325,000 hospitalizations, and 5,000 deaths in the United States each year," can be attributed to foodborne illness.[1] Foodborne illnesses account for "more deaths each year than the combined total of all 15,000 products regulated by the U.S. Consumer Products Safety Commission."[2] These numbers are staggering, and unfortunately for the food industry, they have been brought to the forefront of the national consciousness due to several recent high-profile outbreaks. The recent salmonella outbreak involving peanuts from the Georgia company, Peanut Corp. of America, at one time reached forty-three states and Canada.[3] Just two years earlier, ConAgra "issued a voluntary recall of Peter Pan and Great Value peanut butters when the brands were linked to a *Salmonella* outbreak that had sickened 425 people in 44 states."[4] The previous year, 71 people in five states fell ill after eating at Taco Bell.[5] Earlier in 2006, 199 people were infected with *E. coli* after "consumption of tainted spinach."[6]

The media gave extensive coverage to the outbreaks, which was followed quickly by attention from legislatures. Since January of this year, state legislatures across the nation have introduced more than 600 bills directed at the food industry.[7] One hundred thirty-five of those bills concerned

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1 Paul S. Mead, *et al.*, *Food-Related Illness and Death in the United States*, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/ncidod/eid/Vol5no5/mead.htm.

2 *Id.*

3 Lyndsey Layton, *Peanut Processor Knowingly Sold Tainted Products, It Found Salmonella 12 Times*, WASH. POST, Jan. 26, 2009, at A01.

4 Antony B. Klapper and Marilyn A. Moberg, *Marshalling an Effective Defense, Amid Wave of Food Contamination Litigation,* Update–Food Drug Law Institute Update, July/August 2007 at p. 32.

5 *Id.*

6 *Id.*

7 Jane Zhang, *Hoping to Make Food Safer, States Go It Alone*, WALL. ST. J., May 12, 2009, at A13.

processing, sanitation, and inspection.[8] Another ninety-seven related to "meat, poultry, and fish."[9] Sixty-three addressed "adulteration of food products."[10] The remaining bills concerned restaurants.[11]

While Indiana has not been a hotbed of foodborne illness claims or legislation aimed at the food industry, recent developments indicate that the issue may hit home in the near future. This article will arm Indiana practitioners with an understanding of recent litigation concerning foodborne illness claims and strategies for preventing and defending those claims. While foodborne illness is a hot topic, Indiana practitioners should also be familiar with additional litigation facing the food industry, such as claims concerning allegations of misleading or inaccurate labeling. Finally, in order to fully address litigation concerning either foodborne illness or labeling, a practitioner should be familiar with the laws and regulations governing the industry, including any developments in Indiana. Accordingly, this article also provides an overview of those topics.[12]

I. RECENT CASES INVOLVING FOODBORNE ILLNESS

The recent salmonella outbreak, which was linked to the Peanut Corporation of America, has already led to a flurry of lawsuits—and there are surely more to come. The family of Clifford Tousignant has filed suit against King Nut, claiming Mr. Tousignant died as a result of tainted peanut butter.[13] A couple in Vermont, the Meuniers, filed suit on behalf of their minor son, who became ill after consuming peanut butter.[14] In addition, The Hartford has already filed its own lawsuit asking for a declaratory judgment on the extent of The Hartford's responsibility under three policies issued to Peanut Corporation of America.[15] While The Hartford has refused to comment on the litigation, it is thought that the insurer may be attempting to avoid liability for any intentional acts by its insureds.[16] Such a posi-

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8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 Note, however, that this article does not provide an exhaustive explanation of the agencies that regulate the food industry or all regulations promulgated by the industry. It seeks only to alert practitioners to the agencies and regulations that should be considered in order to mount a full defense of a food industry client.

13 Bob Von Sternberg , *Family Sues Peanut Butter Maker Over Death Linked to Salmonella Outbreak*, (MINNEAPOLIS) STAR TRIBUNE, Apr. 23, 2009, at 2B; *see* Jeffry Scott, *Laws to Tackle Tainted-Food Cases Seem to Lack Much Bite*, ATLANTA JOURNAL-CONSTITUTION, Mar. 5, 2009, at C1 (indicating that attorney Bill Marler has filed "multiple claims against Peanut Corp."); Diane Levick, *A Limit on Shelling Out?: The Hartford Asks Court to Clarify its Coverage Liability in Salmonella Outbreak, Peanut Recall*, HARTFORD COURANT, Feb. 6, 2009, at A1 (stating Marler has filed lawsuits on behalf of two clients).

14 Sarah Crichton, *Kellogg Sued in Salmonella Case*, NEWSDAY, Feb. 5, 2009, at A24

15 *See* Levick, *supra* note 13.

16 *Id.*

tion by The Hartford may have a significant impact, given recent news that Peanut Corp. of America knew the products were contaminated.[17] Further, The Hartford's lawsuit has prompted other plaintiffs to sue not only the Peanut Corporation of America but also companies that used Peanut Corporation's products in their own end-products. For example, the Meuniers, who had already sued Peanut Corporation of America, added Kellogg Co. as a defendant.[18] The couple's attorney explained that "Kellogg was added as a defendant after it [became] clear that PCA's assets and limited insurance coverage of between $28 million to $31 million would be insufficient once all action had been launched."[19]

While these cases are in their infancy, others have made their way through the trial and appellate courts. One such case demonstrates how important experts are to foodborne illness cases. In *San Francisco v. Wendy's International, Inc.*,[20] the San Franciscos alleged that they purchased a hamburger from Wendy's. After Mr. San Francisco ate a portion of the sandwich, he observed that the hamburger was red and "tasted funny."[21] He discarded the remainder of the sandwich.[22] Mr. San Francisco became ill shortly thereafter and within "one-and-a-half to two hours," experienced "vomiting and diarrhea."[23] Ultimately, he was admitted to the hospital, where he remained for ten days.[24] The San Franciscos filed suit, alleging that the Wendy's hamburger caused Mr. San Francisco's illness.[25] In support of their claim, the plaintiffs offered Dr. Gregor, who treated Mr. San Francisco at the hospital, and Dr. Todd, "an expert in food safety and toxicology from Michigan State University."[26]

Dr. Todd testified that because Mr. San Francisco became ill so soon after eating the hamburger, a typical *E. coli* infection was not the cause, since *E. coli* typically requires a three- to seven-day incubation period.[27] Dr. Todd opined, however, that "*E. coli* bacteria was present on the ground beef in the Wendy's hamburger; that the bacteria produced a verotoxin; and that the ingestion of the verotoxin . . . produced the rapid onset of Mr. San Fran-

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17 *See* Layton, *supra* note 3.

18 *See* Crichton, *supra* not e14.

19 *Id.* The couple may also add King Nut as a defendant. *Id.*

20 656 S.E.2d 485 (W.Va. 2007).

21 San Francisco v. Wendy's Int'l, Inc., 656 S.E.2d 485, 490 (W.Va. 2007). Unfortunately for Wendy's, the San Franciscos were not the only patrons to bring foodborne illness claims against the company. *See* Roney v. Wendy's Old Fashioned Hamburgers of N.Y., 2006 U.S. Dist. LEXIS 11303.

22 *San Francisco*, 656 S.E.2d at 490 (W. Va. 2007).

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

cisco's symptoms."[28] Dr. Gregor used differential diagnosis to determine that Mr. San Francisco suffered from a foodborne illness.

Wendy's filed a motion for summary judgment, including contemporaneous motions in limine to exclude both Dr. Gregor and Dr. Todd.[29] The trial court granted the motions in limine and, thus, also granted the motion for summary judgment.[30] On appeal, the San Franciscos argued that Dr. Gregor was a qualified physician with a board certification in internal medicine and a "sub-specialty in cardiovascular disease."[31] Further, during his twenty-three years of practice, Dr. Gregor "treated numerous gastrointestinal conditions, including diagnosing and treating multiple patients suffering from foodborne illness."[32] Wendy's challenge to Dr. Gregor was, in essence, that Dr. Gregor was neither a gastroenterologist nor an epidemiologist.[33] The court explained that while other physicians with other specialties might be more qualified to render an opinion on foodborne illness, this went to the weight of Dr. Gregor's testimony, not its admissibility.[34] The court rejected Wendy's argument that Dr. Gregor inappropriately relied on a differential diagnosis to reach his opinion.[35] The appellate court also overturned the trial court's exclusion of Dr. Todd, holding Dr. Todd's opinions were supported by the evidence and by medical literature.[36] It should be noted that Wendy's challenged Dr. Todd's opinion, in part, on the basis that there was no evidence that Mr. San Francisco was exposed to *E. coli*—no samples taken from Mr. Todd during his hospitalization were tested for a foodborne pathogen.[37] The court explained that it did not require a positive test to proceed with a foodborne illness claim and noted that "food poisoning is a 'fairly common illness' for which scientific testing would not be cost effective, and the 'emphasis is on the last meal before the event.'"[38] The appellate court determined that the trial court improperly excluded the

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[28] *Id.*

[29] *Id.* at 491.

[30] *Id.*

[31] *Id.* at 496.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 496-97.

[35] *Id.* at 497-500.

[36] *Id.* at 500-502.

[37] *Id.* at 501.

[38] *Id.* (quoting Bussey v. E.S.C. Restaurants, Inc., 620 S.E.2d 764, 767 (2005)). As will be explained in detail in the succeeding sections, the court appears to suffer from a commonly held misconception that foodborne illness can be traced to the last meal consumed, when that is often not the case.

San Franciscos' experts; it also overturned the trial court's entry of summary judgment.[39]

II. How to Reduce Clients' Risk of Foodborne Illness Claims

The headlines demonstrate that claims of foodborne illness can wreak havoc on a company's business and its bottom line, and the cases show that foodborne illness litigation is especially expensive because it is highly fact-sensitive and dependent on testimony from experts. Accordingly, counsel for members of the food industry will want to help their clients reduce the risk of foodborne illness claims.

This can be done by suggesting proactive measures. The first step is to ensure that the client is aware of, and in compliance with, all applicable laws and regulations. Counsel may also wish to identify particular areas where the client may want a written policy to help ensure compliance with applicable laws and regulations—for instance, a restaurant may have a written policy regarding the proper handling of fish or poultry products, whereas a manufacturer may have a policy regarding how employees should report any concerns regarding adulterated food. Care should be taken, however, to create written policies only on matters or issues that are material and that the client intends to enforce. While a written policy can be an effective means of ensuring compliance with applicable laws and regulations, a written policy that is disregarded by the company or its employees can also be a damning piece of evidence at trial.

Counsel may also advise clients to educate their employees about appropriate food handling or food manufacturing processes. Counsel can also underscore the need to document any such education, as it may later provide evidence of reasonable care.

Further, companies such as the American Sanitation Institute,[40] the American Institute of Baking,[41] and Silliker[42] perform private audits of facilities for food retailers, distributors, or wholesalers. Counsel may suggest to a manufacturing client that the client arrange for such an audit. The audit will help to avoid foodborne illness by identifying areas for improvement and will, in the unfortunate event of litigation, provide evidence that the company exercised reasonable care to prevent the harm. If a company arranges for such an audit, the records of that audit should be maintained. In addition, counsel may suggest to food companies that incorporate items and materials from retailers, distributors, or wholesalers that they require those vendors to provide copies of their latest audit results. If the client has

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[39] *Id.* at 501-502. Further, foodborne illness is not even limited to humans. Pet food litigation cost as many as twelve manufacturers a combined $32 million dollars. *See* In re: Pet Food Prods. Liab. Litig., 2008 U.S. Dist. Lexis 94603 (D.N.J. 2008).

[40] http://www.asifood.com.

[41] http://www.aibonline.org.

[42] http://www.silliker.com.

the bargaining power, counsel may also suggest that the client require the vendor to provide indemnification for any contaminated food product sold to the client.

Further, counsel, for reasons discussed herein, should notify clients that immediate notification of a potential foodborne illness claim is essential to maximizing the potential for an effective defense.

These steps will likely not only reduce the incidence of contamination and foodborne illness, but will also present a strong defense in the event that an illness and subsequent litigation do occur.

III. HOW TO EFFECTIVELY DEFEND A FOODBORNE ILLNESS CLAIM

In the event that a client is faced with a foodborne illness claim, counsel will want to act promptly not only because foodborne illness claims quickly garner unwanted media attention, particularly when multiple persons are sickened, but also because evidence such as stool or product samples and questionnaire responses needs to be gathered and preserved.

A. INITIAL INVESTIGATION AND INFORMAL DISCOVERY

When counsel receives notice of a foodborne illness claim, he must first determine whether the Indiana Department of Health ("ISDH") has been notified. If so, contact the ISDH representative in charge of the investigation to determine what evidence has already been gathered. Have the claimants provided a stool sample for testing? Have the claimants filled out a questionnaire about their exposure to particular foods and food facilities?

1. Obtaining Necessary Samples

Obtaining a stool sample is particularly important, as tests may reveal what pathogen, if any, has caused the illness. Knowing what pathogen is involved is necessary in identifying the incubation period for the foodborne illness, which is incredibly important. Many lay people assume that any given foodborne illness was caused by the last meal consumed before symptoms developed.[43] As evidenced by the table below, that is often not the case, as some foodborne pathogens have incubation periods of several days.

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[43] Even courts can fall victim to this misconception. *See* San Francisco v. Wendy's Int'l, Inc., 221 W. Va. 734, 750 (W. Va. 2007) (quoting another case and explaining that "[a]s the *Bussey* court indicated, "food poisoning is a 'fairly common illness' for which scientific testing would not be cost effective, and the 'emphasis is on the last meal before the event.'" Given the pervasiveness of the misconception, counsel should take every opportunity in the litigation to remind the plaintiff and the court that the identification of the source of a foodborne illness is more complicated than remembering the last meal eaten.

MAJOR FOODBORNE ILLNESSES[44]

DISEASE	PATHOGEN	INCUBATION PERIOD/MEAN	DURATION OF ILLNESS
Salmonellosis	*Salmonella* (facultative) Bacteria	8-72 hours 18-36 hours	2-3 days
Shigellosis	*Shigella* (facultative) Bacteria	1-7 days 1-3 days	Indefinite
Listeriosis	*Listeria monocytogenes* Bacteria	2 days—3 weeks 4-21 days	Indefinite; high fatality in the immuno-compromised
Staphylococcus	*Staphylococcus aureus* Bacteria	1-6 hours 2-4 hours	1-2 days
Clostridium perfringens	*Clostridium perfringens* Bacteria	8-22 hours 10 hours	24 hours
Bacillus cereus	*Bacillus cereus* Bacteria	½ - 5 hours; 8-16 hours ½ -5 hrs; 12 hrs	6-24 hours; 12 hours
Campylobacter	*Campylobacter jejuni* Bacteria	2-5 days	5-7 days 3-5 days
E. coli 0157:H7	*Escherichia coli* Bacteria	2-5 days	5-10 days 2-5 days
Botulism	*Clostridium botulinum* Bacteria	12-36 hours; 72 or more hours	Several days—year 18-36 hours
Viral Gastroenteritis	Snow Mountain, *Calicivirus* Virus	24-48 hours	24-60 hours 36 hours
Hepatitis A	*Hepatitis A* Virus	7-50 days	Several weeks to months 25-30 days
Norovirus infection	*Noro* Virus	12-96 hours	1-2 days

Establishment of an incubation period may permit a defendant to wholly rebut a plaintiff's claim. In *Anderson v. Piccadilly Cafeteria, Inc.*, Anderson filed suit against Piccadilly Cafeteria, Inc., alleging that a salad purchased at Piccadilly Cafeteria, Inc. caused her to suffer severe vomiting and diarrhea. Ms. Anderson stated that her symptoms began within fifteen minutes

[44] Information taken from the Indiana State Department of Health, FBI Bacteria and Viral Charts, http://www.in.gov/isdh/21057.htm, last accessed on May 12, 2009. The charts provided by the Department of Health include additional information regarding symptoms, foods affected, and type of illness.

of eating the salad. Defendants put forth evidence demonstrating "that the incubation period for food bacteria is at least one hour, usually much longer."[45] Accordingly, the plaintiff abandoned the claim that the food was adulterated, instead arguing that she suffered a "vagal response" to the salad, a claim with which the appellate court dispatched. Other plaintiffs' claims have been similarly disproven based on evidence regarding the incubation period.[46]

If the ISDH has not yet obtained a stool sample, counsel may wish to consider contacting the claimant directly about providing a stool sample for independent testing.[47] In making that determination, counsel will need to evaluate a competing consideration—that some evidence indicates that juries return lower verdicts where the plaintiff is unable to attribute his injuries to a particular pathogen.[48] Thus, it is possible that a lack of testing, and thus a lack of identification of the pathogen, may result in a lower verdict. As identification of the pathogen, however, may wholly eliminate a client's product, it will, in most cases, still be advisable to arrange for testing. In some circumstances, however, it will be impossible to obtain a proper stool sample as the claimant's symptoms subsided long before counsel was notified of the claim. In those situations, it is all the more important to obtain a food history as soon as practicable.

If possible, counsel should also obtain a sample of the food that allegedly gave rise to the claimant's illness. If a pathogen is identified in the stool sample, the food sample can be tested for that pathogen. If no sample is identified, it is possible that the food sample can still be tested for any evidence of contamination.

2. Obtaining Necessary Information

Because many people assume, often incorrectly, that a foodborne illness was caused by the last meal consumed before the onset of symptoms, counsel will want to obtain a food history from the claimant as soon as possible. Days or weeks after the illness, when the health department is investigating the source—or, worse, months or years later when the deposition oc-

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45 Anderson v. Piccadilly Cafeteria, Inc., 804 So. 2d 75, 77 (La. App. 2001).

46 Denaro v. 99 Restaurant, Inc., 2002 WL 31546120 at *2 (M.A. Appp. Div. 2002); *see* Klapper, *supra* note 4, at 35.

47 If the claimant has used antibiotics near the time of the sample, the sample may reveal a false negative. *See* Marler, Presentation at the 2005 Defense Research Institute Conference on Food Liability Litigation, "Separating the Chaff from the Wheat: How to Determine the Strength of a Foodborne Illness Claim."

48 Jean C. Buzby, *et al.*, *Product Liability and Microbial Foodborne Illness*, Report from the United States Department of Agriculture. This 2001 study analyzed verdicts in 175 foodborne illness cases from 1988-1997. In those cases "where the alleged illness came from a specified pathogen, plaintiffs won 41.7 percent of the time, and received an average award of $82,333. In cases where the illness was caused by an unspecified pathogen, however, plaintiffs prevailed only 22 percent of the time and received average awards of only $4,554."

curs—the claimant will no doubt remember the last meal she ate before becoming ill, as she likely already associates that meal with her illness. What she is unlikely to remember is the food she ate and the restaurants she visited in the days before her illness—information that may identify the actual source of the illness. Thus, in order to ensure that a client will have the opportunity to show an alternate source of the illness, particularly when multiple claimants are involved, it is critical that a food history be obtained from the claimant as soon as possible. Oregon publishes a sample questionnaire that offers an excellent guide to the type of information needed.[49] The questionnaire seeks to identify what treatment the claimant has received and what types of samples, if any, have been taken.[50] It also seeks information on the foods consumed by the claimant, including the names of the restaurants or stores at which the claimant purchased the food.[51]

The questionnaire may also help to identify the precise incubation period of the illness, which may rule out the client's products. In addition, counsel may consult with the ISDH. If the department has not yet gathered the information, counsel may contact the claimant to schedule an interview to gather the information. Obviously, if the claimant is already represented by counsel, the questionnaire should be sent to opposing counsel for discussion with the claimant.

Counsel may also want to evaluate the plaintiff's behavior as a source of comparative fault. Many people stricken with foodborne illness overlook their own role in the illness–that is, the manner in which food was prepared or stored in the home. A study revealed that 1.5 percent of the persons studied drank raw milk, 1.9 percent ate raw shellfish, 19 percent ate runny eggs, and 30 percent preferred pink hamburger. Only 93 percent responded that they "almost always washed their hands after handling raw meat or poultry," and that they "almost always washed their cutting board after cutting raw chicken."[52] Accordingly, either at the informal discovery or formal discovery stage, counsel should gather information on how the claimant, or the person in the claimant's household responsible for food preparation, handled food, as that information may reveal another possible cause of the claimant's injuries.

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[49] http://www.oregon.gov/DHS/ph/acd/outbreak/shotgun.doc; Minnesota's Department of Health also publishes a questionnaire, which is available at http://www.co.washington.mn.us/client_files/documents/phe/ENV/ENV-MDH06GIsum.pdf, p.185.

[50] *Id.*

[51] *Id.*

[52] Shiferaw B, *et al.*, *Prevalence of High-Risk Food Consumption and Food-Handling Practices among Adults: A Multistate Survey, 1996 to 1997*, FoodNet Publication. With respect to the types of food consumed, as such as raw milk or runny eggs, the study was based on what the participants had eaten in the five days before the study.

3. Gathering Necessary Documents from Client

Upon notice of the claim, counsel should immediately encourage the client to begin marshaling all documentation regarding the purchase, preparation, sale, or distribution of the product at issue. In particular, counsel should gather the following documents: all contracts with vendors or distributors related to the product; all invoices for the purchase of the product by the client and the sale of the product to any consumers, including any records showing the method of transporting the product to the client or to a sales point; any indemnification agreements related to the product; and any records documenting the preparation or storage of the product.

It is possible that these documents will enable counsel to eliminate the client's product as a source of the illness: perhaps the client did not sell products to the location at issue or did not sell products during the relevant time period.[53] Even if the documents do not provide such a clear-cut defense, and they rarely will, they will ensure that documents necessary to defend the client are neither lost nor destroyed.

Counsel should also consider reviewing any contracts pertaining to the product. Do the contracts indicate which party will bear the responsibility of tracing the product in the event of an outbreak; that is, is the distributor responsible for notifying all stores to which it sold contaminated peanut butter? If so, counsel may contact the responsible party to ask that it conduct the necessary investigation to trace the product. Counsel may also review the invoices to see if those documents support or contradict the claimant's story regarding the purchase of the product. For instance, if the claimant asserts that he got sick from a product purchased from a particular store, verify that the client's products were in fact sold to that store (and at such a time that the product would not have expired before sale). Counsel should also identify any companies that transported the product to the client. If the product must be maintained at a certain temperature to avoid spoiling, identify whether the transporting company has any records indicating the proper temperature was maintained. If not, consider adding the transporting company as a cross-defendant. To the extent the client has any indemnification agreements concerning the product and the indemnification runs in the client's favor, counsel should notify the indemnifying party of the claim.

Finally, counsel may examine all records regarding the preparation or storage of the product. A client with detailed records may be able to show that no contamination occurred by presenting circumstantial evidence on how difficult it would be for contamination to occur given the client's precautions.[54] For instance, Pepsi-Cola once exposed a hoax where people

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[53] Shawn K. Stevens, *Uncovering the Truth in Foodborne Illness Litigation: Defending Liability and Damages*, DRI Food Liability Seminar (May 2008), at 50.

[54] *See id.* at 49-50.

claimed to have discovered syringes in Pepsi cans, by showing the canning process and demonstrating that it was impossible for someone to contaminate a can with a syringe.[55] Similarly, if a company can show the lengths to which it goes to ensure proper preparation and storage, it may be able to show that contamination was either impossible or highly improbable.

Finally, the client's insurer should be put on notice to ensure that any claims for coverage are preserved.[56]

B. LITIGATION STRATEGY

If the matter does proceed to litigation, counsel must evaluate whether the claims are preempted and what types of experts or consultants are needed to defend the claim and protect the client from harm to the brand or company name.

Some claims against the food industry may be preempted by federal law. One example of preemption is the express preemption provision in the Federal Meat Inspection Act, which provides in part that states may not impose requirements "in addition to, or different from those" under the Act regarding the "premises, facilities and operations of any establishment" where meat is inspected by the USDA/FSIS.[57] Further, states are prohibited from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those imposed by the FMIA."[58] In interpreting an express preemption provision from another statute, the Supreme Court explained that

> the phrase "no requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[59]

Accordingly, statutes barring states from imposing any requirements (*e.g.*, laws or regulations) may also bar common-law claims.[60] Thus, counsel

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55 Laura Zinn and Mary Beth Regan, *The Right Moves, Baby*, BUSINESS WEEK, July 5, 1993.

56 This article does not address the insurance coverage issues arising in a foodborne illness claim, such as whether foodborne illness claims constitute bodily injury, or whether a insured is covered for claims made by downstream parties affected by the contaminated product.

57 21 U.S.C. § 678.

58 *Id.*

59 Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992).

60 *See* Cohen v. McDonald's Corp., 808 N.E.2d 1 (Ill. App. Ct. 2004) (holding plaintiff's claims about nutritional information provided by McDonald's were preempted by the NLEA).

may want to evaluate which statutes govern the product at issue and then determine if that statute contains any preemption provisions and the applicability of any such provisions to the claims at issue.

As the matter nears trial, counsel can also evaluate whether to hire a media consultant to aid the client with responding to, and even influencing, media coverage. In smaller cases, and particularly those with only one claimant, such a consultant may be unnecessary. In instances with several claimants, it may be wise to hire a consultant to help the company convey a clear message that the company's products are safe, if such a statement is supported by the initial investigation. While counsel will be focused on prevailing at trial, such a victory will be hollow if the company's brand suffers irreparable harm during the period of litigation. A media consultant can help counsel identify how the litigation strategy may affect the client's brand, and counsel can then discuss such concerns with the client. Just as the media consultant can help counsel spot potential issues, counsel can guide the media consultant about how certain statements to the media may affect the litigation.

Also, counsel will want to be aware that the client may value certain business concerns more than a particular litigation strategy. For instance, a client may have a viable cross-claim against a vendor but elect not to pursue it if doing so would jeopardize a longstanding relationship that cannot be easily repaired or replaced.

Further, when a case reaches the jury, counsel should consider evaluating the "CSI"-effect, "a purported phenomenon whereby high-tech, forensic science dramatized in television crime dramas theoretically promotes unrealistic expectations among jurors of how conclusively forensic evidence determines . . . causation or liability."[61] A jury consultant, Tara Trask, has explained that "the lack of forensic scientific evidence, even if it was simply overlooked, it never existed or is otherwise irrelevant, may in the end cause many jurors to disbelieve a legitimate claim or defense."[62] Accordingly, in addition to "artfully teaching the science of food safety, a food liability attorney should always: (1) anticipate what scientific or forensic evidence jurors might independently believe 'should' be available; and (2) if the evidence is not accessible (or does not exist), be sure to explain why."[63] Accordingly, if the client does not have a sample of the food that gave rise to the claim, counsel should explain the reasons to the jury. Further, if no samples were collected from the claimant at the time of the claimant's illness—such as a stool sample—that must also be explained to the jury. Failing to explain

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61 Tara Trask, *The "CSI Effect": Popular Culture's Effect on Civil Juries*, DRI Food Liability Seminar (May 2008).

62 Shawn Stevens, *Anticipating Juror Perceptions and the "CSI Effect" in Complex Food-Borne Illness Lawsuits,* Gass Weber Mullins LLC, *available at* http://www.defendingfoodsafety.com/tags/food-poisoning-litigation-and/, last accessed on May 14, 2009.

63 *Id.*

the absence of this evidence, the understandable reasons for its absence (for instance, all the food was eaten or leftovers were discarded), may cause one or more jurors to conclude that the evidence existed but was not offered because it was unfavorable. Further, in a class action or serious injury matter, it may make sense to retain a jury consultant who can help identify potential "CSI"-effect issues.

IV. Claims Related to Misbranding or Inaccurate Labeling

Food companies may be subject not only to foodborne illness claims but also to claims related to labeling. In particular, counsel should be aware of the risks a client faces when it makes a nutrient content claim or a health claim on the label. FDA regulations indicate that "an expressed nutrient content claim is any direct statement about the level (or range) of a nutrient in the food, e.g., 'low sodium' or 'contains 100 calories.'"[64] Further, phrases such as *high in oat bran*, or those that suggest that the product may be useful in maintaining healthy dietary practices, such as *healthy, contains 3 grams (g) of fat*, are "implied nutrient content claim[s]."[65] The FDA has defined a health claim as "any claim made on the label or in labeling of a food . . . that expressly or by implication, including 'third party' references, written statements (e.g., a brand name including a term such as "heart"), symbols (e.g., a heart symbol), or vignettes, characterizes the relationship of any substance to a disease or health-related condition."[66]

The FDA recently posted a letter to General Mills, Inc., taking issue with certain health claims made on Cheerios packaging and on General Mills' web site.[67] The FDA took issue with claims on Cheerios' boxes that "Cheerios is . . . clinically proven to lower cholesterol. A clinical study showed that eating two 1.5 cup servings daily of Cheerios cereal reduced bad cholesterol when eaten as part of a diet low in saturated fat and cholesterol."[68] The FDA does permit health claims "linking soluble fiber from whole-grain oats with a lower risk of coronary heart disease, and also to include—as part of that statement—a note about lowering total and LDL cholesterol levels."[69] The FDA contends, however, that the Cheerios' label "inappropriately sepa-

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64 21 C.F.R. § 101.13(b)(1).

65 21 C.F.R. § 101.13(b)(2).

66 21 C.F.R. § 101.14(a)(1). Both nutrient content claims and health claims are heavily regulated by the FDA, and this article, as an overview of potential litigation affecting members of the food industry, cannot provide an exhaustive treatment of the subject. Thus, counsel with clients considering use of nutrient content or health claims may wish to review 21 C.F.R. § 101.12 and 21 C.F.R. § 101 in their entirety.

67 Miranda Hitti, *FDA Warns Cheerios on Health Claims, FDA Calls Cheerios 'Misbranded' Because of Health Claim Rules; General Mills Stands by its Science,* WebMD Health News, May 13, 2009, *available at* http://www.webmd.com/food-recipes/news/20090513/fda-warns-on-cheerios-health-claims.

68 *Id.*

69 *Id.*

rates the heart disease and cholesterol claims."[70] The FDA gave General Mills fifteen days to correct the matter. In response, General Mills issued a statement that the science supporting its claims is "not in question" and that it looks forward to discussing the matter with the FDA.[71]

The Federal Trade Commission ("FTC") regulates the related subject of food advertising, in particular whether the advertising is misleading.[72] Thus, if a company makes an assertion about the health effects of a food and that assertion is either incorrect or misleading, the FTC may file a complaint alleging deceptive trade practices.[73] For example, in June 1987, Kraft, Inc. ("Kraft") published an advertisement that implied that Kraft Singles had as much calcium as a five-ounce glass of milk and that its product had more calcium than other cheese products.[74] Both implications were untrue.[75] The FTC entered an order requiring Kraft to cease and desist making these claims about "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese."[76] Kraft filed suit seeking to overturn the order, but its appeal was denied.[77]

The FTC is not the only party cracking down on inaccurate or misleading labels. Consumers have mounted quite an attack of their own, and their attacks often prove costly.

One area of growing litigation is class action litigation directed at a correlation between food companies and obesity. McDonald's Corporation was sued by a class of plaintiffs claiming (1) that the company misled consumers into believing that the company's food was nutritious, (2) that McDonald's failed to disclose that some additives made the food less healthy, and (3) that McDonald's implied that nutritional information was available when it, in fact, was not.[78] They also alleged that "as a result, plaintiffs have developed 'obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, related cancers, and/or other detrimental and adverse health effects.'"[79] McDonald's filed three motions to dismiss the

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 38. Further, in Indiana, a food is considered misbranded if is contains a "false or misleading representation with respect to another food or a drug, device, or cosmetic." 410 IAC 7-5-1(a).

[73] *See* Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992).

[74] *Id.*; *Federal Appeals Court Upholds FTC Ruling that Kraft Misrepresented Calcium Content of Individual Cheese Slices,* FTC Press Release, Aug. 10, 1992.

[75] Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992).

[76] *Id.* at 315.

[77] *Id.* at 327.

[78] Pelman v. McDonald's Corp., 396 F.3d 508, 510 (2d Cir. 2005) ("*Pelman III*"). The *Pelman* case has given rise to numerous decisions, including, but not limited to *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) ("*Pelman I*"); *Pelman v. McDonald's Corp.*, 2003 U.S. LEXIS 15202 (S.D.N.Y. 2003) ("*Pelman II*"); *Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320, 322 (S.D.N.Y. 2006).

[79] *Id.*

plaintiffs' allegations, all of which were ultimately denied.[80] Today, some three years after the court denied McDonald's third motion to dismiss—and no doubt countless hours of attorney time later—the court is evaluating whether to certify the class.[81]

Other plaintiffs have learned from the progeny of decisions in the *Pelman* case and have taken other food companies to task in class actions based on similar claims that the companies misrepresented that their products were healthy.[82] A recent example of such a case is *Lockwood v. Conagra Foods, Inc.*[83] In *Lockwood*, the plaintiff claimed the defendant engaged in "misleading conduct by advertising its 'Healthy Choice' pasta sauce as 'all natural' when in fact it includes 'high fructose corn syrup.'"[84] Conagra moved to dismiss, arguing that plaintiff's claims were preempted by the provisions of the National Labeling and Education Act ("NLEA").[85] The NLEA provides that a state may not impose "labeling requirements for artificial flavors, colors or preservatives," unless they are identical to the FDA's requirements.[86] The *Lockwood* court denied Conagra's motion to dismiss, noting that plaintiff did not allege that Conagra's product contained "artificial flavoring, coloring or a chemical preservative"; the plaintiff instead alleged that "'high fructose corn syrup' is not produced by a natural process and therefore the pasta is not 'all natural.'"[87] Another court faced a similar claim where the plaintiff claimed Snapple's use of the phrase *all natural* was misleading because the product contained high fructose corn syrup, but that court reached a different conclusion.[88] The *Holk* court held that while the NLEA did not preempt the claims, implied preemption existed under the Food Drug and Cosmetic Act ("FDCA").[89]

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80 *See id.*

81 *See* Mar. 27, 2009, Order, Docket No. 136 in *Pelman v. McDonald's Corp.*, 1:02-cv-07821-SHS.

82 Mills v. Giant of Maryland, LLC, 441 F. Supp. 2d 104, 105-106 (D.D.C. 2006); Williams v. Gerber Prods. Co., 523 F.3d 934, 936-37 (9th Cir. 2008) (claiming packaging for fruit snacks were deceptive because the product contained no fruit juice from any of the fruits pictured on the packaging and because the only juice contained in the product was white grape juice from concentrate).

83 2009 U.S. Dist. LEXIS 10064 (N.D. Cal. 2009).

84 Lockwood v. Conagra Foods, Inc., 2009 U.S. Dist. LEXIS 10064 (N.D. Cal. 2009).

85 *Id.*

86 *Id.*

87 *Id.* The court also compared the plaintiff's complaint to various other express preemption provisions of the NLEA, each time holding plaintiff's claims were not preempted. The *Lockwood* court also noted that the NLEA did not result in implied preemption of all state laws regarding labeling, as the statute explicitly stated what it did preempt and contained a "savings clause" stating that "the NLEA 'shall not be construed to preempt any provision of State law, unless such provision is expressly prohibited under' 21 U.S.C. § 343-1(a)." *Id.*

88 Holk v. Snapple Beverage Corp., 574 F. Supp. 2d 447 (D.N.J. 2008).

89 *Id.* The *Lockwood* court criticized the *Holk* decision, stating the latter court "did not consider how the FDCA preemption provisions added by the NLEA affect the implied preemption analysis." *See supra*, note 84.

V. OTHER AGENCIES AND REGULATIONS AFFECTING THE FOOD INDUSTRY

Both federal and state agencies regulate food, including matters related to labeling and food safety.

A. REGULATION BY THE FEDERAL GOVERNMENT

The Food and Drug Administration ("FDA") regulates approximately seventy-eight percent of "the domestic and imported foods sold in interstate commerce."[90] The Food Safety Inspection Service ("FSIS"), an agency falling under the United States Department of Agriculture ("USDA"), regulates the remainder.[91] FSIS is charged with regulating meat, poultry, and shell egg products.[92]

While the FDA and FSIS are the primary agencies overseeing the food industry, several other agencies can affect the industry as well. For instance, the Center for Disease Control ("CDC") collects and tracks data on various illnesses, including foodborne illnesses. In fact, the CDC investigates outbreaks of foodborne illness and monitors the effectiveness of measures aimed at combating such outbreaks.[93] The CDC also helps "state and local epidemiologists (and state health laboratories) identify and prevent food-borne illness and other outbreaks."[94] The Environmental Protection Agency ("EPA") affects the food industry when it regulates certain pesticides and "establishes tolerances for residues on various food commodities and animal feed."[95] Also, as already noted, the FTC regulates the advertising of food.

B. REGULATION BY THE STATE OF INDIANA

States may also each regulate the food industry. Indiana has taken advantage of that opportunity, imposing its own requirements for food labeling.[96] Like most states, Indiana requires a food manufacturer to provide information about the "quantity of food in the package," which must be expressed "in the terms of weight, measure, numerical count, or a combination of numerical count and weight or measure . . . ."[97] Further, Indiana

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90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.* Other agencies that regulate the food industry to a lesser extent are the Animal and Plant Health Inspection Service; Grain Inspection, Packers, and Stockyards Administration; Agricultural Marketing Service; and National Marine Fisheries Service.

96 *See* 418 IAC 7-5-1.

97 418 IAC 7-5-1(F)(2).

has passed numerous regulations pertaining to the safe handling of food in restaurants and other establishments that serve food to the public.[98]

As already noted, many states are becoming very active with regard to the food industry. Oregon recently passed legislation imposing civil fines as high as $10,000 for companies that sell adulterated food.[99] Georgia passed a bill requiring companies to report within twenty-four hours any test results revealing tainted food.[100] Indiana has not yet introduced measures this strong. It has, however, recently considered legislation regarding nutritional information in restaurants.[101] House Bill 1207 was not passed in the last session, although it is likely that a similar measure will be introduced again next session. If it had passed, the bill would have required any restaurant with twenty or more locations in Indiana to provide certain nutritional information on their menus for "each item or unit of food"; namely, "total calories, total fat and grams, total saturated fat and grams, total trans fat and grams, total cholesterol and grams, total sodium and milligrams, total carbohydrates and grams, total fiber and grams, total sugar and grams, total protein and grams."[102] The information concerning calories and carbohydrates is required to be "made available to consumers in a manner that allows consumers to consider the information when selecting an item or unit of food for consumption, including presenting the information on the printed and posted menu of the food establishment."[103] The other information required by the bill can be provided on a separate document made available to the customers.[104] The bill was referred to the Committee on Commerce and Public Policy and Interstate Cooperation of the Senate.

While House Bill 1207 was not passed, it should be noted that other states have passed similar legislation that has raised particular concerns for the food industry and its counsel. For instance, what methods must the restaurant use to calculate the nutritional content of its foods? May it rely on nutritional software, which calculates nutritional information based on

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98 *See* 410 IAC 7-21.

99 *See* Zhang, *supra* note 7.

100 *Id.*

101 A recent study reveals that consumers armed with nutritional information may moderate their eating habits; Howlett, et al., *Coming to a Restaurant Near You? Potential Consumer Responses to Nutrition Information Disclosure on Menus*, J. CONSUMER RESEARCH 2009; *People Will Make Healthier Choices if Restaurants Provide Nutritional Data, Study Finds,* SCIENCE DAILY, Apr. 6, 2009.

102 H.B. 1207, 116th Gen. Assem. (Ind. 2009); New York passed similar legislation, which was upheld despite challenges by the New York Restaurant Association. N.Y. Restaurant Ass'n v. New York Bd. of Health, 556 F. 3d 114, 117-18 (2d Cir. 2009). In particular, the Second Circuit explained that "the NLEA *does not* regulate nutrition information labeling on restaurant food, and states and localities are free to adopt their own rules." *Id.* at 120, 123. A state may not, however, regulate use of nutrition claims, such as "heart healthy." *Id.* at 123-24.

103 H.B. 1207, 116th Gen. Assem. (Ind. 2009).

104 *Id.*

ingredients, or must the restaurant have each menu item tested by a laboratory?[105] Also, will the legislation give rise to a private right of action if the restaurant fails to provide the required information or if it provides inaccurate information?[106] In addition, what is a restaurant's liability for variation in the preparation or serving of dishes?[107] "As one restauranteur said, '[I]f you're working by hand and making pasta, putting in cream and tossing in things as you go, it's probably fairly close, but there are going to be variances because it's not prepackaged . . . . Even if you're cutting a meatloaf, if the specifications [*sic*] on the meatloaf is 12 ounces and (instead) cuts 13 ounces, it's going to be off by 6 to 8 percent."[108]

These questions are no longer merely rhetorical: Applebee's was hit with a $5 million lawsuit "after an independent lab found more calories and fat in a menu item than the chain's nutritional information claimed."[109] In fact, more than one lawsuit has been filed against Applebee's regarding this issue.[110] The situation faced by Applebee's is unique because the chain worked with Weight Watchers to market certain portions of the Applebee's menu as more nutritional fare, providing not only nutritional information but also the "points" information from the Weight Watchers program. The lawsuits underscore that when restaurants provide nutritional information, consumers expect it to be accurate, and when it is not, some consumers will seek to hold the restaurant liable. While the legislature may ultimately specify that the Indiana law creates no private right of action, or the Indiana courts may interpret the law in this manner, the legislation may pose a risk of liability to restaurant owners that is not immediately evident.

Even if such a bill were to pass, restaurants with fewer than twenty locations in the state would be exempt. Those restaurants may feel compelled to voluntarily comply, however, if they compete with restaurants affected by the law. Restaurants considering voluntary compliance with the nutritional information requirement should consider the risks outlined above. The decision to offer nutritional information may lead to liability for inaccuracies in the reporting of the information. Further, any restaurant that voluntarily complies with the legislation, if such legislation ever passes, should

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105 Kenneth Odza, *Nitty-Gritty on Menu Labeling Requirements and What Can Be Done to Stem Consumer Litigation,* Nov. 12, 2008, http://www.foodliabilitylaw.com/2008/11/articles/food-litigation-tips/nittygritty-on-menu-labeling-regulations-and-what-can-be-done-to-stem-consumer-litigation/.

106 *Id.*

107 *Id.*

108 *Id.* (citing Rebekah Denn, *Local Chains Affected by Labeling Law Ready Their Nutritional Data*, SEATTLE POST INTELLIGENCE, Nov. 11, 2008).

109 *Id.*

110 Meg Marco, *Lawsuits Claim Applebees Weight Watchers Food Has Too Much Fat*, THE CONSUMERIST, Oct. 10, 2008, *available at* http://consumerist.com/5061748/.

consider expressly noting the variability in the preparation of the food and risk of error in that information.[111]

VI. Conclusion

Recent developments demonstrate that the food industry is under increasing scrutiny. This dynamic and uncertain time for the food industry presents a unique opportunity for counsel to provide their clients with a thorough understanding of the challenges faced by the industry and to provide guidance designed to prevent or handle claims faced by the industry, whether they are related to foodborne illness or labeling. While Indiana law in this area is relatively underdeveloped, the increase in food-related litigation seems as unavoidable as the human need to eat. Armed with an understanding of how to prevent and defend claims, with knowledge regarding the underlying laws and regulations, and with lessons learned in other litigation, Indiana defense practitioners can respond when Indiana plaintiffs ask, "Was it something I ate?"

111 *See* Odza, *supra* note 105.

JURY INSTRUCTIONS IN MEDICAL MALPRACTICE CASES THAT MAY LIMIT DAMAGE AWARDS

Katherine G. Karres*

Much ado, legal argument, and appeals are founded on the tender (and refused tender) of final jury instructions. Final jury instructions are a party's last chance to inform the jury of its case theory. It is important that "[f]inal jury instructions are read to the jury immediately before it retires to deliberate and decide the issues presented at trial. The purpose of final jury instructions is to guide the jury in the application of correct principles of law to the facts of the case before them."[1] Moreover, jury instructions help connect the dots so that the jury may comprehend the case clearly and "arrive at a just, fair, and correct verdict."[2] As the Indiana Supreme Court has recognized, "a party's final argument to the jury frequently utilizes the court's indicated final instructions as the legal backdrop against which the party paints his view of how the facts relate to those legal principles."[3] Therefore, not only does one's case theory dictate the applicable jury instructions, but the jury instructions will dictate how one must present her case.

All medical malpractice attorneys know about the cap placed on damage awards assessed against qualified health care providers. Other ways to limit damages are through properly formulated case theories along with accurate and factually supported jury instructions. This article will analyze Indiana's progression of cases and the sufficiency of the evidence required to support jury instructions on contributory negligence, mitigation of damages, and res ipsa loquitur.

I. Contributory Negligence as a Complete Bar to Plaintiff's Claim

When Indiana adopted the Comparative Fault Act more than twenty years ago, the General Assembly specifically excluded claims for medical

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1 Indian Trucking v. Harber, 752 N.E.2d 168, 174 (Ind. Ct. App. 2001).

2 Estate of Dyer v. Doyle, 870 N.E.2d 573, 581 (Ind. Ct. App. 2007).

3 Peak v. Campbell, 578 N.E.2d 360, 363 (Ind. 1991).

malpractice against qualified health care providers.[4] Therefore, medical malpractice claims are unique because the plaintiff's negligence in these cases may act as a complete bar to recovery rather than a mere reduction in damages. Where facts permit, a defendant in a medical malpractice case should inform the jury through jury instructions of the common-law contributory negligence defense.

A jury instruction will be given if it is (1) a correct statement of the law, (2) supported by the evidence in the record, and (3) not covered by other instructions given by the court.[5] Physicians have duties to patients, but patients also have duties to their physicians. If the evidence supports giving a contributory negligence instruction at trial, that defense may completely bar a plaintiff's recovery.[6]

First, under the Indiana Pattern Jury Instructions, a patient has a duty to provide accurate information to her physician, and the jury may be instructed as follows:

> The patient has a duty to exercise reasonable care in providing a health care provider with accurate and complete information. If the health care provider has proved by a preponderance of the evidence each of the following:
>
> (1) The plaintiff failed to provide accurate and complete information to the health care provider;
>
> (2) A reasonably prudent person in the same or similar circumstances would have provided accurate and complete information to the health care provider; and
>
> (3) The plaintiff's failure to provide accurate and complete information to the defendant proximately caused plaintiff's injury;
>
> Then your verdict should be for the health care provider.[7]

Moreover, a patient has a duty to follow a physician's instructions, and the jury may be instructed as follows:

> The patient has a duty to exercise reasonable care in following the health care provider's instructions. If the health care provider has proved by a preponderance of the evidence each of the following:
>
> (1) The plaintiff failed to follow the health care provider's reasonable instructions, which the health care provider gave concurrently with or prior to the alleged act of malpractice;

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4 IND. CODE § 34-51-2-1.

5 Miller v. Ryan, 706 N.E.2d 244, 251 (Ind. Ct. App. 1999).

6 IND. CODE § 34-51-2-1.

7 Indiana Pattern Jury Instruction No. 23.17.

(2) A reasonably prudent person exercising reasonable care in the same or similar circumstances would have followed the health care provider's instructions; and
(3) The plaintiff's failure to follow the health care provider's instructions proximately caused plaintiff's death/injury;

Then your verdict should be for the defendant.[8]

Furthermore, if supported by the evidence, the jury will be instructed on the effect a patient's contributory negligence has on her claim:

> The question of contributory negligence by the plaintiff is an issue in this case. If the plaintiff's negligence proximately contributed to his/her injury/damage, then the plaintiff cannot recover even though the defendant may have been negligent. The defendant has the burden of proving by a preponderance of the evidence that the plaintiff was negligent.[9]

In *Memorial Hospital of South Bend, Inc. v. Scott*,[10] a patient turned on a bed pan flusher and was injured by the hot water. The supreme court held that to avoid being found contributorily negligent, a plaintiff must exercise that degree of care that an ordinary and reasonable man would exercise in like and similar circumstances.[11] This duty will take into account any mental or physical limitations.[12] If a plaintiff is found to be contributorily negligent, then his negligent conduct is a contributing legal cause to the harm he suffered.[13]

The next important case decided was *Ott v. Weinstock*,[14] in which the defendant attempted to argue that the patient-plaintiff was contributorily negligent when she failed to follow the recommendations of another physician and later checked herself out of a hospital after her condition worsened. Because the patient had been ill for more than one and one-half years and the other physician and hospital staff failed to help her condition, the court found that it was up to the jury to decide whether it was reasonable for her to ignore the advice of the health care providers that she return to the defendant's care.[15]

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8 Indiana Pattern Jury Instruction No. 23.18.

9 Indiana Pattern Jury Instruction No. 9.05.

10 300 N.E.2d 50 (Ind. 1973).

11 *Id.* at 56.

12 *Id.* at 58.

13 *Id.* at 56.

14 444 N.E.2d 1227 (Ind. Ct. App. 1983).

15 *Id.* at 1239-40.

That same year, the court of appeals decided *Fall v. White.*[16] Mr. Fall was a longtime patient of the defendant, Dr. White. Mr. Fall had repeatedly ignored Dr. White's orders and failed to give him a complete medical history. After he was diagnosed with heart problems, Mr. Fall failed to submit to the ordered lab work and did not return to Dr. White's care. Mr. Fall was advised to present to the emergency room if he experienced any chest pain. He experienced chest pain, did not present to the emergency room, and he died shortly thereafter. His wife filed suit. Despite the plaintiff's objections, the court ruled that the following jury instruction was proper: "The patient, as well as the physician, has the duty to exercise reasonable care: the physician has a duty to his patient to exercise reasonable care in forming his diagnosis and rendering treatment while the patient has a duty to exercise reasonable care in providing the physician with accurate and complete information and following his instructions for further care or further diagnostic tests."[17] A patient does not have a duty to diagnose his own condition and can expect a physician to ask proper questions, but he must exercise reasonable care in providing accurate medical information.[18]

The court reaffirmed the contributory negligence defense twelve years later in *Smith v. Hull*.[19] The plaintiff repeatedly presented to the defendant's office for injections of human hair to treat his baldness. He was informed of and acknowledged the applicable risks. The plaintiff later became unhappy with the results, which included side effects to which he had specifically consented. While the medical review panel found for the plaintiff, the jury found for the defendant. The jury was instructed on contributory negligence and the plaintiff's duty to use ordinary care.[20] The plaintiff challenged whether the instructions were warranted and argued that contributory negligence instructions were warranted in only two occasions: when there is a failure to provide accurate information or failure to follow instructions.[21] The court disagreed as to the limited availability of the defense.[22] It ruled that a plaintiff must exercise a reasonable degree of care, and if his conduct was a legal cause of his harm, then he was negligent if that conduct fell below the standard to which he was required to conform for his own protection.[23] The court further noted that plaintiff's negligence must be simultaneous with that of the defendant and unite to create the

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16 449 N.E.2d 628 (Ind. Ct. App. 1983).

17 *Id.* at 632, 634.

18 *Id.* at 634.

19 659 N.E.2d 185 (Ind. Ct. App. 1995).

20 *Id.* at 191.

21 *Id.*

22 *Id.*

23 *Id.*

claim.[24] The plaintiff had repeatedly consented and submitted to the injections and then later failed to heed the defendant's advice.[25] His "desire to sport a full head of hair motivated him to pursue remedies that he knowingly undertook at his own peril."[26]

In *King v. Clark*,[27] the plaintiff experienced lumps in her breast and was diagnosed with fibrocystic disease. The plaintiff presented again for a physical breast examination in June 1993, and the diagnosis was unchanged. The plaintiff experienced more inflammation in September and October 1993, but she did not undergo an ordered mammography until November. It showed cancer. The plaintiff further delayed treatment and sought other opinions. Jury instructions on contributory negligence and incurred risk were warranted because the plaintiff waited three to four weeks before seeking treatment and then failed to undergo the treatment recommended by defendant for another five weeks.[28] Moreover, the plaintiff's and defendant's negligence occurred over the same lengthy period of time, until the plaintiff placed herself under the care of another physician. Under the circumstances, a jury could reasonably infer that her actions occurred simultaneously with those of Dr. Clark and thus were a contributing legal cause of her injuries.[29]

In *Faulk v. Northwest Radiologists, P.C.*,[30] the court of appeals held that the patient's failure to return for checkups was "simultaneous" with the defendants' alleged negligence. The plaintiff was diagnosed with neck cancer and underwent surgery to remove the cancer and surrounding lymph nodes. The plaintiff was instructed to return to his surgeon regularly and frequently after the surgery. He failed to do so. He presented to Northwest Radiologists for radiation, and he was repeatedly told by those physicians to return to his surgeon. Two years later, after his physicians believed his tongue looked suspicious, *Northwest Radiologists scheduled an appointment for plaintiff* with his surgeon. The plaintiff had cancer in his tongue and subsequently had his vocal cords and tongue removed. The plaintiff filed suit alleging that it was his surgeon's responsibility to ensure he followed up.[31] The court disagreed and found that plaintiff unreasonably failed to follow the surgeon's instructions to return to him, and that there was evidence that the tongue cancer developed following the original surgery.[32]

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[24] *Id.* at 192.

[25] *Id.*

[26] *Id.*

[27] 709 N.E.2d 1043 (Ind. Ct. App. 1999).

[28] *Id.* at 1048.

[29] *Id.*

[30] 751 N.E.2d 233, 242 (Ind. Ct. App. 2001).

[31] *Id.* at 239.

[32] *Id.*

Moreover, had the plaintiff returned regularly, he possibly could have been diagnosed earlier.[33] Because the plaintiff's failure to return was simultaneous with the alleged acts of negligence by the surgeon (failure to make sure the plaintiff followed up), his actions were a proximate cause of his injuries.[34]

After a string of cases that allowed the contributory negligence jury instruction, Indiana courts have now begun to restrict the scope of this defense. In *Cavens v. Zaberdac*,[35] the plaintiff had seen a pulmonologist for years regarding asthma attacks, and she presented to the emergency room on at least eight occasions. On the final occasion, she began having an attack at 7:00 A.M., but an ambulance was not called until 11:30 A.M. The plaintiff was seen by the defendant, an emergency room physician. He gave her medications and arranged for an EKG. The plaintiff went into cardiac arrest and died at 11:45 P.M. Defendant argued that the plaintiff had improperly and excessively used her medications, which probably aggravated her condition. He also argued that she had delayed treatment on the day of her death. The defendant sought to use this argument to support his requested defense of contributory negligence.[36] Despite the defendant's argument to the contrary, the court found that doctors take their patients as they find them, and the defendant could not use the plaintiff's prior actions of negligence against her.[37] Many patients cause their own infirmities through carelessness, and "to permit healthcare providers to assert their patients' pre-treatment negligent conduct to support a contributory negligence defense would absolve such providers from tort responsibility in the event of medical negligence and thus operate to undermine substantially such providers' duty of reasonable care."[38]

In *Joyner-Wentland v. Waggoner*,[39] the plaintiff presented to the defendant's office for consultation for a breast lift, and she reported that she had undergone a mammography two years previously. The defendant did not order a preoperative mammography. During the surgery, the defendant found suspicious tissue, which was found to be cancer. In reality, the plaintiff's last mammography had been five years previously. The issue at trial was whether the plaintiff was contributorily negligent in giving an incorrect medical history. The trial court refused to tender the defendant's final proposed jury instructions on contributory negligence.[40] The court of appeals

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[33] *Id.* at 239-40.

[34] *Id.* at 242.

[35] 849 N.E.2d 526 (Ind. Ct. App. 2006).

[36] *Id.* at 528-29.

[37] *Id.* at 530.

[38] *Id.*

[39] 890 N.E.2d 730 (Ind. Ct. App. 2008).

[40] *Id.* at 733.

found that the instructions were not supported by the evidence.[41] A patient *may* be contributorily negligent if she gives her doctor false or incomplete information when she is capable of providing an accurate history.[42] The court found that it did not matter whether the plaintiff had a mammography two years or five years previously, because the defendant should have ordered a mammography anyway.[43] Thus, the plaintiff's actions were not a proximate cause of her damages.[44] Moreover, the defendant presented no evidence that she would have ordered a mammography had she known the plaintiff had none conducted for five years.[45]

As one can readily discern from this line of cases, the biggest hurdle for defense attorneys is the second part of the jury instruction requirement: whether the instruction is supported by the evidence in the record. If a contributory negligence defense is planned, evidence needs point in that direction. The attorney must show that the plaintiff's unreasonable conduct was simultaneous and coexisting with any negligence on the part of the defendant, and that plaintiff's negligence was a proximate cause of the plaintiff's injuries, whether caused by something that the defendant did not do because of misinformation or something that plaintiff did or did not do in failing to follow instructions.

II. Mitigation of Damages—How Plaintiff's Subsequent Actions Are Relevant

If giving jury instructions were a beauty pageant, mitigation of damages would be the first runner-up to contributory negligence. When a defendant fails to prevail in his attempt to get a contributory negligence jury instruction to bar a plaintiff's recovery, then mitigation of damages is a saving grace to limit the recoverable damages. This is why a defendant must proffer jury instructions on *both* the contributory negligence and mitigation-of-damages defenses. The three cases outlined in this section began as contributory negligence cases and ended with discussions of mitigation of damages.

The acceptable mitigation-of-damages jury instruction in Indiana instructs the jury on a patient's duty to follow a health care provider's instructions *after* treatment:

> The patient has a duty to exercise reasonable care in following a health care provider's instructions after treatment. If the health

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41 *Id.* at 734, 736.

42 *Id.* at 734.

43 *Id.* at 736.

44 *Id.*

45 *Id.* at 735.

> care provider proved by a preponderance of the evidence each of the following:
>
> (1) The plaintiff failed to follow the health care provider's reasonable instructions given after the alleged act of malpractice;
>
> (2) A reasonably prudent person exercising reasonable care in the same or similar circumstances would have followed the health care provider's instructions; and
>
> (3) If you find the health care provider liable for an act of malpractice;
>
> Then you may reduce the amount of money you would otherwise award plaintiff by the amount you decide was proximately caused by plaintiff's failure to follow instructions.[46]

In *Harris v. Cacdac*,[47] the plaintiff claimed the defendant performed an unnecessary surgical cervical disc excision, and the defendant claimed that plaintiff failed to exercise her neck as directed following the surgery. The plaintiff challenged the jury instruction on contributory negligence for failure to follow the physician's instructions.[48] The court ruled that a patient can be contributorily negligent in failing to follow a physician's instructions, *but that the negligence must be a proximate cause of the injury*.[49] To completely bar recovery, a patient's negligence must be simultaneous and cooperating with that of the defendant to create the cause of action.[50] Instead, because this patient's negligence was wholly subsequent to the physician's negligence, it did not bar her recovery, but constituted a failure to mitigate damages.[51]

In *Sawlani, v. Mills*,[52] a plaintiff underwent mammography in September 1997, due to thickness and pain in her left breast. The radiologist read the mammogram as normal and instructed the patient to return in one year for a follow-up mammography. The plaintiff failed to read the instruction and did not return for twenty months. Cancer was found in May 1999, and the plaintiff underwent a lumpectomy, radiation, and chemotherapy. The defendant argued that the plaintiff's failure to undergo a mammography in September 1998 was a complete bar to her recovery.[53] The court disagreed and ruled that her failure occurred wholly after the defendant's negligence

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46 Indiana Pattern Jury Instruction No. 23.19.

47 512 N.E.2d 1138 (Ind. Ct. App. 1987).

48 *Id.* at 1139.

49 *Id.* at 1139-40.

50 *Id.* at 1140.

51 *Id.*

52 830 N.E.2d 932 (Ind. Ct. App. 2005).

53 *Id.* at 941.

and instead went toward her failure to mitigate damages.[54] The plaintiff's negligence was not the proximate cause of her damages because it was not simultaneous and cooperating with the defendant's fault.[55] The court distinguished *King*[56] and *Fall*,[57] where the plaintiff's and defendant's negligence were simultaneous, and analogized to *Harris*,[58] where the plaintiff failed to follow instructions after the claimed negligent act.[59]

In *Foster v. Owens*,[60] the plaintiff underwent gallbladder surgery and liver biopsy. She was diagnosed with cirrhosis and Hepatitis C. Even though her clotting ability was compromised, Dr. Foster performed another liver biopsy. Her liver was lacerated, and she began to bleed. Dr. Foster recommended a thoracentesis, and he claimed she refused. The plaintiff was discharged, but she eventually presented to another hospital with a massive bleed. She died a few weeks later. Dr. Foster attempted to instruct the jury on contributory negligence, but that was rejected and replaced by a mitigation-of-damages instruction.[61] The court noted that mitigation of damages is not an affirmative defense to *liability,* and instead reduces the amount of damages *after liability has been established*.[62] The court of appeals held that Dr. Foster failed to establish actual causation from plaintiff's failure to follow his instruction and should have received an instruction on neither contributory negligence *nor* mitigation of damages.[63] Unfortunately for Dr. Foster, he failed to correlate plaintiff's inaction to any injury she suffered.[64]

Even though a mitigation-of-damages jury instruction may save one's case when an attempt at a contributory negligence defense fails, one still must meet the evidentiary burden for this instruction as well. The defendants must show that the plaintiff acted unreasonably after the defendant's negligence and those actions caused an aggravation of the damages.

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54 *Id.* at 943.

55 *Id.* at 942.

56 709 N.E.2d 1043 (Ind. Ct. App. 1999).

57 449 N.E.2d 628 (Ind. Ct. App. 1983)

58 512 N.E.2d 1138 (Ind. Ct. App. 1987).

59 830 N.E.2d at 943.

60 844 N.E.2d 216 (Ind. Ct. App. 2006).

61 *Id.* at 220.

62 *Id.* at 221.

63 *Id.* at 222.

64 *Id.*

III. CAN A DEFENDANT RECEIVE A CONTRIBUTORY NEGLIGENCE INSTRUCTION WHEN NONQUALIFIED DEFENDANTS ARE SUED AS WELL?

It is well known among medical malpractice attorneys that the Indiana Comparative Fault Act does not apply to qualified health care providers.[65] What is less known is how a qualified health care provider deals with issues such as settling codefendants and nonqualified defendants when proceeding to trial.

A qualified health care provider may use the traditional comparative fault nonparty defense in medical malpractice cases. This affirmative defense traditionally must be asserted within ninety days after a claim is filed with the Indiana Department of Insurance, but it may be extended to give a health care provider the chance to discover the existence of a nonparty defense and assert the same.[66] If properly preserved, then the jury will be instructed on the nonparty defense.

In addition, if a plaintiff sues both qualified and nonqualified health care providers, then the court may delay the action until the medical review panel process is completed for the qualified providers and allow joinder of the qualified health care providers in the cause of action.[67] When there are both qualified and nonqualified defendants, the qualified health care providers can assert only contributory negligence as a defense and have limits on recovery against them. The nonqualified health care providers have no limits on damages and are governed by Comparative Fault Act. This brings up multiple issues, including assignment of fault and damage amounts. In *Smith v. Pancner*,[68] the Indiana Supreme Court ruled that a patient-plaintiff may access the Indiana Patient's Compensation Fund even though his claim was settled by a nonqualified health care provider, if it was at the approval of a qualified health care provider and his insurer.

In *Palmer v. Comprehensive Neurologic Services, P.C.*,[69] the plaintiff was treated for multiple sclerosis. He continued to feel worse and was told his symptoms were a side effect of the medication. The plaintiff then suffered continuous seizures and was taken to the emergency room where he later died. It was learned that plaintiff suffered from viral encephalopathy caused by herpes. It was unclear whether he ever suffered from multiple sclerosis. The plaintiff filed suit against multiple nonqualified health care providers, and those proceedings were stayed during the medical review panel process for the qualified health care provider defendants.[70] The med-

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65 IND. CODE § 34-51-2-1.

66 IND. CODE § 34-51-2-17.

67 IND. CODE § 34-51-2-18 .

68 679 N.E.2d 893, 896 (Ind. 1993).

69 864 N.E.2d 1093 (Ind. Ct. App. 2007).

70 *Id.* at 1096.

ical review panel found a breach in the treatment of the seizures. After the panel opinion, the actions were joined. The plaintiff eventually settled with the two nonqualified defendants.[71] A jury verdict was returned for the plaintiff (against the qualified providers) in the amount of $375,000, but after the set-off of the settlement amount, the award was reduced to zero.[72] Plaintiff's request to deny set-off, grant additur or a new trial, and request for prejudgment interest were all denied by the trial court and on appeal.[73] The court found that the *substantive* parts of the Comparative Fault Act denying set-off did not apply to plaintiff's claim even though some *procedural* rules did apply regarding nonparty defenses.[74] Plaintiff had proceeded against the qualified defendants only under a theory of joint and several liability, and thus she could not rely on her prior type of claim against the settling defendants to govern the apportionment of damages at trial.[75] Moreover, the plaintiff's claim was governed by the one-satisfaction principle, and the trial court was correct in preventing plaintiff's recovering twice for the same injury (death).[76]

Even though set-off and nonparty defenses can be asserted at trial to reduce damages against a defendant, they must be thought of well in advance. The use of both these defenses together is unique to the Medical Malpractice Act, as it receives the substantive benefits of contributory negligence and the procedural benefits of the Comparative Fault Act.

IV. Does a Captain-of-the-Ship Jury Instruction Still Mean the Plaintiff Always Wins?

The Indiana Supreme Court says it just isn't so. But be prepared, the plaintiff is likely to win, absent a good amount of convincing on the part of the defendant. There is a separate res ipsa loquitur jury instruction for medical malpractice cases:

> If the plaintiff has proved by a preponderance of the evidence each of the following:
> (1) The patient and the patient's actions or reactions were under the health care provider's care and exclusive control;
> (2) The injury was of a nature that would not have occurred but for an act of malpractice; and
> (3) The agency or instrumentality that caused the injury was within the health care provider's exclusive control;

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71 *Id.* at 1097.

72 *Id.*

73 *Id.* at 1097.

74 *Id.*

75 *Id.* at 1100.

76 *Id.* at 1100-1101.

> Then you may infer that an act of malpractice may have occurred, but you must weigh such inference with all of the other evidence presented.[77]

Moreover, despite the recent decision in *Ho v. Frye*[78] to the contrary, Indiana courts may still find the following jury instruction valid: "In performing an operation, a doctor has a duty to the patient to remove [the foreign object] and cannot delegate that duty."[79]

In *Miller v. Ryan*,[80] the court upheld the captain-of-the-ship doctrine and ruled that the health care provider could not avoid responsibility by delegating part of a surgery to another health care provider. Dr. Miller, a podiatrist, diagnosed the plaintiff with diabetic neuropathy and recommended surgical correction of bunions on both feet. The plaintiff complained of pain following the surgery and filed a complaint. The jury found in favor of the plaintiff, and Dr. Miller challenged, inter alia, the captain-of-the-ship jury instruction. The instruction was given as follows:

> If you find that a podiatrist in performing an operation is under a duty to his patient to protect the patient's nearby anatomical structures, then he may not delegate the duty to another podiatrist or assistant and thereby avoid responsibility.[81]

Dr. Miller argued that the instruction was ambiguous, contained vague medical terms, and was unsupported by expert testimony. The instruction had been taken from *Funk v. Bonham*,[82] which held that a surgeon cannot assign details of an operation to an assistant and escape liability when the patient was unaware of the delegation. Dr. Miller relied on *Huber v. Protestant Deaconess Hospital Association of Evansville*,[83] which held that a surgeon was not liable for the acts of a hospital employee anesthetist when the act was performed when he was out of the room and the anesthetist was duly trained. The court ruled in favor of the plaintiff and upheld the instruction holding that Dr. Miller had *control* over what occurred in the operating room and it was he who diagnosed the condition, recommended the surgery, told the plaintiff he would perform the surgery, and dictated the operative report, which failed to mention that another surgeon performed any part of the surgery.[84]

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77 Indiana Pattern Jury Instruction No. 23.14.

78 880 N.E.2d 1192, 1200 (Ind. 2008).

79 Indiana Pattern Jury Instruction No. 23.03.

80 706 N.E.2d 244, 251 (Ind. Ct. App. 1999).

81 *Id.* at 250.

82 204 Ind. 170, 179, 183 N.E.312, 315-16 (Ind. 1932).

83 127 Ind. App. 565, 133 N.E.2d 864 (1956).

84 706 N.E.2d at 251.

In *Ross v. Olson*,[85] the res ipsa loquitur instruction was rejected because there was *direct evidence* as to the cause of plaintiff's injury—a surgical chisel severed his artery during knee replacement surgery. The court noted that res ipsa can be used when causation is lacking, when a plaintiff can establish that the injuring instrumentality was in exclusive control of the defendant, and when the accident would not have occurred but for the failure to use proper care.[86] Jury instructions on this doctrine will not be given "merely because there was a bad result" and only when there is *circumstantial evidence* as to the cause of the injury.[87]

In *Ho*,[88] the Indiana Supreme Court ruled that the doctrine of res ipsa loquitur operates just to shift the burden to the defendant to show he was not negligent and is not enough to find absolute or automatic liability on the part of a defendant. The plaintiff underwent abdominal surgery, and surgeon Dr. Ho was informed by the nursing staff that all sponges had been removed. It was later discovered that a sponge remained. Despite a panel opinion against him, Dr. Ho prevailed at trial. The plaintiffs believed that they were entitled to partial summary judgment based on res ipsa because Dr. Ho had breached, as a matter of law, his nondelegable duty to assure removal of sponges. They relied heavily on *Funk* and *Miller*.[89] The court ruled that res ipsa loquitur shifted the burden to Dr. Ho to prove that he was not negligent, and he could do this through his own testimony or through an expert.[90]

Res ipsa loquitur is changing, and defendants need to take notice. While plaintiffs will argue that res ipsa always means automatic liability, that is just not the case. The next step is to see if the Indiana Pattern Jury Instructions will follow.

V. Conclusion

Although jury instructions may be the last part of a case, they cannot be the last thing on an attorney's mind. From the nonparty defense that needs to be asserted at the outset of a case to contributory negligence, which must have ample factual support throughout trial to be given, the defenses asserted through jury instructions are extremely important to a defendant's case. Just remember, no jury instruction is given automatically, and attorneys must work hard for their defenses.

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85 825 N.E.2d 890, 894 (Ind. Ct. App. 2005).

86 *Id.* at 893.

87 *Id.*

88 880 N.E.2d 1192 (Ind. 2008).

89 *Id.* at 1198.

90 *Id.* at 1200-1201.

INDIANA LAW CONCERNING STATUTE OF REPOSE, COMPARATIVE FAULT (APPORTIONMENT/NONPARTY DEFENSE), AND PUNITIVE DAMAGES AS IT MAY APPLY TO ASBESTOS CLAIMS

Scott M. Kyrouac*

I. Statute of Repose (Indiana Code § 34-20-3-1 et Seq.)

Indiana's unique statute of repose can be an effective defense to eliminate stale claims against product manufacturers. By reading the statutory language and the interpreting case law, a prudent attorney may be able to save his client from incurring a costly defense alleging asbestos-related disease. A reading of the statute partially explains the mechanics of the defense.

A. REPOSE STATUTE

Indiana Code § 34-20-3-1(b) provides in relevant part as follows:

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

B. CASE LAW INTERPRETING STATUTE OF REPOSE

Without reading case law that has interpreted the statute, a practitioner could be misled by the language of the statute. An asbestos product liability action is governed by Indiana Code § 34-20-3-1, which provides a two-year statute of limitations and a ten-year statute of repose for claims brought under the Indiana Product Liability Act. The court in *Dague v. Piper Aircraft Corp.*[1] made it clear that the statute of repose prohibits any product liability action that is not commenced within ten years of the date the product was delivered to the initial user or consumer. In other words, the *or* in the statute is interpreted by the Indiana Supreme Court as *and*.

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[1] 418 N.E.2d 207, 213 (Ind. 1981).

Specifically, the court in *Dague* ruled on the following issues concerning the statue of repose:

> (1) Does the statute of limitations in the Product Liability Act apply to bar this action, in view of the word "or" between the two statutory periods of time?;
> (2) Does this statute of limitation apply to bar this action, notwithstanding plaintiff's contention that defendant's alleged failure to warn occurred within the statutory period of limitations?;
>
> In 1965, Piper Aircraft manufactured a Piper Pawnee PA 25-235 aircraft, bearing serial number 25-3263 and Federal Aviation Administration number N7317Z. As noted above, Piper Aircraft first sold this plane and placed it in the stream of commerce on March 26, 1965. On July 7, 1978, near Logansport, Indiana, the plane crashed and burned while being flown by plaintiff's decedent, John Dague. As a result of injuries sustained in that crash, John Dague died on September 5, 1978.
>
> Piper Aircraft Corporation contends that this cause is barred by section five of the 1978 Products Liability Act. Ind. Code § 33-1-1.5-5 (Burns § 34-4-20A-5) provides:
>
> > "This section applies to all persons regardless of minority or legal disability. Notwithstanding Ind. Code § 34-1-2-5, any product [*524] liability action must be commenced [**210] within two years after the cause of action accrues *or* within ten years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight years but not more than ten years after the initial delivery, the action may be commenced at any time within two years after the cause of action accrues."
>
> Under Piper Aircraft's interpretation of this statute, our legislature intended to place an outer limit of ten years on all product liability actions, except where the cause of action accrues more than eight (but less than ten) years after initial delivery of the product. On the other hand, plaintiff argues the statute provides for two alternative periods of limitation. In support of this contention, plaintiff points to the legislature's use of the disjunctive "or" in describing [***5] the time limitations. Plaintiff also argues this section violates article one, section twelve and article four, section nineteen of the Indiana Constitution. We shall address these issues in the sequence in which they are presented by the Court of Appeals' certified questions order.

In construing an Indiana statute, our duty is to ascertain and give effect to the intent of the legislature. In doing so, we must give meaning to the language used, where that meaning is clear and unambiguous. Where the meaning of the statute is ambiguous, however, or where one or more constructions are apparently possible, we must construe the statute so as to arrive at the apparent intention of the legislature which is consistently revealed in all sections of the act, and consistent with all other statutes passed by the legislature. *See, e.g.*, *Loza v. State,* 263 Ind. 124, 128-129, 325 N.E.2d 173, 1976 (1975); *State ex rel. Bynum v. LaPorte Superior Court*, (1973) 259 Ind. 647, 650, 291 N.E.2d 355, 356; *Thompson v. Thompson*, (1972) 259 Ind. 266, 273, 286 N.E.2d 657, 661; *Allen County Dep't of Public Welfare v. Ball Memorial Hosp. Ass'n*, (1969) 253 Ind. 179, 184-85, 252 N.E.2d 424, [***6] 427; *State v. Gilbert*, (1966) 247 Ind. 544, 219 N.E.2d 892, 895.

The clear intention of the legislature in section five was to limit the time within which product liability actions can be brought. However, under plaintiff's interpretation, which emphasizes the legislature's use of the disjunctive "or," the three phrases of this section are not reconcilable with each other. In addition, such an interpretation would give [*525] nothing more to or take nothing more from the plaintiff than she already had under our general limitation statutes already in existence at the time the act was passed. *See* Ind. Code § 34-1-2-1 et seq. (Burns 1973). Plaintiff would have us interpret the statute to give a claimant the right to bring an action within two years after it accrues, without any reference to the length of time which has passed since the initial entry of the product into commerce. If the legislature had intended such a rule, they could simply have stated it in those terms. The obvious intent of the statute, however, is that the action must be brought within two years after it accrues, but in any event within ten years after the product is first delivered to the initial [***7] user or consumer, unless the action accrues more than eight but less than ten years after the product's introduction into the stream of commerce.

Our Court of Appeals recognized this proposition in *Amermac v. Gordon, Inc*., (1979) 182 Ind.App. 116, 394 N.E.2d 946, 948 n.4, with the following observation:

> "Although not deciding the issue, we note that Indiana's recently enacted Products Liability Act, Ind. Code (1978 Supp.) § 33-1-1.5-1 (Acts 1978, P.L. 141, Sec. 28), may shed light upon the Legislature's intentions as the applicable statute of limitations in these situations. First, although somewhat confusingly drafted, *see* J. Vargo & J.

> Leibman, *Survey of Recent Developments in Products Liability*, 12 Ind. L. Rev. 227, 249 (1979), the legislature clearly intended to place an *absolute* time limit on liability for a product's defects, including actions in negligence. Ind. Code (1978 Supp.) § 33-1-1.5-1. This policy would be defeated by applying a tort limitation which would not begin to [**211] run until *after* an injury, no matter when that injury occurred. Second, the Legislature specifically differentiated between actions in tort (negligence and strict [***8] liability) and warranty actions. Ind. Code (1978 Supp.) § 33-1-1.5-1. This, too, would seem to indicate that a contract statute of limitations would apply in actions for personal injuries due to a breach of implied warranty."

Legal scholars have reached a similar conclusion:

> "Reference to House Bill No. 1258 reveals language similar to the enacted bill, with the exception that the two limitation provisions are joined with the word 'and' rather than 'or'. Although the legislature in conference committee might have chosen a completely opposite course to that introduced in the House, such an [*526] analysis would find the clause following, 'initial user or consumer,' to be mere surplusage. This clause states: '[E]xcept that, if the cause of action accrues more than eight (8) years but not more 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. *Unless the ten-year period was intended to be an outer cutoff, there would be no need to state again that the plaintiff has two years in which to bring his action if his injury occurs during the ninth or tenth year of the life* [***9] *of the product*. The purpose of this clause is clearly to insure that all plaintiffs injured within ten years of delivery will, nevertheless, have a full two years to file a claim."

J. Vargo & J. Leibman, *supra*. 12 Ind. L. Rev. at 250 (emphasis added).

We find this argument to be persuasive. We are also persuaded by Piper Aircraft's contention that plaintiff's proposed interpretation not only ignores the clear legislative intent, it also would produce the irrational result of granting persons injured by a new product ten years to file suit, while granting only two years to all others. *Plaintiff correctly argues that the interpretation of the statute we now adopt, in effect, changes the disjunctive term "or,"*

> *which, of course, appears in the statute, to the conjunctive "and*." While terms of this type should ordinarily be given their literal and normal definition when it is apparent that the resulting meaning was intended, this Court is not bound to blindly give effect to the word "or," when a disjunctive reading of the terms of the section would render meaningless a portion of the statute. Likewise, the term "or" should not be given its ordinary meaning when such [***10] an application flies in the face of a clearly contrary legislative intent. *State v. Myers*, (1896) 146 Ind. 36, 38, 44 N.E. 801, 802; *Armstrong v. State ex rel. Klaus*, (1918) 72 Ind. App. 303, 317-18, 120 N.E. 717, 721. Moreover, we are at liberty to make minor substitutions of words where necessary to give vitality to the legislative intent. *See generally Woerner v. City of Indianapolis*, (1961) 242 Ind. 253, 261-63, 177 N.E.2d 34, 37-38, *cert. denied*, (1962) 368 U.S. 989, 82 S.Ct. 605, 7 L.Ed.2d 526. Therefore, we hold that section five of the Product Liability Act bars plaintiff's action in this cause, inasmuch as the damages incurred by plaintiff occurred more than ten years after the product was first place in commerce.

Indiana Code § 34-20-3-2 was enacted to extend the time for injured parties to sue defendants who mined and sold commercial asbestos to two years after the person knows that he has asbestos-related disease. However, the court in *Allied Signal, Inc. v. Ott*[2] adopted the same interpretation of the language in the statute of repose and did not extend the time limit for suing defendants who did not mine or sell commercial asbestos. Consequently, a suit filed in 1986 based on a defective product delivered to the consumer in 1970 that causes an injury to a plaintiff in 1985 is barred by the statute of repose. Indiana Code § 34-20-3-2 applies only to asbestos product liability actions where the defendant "mined or sold commercial asbestos."[3] The Indiana Supreme Court in *Allied Signal v. Ott* held that Indiana Code § 34-20-3-2 applies only to certain product liability actions against bankrupt defendants and against defendants who "mined and sold commercial asbestos."

Indiana reviewing courts have uniformly upheld the statute of repose as it pertains to asbestos claims.[4] In sum, the courts have repeatedly held that Indiana Code § 34-20-3-2 "does not apply to product manufacturers because the product manufacturer did not 'mine or sell commercial asbestos,' and that any claims made against the product manufacturers by the plaintiff

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

3 *See* Allied Signal, Inc. v. Ott, 785 N.E.2d 1068 (Ind. 2003).

4 *See* Allied Signal, Inc. v. Ott, 785 N.E.2d 1068, 1078 (Ind. 2003), *reh'g denied*; *also see* Allied Signal v. Herring, 785 N.E.d.2d 1090 (Ind. 2003), *reh'g denied;* Black v. AC&S, Inc., 785 N.E.2d 1084 (Ind. 2003) (reversing the Indiana Court of Appeals), *reh'g denied*.

are subject to Section 1 which bars all product liability actions not commenced 'within ten (10) years after delivery of the product to the initial user or consumer.'"[5] Any company that has never sold or mined "commercial asbestos" has available to it the statute of repose defense. Consequently, any lawsuit against a corporation that neither mined nor sold commercial asbestos that is not commenced within ten years of the last possible delivery of the product to the initial consumer is barred by the statute of repose.

C. STATUTE OF REPOSE AS A BASIS FOR SUMMARY JUDGMENT

It is proper to raise the defense of the statute of limitations or the defense of the statute of repose in a motion for summary judgment.[6] The purpose of summary judgment is to terminate litigation about which there can be no factual dispute that may be determined as a matter of law.[7] A defendant should not be forced to bear the expense and risk of trial where Indiana law is clear that a plaintiff cannot make a prima facie case.[8]

Once a defendant company establishes the existence of material facts establishing a defense of the statute of limitations or a statute of repose, the burden of proof shifts to the opponent of the motion for summary judgment.[9]

D. INDIANA STATUTE OF REPOSE IS CONSTITUTIONAL

Indiana courts have held that the statute of repose is constitutional and is presumed to be constitutional.[10] Any party challenging the constitutionality of the enactment bears the burden of proof, and all doubts are resolved against that party.[11]

Any analysis of the statute begins with the presumption that the statute of repose is constitutional.[12] If plaintiffs challenge the constitutionality of section 1 as applied to them, they will bear the burden to overcome the presumption of constitutionality. All doubts are to be resolved in favor of

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5 *See Ott*, 785 N.E.2d at 1071, 1073.

6 Honeywell, Inc. v. Wilson, 500 N.E.2d 1251, 1252 (Ind. Ct. App. 1986).

7 Bushong v. Williamson, 790 N.E.2d 467 (Ind. 2003).

8 Brannon v. Wilson, 733 N.E.2d 1000, 1001-1002 (Ind. Ct. App. 2000), *trans. denied.*

9 Mack v. American Fletcher Nat'l Bank & Trust, 510 N.E.2d 725, 733 (Ind. Ct. App. 1987), *trans. denied*.

10 Allied Signal, Inc., v. Ott, 785 N.E.2d 1068 (Ind. 2003); Bunker v. National Gypsum Co., 441 N.E.2d. 8 (Ind. 1982) ("As with other legislation, legislative statutes of limitations carry a general presumption of constitutionality." 441 N.E.2d at 12.).

11 Devorak v. City of Bloomington, 796 N.E.2d 236, 238 (Ind. 2003) ("challenging of the zoning ordinance as unconstitutional").

12 Town of St. John v. Boehm, 675 N.E.2d 318, 321 (Ind. 1996); Ziebell v. State, 788 N.E.2d 902, 910 (Ind. Ct. App. 2003). "Analysis of the statute in question begins with a presumption that such statute is presumed to be constitutional." General Motors Corp. v. Indianapolis Power & Light Co., 654 N.E.2d 752, 764 (Ind. Ct. App. 1995).

the statute's validity.[13] The supreme court in *Ott* did not change the presumption of statutory validity.

E. IN THE EVENT PLAINTIFF CLAIMS THE STATUTE OF REPOSE IS UNCONSTITUTIONAL AS TO THE SPECIFIC PLAINTIFF

If a plaintiff alleges that section 1 is unconstitutional as applied to that plaintiff, the defendant needs to submit the affidavit of a medical doctor who demonstrates that a reasonably experienced physician could not have diagnosed the plaintiff with an asbestos-related illness or disease within the repose period. Such an affidavit negates any claim of the plaintiff that it would be unconstitutional to bar this plaintiff's claim because of the statute of repose. Keep in mind any reasonable physician is of the opinion that it would be dangerous and morally unethical to have performed an open lung biopsy on any patient while he was asymptomatic. Consequently, the statute of repose defense as it pertains to any specific plaintiff is constitutional since evidence specific to the plaintiff should demonstrate validity of the statute of repose.

In *Ott*, the supreme court upheld the constitutionality of the statute. In doing so, the court discussed a scenario "where a Plaintiff is injured by a product within ten (10) years of its initial delivery, but who has neither knowledge of or any ability to know of that injury until more than ten (10) years has passed."[14] The supreme court stated that, in such a scenario, "we agree with the Trial Court and Judge Barnes (in *Jurich v. Garlock*, 759 N.E.2d 1066 (Ind. Ct. App. 2001), *rev'd* 785 N.E.2d 1093 (Ind. 2003)), that the rule of *Martin v. Richey* is implicated. But it is implicated only where the Plaintiff's cause of action has accrued within the ten (10) year period."[15]

In determining whether an injury has occurred in this context, the *Ott* court stated that "injury for this purpose does not occur upon mere exposure to (or inhalation of) asbestos fibers."[16] The supreme court then cited with approval "substantial authority on this point." In footnote 8, the supreme court noted federal and state court decisions from courts in Arizona, Maine, Pennsylvania, and Virginia holding that "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss of damage to a Plaintiff's interest required to sustain a cause of action under general applicable principles of tort law."[17] Consequently, any claims by a plaintiff that his cause of action for mesothelioma or lung cancer had "accrued" be-

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[13] State v. Rendleman, 603 N.E.2d 1333, 1334 (Ind. 1992); Mathys v. City of Berne, 501 N.E.2d 1142, 1145 (Ind. Ct. App. 1986).

[14] *Id.* 785 N.E.2d at 1074.

[15] *Id.*, 785 N.E.2d at 1074-75.

[16] 785 N.E.2d at 1075.

[17] *Ott*, 785 N.E.2d at 1075 n.8 (quoting Burns v. Jaquays Mining Corp., 156 Ariz. 375, 752 P.2d 28, 30 (1987) (quoting Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir. 1985), *cert. denied*, 474 U.S. 864)).

cause the plaintiff was "injured," within the meaning of *Ott* at the point in time where the plaintiff's disease was subclinical or asymptomatic would be contrary to the authorities accepted by the *Ott* court in footnote 8 of its opinion. For example, Arizona's high court decision in *Burns*, the first case approved by the supreme court in footnote 8 of its opinion in *Ott,* shows that a disease that is asymptomatic—a "disease" without any symptoms or clinical manifestations—is by definition "insufficient . . . to sustain a cause of action . . . ."[18]

Under Indiana law, any attempt by a plaintiff to avoid summary judgment by trying to overcome the presumption of constitutionality of section 1 as applied to that plaintiff by relying on language from *Ott* warrants granting the defendant leave to file a reply brief. However, as a safeguard, one may submit an affidavit of a physician stating that no reasonable physician could have discovered the asbestos-related disease during the statute of repose period using generally accepted medical practice along with the original summary judgment motion. This will demonstrate that the statute of repose is valid and constitutional as it pertains to the particular plaintiff.

II. COMPARATIVE FAULT: APPORTIONMENT AND NONPARTY DEFENSE

In general, torts in Indiana are governed by the law of comparative fault. Indiana Code § 34-51-2-1 *et seq*. provides the groundwork for apportionment of fault among defendants and nonparties in tort cases.

> Sec. 1.
> (a) This chapter governs any action based on fault that is brought to recover damages for injury or death to a person or harm to property, except as provided in subsection (b).
> (b) This chapter does not apply to an action:
> (1) brought against a qualified health care provider under IC 16-9.5 (before its repeal), IC 27-12 (before its repeal), or IC 34-18 for medical malpractice; or
> (2) that accrued before January 1, 1985.

Indiana Code § 34-51-2-14 authorizes a defendant to assert a defense that the damages to the claimants were caused in full or in part by a nonparty. A nonparty defense is to be pled as part of the answer; however, a defendant who gains actual knowledge of the nonparty defense after the filing of the answer may plead the defense with reasonable promptness. However, if the defendant was served with the complaint and a summons more than 150 days before the expiration of the statute of limitations, the defendant shall plead any nonparty defense not later than forty-five days before the expira-

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[18] *Burns*, 752 P.2d at 30. ("The possible existence of subclinical asbestos-related injury prior to manifestation may be of interest to histologists (but) . . . subclinical injury . . . is insufficient . . . to sustain a cause of action . . . ." (quoting *Schweitzer*, 758 P.2d at 942)).

tion of the limitation of action. A trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with giving the defendant a reasonable opportunity to discover the existence of a nonparty defense.[19]

Pursuant to Indiana case law, a nonparty who may be at fault includes an employer or former employer.[20] Fault on the part of a nonparty may include negligence.

A. GENERAL DEFINITION OF NEGLIGENCE

Negligence is the failure to use due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances.[21] *Negligence* has been defined as a failure to exercise the care that a person of ordinary prudence would exercise under like circumstances.[22] The standard of conduct required to measure up to the duty to exercise ordinary care may vary depending upon the particular circumstances.[23] Negligence comprises three elements: a duty on the part of the defendant to conform his conduct to the standard of care necessitated by the relationship; a breach of that duty; and injury that the plaintiff suffered as a result of that failure.[24]

B. DEGREES OF FAULT

In Indiana there are no degrees of care. There is only the duty to use due care.[25] There is but a single standard of care in this state, and that is "due care," "ordinary care," and "reasonable care," which terms are regarded by our courts as having the same significance.[26] Ordinary or reasonable care is the care that an ordinarily prudent person would exercise under the same or similar circumstances.[27] Use of such terms as *slight care*, *great care*, *highest degree of care*, or other instructions indicating the quantum of care the law requires is misleading.[28] Lack of reasonable care under the circum-

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19 *See* IND. CODE § 34-51-2-16.

20 Waldridge v. Futurex Indus., 735 N.E.2d 229 (Ind. Ct. App. 1998).

21 Central Transport, Inc. v. Great Dane Trailers, Inc., 423 N.E.2d 675 (Ind. Ct. App. 1981); Tabor v. Continental Baking Co., 110 Ind. App. 633, 38 N.E.2d 257 (1941); Cleveland, C., C. & St L. Ry. v. Jones, 51 Ind. App. 245, 99 N.E. 503 (1912).

22 Southern Ry. v. Harpe, 223 Ind. 124, 58 N.E.2d 346 (1944).

23 Franklin v. Benock, 722 N.E.2d 874 (Ind. Ct. App. 2000).

24 Benton v. City of Oakland City, 721 N.E.2d 224 (Ind. 1999); Dibortolo v. Metropolitan Sch. Dist., 440 N.E.2d 506 (Ind. Ct. App. 1982).

25 South E. Ind. Natural Gas Co.v. Ingram, 617 N.E.2d 943 (Ind. Ct. App. 1993).

26 Central Transport, Inc. v. Great Dane Trailers, Inc., 423 N.E.2d 675 (Ind. Ct. App. 1981).

27 Neal v. Home Bldrs., Inc, 232 Ind. 160, 111 N.E.2d 280 (1953).

28 Thompson v. Ashba, 122 Ind. App. 58, 102 N.E.2d 519 (1951); Midwest Motor Coach Co. v. Elliott, 95 Ind. App. 64, 182 N.E. 541 (1932).

stances is the factor upon which negligence depends.[29] The standard is objective. Consequently, a person with a mental disability is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the person's capacity to understand the consequences of his actions.[30]

C. DEFINITION OF COMPARATIVE FAULT

The Comparative Fault Act[31] contemplates that all types of fault be compared. Fault includes "any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages."[32] Therefore, the defendant may prove negligent, reckless, or willful and wanton conduct on the part of the plaintiff to diminish or defeat a plaintiff's claim.

> [C]ommon law characterizations of [plaintiff's] conduct as contributorily negligent as a matter of law mean little in the context of comparative fault other than that [plaintiff] must be assessed some proportion of his damages . . . . The classification of [plaintiff's] conduct as reckless, willful or wanton is equally unavailing.[33]

Our comparative fault statute reflects a legislative intent that fairness is best achieved by a relative assessment of the parties' respective conduct.[34] Fault includes the unreasonable failure to avoid an injury or mitigate damages.[35] Fault was expanded to include intentional acts or omissions effective July 1, 1995. Furthermore, as of July 1, 1995, product liability cases use a comparative fault analysis, although the definition of *fault* for purposes of product liability cases differs from the definition of *fault* in the Comparative Fault Act.[36]

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29 Jones v. Gleim, 468 N.E.2d 205 (Ind. 1984).

30 *See* RESTATEMENT (SECOND) OF TORTS § 28318 (1965); Creasy v. Rusk, 730 N.E.2d 659, 667 (Ind. 2000).

31 IND. CODE § 34-5 1-2

32 IND. CODE § 34-6-2-45(b).

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

34 Booker, Inc. v. Morrill, 639 N.E.2d 358 (Ind. Ct. App. 1994).

35 *See* Medlock v. Blackwell, 724 N.E.2d 1135 (Ind. Ct. App. 2000); Deible v. Poole, 691 N.E.2d 1313 (Ind. Ct. App. 1998), *adopted*, 702 N.E.2d 1076 (Ind. 1998).

36 *Compare* IND. CODE §§ 34-6-2-45 (a) and (b) *with* IND. CODE § 34-20-8-1.

D. NONPARTY DEFENSE BURDEN OF PROOF

Indiana Code § 34-51-2-15 places the burden of proof of a nonparty defense upon the defendant, who must affirmatively plead the defense. A *nonparty* is "a *person who caused or contributed to cause the alleged injury,* death, or damage to property but who has not been joined in the action as a defendant."[37] Therefore, a nonparty defense may still be available even though the nonparty could not be liable to the plaintiffs because of immunity or some other defense. Specifically, the nonparty defense is not limited to instances where the named nonparty is liable to the plaintiff.[38] For example, an employer may be a nonparty who is assigned fault.[39]

Nonparties must be specifically named by the defendant to maintain his claim that there is such a person whose percentage of fault should be determined.[40] However, the rule in *Cornell Harbison* does not preclude the introduction of competent and relevant evidence that the conduct of some unnamed third party was the sole proximate cause of the plaintiff's injuries.[41] Such evidence may be argued to the jury as bearing on the plaintiff's burden of proof with regard to proximate causation. The court may not, however, instruct the jury as assign fault to an unnamed nonparty.[42]

E. PARTIES WHO HAVE BEEN DISMISSED

Percentages of fault may be allocated only to a plaintiff, a defendant, and any person who is a nonparty within the meaning of the Act. A party dismissed from the suit does not necessarily remain as a nonparty defendant for purposes of determining fault where the defendant neither objected to the dismissal nor pleaded a nonparty defense.[43] Remaining defendants need to consider opposing a motion to dismiss or request that the dismissed party become a nonparty for purposes of allocation of fault.[44] When multiple defendants are sued and the plaintiff enters into settlement agreements with some of the defendants who are dismissed with prejudice, the trial court may grant leave to remaining defendants to amend their answers to raise the nonparty defense.[45] The definition of nonparty in the Comparative

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[37] IND. CODE § 34-6-2-88 (emphasis added), the definition now specifically excludes the concept of liability and focuses instead on causation.

[38] Bulldog Battery Corp. v. Pica Inves., 736 N.E.2d 333 (Ind. Ct. App. 2000).

[39] Waldridge v. Futurex Indus., 735 N.E.2d 229 (Ind. Ct. App. 1998).

[40] Cornell Harbison Excavating, Inc. v. May, 546 N.E.2d 1186 (Ind. 1989).

[41] Kveton v. Siade, 562 N.E.2d 461 (Ind. Ct. App. 1990).

[42] *Id.* at 464. *See also* Lueder v. Northern Ind. Pub. Serv. Co., 683 N.IE.2d 1340, 1344 (Ind. Ct. App. 1997).

[43] Bowles v. Tatom, 546 N.E.2d 1188 (Ind. 1989).

[44] *Id.*

[45] Gilliam v. Contractors United Inc., 648 N.E.2d 1236 (Ind. Ct. App. 1995).

Fault Act does not preclude named parties from reverting to nonparty status after being dismissed following settlement.[46]

F. NO CREDIT FOR PAYMENTS BY SETTLING CODEFENDANT

A defendant who suffers judgment in a tort case is not entitled to credit for money paid by a settling codefendant who has not been added back under the nonparty provisions of the Comparative Fault Act. Under the Comparative Fault Act, a defendant must name the settling party as a nonparty if he seeks the benefit of the settlement.[47] Allocation of fault to a nonparty defendant does not create a right to indemnity.[48] In an asbestos case, settling defendants are routinely named as nonparties typically through a case management order.[49]

Where defendants are severally liable, a defendant who goes to trial does not get credit for amounts paid by nonparty defendants who settled the plaintiffs' claims against them.[50] Bankrupt former manufacturers of asbestos-containing products could be named as nonparties in a wrongful death action to recover for exposure to asbestos. The proportional allocation of fault to a bankrupt nonparty under the Comparative Fault Act is not an action or proceeding against the debtor in contravention of automatic stay provisions of the federal bankruptcy law. Allocation of fault to a nonparty does not create an award of damages, money judgment, or liquidated claims against the bankrupt nonparty nor does it affect the bankruptcy estate.[51]

III. PRODUCT LIABILITY STATUTE (LIMITATION ON STRICT LIABILITY)

The modern product liability statute incorporates most of the principles of comparative fault. Consequently, most of the terminology discussed in the review of comparative fault carries over to the product liability statute. Before 1995, the Product Liability Act defined *seller* as "a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor." Indiana Code § 33-1-1.5-2 (1994) and the provisions of Indiana Code § 33-1-1.5-3 (1994) outlining strict liability provided that

> (a) One 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 his property is subject to liability for physical harm caused by that product to the user or consumer or to his property if that user or consumer is

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46 Koziol v. Vojvoda, 662 N.E.2d 985 (Ind. Ct. App. 1996).

47 Mendenhall v. Skinner & Broadbent Co. Inc., 728 N.E.2d 140 (Ind. 2000).

48 Indianapolis Power & Light Co. v. Snodgrass, 578 N.E.2d 669 (Ind. 1991).

49 Owens Corning Fiber Glass Corp. v. Cobb, 754 N.E.2d 905 (Ind. 2001).

50 R.L. McCoy v. Jack, 772 N.E.2d 987 (Ind. 2002).

51 Bondex Int'l v. Ott, 774 N.E.2d 82 (Ind. Ct. App. 2002).

> in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and if:
> (1) The seller is engaged in the business of selling such a product; and
> (2) The product is expected to and does reach the user or consumer without substantial alteration in the condition in which it is sold by the person sought to be held liable under this chapter.
> (b) The rule stated in subsection (a) applies although:(1) The seller has exercised all reasonable care in the preparation, packaging, labeling, instructing for use, and sale of his product; and (2) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

The 1995 tort reform amendment limited the availability of recovery under the theory of strict liability. The post-1995 Act continues to recognize an action in strict liability against a manufacturer but only in cases proving a manufacturing defect. A seller may be strictly liable for a product manufacturing defect only if the seller is a "manufacturer" as defined in Indiana Code 34-6-2-77 or as noted in Indiana Code 34-20-2-4.

Indiana Code § 34-20-2-1 provides that

> Except as provided in section 3 of this chapter, 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.

A product liability action premised on strict liability in tort may be neither commenced nor maintained against a seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective.[52]

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[52] IND. CODE § 34-20-2-3.

Indiana Code § 34-20-8-1 provides that 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, is to be compared in accordance with the Comparative Fault Act provisions of Indiana Code §§ 34-51-2-7, 34-51-2-8, 34-51-2-9, or Indiana Code § 34-20-8-1(a). In assessing the percentage of fault, the jury shall consider the fault of nonparties, that is, 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.[53]

A. DEFINITION OF FAULT

There are two definitions of *fault*—one that applies to product liability actions and one for comparative fault actions. The term *fault* for purposes of product liability actions means

> an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following: (1) Unreasonable failure to avoid an injury or to mitigate damages; [and] (2) A finding under IC 34-20-2 that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.[54]

The product liability definition of *fault* does not include "unreasonable assumption of risk not constituting an enforceable express consent" or "incurred risk" but includes "strict liability" as a type of fault to be compared with the fault of all others who caused or contributed to cause the harm. *Fault* for purposes of the Comparative Fault Act, Indiana Code § 34-51-2, includes

> any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.[55]

B. FOR ACTIONS ARISING BEFORE JULY 1, 1995

For actions arising before July 1, 1995, Indiana Code § 33-1-1.5-3 (1994) provided that

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53 IND. CODE §34-20-8-1(b).

54 IND. CODE § 34-6-2-45(a).

55 IND. CODE § 34-6-2-45(b).

(a) One 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 his property is subject to liability for physical harm caused by that product to the user or consumer or to his property if that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by' the defective condition, and if:
  (1) The seller is engaged in the business of selling such a product; and
  (2) The product is expected to and does reach the user or consumer without substantial alteration in the condition in which it is sold by the person sought to be held liable under this chapter.

(b) The rule stated in subsection (a) applies although:
  (1) The seller has exercised all reasonable care in the preparation, packaging, labeling, instructing for use, and sale of his product; and
  (2) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

C. DEFINITION OF PRODUCT

Indiana Code § 34-6-2-114 provides that the definition of *product*. The Act does not apply to transactions that are predominately for the sale of a service. It may be difficult to tell the difference between a product and a service.[56] In *Hill v. Rieth-Riley Construction Co.,*[57] the court analyzed which aspect of the contract was predominant. The court concluded the plaintiff could not bring a product liability claim for installing concrete plugs and guardrails because those actions had been performed pursuant to the defendant's contract with the Department of Transportation predominantly for services. Similarly in *Whitaker v. T.J. Snow Co.*,[58] the Seventh Circuit held a contract between a worker's employer and company that refurbished a seam welder was predominantly one for services rather than for a product where the company did not manufacture any significant component parts.

In determining whether an action exists in product liability, the following factors should be considered: (1) the terms describing the performance required of the parties and the words used to describe the relationship between the parties; (2) the circumstances of the parties and the primary reason they entered into the contract; (3) the final product the purchaser

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[56] *See, e.g.*, William C. Powers, Jr.*, Distinguishing between Products and Services in Strict Liability*, 62 N.C.L. Rev. 415 (1984).

[57] 670 N.E.2d 940 (Ind. Ct. App. 1996).

[58] 151 F.3d 661 (7th Cir. 1998).

bargained to receive, and whether it may be described as a good or a service: and (4) the costs involved for the goods and services, and whether the purchaser was charged for a good, or a price based on both goods and services.[59]

D. UNREASONABLY DANGEROUS

Indiana Code § 34-6-2-146 defines *unreasonably dangerous*. The question whether a product is in a defective condition focuses on the product itself. The requirement that the product be unreasonably dangerous focuses on the reasonable contemplations and expectations of the consumer. Both must exist—the product must be in a defective condition and be unreasonably dangerous—for liability to attach in a product liability case.[60] In *Welch v. Scripto-Toakai Corp.*, the court dealt with the issue of whether a butane lighter was unreasonably dangerous. A lighter's being in the hands of a child did not necessarily render a lighter unreasonably dangerous. The court held that a disposable butane cigarette lighter that ignited when operated did not function in a manner unexpected by an ordinary consumer (an adult) and was not unreasonably dangerous for purposes of imposition of strict liability under Product Liability Act, even though a lighter can be potentially dangerous in the hands of a child.[61]

E. DEFINITION OF CONSUMER

Indiana Code § 34-6-2-29 defines *consumer* for purposes of the Product Liability Act. *User* has the same meaning as *consumer*.[62] Before 1995, the statutory provision read as follows:

> "user or consumer" means a purchaser, any individual who uses or consumes the product, or 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 any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.[63]

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59 Dow Chem. Co. v. Ebling, 723 N.E.2d 881, 904-905. (Ind. Ct. App. 2000).

60 *See* Welch v. Scripto-Toakai Corp., 651 N.E.2d 810 (Ind. Ct. App. 1995); *see also* Cox v. American Aggregates Corp., 580 N.E.2d 679 (Ind. Ct. App. 1991), *rejected on other grounds*, Baker v. Westinghouse Elect. Corp., 637 N.E.2d 1271 (Ind. 1994).

61 *See also* Smith v. AMLI Realty Co., 614 N.E.2d 618 (Ind. Ct. App. 1993); Rupert v. Machine Tool Corp., 661 N.E.2d 826 (Ind. Ct. App. 1995); Natural Gas Odorizing Inc. v. Downs, 685 N.E.2d 155 (Ind. Ct. App. 1997).

62 *See* IND. CODE § 34-6-2-147.

63 IND. CODE § 33-1-1.5-2 (1994).

F. DAMAGE TO THE PRODUCT ITSELF

In cases like *Martin Rispens & Sons v. Hail Funns, Inc.*,[64] the courts have held that the product itself is not "property" for purposes of the Product Liability Act requiring harm to a "consumer's property." Specifically, there is no liability under the Product Liability Act where no damage to person or other property is present.[65] Fires that allegedly occurred as result of defects in vehicles and either damaged or destroyed vehicles, but that did not result in injury to any person or other property belonging to the owners of vehicles, did not result in "physical harm" to a user or to a user or consumer's property within the meaning of the act.[66] A manufacturer of a product may be liable for physical harm caused by that product to the user's other property.[67]

The Act contemplates the defective product harming some other property or person.[68]

G. DEFENSES TO PRODUCT LIABILITY

Indiana Code §§ 34-20-8-1, 34-20-6-4, and 34-20-3-1 provide for certain defenses.

> Ind. Code § 34-20-8-1. Assessment of percentage.
> (a) In a product liability action, the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact in accordance with IC 34-5 1-2-7, IC 34-51-2-8, or IC 34-51-2-9.
> (b) In assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.
>
> Ind. Code § 34-20-6-4. Misuse of product.
> It is a defense to an action under this article (or IC 33-1-1.5 before its repeal) that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.

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64 621 N.E.2d 1028 (Ind. 1993).

65 Progressive Ins. Co. v. General Motors, 749 N.E.2d 484 (Ind. 2001).

66 *See also* Interstate Cold Storage, Inc. v. General Motors Corp., 720 N.E.2d 727 (Ind. Ct. App. 1999).

67 *See* IND. CODE § 34-20-2-1.

68 Interstate Cold Storage, Inc. v. General Motors Corp., 720 N.E.2d 727 (Ind. Ct. App. 1999). *See also* I/N Tec. v. Hitachi, Ltd., 734 N.E.2d 584 (Ind. Ct. App. 2000), *trans. denied*; Hitachi Constr. Mach. Co. Ltd. v. AMAX Coal Co., 737 N.E.2d 460 (Ind. Ct. App. 2000), *trans. denied.*

Misuse occurs where cause of the physical harm is a misuse of the product by a claimant.[69] Misuse also occurs when a product is used for a purpose or in a manner not foreseeable by the manufacturer. A consumer who uses a product contrary to a clear warning, misuses the product. Such conduct may also constitute incurred or assumed risk. A seller may reasonably assume that a warning will be read and followed. Misuse should be compared with all other fault and is not necessarily a complete bar to recovery. Consequently, a plaintiff's misuse of a product falls within the definition of *fault.* Unreasonable failure of a plaintiff to avoid an injury or to mitigate damages also constitutes fault.[70] A trier of fact must compare misuse with all other fault in the case.[71]

As previously discussed, the statute of repose as outlined in Indiana Code § 34-20-3-1(b) may also be another defense to a product liability claim involving asbestos. Suffice it to say that many claims of product liability involving asbestos-containing products will fail to survive a summary judgment motion.

In sum, liability will be attributed to a manufacturer only if the product contains a defective condition rendering it unreasonably dangerous for its intended use.[72] Misuse of a product is to be considered in calculating the percentage of fault of any plaintiff or nonparty defendant. A lawsuit must be timely filed to hold a seller or manufacturer liable. Specifically, Indiana Code § 34-20-3-1 (statute of repose) will bar a claim against the defendant if the product was delivered to the initial consumer ten years or more before the lawsuit was filed.

IV. PUNITIVE DAMAGES

Indiana statutes regulate any claim for punitive damages. For example, Indiana Code § 34-51-3-1 et seq. governs all cases in Indiana in which a party requests the recovery of punitive damages in a civil action. Indiana Code § 34-51-3-2 provides that

> Before a person may recover punitive damages in any civil action, that person must establish, by clear and convincing evidence, all of the facts that are relied upon by that person to support the recovery of punitive damages.

A. MONETARY LIMIT ON PUNITIVE DAMAGES

Indiana Code § 34-51-3-3 provides that

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69 IND. CODE § 34-20-6-4.

70 IND. CODE § 34-6-2-45(a).

71 IND. CODE § 30-24-8-1; Barnard v. Saturn Corp., 790 NE.2d 1023 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 755 (Ind. 2003).

72 Wingett v. Teledyne Indus., 479 N.E.2d 51 (Ind. 1985).

A jury in a case subject to this chapter may not be advised of:
1) limitation on the amount of punitive damages awarded under Ind. Code § 34-51-3-4 of this chapter; or
2) the requirement of under Ind. Code § 34-51-3-6 of this chapter concerning allocation of money received and payment of punitive damages award.

Indiana Code § 34-51-3-4 provides that

A punitive damage award may not be more than greater of:
1) Three (3) times the amount of compensatory damages awarded in the action; or
2) Fifty thousand dollars ($50,000).

B. A PLAINTIFF CAN RECEIVE ONLY TWENTY-FIVE PERCENT OF A PUNITIVE DAMAGE AWARD

Indiana Code § 34-51-3-5 provides that

If the trier of fact awards punitive damages that exceed the limitations under Section 4 (Ind. Code § 34-51-3-4) of this chapter, the court shall reduce the punitive damage award to not more than the greater of:
1) Three (3) times the amount of compensatory damages awarded in the action; or
2) Fifty thousand dollars ($50,000).

Indiana Code § 34-51-3-6 provides that

a) except as provided in Ind. Code § 13-25-4-10, when a finder of fact announced a verdict that includes a punitive damage award in the civil action, a party against whom the judgment was entered shall notify the Office of the Attorney General of the punitive damage award;
b) when a punitive damage award is paid, the party against whom the judgment was entered shall pay punitive damages award to the clerk of the court where the action is pending;
c) upon receiving the payment described in subsection (b), the clerk of the court shall:
   1) pay the person to whom punitive damages were awarded 25 percent of the punitive damage award; and
   2) pay the remaining 75 percent of the punitive damage award to the treasurer of the state, who shall deposit the funds into the violent crimes victim's compensation fund established by Ind. Code § 5-2-6.1-40.

d) the Office of the Attorney General may negotiate and compromise a punitive damage award described in subsection (c)(2);
e) the state's interest in a punitive damage awarded described in subsection (c)(2) is effective when a finder of fact announces a verdict that includes punitive damages.

C. NO PUNITIVE DAMAGES IN A WRONGFUL DEATH ACTION

In wrongful death actions, there are no punitive damages available to a plaintiff. As explained by the Indiana Supreme Court in *Durham v. U-Haul International*,[73] punitive damages are not recoverable in a wrongful death action. Furthermore, the spouse's claim for consortium will not support a claim for punitive damages in Indiana wrongful death case.[74]

V. CONCLUSION

When applying Indiana law to product liability claims involving asbestos-containing products, it is essential to have a thorough understanding of Indiana's Product Liability Statute and the supporting case law. Many of the cases filed are untimely and should be disposed of through summary judgment proceedings. In the remaining cases, nonparty defenses usually dilute the potential liability of the named defendant. In any case where the plaintiff has allegedly died of asbestos exposure, punitive damage claims are not appropriate.

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[73] 745 N.E.2d 755 (Ind. 2001).

[74] *Id.*

PRACTICING BEFORE THE INTERNATIONAL TRADE COMMISSION, OR CONFIDENTIALITY CALISTHENICS IN WASHINGTON D.C.

William L. O'Connor*

During spring break 2007, I was walking with my family in Washington, D.C., near a building that houses the International Trade Commission ("ITC"). At the time, I did not know what the ITC was, why it existed, or what it did. Nor did I know that it would dominate my legal life for the next two years or that life would center around a courtroom filled with dozens of lawyers, paralegals, and information and technology assistants (none mine) to handle the millions of pages, depositions, exhibits, and other paper to be presented to the administrative law judge.[1] The case for which I was there involved the manufacture of sucralose, a high-intensity artificial sweetener. Subsidiaries of a British holding company, Tate & Lyle PLC, had complained to the ITC that foreign manufacturers were infringing its patents in the manufacture of sucralose that was being imported into the United States. I represented one of the respondents in that action.

On April 6, 2007, the complaint was filed. The case was tried in February 2008. The administrative law judge issued his 200-page initial determination in September 2008, and the full ITC issued its opinion in April 2009. The ITC concluded that, except for certain defaulted or nonresponding parties, the intellectual property rights were not infringed. This matter is still subject to review by the federal circuit court of appeals.

That complaint alleged infringement by foreign manufacturers of sucralose and domestic distributors and retail packagers and suppliers of products allegedly containing imported sucralose. A client with whom I had worked was caught up in this complaint, and so it soon came to my attention.

This article gives only an overview of the ITC, its purpose and procedures, and certain facets of the process. I am certainly not a patent litigator and some of the other attorneys from Washington and Boston, who represented other respondents, were certainly more experienced ITC litigators than I. For its litigation aspects, it was a fascinating process and taught me

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1 This author is not professing years of expertise before the ITC. This article is meant to provide certain insights from a unique experience. Anyone preparing to practice before the ITC is encouraged to become very familiar with its rules of practice as they can be strictly enforced with harsh results.

that just when I think I have seen everything, a new method of relief is brought to light.

My involvement was in an investigation commonly called a "337 action."[2] These actions almost always consist of an allegation of patent infringement in an imported article, but its application is not limited solely to patent actions. The Commission authority appears to cover any "unfair act" that would be involved in international trade and imports into the United States that damage a domestic industry. Although the ability to pursue 337 actions has existed for more than 75 years it has been little used until the last decade or so. This appears to have resulted from past standards of proof, lack of understanding or its application, or reluctance on the part of the Commission to use its power.[3] This case will serve only as a background for my observations of this very interesting forum and process.

In order to explain my alternate title one has to understand the role of confidentiality at the ITC. Because it knows it will be dealing with sensitive information that the parties will almost invariably claim is confidential, the ITC has its own standing confidentiality order. It is broad, strict, and ever-present. Any document that any party designates as confidential cannot be shown to anyone, even one's own client. This includes briefs and motions and orders until the court enters a public version of its own order. During the trial, besides the numerous legal personnel, there were also many concerned clients, observers, and news organizations. All are allowed in the courtroom as long as the red diode sign reads *Public*. Once one of the attorneys or the judge remarks that upcoming exhibits or testimony may be confidential then a switch is flipped and the red diode sign reads *Confidential*. At that point, everyone in the large courtroom who has not signed onto the confidentiality order, meaning everyone unaffiliated with the law firms or the ITC, must leap up and out and wait in the hallway anxiously watching the red diode sign for its *Public* setting to reappear.[4]

I. WHAT IS THE ITC?

The ITC describes itself as an independent, quasi-judicial federal agency.[5] It investigates the results of dumped and subsidized imports on domestic industries, conducts safeguard investigations, and adjudicates cases involving alleged infringement of domestic intellectual property rights by imported goods. The case in which I was involved related to an alleged infringement of domestic intellectual property rights by imported

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2 So named as its authority springs from 19 U.S.C. § 1337.

3 Robert A. Caplen, *Recent Trends Underscoring International Trade Commission Review of Initial Determinations and Federal Circuit Appeals From Final Commission Determinations Under Section 337 of the Tariff Act of 1930*, 17 FORDHAM INTELLECTUAL PROP., MEDIA & ENTM'T L.J. 337, 342-44 (2007).

4 One was always tempted to look concerned or smug or shocked as everyone else came back to heighten the sense of tension. However, since the tension was high enough as it was, one did not do so.

5 http://www.usitc.gov/.

goods (such allegation was ultimately rejected)—a so-called 337 action.[6] The ITC has several distinct areas of responsibility each delineated by the federal code provision granting it authority.

Since it is a federal agency, its powers spring from congressional, and thus usually, statutory authority. 19 U.S.C. § 1330 sets out how the commission itself is organized. No more than three members may be of the same political party and appointments to the commission are encouraged to be alternated between major political parties.[7] The members are appointed by the president.

The Commission deals with international trade issues brought by complaint, *sua sponte* or by Congress. For example, the Commission has issued determinations or publications on *Circular Welded Carbon Quality Steel Line Pipe From China and Korea*, *Citric Acid and Certain Citrate Salts from Canada and China*, and *Matchbooks from India*. There are numerous other matters constantly before the Commission and a review of the web site is interesting, even to the casual observer.[8]

The ITC originated in 1922 as part of a tariff act.[9] It was a little-used agency and statutory section for many years. Substantial changes were made to the statute in 1974 that made it a more attractive tool for persons trying to protect a domestic industry from foreign imports that violated intellectual property rights. Section 1337 outlaws importing and sales in the United States of imported goods that violate a United States intellectual property right.[10]

II. What Is the ITC's Jurisdiction?

In order to invoke the ITC's jurisdiction one must show importation of an article that falls under the scope of 19 U.S.C. § 1337 and that affects a domestic industry.[11] The scope of § 1337 is very broad and essentially states that all unfair acts are unlawful.[12] The section for 337 actions is used primarily or almost exclusively for patent infringement. The jurisdiction section more precisely at issue is 19 U.S.C. § 1337(a)(1)(B):

> (B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—

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6 19 U.S.C. § 1337.

7 This appears to be the meaning of the word *independent* in the Commission's description of itself.

8 http://www.usitc.gov/.

9 Caplen, *supra* note 3 at 341.

10 *Id.*

11 19 U.S.C. § 1337(a)(1)-(2)

12 19 U.S.C. § 1337(a)(1)(A); In re Von Clemm, 229 F.2d 441 (CCPA 1955).

(i) infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under Title 17; or
(ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.[13]

If one is dealing with a product patent this question may easily be answered but the question becomes more complex when dealing with process patents. A process patent is one that covers not the article itself but a process used in its manufacture. Through its history the ITC has gone back and forth on its jurisdiction over final products in which precursors or intermediate steps, covered by a process patent, may be used. In 1934, the Court of Customs and Patent Appeals issued the *Northern Pigment* decision.[14] It held not only that the products directly produced by the patented process were under the jurisdiction of the ITC but that items that were further processed into different products also fell under the ITC's jurisdiction.

Northern Pigment was overruled by *In re Amtorg*[15] the next year. Congress moved to reinstate the effect of the *Northern Pigment* decision when it revised the statute in 1940.[16]

Even with this precedential and legislative history, difficult questions still arise when dealing with manufacturing processes that simply aid the manufacturing process and do not directly result in the final product. The ITC must be mindful of the extraterritorial application of U.S. law[17] balanced against its role to protect against unfair use of intellectual property.

An interesting aspect of the difference between the ITC and a district court is seen in the application of certain defenses available in district court but unavailable to the ITC respondent. 35 U.S.C. § 271(g) provides generally that a foreign manufactured product will not be considered to infringe a U.S. patent if it is materially changed by subsequent processes or becomes a trivial part of another product.[18] However, this defense and the application of this statute are unavailable in a 337 action.[19]

The importation component is typically shown by products directly imported into the United States. However, even a nondomestic sale intended or likely for importation may qualify as a jurisdictional act.[20]

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13 19 U.S.C. § 1337(a)(1)(B).

14 In re Northern Pigment, 71 F.2d 447 (C.C.P.A. 1934).

15 In re Amtorg, 75 F.2d 826, 22 CCPA 558 (1935).

16 *See* Amgen, Inc. v. ITC, 902 F.2d 1532, 1538-39 (Fed. Cir 1990).

17 *See* Microsoft Corp. v. AT&T, 550 U.S. 437, 127 S. Ct. 1746, 1759 (2007).

18 35 U.S.C. § 271(g).

19 Kinik v. ITC, 362 F.2d 1359, 1361 (Fed. Cir. 2004).

20 Amgen, Inc. v. ITC, 519 F.3d 1343, 1350-51 (Fed. Cir 2008).

The complainant must also show injury to a domestic industry in order to invoke jurisdiction. This can be a very complex question when dealing with smaller companies and immature industries. The proof of harm to a domestic industry is usually two-pronged: economic and the technical.[21]

> (3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned—
> (A) significant investment in plant and equipment;
> (B) significant employment of labor or capital; or
> (C) substantial investment in its exploitation, including engineering, research and development, or licensing.[22]

The economic prong requires proof of either commercial exploitation or of at least substantial preparation for the same. The technical prong requires proof that this exploitation is actually related to the protected article.[23]

III. Practice Tip

As stated above, this author does not profess to be a master ITC practitioner. However, there are a few things to note if one chooses to file an ITC complaint. The ITC is a fact-pleading, not notice-pleading, forum.[24] This is because the complaint may spark an international trade investigation, which commits and uses extensive resources. Also, this is a forum committed to speedy resolution. When those two things are taken in conjunction, it follows that the party that chooses that forum had better be ready to proceed and a party drawn into such an action should waste no lead time. Typically, once the complaint is filed, the ITC has a time period to determine if it will act on the complaint. Potential respondents should start work immediately. One should commit to a thorough investigation, have experts prepared, and get documents ready for production before committing to the forum or before the ITC accepts the investigation. Once the train starts rolling there is little sympathy for any complainant or respondent ill prepared for what comes.

The ITC is more reluctant to allow pleading amendments than is a district court. "After an investigation has been instituted, the complaint or notice of investigation may be amended only by leave of Commission for good cause shown."[25] This typically requires the complainant to show why

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21 19 U.S.C. § 1337(a)(3).

22 *Id.*

23 Certain Variable Speed Wind Turbines and Components Thereof, Inv. No. 337-TA-376, USITC Pub 3003 (Nov. 1996) Comm'n Op. at 14-17.

24 19 C.F.R. § 210.10(a)(1).

25 19 C.F.R. § 210.14(b)(1).

it was unable to plead the allegations earlier.[26] If one discovers new information in the course of discovery, its motion can still be defeated by showing prejudice to the public interest and the rights of the parties[27] or by showing that the complainant had some prior knowledge to support the allegation.[28]

One may also want to consider whether it is in the client's interest to be caught up in an ITC proceeding. They are work-intensive and extremely expensive. I cannot comment more strongly on the dedication of the ITC office, staff, and the administrative law judges who regularly work on these matters. In addition, the attorneys who do this regularly are extremely hard workers with horrendous schedules. If a party named as a respondent in an investigation has little interest in the targeted article, it may be worthwhile to investigate an early consent order.

This situation would typically arise for domestic distributors of a targeted article. There was some early support for the thought that 337 actions should target only foreign entities and that domestic companies were immune from ITC remedial orders.[29] The federal circuit made it clear that U.S. companies are proper respondents if they import targeted articles.[30] The Commission itself further ordered that domestically manufactured products may also fall under its jurisdiction as long as the imported targeted article is included in the manufactured product.[31]

Based on this, it appears that domestic distributors can be the subject of an ITC action. If the targeted article is just passing through a warehouse, it may be in the company's best interest to avoid fighting to the bitter end. If a party cannot successfully negotiate a resolution with the complainant then a motion to terminate and accept a consent order may be necessary. Under Commission rules, a party may move to terminate an investigation as to itself based on a consent order.[32] However, the consent order requires much more than just an agreement that one has stopped dealing in the article. Although the consent order does not have to contain a stipulation of

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26 Certain Wireless Communications Equipment, Articles Therein, and Products Containing the Same, Inv. No. 337-TA-577, Ord. No. 5 at 2 (Sept. 14, 2006).

27 19 C.F.R. § 210.14(b)(1).

28 Certain Optical Disk Controller Chips and Chipsets and Products Containing Same, Including DVD Players and CD Players and PC Optical Storage Devices II, Inv. No. 337-TA-523, Ord. No. 29 (Mar. 4, 2005).

29 Bryan A. Schwartz, *The Implications of GATT on U.S. Intellectual Property Laws: Beyond the Amendments: Federal and ITC Case Law Developments That May Determine the Long-Term Future of Section 337 Litigation,* 22 AIPLA Q.J. 491, 499 (1994).

30 Texas Instruments, Inc. v. ITC, 988 F.2d 1165, 1168 (Fed. Cir. 1993), *cert. denied* 520 U.S. 1228 (1997).

31 Certain Sputtered Carbon Coated Computer Disks and Products Containing Same, Including Disk Drives, Comm'n Op., USITC Pub. 2701, Inv. No. 337-TA-350 (May 27, 1993).

32 19 C.F.R. § 210.21(c)(1)(ii).

violation,[33] it must contain an admission of all jurisdictional facts, a waiver of the right to seek judicial review or challenge the validity of the consent order, a stipulation that the signatories to the consent order will cooperate with and not impede the Commission's efforts to gather information, and a stipulation that the party will not seek to challenge the validity of the intellectual property.[34] The consent order must also state that it will not apply to a claim of intellectual property that has expired or been adjudicated to be invalid or unenforceable by a finding or judgment that has become final and nonreviewable.[35]

If one cannot reach resolution with the complainant, it appears moving for a consent order unilaterally is a much better option than simply not participating. The consent order gives some relief that it is not a finding of a violation, and if the participating parties prove that the patent is invalid, the consent order will no longer apply. A party that does not participate can be defaulted or have the Commission enter an order based on the nonparticipation. This can lead to the entry of a limited exclusion order against the nonresponding party even when all participating respondents win their portion of the case.

IV. What Are the Benefits of a 337 Action?

The four main benefits of the ITC are (1) jurisdiction, (2) discovery, (3) convenience of one forum, and (4) speed. If a company wants to continue importing goods into the United States, then it had better voluntarily engage in the process or an order will be entered against it by default or by adverse inference. Further, once the party is engaged, it must comply with discovery that the ITC finds reasonable. These include opening its plant for inspection, producing documents, and regular depositions. Finally, given its statutory mandate to complete investigations, things move quickly in the ITC. That is a blessing and a curse. If the complainant, as the party who chose the forum, has too little time, it can be caught unprepared to move forward on the allegations.

The ITC now has broad powers to conduct hearings, enter final orders, and give fairly broad relief. Although the ITC does not grant money damages, it can issue orders excluding entry of the accused products into the United States. The ITC can typically enter general exclusion orders,[36] limited exclusion orders,[37] and cease-and-desist orders.[38] The limited exclusion order will affect only the respondents named, but the general exclusion

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[33] 19 C.F.R. § 210.21(c).

[34] 19 C.F.R. § 210.21(c)(3)(A)-(B).

[35] *Id.*

[36] 19 U.S.C. § 1337(d)(2)(A).

[37] 19 U.S.C. § 1337(d)(1)-(2).

[38] 19 U.S.C. § 1337(f).

order can prohibit all infringing goods regardless of their source.[39] The cease-and-desist orders are based on personal jurisdiction and typically are directed at domestic entities that deal in the imported products.[40]

Although the ITC does not issue damage orders, it can enforce its orders by the use of fines and penalties.[41] These fines can be large, such as the greater of $100,000 or twice the domestic value of the goods per day.[42]

The ITC moves with good speed, dispenses with the typical jurisdiction problems associated with foreign manufacturers, dispenses with cooperation problems regarding discovery, is an excellent way to aggregate all parties (foreign and domestic) in one proceeding, and can provide excellent relief to problems associated with foreign entry of infringing goods.

In regard to speed, the 337 actions are usually initiated by complaints from allegedly aggrieved holders of intellectual property rights. Upon the receipt of a complaint the Commission has to determine within 30 days whether it will initiate an investigation.[43] Once the Commission accepts, the matter is assigned to an administrative law judge who is required to conduct the matter quickly.[44] A target date for completion is one of the first orders entered. All parties and attorneys are required to make every effort to avoid delay. This admonition is taken seriously.

The ITC is a rocket-docket jurisdiction. For cases like mine, with seven process patents and hundreds of thousands of pages of documentation, that is a tall order.

Even the trial procedure time is strictly controlled. Each team had a paralegal with a stopwatch to keep track of time used in either arguing or examining witnesses. When the parties approach the end of the case, the time left for each side can be a substantial factor in the decision-making process.

The failure to have experts ready, the demands of massive documentation, the need for extensive discovery in foreign lands involving on-site testing, and even local traffic conditions that cause delays are expected by the attorneys with whom I dealt. They were all very experienced ITC attorneys who worked ridiculously long hours with great determination.

The jurisdiction and cooperation benefits of the ITC go hand in hand. The ITC considers its jurisdiction, for the most part, to be *in rem* rather than over a particular party. The complainant must show that there is an importation of infringing articles and that there is a *domestic industry* related to

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39 19 U.S.C. § 1337(d).

40 19 U.S.C. § 1337(f); In re Certain Lens-Fitted Film Packages, Comm'n Op. 11, Inv. No. 337-TA-406 (June 23, 2003).

41 *Id.*

42 19 U.S.C. § 1337(f)(2).

43 19 C.F.R. § 210.10(a)(1).

44 19 C.F.R. § 210.2.

the intellectual property at issue.[45] The case law interpreting this jurisdiction issue is explicit that there need be no personal jurisdiction over a particular manufacturer for the ITC to enter a remedial order.

The beauty of this arrangement is apparent to anyone who has had difficulty to get far distant entities without a significant U.S. presence to cooperate and engage. If articles manufactured by the entity enter the U.S. and that entity chooses neither to respond nor to cooperate, then it is likely that those goods will be blocked at the border by a limited exclusion order for failure to participate or default.

If the source of the alleged infringement is a foreign manufactured article that is then incorporated into various products, Commission rules appear to allow all such parties to be joined in the same action and subject to the same rules and robust discovery.

Under Commission rules a party that fails to respond or participate in discovery can be subject to a summary order and an exclusion order.[46] The Commission is directed to avoid using default or failure to participate as the basis for a general exclusion order that would affect all manner of companies and not just the defaulting or nonresponding party. 19 C.F.R. § 210.16(c) states in part:

> (c) *Relief against a respondent in default*. (1) After a respondent has been found in default by the Commission, the complainant may file with the Commission a declaration that it is seeking immediate entry of relief *against the respondent in default.* The facts alleged in the complaint will be *presumed to be true with respect to the defaulting respondent* . . . .[47]

Section 337(g)(1) of the Tariff Act of 1930 provides that

> [I]f –
>
> (A) a complaint if filed against a person under [section 337];
> (B) the complaint and a notice of investigation are served on the person;
> (C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice;
> (D) the person fails to show good cause why the person should not be found in default; and
> (E) *the complainant seeks relief limited solely to that person*;
>
> the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry

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45 19 U.S.C. §§ 1337(a)(1) and (2).

46 19 C.F.R. § 210.16 (default); 19 C.F.R. § 210.17 (failure to participate).

47 19 C.F.R. § 210.16(c) (emphasis added).

> or a cease and desist order, or both, *limited to that person* unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.[48]

It is through this mechanism that the ITC procedure can assure unprecedented access and cooperation in discovery. The pretrial process for discovery is similar to federal district court litigation. The parties have access to interrogatories, requests for admissions, requests for production, plant inspections, nationwide subpoenas, and depositions.[49]

Another incentive to cooperate in discovery that is not unique to the ITC is 35 U.S.C. § 295. This code section reads:

> In actions alleging infringement of a process patent based on the importation, sale, offer for sale, or use of a product which is made from a process patented in the United States, if the court finds—
>
> (1) that a substantial likelihood exists that the product was made by the patented process, and
>
> (2) that the plaintiff has made a reasonable effort to determine the process actually used in the production of the product and was unable to so determine,
>
> the product shall be presumed to have been so made, and the burden of establishing that the product was not made by the process shall be on the party asserting that it was not so made.[50]

This is a burden-shifting statute that could have a large impact on the trial. It is crucial to give full cooperation in discovery, to properly attend the discovery committee meetings, and to ensure the report that issues is accurate and unbiased. A party that wishes to employ this statute must prove by a preponderance of the evidence that there is a substantial likelihood that the respondent uses the patented process and the patent holder has made reasonable effort to determine the actual process but has been unable to do so.[51] In my limited experience, discovery disputes are shorter because the administrative law judges have little patience with such delay. It quickly became apparent that there was less likelihood of a party filing a massive motion to compel with an exhaustive line-by-line, comma-by-comma excoriation. The motions were short and to the point, the responses

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48 19 U.S.C. § 1337(g)(1) (emphasis added).

49 19 C.F.R. § 210.28-32.

50 35 U.S.C. § 295.

51 Pfizer, Inc. v. F&S Alloys & Minerals Corp., 856 F. Supp. 808, 810 (S.D.N.Y. 1994).

were expected to be the same, and the ALJ came to quick, bright-lined resolutions, which had better be followed.[52]

One of the processes that the ITC has in place to avoid such motion practice is the regular discovery committee meeting and report. This meeting and report are set up by the ground rules of the court.

A brief word on ground rules. One of the first orders entered by the administrative law judge will establish a set of ground rules for the administration of the case. Each judge has a different set. Failure to follow a ground rule can jeopardize a legal position so it is important to follow the same. The ground rules can and frequently do cover service requirements, motion practice regarding dispositive and discovery motions, discovery dispute resolution, translations, confidential submissions, Bates numbering, privilege logs, notice of prior art, expert reports, exhibit exchange format and translations, procedure during trial, and everything in between.[53]

Before any discovery matter can be brought to the ALJ it must have been raised, addressed, and at least attempted to be resolved and evidenced by the discovery committee report filed with the ITC. Since it already has an expansive confidentiality order in place, the ITC seems inclined toward allowing discovery as long as it will not slow the process. As a case in point, one set of ground rules states in regard to discovery disputes:

> Every motion to compel more responsive answers to interrogatories or the production of documents, other than discovery requests that have been unanswered on grounds of attorney-client privilege or attorney work-product immunity, that complies with the provisions of *Ground Rule 3.2* (regarding certifications) and *Ground Rule 4.1.1* (regarding the Discovery Committee) shall be deemed granted, and the requested discovery shall be produced within *five (5) business days* following the deadline set for the responses to said motion, unless the party from whom such discovery is sought provides in its response to the motion the reason why the Discovery Committee reached an impasse in resolving the dispute and good cause for denying the motion to compel. The failure to issue an order concerning the request within the foregoing five business days shall not be grounds for delaying production of the requested discovery.

Each ALJ court has ground rules that are established to deal with typical issues that arise, and good working knowledge of the ground rules is required. One can impair a trial argument by having failed to follow a ground rule in preparation weeks before.

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[52] The author's first discovery dispute was a quick and joyless lesson in the finer art of ITC litigation.

[53] *See* Order No. 2, Notice of Ground Rules, Inv. No 337-TA-604 (May 10, 2007).

The ALJ also has a standing strict confidentiality order. Anything the parties mark as confidential information, documents, briefs, or depositions are subject to the same strict requirements. Only those who have signed onto the confidentiality order and submitted the same to the ITC can review such material, it cannot be disclosed to the client or to anyone else. Violation of the order may have severe consequences.

This order can make it difficult on attorney-client communication since there is typically no mid-level of confidentiality. Even drafting and having a client sign discovery responses can be affected, since if the request asks for contention-type answers, those could contain confidential material. Keeping the client informed can be a frustrating experience for both attorney and client.

An ITC hearing is also fairly unusual in that it includes Commission staff counsel that acts almost as a party in the case. These attorneys propound discovery, engage in the depositions, file briefs, and fully participate in the trial. They are not required to adopt any party's position. They represent a dispassionate observer and their input is used, but not required to be adopted, by the administrative law judge.

V. TRIAL

The trial and final pretrial steps involve expansive pretrial briefs, exhibit lists, and the preparation of all direct witness statements. Given the short time span, much of this work takes place while dispositive motions are pending.

The ITC has a process very similar to Federal Rule of Civil Procedure 56 summary judgment. Commission Rule 210.18(b)[54] allows a party to move for summary determination in its favor on any part of the issues as long as the materials show there is no genuine issue of material fact. The ITC recognizes that this is analogous to Federal Rule 56.[55]

The witnesses' statements are prepared in question-and-answer format and signed by the witness, included as an exhibit, and disclosed pretrial just as they are in many administrative hearings. All objections to the testimony are submitted pretrial. Once the trial begins, the party calls its witness to the stand, the witness identifies and verifies his statement, corrects anything that has been discovered, and is then offered for cross-examination. The ITC does not strictly follow the Federal Rules of Evidence.

As stated above, the trial time is strictly controlled and monitored. It appears that the ITC is very serious that the trials will last only as long as has been allotted and no longer. Be mindful of this when considering the length of trial. The diligence with which everyone kept time leads this au-

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54 19 C.F.R. § 210.18(b).

55 Certain Endoscopic Probes for Use in Argon Plasma Coagulation Systems, Inv. No. 337-TA-572, 2007 ITC LEXIS 572 (May 21, 2007).

thor to believe that more than one party has found itself with no time to respond or call witnesses or cross-examine in the waning moments of trial.

Even before the trial is over, the parties are working on their posttrial briefs and massive proposed findings and conclusions.

VI. Initial Determination and Appeal

The administrative law judge who conducted the trial will issue an initial determination several months after the trial. This is typically a very large document that discusses all the issues in great detail and summarizes the court's findings. The initial determination is subject to review by the full ITC. Since it is unlikely that the ALJ resolved all issues in favor of any one party, everyone will notice an appeal to the full ITC or risk waiving rights before the ITC or the federal circuit. The appeal to the full ITC is also an accelerated process with the petition due ten days after the initial determination.[56] Any issue not raised will be deemed abandoned.[57]

If the Commission chooses to review an initial determination, it can further ask the parties to brief particular issues. The Commission's review is essentially de novo.[58]

When the federal circuit reviews the opinion of the ITC, it uses a substantial evidence standard such that the circuit will not reverse a Commission's factual findings as long as they are supported by relevant evidence that the reasonable person would find adequate to support the conclusion.[59] The legal findings are reviewed de novo.[60]

The findings and conclusions of the ITC or the federal circuit in review of an ITC opinion have no collateral estoppel effect on other litigation.[61]

VII. Remedy and Bonding

Once the Commission has issued its opinion, then a party may still import the targeted articles as long as it follows the Commission opinion on bonding. This right to import exists until the opinion becomes final and nonreviewable.[62] The bond is required to be set in an amount to protect the complainant from injury but not so high as to effectively prevent importation.[63]

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56 19 C.F.R. § 210.43(a).

57 19 C.F.R. § 210.43(b)(2).

58 19 C.F.R. § 210.45; Certain Acid Washed Denim Garments and Accessories, Comm'n Op. at 4-5, Inv. No. 337-TA-324 (Aug. 28, 1992).

59 Surface Tech., Inc. v. ITC, 801 F.2d 1336, 1340-41, (Fed. Cir. 1986).

60 5 U.S.C. § 706(2)(A) (1994); YBM Magnex, Inc. v. ITC 145 F.3d 1317, 1320, (Fed. Cir. 1998).

61 Texas Instruments, Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558, 1569 (Fed. Cir. 1996).

62 19 U.S.C. § 1337(j)(2)-(4); 19 C.F.R. § 210.50(a)(3).

63 19 U.S.C. § 1337(j)(3); Certain Toothbrushes and Packaging Thereof, Inv. No. 337-TA-391, USITC Pub 3068, Comm'n op. at 7 (Oct. 1997).

VIII. CERTIFICATION OF ARTICLES FOR ENTRY

Assuming that a party or article has been subjected to an exclusion order, a problem arises if the manufacturer changes its process or a nonparty wishes to show its product should be exempt from a general exclusion order. The Commission opinion may contain a process and instructions for the importer to certify that the article does not infringe.[64] One must be mindful of the Commission's power to fine persons who violate its orders. If one is going to certify an article as noninfringing, there should be careful consideration of the risks involved.

IX. CONCLUSION

If you have made it to this point in the article, then you have the determination and fortitude to practice before the ITC. This article is an overview of complex issues that can become very sticky at times. There are some excellent resources, articles, and blogs for those who wish to have a deeper understanding of the forum. This author enjoyed the process and looks forward to being back in Washington again.

64 Certain Inkjet Cartridges and Components Thereof, Inv. No. 337-TA-446, USITC Pub 3549, Comm'n Ord. at 10-11 (Oct. 2002).

INDIANA ANTITRUST COMPLIANCE IN THE NEW MILLENNIUM

David Williams Russell*

I. Introduction

Antitrust enforcement was not a priority during the Bush administration. Merger and acquisition activity was down, monopolization was not viewed harshly, and price discrimination favoring large enterprises over small ones was not viewed as a problem. Indeed, much of the activism in antitrust law and enforcement during the past decade has come from the European Union. Taking a page from the United States' playbook, the EU found European impacts resulting from overseas business combinations, moved to block or modify several large proposed business combinations, and disciplined large United States companies such as Microsoft because of their European business practices.

II. Price Fixing

There was a major exception to this benign neglect of the antitrust laws in the United States, and in Indiana in particular, during recent years: the area of price fixing. Price fixing is one of the oldest concerns of antitrust enforcement in the United States, since the ability to control the price ultimately paid by the consumer damages free markets and competition and causes direct adverse economic impact on the American economy.

The traditional view, and the case law, was that this ability to control prices was so pernicious, that price fixing of all kinds should be deemed illegal *per se*. As a result, price fixing cases were relatively cheap and easy for either the government or injured citizens or companies to bring, since injury to competition was *presumed* from the price fixing conduct alone; all that need be proved at trial was that the conduct had resulted in antitrust injury to the "private attorneys general." In the case of the government, the task was even easier, since price fixing alone was all that need be proven.

Note that, under the traditional approach, it did not matter whether the price fixing was *horizontal*, that is, between competitors in the same industry, or *vertical,* that is, imposed unilaterally by a supplier upon its purchasers further down the supply chain. Price fixing was per se illegal. Injury to competition was presumed. Price fixers were subject to jail time, to heavy

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fines, and in civil suits, to awards of trebled damages and attorneys' fees to be paid to plaintiffs who could prove that price fixing had occurred.

A. VERTICAL PRICE FIXING

Two years ago, with the decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,*[1] American antitrust law for the first time made a major exception to the traditional rule that all price fixing conduct was *per se* injurious to competition. *Leegin* confirmed the long-advocated view that *vertical* price fixing imposed by a supplier upon the resale pricing of its wholesale purchasers, was not to be deemed illegal per se but, rather, should be judged, along with other customer restraints and restrictions by suppliers, under the so-called "Rule of Reason."

Whatever the rationale, *Leegin* imposes formidable obstacles to successful lawsuits by consumers or the government brought on the basis of price fixing allegations. Now, not only must a plaintiff prove that vertical price fixing occurred, the plaintiff must establish that the conduct caused antitrust injury to the relevant market segment (what the relevant market segment is must also be proved) as its burden of going forward to prove its own antitrust injury to the trier of fact. This will prove daunting indeed and likely will spell the end of most vertical price-fixing litigation, since the price-fixing conduct itself might now be justifiable, as when suppressing *intrabrand* competition to promote *interbrand* competition.

B. HORIZONTAL PRICE FIXING

Horizontal price fixing among competitors or potential competitors remained a major focus of governmental regulators and private plaintiffs alike, particularly when the affected industries were dealing in commodities deemed essential to public welfare. During the past three years, Indiana's ready-mixed concrete industry has seen a spate of federal grand jury investigations, resulting prosecutions, record fines against companies and their officers, incarcerations of executives, and most recently, class actions against the companies and executives found criminally liable. The court in *United States v. Beaver,*[2] gave broad hints in dictum that horizontal conduct in following price leadership by charging the same prices or giving the same discounts as other sellers in the same market could result in liability for horizontal price fixing. But that is not now, nor has it ever been, the law, despite the fervent wishes of federal prosecutors. In the *Beaver* case, there was ample evidence of meetings where actual agreements on pricing and discount fixing schemes were devised by the participants. There was no need for the court to find liability on the basis of what has been called "conscious parallelism," or price following by competitors. This was just as well,

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[1] 127 S. Ct. 2705 (2007)

[2] 515 F.3d 730 (7th Cir. 2007)

since if conscious parallelism was all that could be proved, there would have been no legal basis for prosecution given that section 1 of the Sherman Antitrust Act requires a finding of an express "contract or . . . conspiracy" as a precondition to finding a violation.

C. CHANGE IN ANALYSIS IS CHALLENGING

This recent split in the traditional analysis of vertical price fixing as fundamentally less harmful than horizontal price fixing presents a challenging problem to business lawyers advising their clients. What is the best approach to take when a client asks for advice about avoiding antitrust problems relating to resale pricing by its customers or pricing practices in its industry?

Probably the first bit of advice to give a client is that companies doing business in a supply chain, such as the one for ready-mix concrete, need to be aware that there are laws and rules in the United States and its states, such as Indiana, governing the distribution and sale of their products, both directly and to and through other contractors. These laws and rules govern not only the bidding and sales process but apply generally throughout the supply chain, including the relationships established with suppliers of components constituting their end product, the equipment used to manufacture it, and the equipment used to deliver it to customers.

You then might want to apply the following framework for thinking about how these laws might be applied to your client.

1. Rules of Thumb for Clients

The first question to ask when thinking about a client's company and its relationships with the various suppliers, competitors, purchasers, and other companies having impact on the ready-mix concrete industry is, "Is my client's relationship with this company horizontal or vertical?"

Sometimes the answer is easy. Direct competitors have a *horizontal* relationship with the client, since both are on the same level of distribution, for example, wholesale or retail. Suppliers and customers have a *vertical* relationship with the client, because they are at levels in the supply chain different from that of the client.

Sometimes the answer is more difficult. What if a client supplies a competitor on a given job? What if some of the client's suppliers are also its competitors? These are called "dual distribution" problems in the antitrust world and can be very complex—especially when competitors at one level of distribution put pressure on suppliers or customers at another level to limit or refuse to supply or to buy from the client. This may constitute either an actionable "group boycott" or merely questionable conduct depending on the facts and whether more than one competitor wants to squeeze the client.

Here are some rules of thumb to help guide clients through the antitrust analysis process.

- Vertical restrictions on or by a client (now including price fixing or resale price maintenance) are generally acceptable unless those hurt by them can prove injuries to competition. These are difficult and expensive to prove, *unless they are ancillary to horizontal price fixing or bid-rigging between competitors, which is very bad and which can ensnare "co-conspirators*."
- Horizontal arrangements with a client's competitors (whether or not they involve price fixing or bid rigging) such as sharing sensitive cost information, allocating bids, territories of sale, customers or jobs, *or anything else* are almost always bad. So, too, is colluding against an unruly competitor for being a price cutter or otherwise competing too vigorously. These arrangements will get the client into deep trouble and are never worth the effort. Unless the client's horizontal arrangement is noncommercial or educational (as in participation in a trade association to improve product quality and educate the public), the client *should not do it*. If a client finds himself in a meeting where such matters are being discussed, he should "*walk out and call his lawyer immediately."*
- If a client is in a dual distribution situation, his legal advisor should consider both the horizontal and vertical aspects of it. The client should not participate if the dual distribution arrangement might look like ganging up on a competitor or price fixing. If the client has any questions, he should take them up with counsel before buying or selling to a supplier or competitor.
- Counsel should warn a client not to charge different prices to similar customers who are at the same level in the supply chain unless he can clearly justify the price differential based on the actual, demonstrable costs to him.

2. Antitrust Analysis

The foregoing rules of thumb may be helpful context for the antitrust analysis process outlined below.

a. *Horizontal arrangements*

The antitrust laws of the United States make illegal horizontal agreements between competitors that restrain trade by such practices as fixing prices and allocating territories and customers. Such agreements, if proven to exist, are per se illegal. This means that a court would presume that there has been injury to competition, once the conspiracy has been shown, and would allow the plaintiff to recover three times the amount of damages actually suffered, plus attorneys' fees. Where the federal government is the plaintiff, substantial criminal penalties also can be imposed.

b. *Vertical arrangements*

In general, since *Leegin,* making an agreement to supply anyone with products or supplies at an agreed price is not restraint of trade, even if the seller attempts to control the price at which a buyer is allowed to resell such products. If, however, the seller's customer is his actual or potential competitor (as where the customer manufactures or distributes the same product the seller supplies), the seller's sales contract could be viewed as an agreement that his competitor will not sell in competition with him, even if that was not what the seller expressly agreed.

Any kind of cross-agreement between competitors to supply each other on different jobs could attract adverse scrutiny because cross-agreements can make vertical sales and supply agreements look like horizontal customer or territorial allocations between actual or potential competitors. This could be deemed per se illegal even if there is no express or implied agreement as to quid pro quo pricing. This view would become even more likely if technology cross-licensing is involved. Depending upon the facts, such arrangements could offend the antitrust laws or be completely justifiable. Suffice it to say for the purposes of this article that sales, supply, or distribution arrangements between potential or actual competitors are subject to question and should be entered into only after consultation with antitrust counsel.

Let us turn our attention to the vertical restrictions a client might seek to impose on customers buying its products for resale to their own customers. In general, such restrictions can be classified as pricing restrictions, customer and territorial restrictions, product restrictions or requirements, and noncompetition restraints. Before discussing the antitrust ramifications of each of these types of restrictions, please note that vertically imposed nonprice restrictions are dealt with less harshly under United States antitrust laws than are horizontal conspiracies.

Resale Price Fixing. Since *Leegin,* resale price fixing is no longer a per se violation of the Sherman Act.[3] However, since some states still prohibit resale price fixing and since price fixing still could be found anticompetitive under a Rule of Reason analysis, it might be prudent to advise a client merely to *suggest*, rather than mandate, a resale price to its resale customers. While attempts to coerce or persuade the distributor not to deviate from the price are no longer *presumed* to violate the Sherman Act, such facts do tend to give weight to arguments that the supplier is exerting unseemly market control. In this author's opinion, vertical price fixing remains conduct that should be avoided.

A very narrow exception to possible liability under a Rule of Reason analysis of vertical price fixing derives from the requirement under section 1 of the Sherman Act of a "contract," "combination," or "conspiracy" and has

[3] 15 U.S.C. § 1.

been upheld since *United States v. Colgate & Co.*[4] Under *Colgate*, a supplier may refuse to deal with customers that do not adhere to suggested retail prices if the supplier does nothing to attempt to persuade the customer to cooperate with the suggested price program. It is extremely difficult for a supplier to do nothing more than suggest prices and terminate price cutters. Inevitably there are complaints from other distributors, telephone calls, and letters that would vitiate the *Colgate* safe harbor.

The best policy for a client in the resale price area is to avoid making arbitrary stipulations, recommendations, or even suggestions to its resale customers about resale pricing without thinking through the business judgments that make such practices beneficial to the ultimate consumer (comfortable margins encourage better customer warranty service, for example). Suggesting nonmandatory retail prices was a common business practice in the United States long before *Leegin,* a fact which may have encouraged the major change in the law *Leegin* entailed.

Price Discrimination. Another pricing concern for a client selling for resale is price discrimination. Under section 2(a) of the Robinson-Patman Act amendments to the Clayton Act,[5] a client commits price discrimination if he sells goods of "like grade and quality" at different prices to each of two distributors performing comparable distributorship functions at the same level of distribution. The injured distributor, or even an injured retailer who purchases from the injured distributor, could have a cause of action for trebled damages under the Robinson-Patman Act. The federal government itself, except for some isolated actions by the Federal Trade Commission, currently is not actively prosecuting price discrimination cases and price discriminators are not subject to criminal penalties.

A client might be able to sell to different distributors at different prices—by offering quantity discounts to large volume distributors, for example—and still not violate Robinson-Patman. This is because cost-justified price differentials are legitimate under Robinson-Patman. If the seller could prove—and the standards of proof are strict—that the differential accurately reflected the difference in cost of dealing with different distributors or that the two distributors performed different distributorship functions, price discrimination would be cost justified. Alternatively, if the seller could prove that the lower price was quoted to meet—but not beat—the bona fide offer of a competitor, the price discrimination would be allowed under the Robinson-Patman Act.

Unfortunately, the applicability of the Robinson-Patman Act would not be so clear were a client to appoint distributors for some United States territories or customers, yet act as his own distributor for others. If, for example, any pricing differentials between the client's sales price to wholesale dis-

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[4] 250 U.S. 300 (1919).

[5] 15 U.S.C. § 13a.

tributors and the client's sales price direct to lower-level distributors could not be cost justified. Any distributor that could prove that the client's pricing policies put the retailer at a competitive disadvantage vis-a-vis any other distributor buying through another channel of distribution might have a cause of action under Robinson-Patman.

In short, whenever a manufacturer elects to act as its own distributor in competition with its other distributors, it should consult with counsel, since all United States antitrust law—not just the Robinson-Patman Act—is extremely confusing and difficult to apply in such situations.

Vertical Non-Price Restraints. Vertical nonprice restrictions by suppliers on distributors generally are evaluated under the so-called Rule of Reason. (*Note*: Since *Leegin,* price restraints by suppliers on distributors also must be analyzed under the Rule of Reason.) The Rule of Reason provides that, even if some trade is restrained by a restriction, if there are offsetting benefits to the economy that justify the restriction, the restraint of trade will be deemed reasonable by the courts. For example, a frequent argument in favor of the reasonable nature of a restraint is that the suppression of competition among distributors of one brand enhances competition among competing brands. Another frequent justification for distributor restraints is that they enable the distributor network to function better as a whole to serve all the customers for the supplier's products.

In the case of territorial and customer restrictions, the Rule of Reason was not always the law. *United States v. Arnold, Schwinn & Co.*[6] held that such restrictions were per se illegal as restraints on the right of the distributor to dispose of his purchases from the manufacturer. The decision of the United States Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*[7] reversed *Schwinn* and held that all such vertical nonprice restrictions were to be judged under the Rule of Reason.

After *Sylvania*, a number of formerly illegal practices, such as prohibiting distributor sales from unauthorized locations, forbidding sales outside a particular territory, and assigning certain customers exclusively to certain dealers, are no longer presumptively illegal, but must be proved to be unreasonable restraints on competition.

Despite the liberalizing effect of *Sylvania*, just as with vertical pricing restraints, it may not be advisable for a client to adopt customer and territorial rules for its resale customers any stricter than absolutely necessary to attain the desired distribution of goods. It is usually preferable, from both the economic and legal standpoints, to employ disincentives, such as sales quotas for areas of primary distributor sales responsibility that discourage sales outside the territory, rather than flatly prohibiting extraterritorial sales.

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6 388 U.S. 365 (1967)

7 433 U.S. 36 (1977)

To stress again the dual distribution problem, if a client competes as a distributor with its own resale customers by, for example, reserving certain customers to itself, there must be a reasonable basis for doing so. Furthermore, there is a real risk that such distribution arrangements could be deemed horizontal conspiracies to allocate customers between competing distributors. Although such horizontal dual distribution arrangements have generally not been found to be per se illegal under the United States antitrust laws, there is a risk that they could be held unreasonable. In an industry under antitrust scrutiny (such as the Indiana ready-mix concrete industry and its suppliers), such arrangements should be structured only with the advice of counsel.

There are a variety of product and purchase restrictions that a client might seek to impose upon its resale customers. In general, such restrictions are permissible only if reasonable. Such restrictions include requirements that resale customers deal only with the client, that to deal in one of the client's products the resale customer must also deal in the client's other products, and that the customer may not deal in competing products.

The basic economic issue in deciding if such practices are justifiable under the Rule of Reason is market foreclosure. Does the restriction foreclose a client's resale customer's other suppliers from selling goods that which otherwise would be marketed in a given area? Are other suppliers foreclosed from selling through the best qualified resellers because of the restrictions? Does the restriction prevent ultimate consumers from buying certain products? If the answer to any of these questions is yes, then the restriction may be unreasonable.

Motivation is also important. Does a client have a legitimate economic reason for its requirements, such as trademark enhancement or the need to maximize sales? A reasonable basis may justify an otherwise unreasonable product restriction.

The answers to such questions depend very much on the facts of a given situation and the extent to which a client controls the market. Requirements that a client's resellers provide warranty service and stock reasonable levels of inventory are unlikely to be unreasonable. However, requirements that resellers with a significant market share in competing goods drop such lines in order to deal in a client's product could be viewed as an unreasonable attempt to freeze competitors out of the market.

In summary, restrictions on resale of products, supplies, or components purchased by a client's resellers are evaluated in light of their reasonableness and their effect on the market. Counsel should note, however, that to the extent that resellers are required to purchase from a client goods, services, or product lines different from or in addition to the basic subject matter of the reseller contract, the amount of such additional purchases may be deemed the payment of franchise fees triggering the applicability of distrib-

utorship disclosure or franchise laws, even if this requirement does not amount to an antitrust violation.

Noncompetition Clauses. If a client grants reseller rights to an individual, corporation, partnership, or other business, it might wish to require that the reseller execute a noncompetition agreement. A noncompetition agreement typically provides that upon termination of the reseller relationship, the former reseller will not compete with the client in the distribution and sale of products similar to the client's products within a specified area within the United States for a period of time after termination.

United States courts are reluctant to deprive an individual or business of his or its livelihood. To be enforceable, such noncompetition agreements must be reasonable in scope of products covered, area in which competition is prohibited, and duration. Typically, prohibitions lasting more than a year or two are held to be unreasonable and it is unwise under Indiana law to impose restrictions for more than two years. In fact, it is an unfair trade practice and unlawful under Indiana's franchise law to impose noncompetition restrictions on franchisees of more than three years.

The validity and enforceability of noncompetition agreements are governed by state law and their treatment varies considerably. Most of the fifty states will enforce restrictive covenants either in their entirety or in part. The courts in some states will impose a smaller geographic area or a shorter time limit if they believe the parameters stated in the written agreement are overly broad. In Indiana, however, broad or lengthy restrictions tend to be stricken in their entirety, rather than narrowly construed so as to be reasonable. A few states, such as California and Michigan, have enacted statutes making noncompetition agreements invalid.

A noncompetition agreement would be particularly helpful to a client that has licenced his trade secrets to his resellers. For at least the specified time period, such an agreement, if properly drafted, will preclude a former reseller from using such trade secrets to compete with your client.

III. Conclusion

Companies selling products for resale in Indiana need to be wary of state and federal laws governing relationships with and impacts upon competition and competitors.

For most, it will be sufficient for them to avoid unlawful *horizontal* relationships with their competitors and to avoid activities that interfere with free competition by all competitors. They can best avoid antitrust scrutiny by avoiding agreements with their competitors that include bid rigging, sharing sensitive cost information, price fixing, allocations of territories, jobs, or customers, and cross-agreements designed to effect lockouts or boycotts of other competitors. Even being present at meetings of competitors where other companies are discussing or considering such matters may be

dangerous. A client will need to decline to participate and withdraw quickly from such meetings and seek legal counsel immediately.

For suppliers to an industry, particularly those who supply through resellers, there are a number of complex antitrust rules. But because of a major change in federal antitrust law in *Leegin*, the formerly most important among these—avoiding the attempt to control the resale prices charged by resellers—is now just another customer restriction to be judged under the Rule of Reason in accordance with the standards of *Sylvania*.

AMICUS CORNER*

SMITH V. CHAMPION TRUCKING COMPANY, INC.

The court of appeal's decision in *Smith v. Champion* represents a significant departure from thirty years of statutory interpretation by the court of Indiana Code § 22-3-2-13. If the appellate decision in *Smith* were to go unchallenged, the injured employee-plaintiff would be allowed to continue to recover on a pending worker's compensation claim despite resolving his third-party case. If the court felt the third-party case was settled for less value than the worker's compensation claim, then the worker's compensation could remain open. This would in effect remove the "absolute bar" found within Indiana Code § 22-2-3-13, which allows employers to terminate worker's compensation claims upon a third-party settlement. Also, this would serve to dampen settlements in third-party cases, since the defendant would face unknown exposure regarding repayment of the statutory lien, which would not yet be determined.

IN THE SUPREME COURT OF INDIANA

	Court of Appeals of Indiana Cause No. 93A02-0808-EX-00701
JIMMIE C. SMITH, Appellant/Plaintiff,	
	Appeal from the Indiana Worker's Compensation Board
v.	
CHAMPION TRUCKING COMPANY, INC., Appellee/Defendant.	Administrative Agency Application No. C-I72793
	The Honorable Linda Hamilton, Chairman

* Ed. note: In publishing these amicus briefs, the editors have elided extraneous matter such as tables of contents and word counts. Elipses (* * * * *) have been inserted at these points. Minor typographical errors have been silently corrected. In all other instances, these briefs are reprinted in the form in which they were submitted.

DEFENSE TRIAL COUNSEL OF INDIANA'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION TO TRANSFER

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QUESTIONS PRESENTED FOR TRANSFER

The questions presented for transfer are whether: (1) the Court of Appeals' decision conflicts with *Doerr v. Lancer Transport Services*, 868 N.E.2d 890 (Ind. Ct. App. 2007), *trans.denied*, which properly recognized and applied Indiana Code § 22-3-2-13 as terminating the worker's compensation liability of an employer and its insurance carrier upon the employee's settlement of a third-party lawsuit obtained without the consent of the employer; and (2) the decision represents a significant departure from existing law favoring settlements.

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TABLE OF AUTHORITIES

CASES

Divine v. Galen & Lowell Graber, 600 N.E.2d 160 (Ind. Ct. App. 1992)
Doerr v. Lancer Transport Services, 868 N.E.2d 890 (Ind. Ct. App. 2007)
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Koughn v. Utrad Industries, Inc., 275 N.E.2d 572 (Ind. Ct. App. 1971)
Koval v. Simon Telelect, Inc., 693 N.E.2d 1299 (Ind. 1998)
McCammon v. Youngstown Sheet and Tube Co., 426 N.E.2d 1360 (Ind. Ct. App. 1981)
Smith v. Champion Trucking Co., Inc., 901 N.E.2d 620 (Ind. Ct. App. 2009)
Waldridge v. Futurex Industries, Inc., 714 N.E.2d 783 (Ind. Ct. App. 1999)

STATUTES

IND. CODE § 22-3-2-13
IND. CODE § 22-3 -2-15
IND. CODE § 22-3-3-27

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Defense Trial Counsel of Indiana ("DTCI")[1] is an association of Indiana lawyers who defend clients in civil litigation including worker's compensation claims. DTCI serves as an advocate for its members and their clients.

The Decision presents issues which directly and fundamentally impact the members of DTCI and their clients. The outcome of this case can greatly impact the defense of worker's compensation claims, the protection of statutory worker's compensation liens and the settlement of personal injury claims asserted by injured workers. The Decision is in conflict with another decision of the Indiana Court of Appeals. The Decision establishes a new rule of law and, in effect, creates numerous unanswered questions. The absence of clear, concrete rules for terminating worker's compensation liabilities will impede the ability of DTCI's attorneys to counsel their clients about worker's compensation claims.

II. BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

Claimant, Jimmie C. Smith, filed an Application for Adjustment of Claim before the Indiana Worker's Compensation Board on January 10, 2005, arising from an injury sustained in the course of his employment with Champion Trucking Company ("Champion"). Smith, an over-the-road truck driver employed by Champion, was involved in an accident with Jeremy Bittner on August 13, 2003. (Appellant's App. pp. 14-15). Champion, through its insurance carrier, paid Smith's medical expenses of $4,342.32.

[1] DTCI is substantially aligned with Appellee/Defendant, Champion Trucking Company.

No temporary total disability benefits were paid because Smith continued to work following the accident. (App. p. 5).

In addition to filing the Application with the Board, Smith, through his Kentucky attorney, made a claim against Bittner for personal injury. Smith settled his claim with Bittner for $10,342 and, on July 22, 2005, Smith signed a Release, releasing Bittner and Bittner's insurance carrier from liability arising from the accident. (App. pp. 78-79, 92). Champion did not provide written consent to the settlement. A few weeks after the Release was executed, Champion received a check in the amount of $3,256.74, which represented 75% of the value of Champion's lien. (App. p. 94).

Thereafter, on August 16, 2005, Smith's counsel arranged for Smith to be evaluated by Dr. David Changaris for the purpose of assigning a permanent partial impairment rating. (App. pp. 62-68). Dr. Changaris assigned a 19% rating to the whole person which, if accepted by the Board, would result in permanent partial impairment benefits of $26,500.00. In light of the settlement reached between Smith and Bittner, on March 2, 2006, Champion filed a motion to dismiss, based upon Ind. Code § 22-3-2-13, to terminate any further worker's compensation liability. Champion did not pay PPI benefits. (App. pp. 16-19). The single hearing member granted Champion's motion and dismissed Smith's Application. (App. pp. 24-25).

Smith appealed the dismissal to the Full Board, which reversed the dismissal and remanded the case to the single hearing member for a hearing on the merits. (App. pp. 26-28). On May 31, 2007, the single hearing member heard evidence and subsequently dismissed Smith's Application, citing *Doerr v. Lancer Transport Services* and I.C. § 22-3-2-13. (App. pp. 4-11). Smith timely appealed. In a published opinion on February 25, 2009, the Court, relying upon this Court's opinion in *Depuy, Inc. v. Farmer,* 847 N.E.2d 160 (Ind. 2006), reversed the Board and held that Smith be allowed to proceed with his workers' compensation claim despite the settlement of the third-party claim because Smith's worker's compensation claim was not "resolved" at the time of the settlement. *Smith v. Champion Trucking Co., Inc.,* 901 N.E.2d 620, 623 (Ind. Ct. App. 2009).

III. SUMMARY OF ARGUMENT

There are two reasons to grant transfer in this case: (1) a conflict in Court of Appeals' decisions, and (2) a significant departure from law or practice. Ind. Appellate Rule 57(H).

First, the Court of Appeals' decision ("Decision") conflicts with *Doerr v. Lancer Transport Services,* 868 N.E.2d 890 (Ind. Ct. App. 2007), *trans. denied.* In *Doerr,* the Court strictly applied I.C. § 22-3-2-13 ("Section 13"). Contrary to that precedent, the *Smith* court based its holding on *obiter dictum* in *Depuy, Inc. v. Farmer,* 847 N.E.2d 160 (Ind. 2006). No other authority was cited in *Smith* to support the Court's holding. The Decision conflicts

with *Doerr* and the clear statutory language in Section 13. Transfer is necessary to resolve this conflict in the appellate decisions.

Second, the Decision represents a significant departure from law or practice. The impact of the Decision is to discourage early settlements of third-party lawsuits. The Court rejected Champion's attempt to terminate benefits because Champion did not challenge the adequacy of the settlement in light of the Court's belief that there was an opportunity for Champion to do so. The impact of this Decision will be that employers and their worker's compensation carriers will need to withhold consent to third-party settlements on any worker's compensation claim not resolved pursuant to I.C. § 22-3-2-15[2] in order to fully protect their lien rights. This practice will curtail and probably eliminate prompt settlements of third-party lawsuits when a worker's compensation lien is involved. The Decision is thus contrary to the stated public policy which favors settlements.

IV. ARGUMENT

A. THE DECISION CONFLICTS WITH *DOERR*

At the heart of this appeal is the strict interpretation of Section 13, a lengthy provision addressing liens and subrogation rights of the employer or worker's compensation carrier and the impact of the employee's settlement of a claim against a third person. The statute states in condensed fashion as follows:

> [1] Whenever an injury or death, for which compensation is payable . . . shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee . . . may commence legal proceedings against the other person to recover damages . . . . In that case, however, *if the action against the other person is brought by the injured employee* or his dependents and judgment is obtained and paid, and accepted *or settlement is made with the other person* . . . then from the amount received . . . there shall be paid to the employer or the employer's compensation insurance carrier, subject to its paying its pro-rata share of the reasonable and necessary costs and expenses of asserting the third party claim, the amount of compensation paid to the employee or dependents, plus the medical . . . expenses paid by the employer or the employer's compensation insurance carrier *and the liability of the employer or the employer's compensation insurance carrier to pay further compensation or other expenses shall thereupon terminate* . . . .

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[2] Ind. Code § 22-3-2-15 permits settlement of a worker's compensation claim on a full and final basis. If the agreement is approved by the Board, the settlement "shall extinguish and bar all claims for compensation."

> [2] In the event the injured employee or his dependents, not having received compensation or medical . . . benefits from the employer or the employer's compensation insurance carrier, shall procure a judgment against the other party . . . or if settlement is made . . . then the employer . . . shall have no liability for payment of compensation or for payment of medical . . . benefits whatsoever . . . .
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> [3] In the event any injured employee . . . shall procure a final judgment against the other person other than by agreement, and the judgment is for a lesser sum than the amount for which the employer . . . is liable for compensation and for medical . . . supplies, . . . then the employee . . . shall have the option of either collecting the judgment and repaying the employer or the employer's compensation insurance carrier for compensation previously drawn, if any, and repaying the employer . . . or of assigning all rights under the judgment to the employer or the employer's compensation insurance carrier and thereafter receiving all compensation and medical . . . services . . . .
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> * * *
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> [9] No release or settlement of claim for damages by reason of injury or death, and no satisfaction of judgment in the proceedings, shall be valid without the written consent of both employer or the employer's compensation insurance carrier and employee or his dependents, except . . . *consent shall not be required where the employer or the employer's compensation insurance carrier has been fully indemnified* or protected by court order.

I.C. § 22-3-2-13[3] (emphasis added).

It is well-established that a third-party settlement bars any further worker's compensation liability under the Indiana Worker's Compensation Act. *Waldridge v. Futurex Industries, Inc.,* 714 N.E.2d 783, 785 (Ind. Ct. App. 1999); *trans. denied; McCammon v. Youngstown Sheet and Tube Co.,* 426 N.E.2d 1360, 1364-65 (Ind. Ct. App. 1981); *Koughn v. Utrad Industries, Inc.,* 275 N.E.2d 572 (Ind. Ct. App. 1971). The purpose behind the termination provision is to "prevent injured employees from settling with a third party, thereby cutting off the opportunity of a worker's compensation carrier to pursue the liable party to recover any benefits it has paid." *Ansert Mechanical Contractors, Inc. v. Ansert,* 690 N.E.2d 305, 307 (Ind. Ct. App. 1997). This rule remains intact, even today. *See Depuy,* 847 N.E.2d at 167 ("[w]e assume without deciding that . . . this rule, announced over thirty

[3] The paragraphs comprising the statute have been referred to as if they bore numbers, as recommended and done by this Court in *Depuy,* 847 N.E.2d at 166.

years ago as a matter of statutory interpretation, remains the law as to claims against third parties.") The Legislature has clearly expressed this rule. I.C. § 22-3-2-13 ("if the action against the other person is brought by the injured employee . . . or settlement is made with the other person . . . the liability . . . to pay further compensation or other expenses shall thereupon terminate.")

In the Decision, the Court focused upon an issue identified, but not decided, by this Court in *Depuy*—"Whether that rule [termination of worker's compensation benefits following settlement] applies where the settlement is obtained before a worker's compensation award has been resolved, and is in an amount less than the anticipated worker's compensation benefit is an open question that we need not resolve here." *Depuy,* 847 N.E.2d at 167. The *Smith* court answered this question by permitting "some supplemental payment from an employer after the injured employee has recovered from a third-party tortfeasor in an amount less than the 'apparent worker's compensation benefits' before the worker's compensation claim was resolved." *Smith,* 901 N.E.2d at 623. No other support beyond *Depuy* was cited in the Decision.

The reliance on *Depuy* is problematic because the *Depuy* discussion of Section 13 is *dicta* and should not have been considered controlling to the issue at bar. *See American Family Ins. Co. v. Ford Motor Co.,* 857 N.E.2d 971, 976 (Ind. 2006) (declining to extend prior interpretation of trial rule as *dicta* and not controlling in subsequent case). In addition, *Depuy* is distinguishable because the third-party defendant there was a co-worker which barred application of Section 13. The Court recognized these limitations in its analysis. *Depuy,* 847 N.E.2d at 166 ("Section 13 defines a 'third party' as a person who is not 'the employer and not in the same employ.' Thus, by its terms, section 13 does not apply . . . .") *Depuy* does not support the new rule of law crafted by *Smith* and it is contradicted by the express language of Section 13.

Since *Depuy,* the Court of Appeals has considered Section 13's bar to compensation. In *Doerr v. Lancer Transport Services,* 868 N.E.2d 890 (Ind. Ct. App. 2007), *trans. denied,* the claimant had not received any worker's compensation benefits or medical services before he settled his third-party lawsuit without the knowledge or consent of the employer or its carrier. Relying upon paragraph 2 of Section 13, *Doerr* held that the employer/carrier had no liability for the work injuries because of the third-party settlement. *Id.* at 892. "[T]he explicit language of Paragraph Two compels this result." *Id.*

The *Smith* court did not reconcile this case with *Doerr.* The Court did not even mention *Doerr* despite it being on four corners with the issue presented and having been raised by the parties. (Appellant's Brief pp. 6-9, Appellee's Brief pp. 6-7). The *Doerr* court rejected the holding of *Smith* that a claimant can obtain additional benefits after a third-party settlement if the settlement amount is less than the employer's worker's compensation

benefits. *Doerr,* 868 N.E.2d at 893. "Permitting an employee to obtain a 'quick and cheap' settlement with the third party tortfeasor, and then requiring an employer to exchange unlimited benefits for whatever minuscule settlement the employee might enter, does not protect the financial interests of the employer." *Id.* The only time the Legislature demonstrated concern that the claimant obtains sufficient funds from the third-party is when the employee obtains a "judgment" against the third-party. Then, and only then, the claimant can exchange the judgment for further benefits. *See* I.C. § 22-3-2-13 (paragraph 3). However, where, like here, the claimant obtains a settlement from the tortfeasor (as opposed to a judgment), the Legislature has demonstrated its concern to protect the employer's financial interests, not the employee's entitlement to additional benefits.[4] *See Doerr,* 868 N.E.2d at 893 ("we do not believe the legislature's use of the phrase 'other than by agreement' was accidental, and we decline to ignore that phrase").

Smith and *Doerr* conflict in their interpretation and application of Section 13. *Smith* focuses on the value and timing of the settlement, while *Doerr* applies the clear mandate of Section 13 to terminate benefits upon a settlement. There now exists significant confusion about when worker's compensation liability terminates and how employers should evaluate claims. The Board has conflicting authority as to when liability terminates after a third-party settlement. The conflict should be addressed on transfer.

B. THE DECISION UNDERMINES THE PROTECTIONS AFFORDED EMPLOYERS AND CARRIERS

The Decision creates numerous problems for employers and carriers in determining how to protect liens. The questions raised by the Decision are answered neither by case law nor by Section 13. For example, the Decision does not address when the employer or its carrier must determine the value of the worker's compensation claim. In the Decision, the Court's new rule depends on the value of the "apparent worker's compensation benefits." This phrase is not identified. When are benefits deemed "apparent"? Is it when a demand is received? When evidence exists to support a claim for a particular benefit? When a claim is initiated, when benefits are actually awarded or at some other time? At the time of Smith's settlement with Bittner, the value of the worker's compensation claim was slightly more than $4,300. No benefits had been paid. Smith had not even been assigned a PPI rating. Even so, the *Smith* court proceeded with the assumption that the

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[4] The *Doerr* court reasoned that a judgment reflects the fair market value of the employee's injuries and would be substantially the same result regardless of who litigated the case (employee, employer or carrier). *Id.* In contrast, a settlement negotiated by an employee, without the consent of the employer, has the potential to evade payment of the statutory lien. *See Dearing v. Perry,* 499 N.E.2d 268, 272 (Ind. Ct. App. 1986) (injured worker and spouse cannot negotiate a third-party settlement and allocate the settlement funds in an arbitrary manner intended to avoid payment of the worker's compensation lien).

value of Smith's worker's compensation claim included the $26,500 in potential PPI benefits never awarded by the Board.

The Decision leaves employers, carriers and their attorneys without any guidance about how or when to evaluate the value of the worker's compensation claim. In short, there is no level of predictability. Employers and carriers are given the impossible task of assigning value to a claim that is a moving target. The Court's attention to the fact that Smith's Application was pending with the Board at the time of the settlement suggests that no employer or carrier is safe from the possibility of waiving part of its lien until the worker's compensation claim is totally resolved. This could be years after the work injury and potentially years after the settlement of the third-party claim. By then, the settlement proceeds may be gone.

If the Decision stands, then even if the claimant has received benefits for the work-injury, the employer/carrier still does not have the finality necessary to accurately judge the sufficiency of the settlement amount. The Decision does not address the ramifications of a "change of condition" application filed pursuant to I.C. § 22-3-3-27. In a "change of condition," the claimant receives benefits and medical treatment typically until the claimant's medical condition is deemed quiescent. Then, within a period of 2 years from the last day for which compensation is paid, the claimant may seek a modification of the award. Thus, for a period of two years after the last day for which compensation was paid, the employer or its carrier has exposure for paying additional benefits or providing medical services. Under *Smith,* the claimant could settle a third-party claim shortly after the date of injury, repay the then-lien in full and foreclose recovery of a subsequent lien arising from additional benefits or services paid out on a "change of condition" application. In such a case, "there may be some potential . . . for some supplemental payment from an employer after the injured employee has recovered from a third-party tortfeasor an amount less than the 'apparent worker's compensation benefits' before the worker's compensation claim was resolved." *Smith,* 901 N.E.2d at 623. Because of the existence of a "change of condition" claim and the potential for extending the time for making such a claim, it is not unrealistic to conceive a scenario where the majority of benefits are paid out long after the settlement of the third-party claim. This seems well beyond the Legislature's directive that liability "shall thereupon terminate" following settlement of a third-party claim. *See* I.C. § 22-3 2-13.

The Decision also does not address the circumstance where consent is not required from the employer/carrier. Pursuant to the last paragraph of Section 13, no consent is required from the employer/carrier if the employer is "fully indemnified." I.C. § 22-3-2-13. At the time of the settlement in this case, Champion was fully indemnified because sufficient funds were available through the third-party settlement to pay the lien at its full statutory

value.[5] Therefore, according to Section 13, Smith did not even need Champion's consent to move forward with the settlement and, in fact, he did not ask for or obtain consent. The Court of Appeals, citing *Depuy,* rejected the possibility that an employer's lien rights would not be protected if additional demands for benefits could be made after a third-party settlement, because "if any employee settles without the approval of the employer (or its carrier) the employer (or its carrier) is free to challenge the amount received as inadequate."[6] *Smith,* 901 N.E.2d at 623 (quoting *Depuy,* 847 N.E.2d at 169-170). However, neither appellate court has addressed the rights available to the employer/carrier where no consent is required but the third-party settlement is less than the "apparent worker's compensation benefits." This case presents those very facts.

C. THE DECISION SIGNIFICANTLY DEPARTS FROM ACCEPTED LAW AND PRACTICE

Transfer is also necessary to address the Court's significant departure from accepted law. The effect of the Decision is to chill third-party settlements. "Champion did not contest the adequacy of the settlement even though it was aware of the third-party claim, asserted its statutory lien and accepted payment from the settlement proceeds. Champion cannot now be heard to complain." *Smith,* 901 N.E.2d at 623. This statement undermines the judicial policy favoring settlements. *See In re Assignment of Courtrooms,* 715 N.E.2d 372, 376 (Ind. 1999); *see also Georgos v. Jackson,* 790 N.E.2d 448, 453 (Ind. 2003).

The new rule challenges employers to evaluate the adequacy of a third-party settlement before it has all of the information to assess the value of the worker's compensation claim and, in turn, the adequacy of the settlement. To avoid additional benefits being owed after a third-party settlement, any analysis of the value of the "apparent worker's compensation benefits" and comparison to the amount of the settlement may be required before enough information is available to make an informed decision. Given the uncertainty, employer and carriers have no incentive to consent to settlement. There are not sufficient safeguards in place to protect the lien rights arising from benefits paid post-settlement.

The Court also did not identify at which period of time the "snap shot" should be taken for purposes of evaluating a settlement. The Decision places the employer or carrier in the position of having to speculate about what benefits may be sought or paid in the future. Faced with this type of exposure, the simpler practice will be to withhold consent to the settlement. In it worth repeating that at the time of settlement between Smith and

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[5] Because the settlement was reached prior to the suit being filed, the amount of the lien was reduced by 25% to pay Smith's attorney's fee. *See* I.C. § 22-3-2-13.

[6] The Court also never explained how an employer/carrier challenges the settlement amount as inadequate.

Bittner, to which Champion neither consented nor was even aware,[7] the worker's compensation lien was $4,342.32. The settlement amount, which was later disclosed to Champion, exceeded $10,000. Smith had not been evaluated by Dr. Changaris and his opinion of the PPI had not been disclosed. Based upon these figures, there were sufficient proceeds to satisfy Champion's lien in full. In other words, with the evidence produced up until that point, there was no reasonable basis for Champion to question, much less challenge, the adequacy of the third-party settlement. There was no evidence at that point in time to alert Champion of the possibility that the settlement proceeds would be insufficient to satisfy its lien if the PPI benefits later sought by Smith were eventually paid.

The ramifications of the Decision on settlement will be great. To avoid a result like this case, employers and carriers wil1, in the future, err on the side of caution and withhold consent to settlement until such time as the lien rights are fully known and protected. In light of the Decision, the only reasonable way to fully protect a worker's compensation lien would be to withhold consent.

The *Smith* Court rejected Champion's argument, "that it was not a party to the settlement and, if Smith were permitted to settle a third-party claim and then make additional demands for benefits, based upon later-obtained information, Champion's rights to lien satisfaction would not be protected" because, the Court held, Champion did not contest the adequacy of the settlement even though it was aware of the existence of a third-party claim and even though it asserted its lien and accepted settlement proceeds. *Smith,* 901 N.E.2d at 623. The Court has misplaced the focus for benefit termination on the employer's knowledge or acquiescence rather than the employee's attempt to obtain the consent. Section 13 requires written consent to the settlement. The "obvious" reason written consent is required is to protect against an employee settling a lawsuit "for an amount well below medical and disability costs and leave the employer with nowhere to turn for the additional money owed. Requiring the written consent of the employer is designed to protect an employer from being shortchanged without its advance approval." *Koval v. Simon Telelect, Inc.,* 693 N.E.2d 1299, 1309 (Ind. 1998). "[T]he Legislature obviously recognized that a judgment or settlement by an injured employee . . . insures to the benefit of the employer or its compensation insurance carrier in every case . . . to the full extent of the employer's obligation under the Act." *Divine v. Galen & Lowell Graber,* 600

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[7] To the extent the Decision suggests that Champion was provided the opportunity to contest the adequacy of the settlement, the Record discloses that the settlement was reached between Smith and Bittner without Champion's knowledge, much less with its consent. (Appellant's App. p. 92). At most, it can be found that Champion accepted payment for its lien *after the Release Agreement had already been signed by Smith.* Smith conceded that neither Champion nor its carrier was present when Smith signed the release agreement and neither was consulted about the amount of settlement. (App. pp. 78-79). Smith had not seen Dr. Changaris until after the settlement. (App. p. 80). In addition, Champion had no basis to assume Smith would try to recover PPI benefits of more than $26,000.

N.E.2d 160, 162 (Ind. Ct. App. 1992). Anything short of written consent is insufficient to avoid the termination provisions in Section 13.

The Court did not explain, nor does the statute contemplate, a situation likely to occur with great frequency if the Decision is allowed to stand—withholding consent to the settlement. Section 13 contemplates that if the employer or its carrier is given notice of a settlement, it will provide written consent. There is no procedure specified if the employer/carrier withholds consent. This omission is likely a result of the Legislature not envisioning such a scenario. If the liability for future compensation terminates upon a settlement, it is in the interest of most employers/carriers to consent to the settlement.

Finally, the Decision appears to violate the long-standing rule prohibiting an injured worker from making a double recovery. *See Waldridge v. Futurex Industries, Inc.,* 714 N.E.2d 783, 786 (Ind. Ct. App. 1999), *trans. denied* (the "prohibition against 'double recovery' has been a part of worker's compensation law since its inception and remains intact"). The Court did not require Smith to repay the carrier the remaining money from the settlement. It appears the Court intends Smith to keep the balance of his third-party settlement and also permit him to "proceed" with his worker's compensation claim. The claimant has thus settled on his own terms, received the settlement proceeds and then pursued additional benefits without the shadow of the worker's compensation lien.

V. CONCLUSION

The Decision expands worker's compensation liability for Indiana employers and worker's compensation insurance carriers and ignores the clear and express language of I.C. § 22-3-2-13. The Decision is inconsistent with existing precedent and statutory authority. The Decision will lead to future unjust outcomes. For the foregoing reasons, this Court should grant transfer and vacate the Decision of the Court of Appeals.

Respectfully submitted,

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* * * * *

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that copies of the foregoing have been served upon the following counsel of record as listed below this 27th day of March, 2009, by depositing said copies in the United States mail, First Class postage prepaid:

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KOVACH V. CALIGOR MIDWEST

In *Kovach v. Alpharma, Inc.*,* nine-year-old Matthew Kovach was prescribed 15 ml of codeine to be administered following surgery by a nurse at the hospital using a 30 ml measuring cup manufactured by one of the defendants ("the cup defendants"). Even though only 15 ml of codeine (or half of the cup) was prescribed, Matthew's father (who was in the room at the time) testified the 30 ml cup was completely full when given to Matthew. After being discharged from the hospital, Matthew went into respiratory arrest and died. Blood tests revealed Matthew had over twice the prescribed dose of codeine in his system.

The Kovachs ("plaintiffs") sued the cup defendants asserting claims for breach of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose under the Uniform Commercial Code ("UCC") as well as strict liability in tort and negligence under Indiana's Products Liability Act. The trial court granted summary judgment in favor of the cup defendants, and the plaintiffs appealed.

On July 16, 2008, the Indiana Court of Appeals affirmed summary judgment on the plaintiffs' claim for implied warranty of fitness for a particular purpose under the UCC. *Kovach v. Alpharma, Inc.,* 890 N.E.2d 55 (Ind. Ct. App. 2008). However, the court of appeals reversed the grant of summary judgment on the plaintiffs' claims under Indiana's Products Liability Act, finding that the plaintiffs could maintain their failure-to-warn claim under theories of negligence and strict liability. The court of appeals also found causation should be presumed because the cup did not warn of the harm that occurred to Matthew. And the court of appeals also allowed the plaintiffs to maintain a simultaneous implied-warranty-of-merchantability claim under the UCC for Matthew's death. Finally, the court of appeals affirmed the trial court's admission of expert testimony.

Chief Judge Baker dissented, finding that no trier of fact could conclude that any imprecision in the measuring cup caused Matthew's death. Instead, Judge Baker found that the double dose that led to Matthew's death resulted from an error on the part of the nurse who administered the codeine.

The cup defendants petitioned the Indiana Supreme Court for transfer. DTCI filed an amicus brief, written by Kevin C. Schiferl, Daniel M. Long, Melanie D. Margolin, and Lucy R. Dollens, Frost Brown Todd LLC (formerly Locke Reynolds LLP), in support of the cup defendants. DTCI argued that the court of appeals' decision impermissibly allowed the plaintiffs to simultaneously pursue claims for Matthew's death under Indiana's Prod-

* This case has been captioned variously by the courts, plaintiffs, and defendants; some have listed defendant Caligor Midwest first, others have listed the defendant, Alpharma, Inc., first.

ucts Liability Act and the UCC. DTCI also argued that the court of appeals' decision created a new failure-to-warn cause of action based on strict liability when no such cause of action exists under Indiana law. And DTCI further argued that the court of appeals erred by allowing the admission of expert testimony that had not been proven to be scientifically reliable on a subject within the understanding of laypersons. The Indiana Trial Lawyers Association filed an amicus brief in opposition to transfer.

The Indiana Supreme Court granted transfer on February 27, 2009, and held oral argument on April 9, 2009. See Cause No. 49S04-0902-CV-88. The Indiana Supreme Court has not yet issued its decision.

IN THE INDIANA SUPREME COURT

Cause No. 49A04-0707-CV-406

JIM KOVACH and JILL KOVACH, individually and on behalf of deceased minor child, MATTHEW KOVACH, Appellants (Plaintiffs),	Appeal from the Marion Superior Court
v.	Cause No. 49D11-0407-PL-1227
CALIGOR MIDWEST, *et al.*, Appellees (Defendants).	The Honorable John F. Hanley, Judge

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TABLE OF AUTHORITIES

CASES

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STATUTES

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IND. CODE § 34-20-2-24

RULES

Ind. Appellate Rule 46
Ind. Evidence Rule 701
Ind. Evidence Rule 702

INTEREST OF AMICUS CURIAE

Defense Trial Counsel of Indiana (DTCI) is an association of Indiana lawyers who defend clients in civil litigation. DTCI has an interest in the outcome of the present case because the court of appeals' decision impermissibly allows the Kovachs to simultaneously pursue product liability and Uniform Commercial Code claims for their son Matthew's death, changes established law on failure to warn claims, and allows expert testimony that has not been proven to be scientifically reliable on a subject within the understanding of laypersons.[1] The court of appeals' decision creates conflicting precedents on important products liability issues and, if left uncorrected, will lead to additional unnecessary litigation.

SUMMARY OF THE ARGUMENT

The court of appeals' published opinion misapplied two sections of Indiana's Product Liability Act ("IPLA"). First, allowing the Kovachs to simultaneously maintain a claim for Matthew's death under the IPLA and Indiana's Uniform Commercial Code ("UCC") conflicts with Indiana Code § 34-20-1-1, which provides the exclusive means of recovering for personal injury or death caused by a product. Second, the court of appeals judicially created a failure to warn claim based upon strict liability principles where no such claim existed.

The court of appeal's ruling also improperly presumed causation where the danger warned of did not cause the injury, relieving plaintiffs of their burden to prove that essential element of their case. Additionally, the court of appeals' decision incorrectly stated that the open and obvious danger rule does not apply in failure to warn claims.

Finally, the court of appeals' ruling failed to require the Kovachs to prove that the opinion testimony of James O'Donnell was scientifically reliable by

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[1] Pursuant to Indiana Appellate Rule 46(E)(2), the undersigned counsel for DTCI has consulted with counsel for Appellees, whose position DTCI supports, to ascertain the arguments that are being made in the Joint Petition to Transfer of the Caligor Defendants, Dynarex Corporation, and the Medegen Defendants.

allowing O'Donnell to opine that the medicine cup was not suitable for precise measurements when he admitted that he did not perform tests that could have verified his opinion. Instead, the court of appeals relied solely on O'Donnell's education and experience to determine that his testimony satisfied Indiana Rule of Evidence 702. This error was compounded by allowing testimony that was not beyond the understanding of laypersons to be admitted as expert testimony.

ARGUMENT

I. THE COURT OF APPEALS' OPINION IMPROPERLY ALLOWED PLAINTIFFS TO PROCEED WITH A WRONGFUL DEATH CLAIM UNDER THE IPLA AND THE UCC.

The IPLA constitutes the exclusive avenue to recover for personal injury or wrongful death caused by a product. The IPLA provides: "This article governs all actions that are: (1) brought by a user or a consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; regardless of the substantive legal theory or theories upon which the action is brought." Ind. Code § 34-20-1-1. It does not matter what name a plaintiff gives a cause of action; so long as that cause of action seeks to recover for personal injury or wrongful death caused by a product, the IPLA controls that action.[2] The IPLA thus supplanted tortious breach of warranty claims seeking damages for personal injuries or death resulting from the use of a product, and such warranty claims no longer exist separate and apart from the IPLA. *Condon v. Carl J. Reinke & Sons, Inc.*, 575 N.E.2d 17, 18 (Ind. Ct. App. 1991).

In holding that the Kovachs could separately maintain UCC claims for Matthew's death, the court of appeals' decision conflicts with Indiana Code § 34-20-1-1.[3] The IPLA and the UCC provide statutory schemes to recover for distinct harms; the IPLA provides recovery for bodily injury and wrongful death caused by a product, while the UCC provides recovery for loss related to the product itself. *See Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.*, 714 N.E.2d 1218, 1228 n.8 (Ind. Ct. App. 1999), *rev'd in part on other grounds*, 746 N.E.2d 941 (Ind. 2001); *Stegemoller v. AC&S, Inc.*, 767 N.E.2d 974, 975 (Ind. 2002).

The Kovachs' UCC claims sought to recover for Matthew's death, which they allege was caused by the cup—a product. In allowing the Kovachs to simultaneously maintain a UCC and an IPLA claim to recover for Mat-

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[2] The Kovachs claimed that Matthew died as a result of the breach of the warranties asserted under the UCC. (Appellants' App. 64-68.) In fact, in the Kovachs' Statement of Case before the court of appeals, they stated: "Finally, the Kovachs claim Matthew died as a result of the Cup's defects, the negligence of the Cup Defendants, and the Cup Defendants' breaches of implied warranty." (Appellants' Br.p.2.)

[3] *Kovach v. Alpharma, Inc.*, Cause No. 49A04-0707-CV-406, Slip Op. at p.21. Although the parties did not brief this argument below, the court of appeals' published opinion allowing plaintiffs to maintain both a UCC claim and an IPLA claim to recover for Matthew's death allegedly caused by a cup, constitutes an important issue with significantly far-reaching implications that must be addressed.

thew's death, the court of appeals relied solely on this Court's decision in *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947 (Ind. 2005). *Hyundai Motor*, however, did not involve a claim for personal injury or wrongful death. It dealt with whether vertical privity was required in a breach of implied warranty of merchantability claim to recover for *economic loss* and, therefore, provides no justification for the court of appeals' departure from settled Indiana product liability law.

The court of appeals' decision is particularly troubling because it does not address Indiana Code § 34-20-1-1 and its impact on the Kovachs' claims. The conflict between the Indiana Code and the court of appeals' decision undermines the legislature's carefully crafted IPLA and UCC statutory schemes. It will also have broad-ranging and unintended consequences of allowing an alternative avenue of recovery to bypass those the General Assembly enacted in the IPLA and to avoid the defenses afforded manufacturers defending such claims.

Such sweeping change should not occur absent legislative action taken only after extensive analysis and consideration of the implications and consequences of such change on matters of policy in this State. This Court should grant transfer and vacate the court of appeals' decision.

II. THE COURT OF APPEALS' OPINION IMPROPERLY CREATES A NEW STRICT LIABILITY-BASED FAILURE TO WARN CLAIM.

Despite correctly noting that a plaintiff in a failure to warn case has the burden to establish the manufacturer failed to exercise reasonable care under the circumstances when providing warnings or instructions to the consumer—a negligence standard—the court of appeals created a new failure to warn claim based upon strict liability principles when it discussed the Kovachs' failure to warn claim as both a strict liability and negligence claim. *Kovach*, Slip. Op. at p.14-16.

A failure to warn claim is statutorily governed by negligence principles and does not impose strict liability upon manufacturers for merely failing to provide the proposed warning or instruction. *See* Ind. Code § 34-20-2-2;[4] *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1166 (Ind. Ct. App. 1988) ("In Indiana, the issue of the adequacy of warnings in a strict liability case is governed by the same concepts as in negligence."); *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 163 n.11 (Ind. Ct. App. 1997).

By creating a new strict liability-based failure to warn claim, Indiana Code § 34-20-2-2 has been dramatically changed. If a strict liability-based failure to warn claim is allowed to exist, the reasonableness of the warning given or the decision not to give a warning is no longer an issue. Instead, all

[4] "However, in an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions." Ind. Code § 34-20-2-2.

that remains to be proven by a plaintiff is that no warning was given or the warning was inadequate.

This is a result not contemplated by the General Assembly. The General Assembly specifically enacted Indiana Code § 34-20-2-2 to create a *negligence*-based failure to warn claim, purposefully declining to add strict liability language it knew how to use.

This Court must vacate the court of appeals' opinion and clarify that failure to warn claims are governed solely by negligence principles.

III. THE COURT OF APPEALS' OPINION IMPROPERLY HELD THAT A PRESUMPTION OF CAUSATION SHOULD EXIST WHERE THE OMITTED WARNING DID NOT INVOLVE THE RISK THAT CAUSED INJURY TO PLAINTIFF.

Well-established law on causation mandates: "In approaching proximate cause in warnings cases, the focus is on the effect of giving a warning on the actual circumstances surrounding the accident. The question is whether the plaintiff's injury was a natural and probable consequence of the failure to warn about the dangers associated with the product." *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 164 n.12 (Ind. Ct. App. 1997) (citing 63A Am. Jur. 2d, *Products Liability* § 1171). The court of appeals erred by presuming causation where the allegedly omitted warning did not involve the risk—doubling the dose of medication—that caused the harm. The court of appeals recognized that where an absent or inadequate warning involved the risk that caused injury to the plaintiff, the missing warning can create a presumption of causation in favor of a plaintiff. *Kovach*, Slip Op. at 24-25 (citing *Ortho Pharm. v. Chapman*, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979) (holding a presumption that an adequate warning will be heeded operates to the benefit of the manufacturer when adequate warnings are given, but where warnings are missing, "the presumption is in essence a presumption of causation.")); *see also Summit Bank v. Panos*, 570 N.E.2d 960, 968 (Ind. Ct. App. 1991); *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1168 (Ind. Ct. App. 1988).

The courts of appeals' opinion, however, incorrectly addressed whether the omitted warning in this case involved the specific risk that caused Matthew's death. This is critical because the warning allegedly omitted in this case—warning against imprecise measurements—involved a risk *different* from the risk that actually caused injury to Matthew—the risk of a nurse *doubling* the dose of medication given to him. *Kovach*, Slip Op. at 28 (Baker, J., dissenting) (finding that no reasonable factfinder would conclude that the nurse's act of doubling the dose was due to imprecise measuring).

Instead, the court of appeals allowed an omitted warning to justify imposing a presumption of causation where the omitted warning was *not* the cause of the injury. In doing so, the decision does not heed this Court's admonition that "[t]he essential question is whether the inadequacy of the

warning was a substantial factor in bringing about the harm." *Ortho Pharm.*, 388 N.E.2d at 557-558.

The court of appeals' opinion abruptly and improperly shifts the focus from whether the omitted warning was the cause of the injury to whether any warning was omitted. This weakens the burden that plaintiffs bear on an essential element of their claim: proof of causation.

The impact of the court of appeals' decision is significant here because it forces the cup defendants to continue to incur the expense of defending themselves when—as Judge Baker noted in his dissent—no reasonable fact finder could conclude that the nurse's act of doubling the dose was the result of imprecise measurements. The substantial harm of the court of appeals' decision is compounded by the fact that the presumption of causation will be given continuing effect at trial with the giving of a jury instruction mandating that jurors presume causation. *See Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006) ("We hold that a presumption is properly given 'continuing effect' under the last sentence of Indiana Evidence Rule 301 by the trial court instructing the jury that when a basic fact is proven, the jury may infer the existence of a presumed fact."). Because of the continuing effect at trial of the presumption of causation, courts should not presume causation lightly and should only do so when it is undisputed that the omitted warning involved the actual cause of the harm. This Court should accept transfer to clarify that causation in failure to warn claims will only be presumed if the omitted warning involved the precise injury to the plaintiff.

IV. THE COURT OF APPEALS' OPINION IMPROPERLY RENDERS THE "OPEN AND OBVIOUS" DANGER RULE INAPPLICABLE IN FAILURE TO WARN CASES.

Defendants in this case argued that the danger inherent in doubling the prescribed dose was so obvious, particularly to a trained nurse, that no warning was necessary. *See Bemis Co., Inc. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981) (no duty to warn where danger is "open and obvious to all"); *Welch v. Scripto-Takai Corp.*, 651 N.E.2d 810, 815 (Ind. Ct. App. 1995) (no duty to warn of open and obvious risks inherent in cigarette lighter). In a footnote, the court of appeals summarily dismissed this argument stating that the "open and obvious" danger rule is inapplicable in failure to warn cases. *Kovach*, Slip Op. at 16 n.4 (citing *FMC Corp. v. Brown*, 551 N.E.2d 444, 446 (Ind. 1990)). This is incorrect.

Under Indiana law, the concept that there is no duty to warn of known or obvious risks still applies in failure to warn claims, as such claims are grounded on negligence principles:

> Conley argues that the open and obvious rule does not apply to claims under the IPLA, but the court disagrees. In *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437 (Ind. 1990), the Indiana Supreme

> Court held that the "open and obvious rule" from [*Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1990)] did not apply to strict product liability claims under an earlier version of the IPLA because the defense was not listed in the statute. [*Koske*,] 551 N.E.2d at 441-42.[5] However, the court stated that the obviousness of a danger was relevant in determining whether a product was sold in an unreasonably dangerous and defective condition, and in evaluating the affirmative defense of incurred risk. *Id.* at 440-41. *Koske* did not directly address whether the open and obvious rule continued to apply to negligence claims. Three weeks after *Koske*, the Indiana Supreme Court held that it did in *Miller v. Todd*, 551 N.E.2d 1139, 1143 (Ind. 1990); *see also Welch*, 651 N.E.2d at 815 (explaining that combined effect of *Koske* and *Miller* allowed consideration of open and obvious character of danger to defeat either type of claim). The 1995 amendments to the IPLA abolished strict liability in failure to warn cases. *Taylor v. Monsanto Co.*, 150 F.3d 806, 808 (7th Cir. 1998) (under Indiana law, "there is no doctrinal distinction between the negligent and strict liability failure-to-warn actions"); *see also* Ind. Code § 34-20-2-2. Thus, the *Koske* holding that the open and obvious rule did not apply to strict liability claims under the Act simply does not apply to Conley's failure to warn claim against Lift-All. Under the IPLA, there is no duty to warn of an open and obvious danger.

Conley v. Lift-All Co., Inc., 2005 WL 1799505, at *5-6 (S.D. Ind. July 25, 2005); *see also Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 111 n.12 (Ind. Ct. App. 1997).

A different panel of the court of appeals has also acknowledged that even after *Koske* and *FMC* were decided, the open and obvious rule still applies in product liability cases based on negligence theories:

> In *Koske v. Townsend Engineering Co.* (1990), Ind., 551 N.E.2d 437, our supreme court considered the question of whether the open and obvious rule applied to strict liability product cases. The court determined that since the rule was not one of the defenses expressly delineated in the Indiana Product Liability Act, it was not applicable. 551 N.E.2d at 442. The court did not expressly rule on the question of whether the rule applied to product negligence cases. 551 N.E.2d at 443, n.4. However, three weeks later, in *Miller v. Todd* (1990), Ind., 551 N.E.2d 1139, 1143, *reh'g denied,* the court held that the rule was applicable in such cases.

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[5] Similarly, this Court's decision in *FMC* was handed down just one day after the Supreme Court's opinion in *Koske*, and includes the same holding from *Koske*—that the open and obvious danger rule asserted in *Bemis* does not apply to *strict* liability claims under the Product Liability Act. *FMC*, 551 N.E.2d at 446 (citing *Koske*, 551 N.E.2d at 41-42).

Schooley v. Ingersoll Rand, Inc., 631 N.E.2d 932, 938-39 (Ind. Ct. App. 1994).

The court of appeals' opinion prevents the defendants from presenting the theory that they had no duty to warn against *doubling* the dose because such harm is open and obvious to everyone. This portion of the court of appeals' decision contradicts existing Indiana law and takes away an important defense for products defendants in Indiana.

But perhaps more ominously, it calls into question the continued viability of negligence as the basis for failure to warn claims under the IPLA because it takes away one of the means by which a defendant can defend the reasonableness of its decision not to give a warning—which is the core of negligence. If the reasonableness of the decision not to give a warning is no longer a consideration, then negligence is no longer the test. To clarify that the open and obvious danger doctrine still applies in failure to warn claims, this Court should accept transfer and vacate the court of appeals' decision.

V. THE COURT OF APPEALS ERRED BY ALLOWING O'DONNELL TO TESTIFY AS AN EXPERT WITHOUT FIRST DETERMINING THAT O'DONNELL'S OPINIONS WERE SCIENTIFICALLY RELIABLE AND BY ALLOWING TESTIMONY THAT WAS NOT BEYOND THE UNDERSTANDING OF A LAYPERSON TO BE PRESENTED AS EXPERT TESTIMONY.

The court of appeals erred by not making any inquiry into whether the principles upon which O'Donnell's opinion were based were scientifically reliable as required by Indiana Rule of Evidence 702(b). Instead, the court of appeals relied upon O'Donnell's education and experience as the sole justification for affirming the trial court's decision to allow O'Donnell's testimony.

The scientific reliability analysis under Rule 702(b) is particularly important here because O'Donnell admitted that he could have performed tests to determine whether his opinion that the measuring cup was not suitable for precise measurements was correct, but he did not. (Appellees' App. 28, 47). When, as here, a purported expert admits that he or she did not perform tests that could confirm the accuracy of his or her observations, courts should more stringently apply the scientific reliability analysis under Rule 702, not less stringently as the court of appeals did here.

Once a witness has qualified as an expert under Rule 702(a), trial courts have a duty to ensure that the testimony from a purported expert is not only reliable, but relevant to the matter at hand. *See Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 550 (Ind. 1999); *Lytle v. Ford Motor Co.*, 814 N.E.2d 301, 309 (Ind. Ct. App. 2004).

The "specialized knowledge" language of Rule 702(a) was not intended to provide an alternative avenue for parties to admit scientific testimony without conducting the requisite testing. *See Lytle*, 814 N.E.2d at 312 (rejecting plaintiff's argument that an expert's testimony can be admitted under the specialized knowledge prong of Rule 702(a) where the expert's opinions

were scientifically based). Instead, the "specialized knowledge" prong of Rule 702 is only to be used where the expert's opinions *cannot* be verified through "specific observations, measurements, or calculations." *PSI Energy, Inc. v. The Home Ins. Co.*, 801 N.E.2d 705, 740 (Ind. Ct. App. 2004).

The court of appeals' decision improperly allowed O'Donnell to testify as an expert under Rule 702 because the Kovachs failed to prove that the principles upon which O'Donnell's opinion was based were scientifically reliable. O'Donnell admitted that his opinion could have been verified through "specific observations, measurements, or calculation," but he chose not to perform those tests. *PSI Energy, Inc.*, 801 N.E.2d at 740.

By not requiring that scientific reliability be established, the court of appeals transformed the Rule 702 analysis into a single test that looks only at the education and experience of the witness. And by doing so, the court of appeals strayed from the central tenet of Rule 702, which is to ensure that only testimony based upon scientifically reliable principles be admitted as expert testimony. *See Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) ("The object of that requirement is to insure the reliability and relevance of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experiences, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.").

Indeed, as the U.S. Supreme Court recognized in its seminal decision addressing admission of expert testimony, the evidentiary rule's "overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underline a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 594-595 (1993).

By instead focusing solely on O'Donnell's education and experience, the court of appeals created a precedent that weakens the gatekeeping function of the trial court under Rule 702 and allows the admission of less, rather than more, scientifically reliable testimony.

Furthermore, not only does the court of appeals' opinion create only one standard within Rule 702, it also has the potential to render meaningless in many cases the mandates of Indiana Rule of Evidence 701, which provides for the admission of lay witness opinion testimony. Rule 701 allows the opinion of lay witnesses to be admitted where the witness's testimony is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Ind. Evidence R. 701.

Opinion testimony which previously qualified only as lay witness testimony based on the lack of scientific reliability can now be awarded expert status by looking at factors completely unrelated to the reliability of the testimony itself, such as education and experience. By expanding the allow-

ance of testimony under Rule 702's "specialized knowledge" prong to encompass all testimony that was previously considered lay witness opinion testimony, Rule 701 is rendered superfluous in many cases.

This error is compounded by allowing O'Donnell to testify as an expert about matters that did not need expert testimony because they were within the understanding of a layperson. Expert testimony may only be offered where the evaluation of the evidence is beyond the understanding of a layperson. *See Lytle*, 814 N.E.2d at 312-13 (excluding an expert from testifying where "the circumstances indicate that a layperson is just as capable of evaluating the evidence and reaching the conclusion that [the expert] did on these points."); *McCutchan v. Blanck*, 846 N.E.2d 256, 261 (Ind. Ct. App. 2006) (requiring the subject matter of the testimony to be distinctly related to some scientific field, business, or profession beyond the knowledge of the average layperson).

Whether the markings in a measuring cup were sufficiently well delineated to allow the precise measurement of medication is not a topic so beyond the understanding of a layperson as to require expert testimony. This is particularly true when all O'Donnell did was visually inspect the cup, something the average person could have done as well.[6] A layperson could have made the same evaluation O'Donnell did and reached an opinion without the need for expert testimony.

This Court should clarify that the guiding purpose of Rule 702 remains the determination of whether the principles upon which expert testimony are based are scientifically reliable. Further, this Court should make clear that expert opinions can only be admitted for matters completely outside the understanding of laypersons.

CONCLUSION

Transfer should be granted, the decision of the court of appeals vacated, and the trial court affirmed.

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[6] While O'Donnell's opinions about the need for greater precision when giving children medication may have been the subject of expert testimony, the Court of Appeals did not rely upon that portion of his testimony to find that the cup was defective. The focus of the Court of Appeals' decision was on whether the cup could be used for precise measurements. *Kovach*, Slip Op. at p.10.

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CERTIFICATE OF SERVICE

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