

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CONSECO, INC.-COUNTERCLAIM)
DEFENDANT,)
CONSECO SERVICES,)
L.L.C.-COUNTERCLAIM DEFENDANT,)
CIHC, INCORPORATED-COUNTERCLAIM)
DEFENDANT; CROSS CLAIM AGAINST)
AMERICAN EUROCOPTER)
CORPORATION, EUROCOPTER, S.A.)
AND SOCIETE NATIONAL INDUSTRIAL)
AEROSPATIALE,)
CONSECO HEALTH INSURANCE)
COMPANY-COUNTERCLAIM DEFENDANT,)
FIRST NATIONAL BANK AND TRUST,)
AS SPECIAL ADMINISTRATOR OF THE)
ESTATE OF LAWRENCE W. INLOW)
(FROM IP 99-831-C H/G),)

Plaintiffs,)

vs.)

AMERICAN EUROCOPTER CORP -)
COUNTERCLAIM & THIRD PARTY)
COMPLAINT FILED 6/4/99,)
EUROCOPTER, S.A. - COUNTERCLAIM)
& THIRD PARTY COMPLAINT FILED)
6/4/99,)
SOCIETE NATIONALE INDUSTRIELLE)
AEROSPATIALE - COUNTERCLAIM &)
THIRD PARTY COMPLAINT FILED)
6/4/99,)
CONSECO INVESTMENT HOLDING)
COMPANY, INC. - THIRD PARTY)
DEFT,)
HEADS UP TECHNOLOGIES, INC. -)
THIRD PARTY DEFENDANT,)
DEATON, CARL SHOCKLEY -)
THIRD-PARTY DEFENDANT,)
SOJKA, MICHAEL JOSEPH - THIRD)
PARTY DEFENDANT,)

Defendants.)

CAUSE NO. IP99-0830-C-H/?

π James T Crouse
Mineo & Crouse
Two Hannover Square - Suite 2350
434 Fayetteville Street Mall
Raleigh, NC 27601

π John R Howie
Howie and Sweeney, LLP
Suite 1400, Park Place On Turtle Cr
2911 Turtle Creek Boulevard
Dallas, TX 75219

π William V Hutchens
Locke Reynolds LLP
201 N. Illinois St., Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961

π Gerard Lear
Speiser Krause
2300 Clarendon Boulevard
Suite 306
Arlington, VA 22201

π Richard M Malad
Cohen & Malad
136 N Delaware St #300
Indianapolis, IN 46204

π Joseph H Yeager Jr
Baker & Daniels
300 N Meridian St
Ste 2700
Indianapolis, IN 46204

Jon C Abernathy
Goodin & Kraege
8555 River Rd #400
Indianapolis, IN 46240-4306

William V Hutchens
Locke Reynolds LLP

201 N. Illinois St., Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961

Stephen C Johnson
Lillick & Charles
Two Embarcadero Center
27th Floor
San Francisco, CA 94111

John D Nell
Wooden & McLaughlin LLP
1600 Capital Center South
201 North Illinois St
Indianapolis, IN 46204

Martin E Rose
Rose Walker LLP
1701 North Market Street
Suite 200
Dallas, TX 75202

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re Lawrence W. Inlow)
Accident Litigation) Cause No. IP 99-0830-C H/K
)

ENTRY ON THE EUROCOPTER DEFENDANTS'
SUMMARY JUDGMENT MOTION

Lawrence W. Inlow was killed when he was hit in the head by a moving helicopter rotor blade after he disembarked. The helicopter was operated by Conseco, Inc., Mr. Inlow's employer. His death resulted in litigation raising a host of claims. Several separate cases have been consolidated in this action. Mr. Inlow's estate is represented by plaintiff First National Bank and Trust, which the court refers to here as "the Inlow Plaintiffs." The Inlow Plaintiffs have asserted claims against a Conseco subsidiary, against the helicopter manufacturer and distributor, Eurocopter, S.A., American Eurocopter Corporation (AEC), and two AEC employees (collectively, "the Eurocopter Defendants"), and against Heads Up Technologies, Inc., the manufacturer of an automated on-board briefing system for helicopter passengers. Many additional claims have been asserted among the defendants and their affiliates and employees, including claims by Conseco and

several subsidiaries against the Eurocopter Defendants for the costs Conseco incurred as a result of Mr. Inlow's death.

This court has jurisdiction over this action under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, and the supplemental jurisdictional statute, 28 U.S.C. § 1367. The manufacturer of the helicopter qualifies as an agency or instrumentality of a foreign state within the meaning of 28 U.S.C. § 1603(b). Foreign states are not immune from federal jurisdiction in cases arising from commercial activity. 28 U.S.C. § 1605(a)(2).

In a decision issued February 7, 2001, the court (1) dismissed the claims against the manufacturer of the on-board briefing system; (2) dismissed the Inlow Plaintiffs' claims against a Conseco subsidiary; and (3) dismissed various counterclaims, cross-claims, and third-party claims for indemnification and contribution. 2001 WL 331625 (S.D. Ind. 2001). In a decision issued December 13, 2001, the court (4) dismissed the Conseco entities' claims against the Eurocopter Defendants. 2001 WL 1781927 (S.D. Ind. 2001).

The remaining claims are the central ones in the litigation: the Inlow Plaintiffs' claims against the Eurocopter Defendants for failing to warn Mr. Inlow and/or the Conseco pilots of the risk that resulted in Mr. Inlow's death. The Inlow Plaintiffs have asserted claims under Indiana law for negligence, product liability,

and fraud and constructive fraud against the Eurocopter Defendants. The Eurocopter Defendants have moved for summary judgment on all of those claims.

As explained below, the court grants the Eurocopter Defendants' motion. The Inlow Plaintiffs have not identified any prior cases finding that aircraft or helicopter manufacturers had a duty to warn operators or passengers of the open and obvious dangers posed by moving propellers or rotor blades. The court finds as a matter of law that the Eurocopter Defendants did not have a duty to warn helicopter operators, like Consec, Inc., or helicopter passengers, like Mr. Inlow, about the known, open, and obvious dangers that moving and decelerating helicopter rotor blades pose for exiting or boarding passengers. The general danger presented by moving rotor blades is obvious to any passenger. The danger is greater when the rotor blades are decelerating. Assuming there might be a duty to address that greater and more specific risk, the undisputed evidence shows that the fact that decelerating rotor blades pose a greater risk is obvious to trained helicopter pilots. Those pilots qualify as "sophisticated intermediaries" under Indiana law, so that the helicopter manufacturer has no duty to warn helicopter passengers about that specific risk. The manufacturer knows that the safe operation of the helicopter is entrusted to the pilot in command, who is responsible for exercising judgment and taking appropriate steps to protect passenger safety in a wide range of circumstances. The Eurocopter Defendants also are entitled to

summary judgment on the Inlow Plaintiffs' fraud and constructive fraud claims, which the Inlow Plaintiffs did not oppose.

Preliminary Matters

Motion to Strike: The Inlow Plaintiffs have moved to strike the National Transportation Safety Board “probable cause report” from the summary judgment record. The Eurocopter Defendants have cited the report primarily for the propositions that: (1) the accident was caused by Mr. Inlow’s failure to maintain a proper clearance from the rotor blade; (2) gusty winds might have been a contributing factor; and (3) the accident was not caused by mechanical failure. See Def. Facts ¶¶ 12-15. The court grants the unopposed motion in its entirety. The controlling statute provides: “*No part* of a report of the [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.” 49 U.S.C. § 1154(b) (emphasis added). Although some older cases from other circuits permitted use of the factual portions of NTSB reports while striking their conclusions, more recent cases have followed the plain meaning of the statute. See *Chiron Corp. & Perseptive Biosystems, Inc. v. National Transportation Safety Board*, 198 F.3d 935, 940-41 (D.C. Cir. 1999) (explaining error in judicial “exception” to § 1154(b) recognized in earlier decisions); see also *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1001 (5th Cir. 1998) (“Federal law flatly prohibits the NTSB accident report from being admitted into evidence in any suit for damages arising out of accidents investigated by the NTSB.”).

Discovery Motions: The Eurocopter Defendants filed a motion for protective order on November 14, 2001. On December 3, 2001, the Inlow Plaintiffs opposed the motion and filed a cross-motion to compel, for modification of the fourth amended case management plan, for sanctions, and for an expedited hearing. The Inlow Plaintiffs have not invoked Rule 56(f) of the Federal Rules of Civil procedure to assert that these pending discovery disputes prevented them from obtaining evidence they needed to oppose the summary judgment motion. Thus, the summary judgment motion is ripe for decision. All pending discovery motions are hereby denied as moot.¹

Summary Judgment Standard

The purpose of summary judgment is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Under Rule 56(c) of the Federal Rules of Civil Procedure, the court should grant summary judgment if and only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c).

¹There is one exception to the denial of discovery motions. In December 2001, the Consecos parties moved for sanctions against the Eurocopter Defendants and their attorneys based on evidence that a private investigator for the Eurocopter attorneys had offered benefits to a Consecos employee if he would turn over confidential information regarding the Inlow accident. The court ordered that certain investigative materials be turned over to the court under seal, but the court has not taken final action on the sanctions issue. The matter remains pending and is separate and independent from the final judgment entered today.

On a summary judgment motion, the moving party must first come forward and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that the party believes demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met the threshold burden of supporting the motion, the opposing party must “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). In determining whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to, and must draw all reasonable inferences in favor of, the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Accordingly, the facts stated in this entry are undisputed or reflect the record evidence in the light reasonably most favorable to the Inlow Plaintiffs.

Summary judgment is not a discretionary remedy. If a party shows it is entitled to summary judgment, the court must grant it. See *Tangwall v. Stuckey*, 135 F.3d 510, 514 (7th Cir. 1998). Also, by granting a proper motion for summary judgment, the court spares the parties, the witnesses, and the jury the ordeal of a trial that could have only one fair outcome. See *Mason v. Continental Illinois Nat’l Bank*, 704 F.2d 361, 367 (7th Cir. 1983).

Undisputed Facts

I. The Accident

Lawrence W. Inlow served as general counsel of Conseco, Inc., which owns numerous insurance and financial services companies. On the morning of May 21, 1997, Mr. Inlow and another Conseco attorney intended to travel on company business from the company headquarters in Carmel, Indiana to North Dakota. The attorneys traveled from Carmel to the Conseco hangar at the Indianapolis International Airport in a company helicopter.

The helicopter in question was an AS-365N2 “Dauphin” helicopter that Conseco acquired from American Eurocopter Corporation (AEC), a subsidiary of Eurocopter, S.A., a French corporation majority-controlled by the French government at times relevant to this lawsuit. The Dauphin was conceived as a multipurpose aircraft. It was designed for uses including military operations and “parapublic” purposes such as medical evacuation and search and rescue, as well as for “executive transport.” Pl. Facts ¶ 31; LaFargue Dep. at 21-22.

The pilot of the helicopter that morning was Conseco employee Carl Deaton. The helicopter landed at the Indianapolis airport and taxied into the wind toward the company jet waiting to take Mr. Inlow and his colleague to North Dakota. Pilot Deaton turned off the helicopter engines and applied the rotor brake. As the main

rotor blades began slowing, the flight observer (a crew member also employed by Consec) got out of the left side door of the helicopter, walked around the front “hugging” the nose, and opened the passenger door on the right side to let Mr. Inlow and the other attorney exit. See Def. Facts ¶ 10.

While the flight observer was looking in the helicopter’s cargo hold for the passengers’ briefcases, Mr. Inlow apparently was not being guided or controlled by any flight crew or ground crew. He first started to walk away from the right side of the helicopter at approximately a 45 to 90 degree angle away from the nose, but then turned around and walked fully upright back toward the helicopter then toward its nose. At about the one o’clock position off the nose of the helicopter, Mr. Inlow was struck in the head by a rotor blade. *Id.* ¶ 11. Mr. Inlow died instantly. A witness estimated the blades were turning at about 150 revolutions per minute (rpms) at the time of the accident, which would mean the blade tips were moving approximately 200 miles per hour. See Allard Dep. at 54.

II. *Risks of Helicopter Rotor Blades*

To understand the issues in this case, we start with a few basic facts about helicopters, their rotor blades, and the risks associated with them. The lift that allows a helicopter to stay in the air is generated by the high-speed flow of air over the main rotor blades, which have a cross-section of an airfoil, like the wings of a fixed-wing aircraft. For the Dauphin helicopter involved in the Inlow accident, the

four main rotor blades have an overall diameter of 38 feet, 2 inches. Pl. Ex. 11. Thus, at a typical flying speed of 350 rpms, the blade tips travel about 700 feet per second, or about 477 miles per hour. The rotor blades are made of a strong, lightweight carbon fiber material. They can and do bend up and down as they rotate.

When a helicopter runs its rotor blades at normal flight speeds, the blades are subject to centrifugal and lifting forces that raise the plane of the disk in which the blades rotate. See Def. Ex. W at 277. When the Dauphin helicopter involved in this accident is parked and its blades are not moving, the blades droop to about 8 feet, 2 inches above level ground in front of the helicopter. Pl. Ex. 11. (The blades are closest to the ground in front of the nose. Pl. Ex. 11; Allard Dep. at 73.) The cyclic control on a helicopter controls the angle of the plane in which the rotor blades rotate. When the blades are under power and the cyclic control is in the neutral position, the blades may rise as high as 9 feet, 4 inches above level ground in front of the helicopter. Pl. Ex. 16.

The undisputed evidence in this case shows that when passengers are boarding or exiting a helicopter, it is safest to have the rotor blades stopped completely. But if the blades are moving at all, it is safer to have the rotor blades moving at full power than to have them decelerating or accelerating at low rpms.

See, *e.g.*, Shirey Dep. at 41.² The undisputed evidence shows that main rotor blades pose the greatest dangers of flexing or flapping closer to the ground when they are decelerating, with the engines off. See *id.* Under those circumstances, the lifting and centrifugal forces on the rotor blades are diminishing, and the rotor blades are subject to gusts of wind, for example, that may push the blades lower.

The fact that moving rotor blades pose a danger to passengers boarding and deboarding helicopters is intuitively obvious. If evidence of the point were needed, it is contained in this record in Federal Aviation Administration documents, federal regulations adopted in Indiana, helicopter industry publications, and the testimony of Conesco pilots. As the FAA stated in a 1979 advisory circular: “The danger of rotating propeller or rotor blades is universally recognized.” Def. Ex. S. Further, pilots are responsible for ensuring passengers’ safety, “whether this is accomplished by stopping the engine completely at the time of loading and unloading, or by providing a definite means of keeping them clear of the propeller if it is left in motion.” *Id.* The same advisory circular also suggested: “Prominent warning signs, placed in the aircraft’s interior near or on the inside face of the aircraft doors to alert passengers and crewmembers of propeller or rotor hazards, could be helpful in preventing accidents.” *Id.*

²The evidence in this case shows that at least some busy heliports actually require arriving and departing helicopters to keep their engines and rotors running while passengers exit and board. The key fact, though, is that these heliports require the rotors to remain under full power during the operation.

With such well-known dangers, the greatest danger comes from inattention. A 1983 FAA advisory circular also addressed the general subject of hazards of moving propeller and helicopter rotor blades. Def. Ex. R. The FAA advised:

The engine of a fixed-wing aircraft or of a helicopter *should be shut down before boarding or deplaning passengers*. This is the simplest method of avoiding accidents.

(Emphasis added.) The FAA did not attempt to prohibit boarding or deplaning passengers with an engine running, but cautioned that these activities should be allowed

only under close supervision. The pilot in command should have knowledge that either the company or the airport operator has ground attendants fully trained in their specific duties to board or deplane passengers from an aircraft with an engine(s) running. The pilot should instruct passengers, before they exit an aircraft with an engine(s) running, the path to follow to avoid the propeller or rotor blades.

Id. The FAA further instructed: “The pilot can be most effective in ensuring that his or her passengers arrive and depart the vicinity of the aircraft safely by stopping the engine completely at the time of loading and unloading, or by providing a definite means of keeping them clear of the propeller if it is left in motion.” *Id.* Briefing of passengers on rotor blade avoidance is also part of the FAA’s commercial pilot standards for helicopters. Def. Ex. V.

The risks associated with rotor blades are also addressed in federal occupational safety regulations, also incorporated into Indiana law, that recognize the risks inherent in rotor blades. The regulations provide in relevant part:

(o) Approach distance. No employee shall be permitted to approach within 50 feet of the helicopter when the rotor blades are turning, unless his work duties require his presence in that area.

(p) Approaching helicopter. The employer shall instruct employees, and shall ensure, that whenever approaching or leaving a helicopter which has its blades rotating, all employees shall remain in full view of the pilot and keep in a crouched position. No employee shall be permitted to work in the area from the cockpit or cabin rearward while blades are rotating, unless authorized by the helicopter operator to work there.

(q) Personnel. Sufficient ground personnel shall be provided to ensure that helicopter loading and unloading operations can be performed safely.

29 C.F.R. § 1910.183 (incorporated by reference at 620 Ind. Ad. Code § 1-1-2 (10)).

Portions of the Safety Manual of the Helicopter Association International are in evidence as Plaintiffs' Exhibit 1 and Defendants' Exhibits T and U.³ The Safety Manual calls for passenger briefings that deal with ingress and egress, among other subjects. The Safety Manual cautions:

³Plaintiffs' Exhibit 1 and Defendants' Exhibit T are from the 1999 edition, after the accident in this case, but substantially similar warnings were in the 1993 version of the Safety Manual, which is in the record (less legibly) as Def. Ex. U.

WARNING! Do not attempt to lead passengers near a rotor disc while rotors are turning, unless passengers have been briefed on the hazards of main rotors and tail rotors. Shut down the helicopter prior to boarding passengers or use ground crews to assist passengers.

The Safety Manual then contains a bold warning about boarding or exiting when the blades are moving *without being under full power*.

WARNING! Main rotor blades can dip very low when rotating slowly. Passengers and crew must be briefed not to stand or walk under the rotor system during low RPM operations. Under no circumstance should any person, whether passenger or crew, be permitted to approach or leave the aircraft during rotor engagement on start-up or until after the rotor blades have completely stopped following engine shutdown.

The record also includes a 1992 training book for pilots called “Learning to Fly Helicopters.” Def. Ex. W. The book includes extensive cautions on the dangers posed by rotor blades, especially at low rpms. The training book does not prohibit boarding and deboarding when the rotors are moving, but it has clear warnings about decelerating rotor blades:

The most dangerous time to be near a helicopter is when the rotors are starting or stopping.

When the rotors are stopped, special devices called *droop stops* keep the blades from hanging down too far. When the rotors are rotating at normal speed, the rotors can droop down quite low, but the pilot has full control of their position with the cyclic and collective sticks. During start-up, after the droop stops move out of position but before the rotor blades are up to normal rpm, the blades are not moving fast enough to be fully controllable by the pilot and are therefore very susceptible to wind gusts.

A gust of wind at the wrong instant can cause a main rotor blade to flap down so low that it can hit the top of the cockpit or tailboom. This is the main reason why helicopters have wind limitations for start-up and shutdown. Needless to say, a blade could also flap down low enough to hit a person standing within the circumference of the rotor disc. It has happened.

Def. Ex. W. at 70. The training book advises that the same precautions should be used for exiting the helicopter. *Id.* at 85.

The training book concludes with “Ten Commandments” and their explanations. The author notes, after a reference to the opening sequence of M*A*S*H*, that it is “usually unnecessary” for a person walking under spinning rotor blades to bend down when the rotors have reached “normal operating rpm.” *Id.* at 276. But the author then cautions: “On the other hand, during rotor engagement and disengagement, nobody should be standing under the rotor disc. When the rotors are below normal operating rpm, they are more susceptible to the variance of the wind and are therefore not fully controllable by the pilot.” *Id.* at 277. The training book continues:

Sudden gusts of wind will cause the blades to flap down. Because wind is unpredictable, and gusty winds are even more unpredictable, and because one never knows when a droop stop might not work properly, it’s always a good idea to keep people outside the area directly below the rotor disc during rotor engagements and disengagements.

Id.

In addition to this general and public information in the record about the risks of moving rotor blades, and especially decelerating rotor blades, Conseco pilots testified that they were actually aware that rotor blades can flex down resulting in a rotor blade strike, especially when the blades are decelerating. They knew about these dangers without further warnings from the helicopter manufacturer or distributor:

- ◆ Carl Deaton, the pilot who flew the Conseco helicopter on May 21, 1997 knew about the “potential for endangerment of passengers of personnel” from the flex of the rotor blades. He knew that because it was “intuitive or from military experience.” Deaton Dep. at 15. He testified: “With any rotational system over your head, there’s always that chance of being struck by it.” *Id.* at 44. He added that the danger was “conceivable,” and that he and the other pilots were “hired to err on the conservative side.” *Id.* at 45.
- ◆ Pilot Robert Chatterton knew about the risk of strikes from decelerating rotor blades before attending AEC training and even before he became a pilot. Chatterton Dep. at 45, 47, 50-51.
- ◆ Pilot Terry Cunningham testified that it was “common sense” that passengers should be unloaded with rotor blades completely stopped or at full operational power to avoid the risk of blade “flap”: “There’s so much common sense involved, . . . that [it] would be putting one down to go into . . . detail on something so common.” He also stated that the risk of blade flap causing injury or death to a person is one of the first things taught at flight school. Cunningham Dep. at 30-32, 132, 138.
- ◆ Pilot Gary White testified that it is “obvious” that blade flap may present a danger to deboarding passengers. White acknowledged that rotor blades become less controllable as rpms decrease and that the Dauphin’s rotor blades could droop lower than their static position while decelerating. White Dep. at 12-14, 19, 23.
- ◆ Conseco’s assistant vice president of flight operations Keith Rowe knew before the Inlow accident that decelerating blades are more susceptible to flapping caused by the wind. He also had observed

that the Dauphin's rotor blades could drop below their stationary level. Rowe was aware there was a risk of passengers being struck by the rotor blades on a windy day. Rowe Dep. at 46-49, 85.

III. *The Dauphin Helicopter*

The Inlow Plaintiffs acknowledge the evidence, discussed above, of the general knowledge of both the general and specific risks of rotor blade strikes, including the increased risks when the blades are decelerating without power. The Inlow Plaintiffs seek to show, however, that the specific design of the Dauphin helicopter required particular warnings about its rotor blades because it was designed with a high-set rotor that, in effect, gives a false sense of security to someone under the rotating blades. The Inlow Plaintiffs contend that the Eurocopter Defendants had a duty to provide warnings to counter that false sense of security.

The Dauphin is marketed as having "high main rotor blades" and the "Starflex rotor system," although Conesco did not receive marketing materials with this language before acquiring the helicopter. Walden Dep. at 67-69, 78; Rowe Dep. at 57-61, 67-70. According to AEC marketing employee Eric Walden, the high rotor blade system is a "safety attribute": "because depending on the operational requirements, some people work around these aircrafts when the blades are at either flight idle or at full rpm. By that, I'm talking about law enforcement and EMS predominantly are the two areas where that takes place.

And to have these blades flying up above nine feet when you're having people walk in and out from the aircraft, to me, is a safety benefit." Walden Dep. at 69.

Thus, the Dauphin's high-set rotor blades provide a safety advantage over the equipment manufactured by Eurocopter's competitors. *Id.* at 78-79. For example, the Dauphin has higher rotor blade clearance than a competing Sikorsky S-76 helicopter. While the Dauphin's rotor blade sits about 8 feet, 2 inches above level ground in a static position and flexes up to 9 feet, 4 inches at full power with the cyclic in neutral, the Sikorsky blades obviously sit much lower. See Rice Dep. at 35; Pl. Ex. 11; Hart Dep. at 42, 44 (Sikorsky competes with AEC in some areas; at rest, the Sikorsky blades "were certainly body height" – either waist or chest high); Hilbert Dep. at 80 (witness was "almost crawling on the ground" when he once exited a Sikorsky with the blades turning). Conseco had considered purchasing a helicopter from Sikorsky. See Rice Dep. at 24. A layperson looking at the Dauphin with the blades at rest would see the rotor blades "several feet or some feet" above the head height of a person. Hart Dep. at 45. A layperson looking at the Sikorsky S-76 could make the assumption that the height of the rotor blade is such that the blade could strike someone. *Id.* at 44-45.⁴

⁴The Inlow Plaintiffs contend that the Eurocopter Defendants should have included a warning in their flight manual like the one that Sikorsky provides. The Sikorsky SK76A flight manual states:

(continued...)

The Inlow Plaintiffs rely heavily on evidence of tests conducted by the Eurocopter Defendants in approximately 1984 for the flight manual for the United States Coast Guard, which had purchased the military model of the Dauphin helicopter. Those tests showed that when the rotor blades were “dynamic,” meaning that they were running at full power (see Deaton Dep. at 101-02 and Pl. Ex. 16), the blades could go as low as 5 feet, 2 inches above level ground in front of the helicopter. Pl. Ex. 11. Plaintiffs’ evidence shows that with the helicopter’s cyclic control in normal use at 5.2 degrees forward, the rotor blade clearance is 7 feet, 8 inches. Pl. Ex. 16 (showing clearance of 2335 mm). To reach as low as 5 feet, 2 inches in the tests, the cyclic control was pushed beyond the normal operating limit to its absolute maximum forward position of 13 degrees. Pl. Ex. 16 (showing clearance of 1560 mm). Both figures reflect the rotor blade clearance when operated at 350 rpm.

The Inlow Plaintiffs focus on the 5 feet, 2 inch limit that is reached when the cyclic is put past the normal operating limits to its absolute maximum forward position. For example, although Conesco pilot Deaton had testified that he knew

⁴(...continued)
WARNING

Passengers and crew members should not be allowed to approach or depart the helicopter directly from the front because of rotor clearance, especially at low rpm and with gusty wind conditions.

Pl. Ex. 9.

of the dangers posed by flexing rotor blades at low rpms, he was asked in his deposition whether he would have allowed anyone out of the helicopter with the blades moving if he had known that they would flex down to less than six feet above the ground. He said no. Deaton Dep. at 30-31. He was also asked in his deposition whether he would have allowed passengers to leave the helicopter with the blades moving if he had seen the Coast Guard diagram. He said no. *Id.* at 181.

However, Deaton also testified that the Coast Guard diagram did not indicate the conditions that produced the 5 feet, 2 inch level for the blades, and that without that information, the diagram was not significant for him as a pilot in command. Deaton Dep. at 102. He continued: “Q: So this basically tells you nothing? A: That is correct, sir.” *Id.* Deaton also testified that on previous occasions, because of high gusts and the chance of rotor flexing, he had asked passengers to stay inside the helicopter until the blades had stopped. *Id.* at 137. The testimony continued: “Q: So as a pilot in command, you didn’t need any warnings about those dangers – you understood them – and if there were gusts, kept your passengers in? A: That is correct, sir.” *Id.*

IV. *Conseco Flight Operations*

At times relevant to this lawsuit, Stephen Hilbert was Conseco’s president, chairman, and CEO. Hilbert made decisions about the purchase of aircraft for

Conseco. Hilbert Dep. at 68-69. Hilbert and Conseco vice president of aviation Dan Rice flew on a demonstration flight of the Dauphin. Neil Williams was the AEC salesperson who worked with Conseco. According to Hilbert, AEC's salesperson told him that the Dauphin helicopter facilitated rapid egress from the aircraft. Hilbert Dep. at 65. At the end of the demonstration flight, Hilbert and Rice exited the helicopter while the rotor blades were turning. Hilbert does not recall how fast the blades were turning. Rice, who is a pilot, testified that he does not recall AEC allowing anyone under the blades while they were decelerating at any point during the demonstration and training process. Rice Dep. at 361-62.

AEC's former chief pilot James Shirey delivered the Dauphin helicopter to Conseco in 1992. Shirey Dep. at 47-48. Shirey was involved in training Conseco pilots and in providing Conseco with information to include in their flight manual. *Id.* at 74. At that time, none of Conseco's pilots were rotary-wing pilots, and Conseco had never had a helicopter operation before. See Rice Dep. at 19, 25; Shirey Dep. at 48.

On one of the first occasions that Hilbert flew in the Dauphin with a Conseco pilot, Hilbert started to exit the helicopter while the rotor blades were still turning, as he had done at the end of the demonstration flight. Rice suggested that they stay in the aircraft until the blades had completely stopped. Hilbert asked what the flight manual said about exiting the helicopter with the blades

turning. Rice told Hilbert that the manual did not prohibit the practice. Hilbert Dep. at 31.

Conseco then developed as its deboarding policy that passengers would exit the Dauphin after the engines had been shut-down but before the rotor blades had completely stopped. Thus, the blades were slowing but not under power. Def. Facts ¶ 31; Rice Dep. at 113-15; White Dep. at 21. Conseco required that passengers exit the aircraft at 90 degrees off the nose of the aircraft, so as to avoid the front of the aircraft where the rotor tip path is typically lowest. Def. Facts ¶ 33. The procedure was implemented because Hilbert, a frequent passenger, did not want to wait 30 to 40 seconds for the blades to stop fully before exiting. Hilbert also did not want the engines kept on because he did not like the noise. *Id.* ¶ 32; Cunningham Dep. at 34-37.

Hilbert expected that Eurocopter would have advised him if there were hazards associated with exiting the aircraft with the rotor blades turning. Hilbert testified that he would not have exited the helicopter with the blades turning, and would not have instituted Conseco's disembarkation policy, if he had known it was dangerous. Hilbert Dep. at 72.

Similarly, Rice testified that if he had known the blades could flex down to six feet, he would not have allowed Conseco executives to disembark with the

blades turning. Rice Dep. at 41. Based on training by AEC, Rice understood the blade to ground clearance on the Dauphin was 9 feet, 4 inches. *Id.* at 33-34. From his experience as a pilot, however, Rice knew that rotor blades could flex down, especially at low rpms when they are not subject to as much centrifugal force. *Id.* at 100. He testified he was never informed that they could flex to six feet or low enough to kill someone. *Id.* at 37- 40. Rice talked to AEC employees, including Williams, about whether the blades presented a danger to workers and passengers “and the implication was no, that it’s a high main set rotor.” *Id.* at 100-01. Rice referred only to an “implication.” He did not attribute any specific statements to AEC employees. According to AEC’s Williams, he never discussed with anyone at Consecos how low rotor blades could go. Williams Dep. at 252.

Several of Consecos’s pilots, including Carl Deaton, were concerned about safety issues within the company’s aircraft operations. Def. Facts ¶ 16. Before the Inlow accident on May 21, 1997, Consecos had no written operational or safety procedures related to helicopter passenger boarding or deplaning. *Id.* ¶ 21. There was no clear delineation of what ground personnel were supposed to do to escort or control passengers or to communicate with flight crews. *Id.* ¶ 22.

Deaton and other Consecos pilots had discussed among themselves the fact that they were uncomfortable with Consecos’s policy of unloading passengers while the rotor blades were decelerating. *Id.* ¶ 61. In fact, before Mr. Inlow’s death, they

had even recommended that Conseco change the policy. *Id.* ¶ 62. If pilot Deaton had been in charge of flight operations, he would have changed the Conseco disembarkation policy. Deaton Dep. at 138.

V. *Eurocopter's & AEC's Disembarkation Policies*

The Eurocopter and AEC flight operations manuals do not prohibit unloading passengers from the helicopter with the rotors turning and the engines not turning. Pl. Exs. 25, 12.⁵ The Eurocopter manual provides instructions for loading or unloading passengers while the rotor blades are turning. According to the manual, in such a situation, a pilot must remain at the controls, someone must guide the passengers, and loading and unloading cannot occur at the same time. Pl. Ex. 25. The AEC manual states: "When practical, boarding and deplaning will be conducted with rotors stopped. When escorts are not available to assist in boarding and deplaning, passengers will be thoroughly briefed on appropriate procedures." Pl. Ex. 12 (1996 version).

⁵The Inlow Plaintiffs have produced an excerpt from a version of the Eurocopter flight operations manual dated October 1999, well after the accident that killed Mr. Inlow. The Eurocopter Defendants have not objected to this evidence and have not argued that this version was different from ones in effect prior to the accident. The Inlow Plaintiffs produced excerpts from five different editions of the AEC flight operations manual. The relevant language is substantially the same in each version.

The Eurocopter Defendants contend that there is no need to warn about risks associated with unloading passengers under slowing rotor blades because those risks are well-known. According to Marcel LaFargue, head of Eurocopter’s preliminary design department, “it is absolutely forbidden to have someone under the rotor disk during deceleration or acceleration phases.” LaFargue Dep. at 235. The practice is forbidden in the “rules of the art.”⁶ *Id.* at 236. LaFargue believes that pilots learn about this rule in their training. *Id.*

Patrick Bremond, the Eurocopter engineer in charge of testing the Dauphin, agrees with LaFargue. Bremond Dep. at 187 (it is “a very basic rule of the art” that it is not safe for passengers to be under the rotor blades of any helicopter when the blades are slowing); see also *id.* at 64 (pilots are instructed not to load or unload passengers while the blades are accelerating or decelerating during the “most basic training”). Bremond noted that pilots may decide to load or unload with the blades turning under certain circumstances, such as medical evacuation or mountain rescue. *Id.* at 237. Under these circumstances, though, the rotors should be under power from the engines, not coasting to a stop. See *id.* at 237-38.

⁶LaFargue and several other witnesses testified in French, and their testimony was translated simultaneously.

AEC safety manager Robert Reuland testified that it is a “standard procedure” not to load or unload helicopter passengers while the rotor blades are decelerating, although AEC does not expressly prohibit the practice. Reuland Dep. at 40 (“It’s not in writing [that] it’s prohibited but that’s a standard procedure that we’ve all used as professional pilots for numerous years.”). However, when asked to consider the specific risk of being struck by the Dauphin’s blades as they are decelerating or “spooling down,” Reuland testified: “I don’t think it’s really a possibility” in light of the height of the rotor blades. *Id.* at 42. Nevertheless, Reuland still would not unload passengers under decelerating blades.

According to AEC’s former chief pilot Shirey, unloading passengers while the rotor blades are decelerating is the “least desirable” of the three possible disembarkation procedures. The safest procedure is to wait until the blades are completely stopped. The second best option is to unload with the blades fully powered by the engines. That said, however, Shirey testified that he was never instructed not to unload passengers with the blades decelerating. In fact, Shirey described the practice as “routine” in both civilian and military contexts. Shirey Dep. at 41 (“And that kind of operation can be conducted safely. I mean, it is on an everyday basis in the helicopter community.”); see also Sojka Dep. at 111-12 (Conseco pilot has witnessed passenger unloading under decelerating blades at airports on occasion). Shirey believes that he probably unloaded some passengers while the blades were decelerating on demonstration flights with potential

customers “on a number of occasions.” Shirey Dep. at 46. Shirey did not recall the disembarkation procedure he used when he flew Conseco’s Danny Rice on the delivery flight. Shirey felt more comfortable with the Dauphin than with other helicopters for unloading passengers with decelerating blades because its rotor was higher than the rotors on some other aircraft. *Id.*

VI. *Mr. Inlow’s Knowledge of Conseco’s Disembarkation Procedures*

Mr. Inlow was a frequent passenger on the Dauphin for five years before the fatal accident. Conseco assistant vice president of flight operations Keith Rowe sometimes piloted the Dauphin. Rowe flew with Mr. Inlow several times. Rowe Dep. at 24-25. Rowe once told Mr. Inlow that he should exit the helicopter by walking away from it at a 90 degree angle from the nose. *Id.* at 25-26. Mr. Inlow acknowledged this instruction. On another occasion, Rowe saw Mr. Inlow exit the helicopter by walking out to the front of the helicopter. Rowe talked to Mr. Inlow about this because he believed it was dangerous. Rowe Dep. at 187-88. Rowe told Mr. Inlow: “You need to walk out from the side, clear the rotor path and then continue forward. Because from my perspective, it looked pretty close.” *Id.* at 187. Rowe later came to believe that Mr. Inlow’s conduct was less dangerous than he had first thought, although there is no evidence in the record that Rowe ever told Mr. Inlow that.⁷

⁷Rowe testified that he learned later that the rotor blades were not as low
(continued...)

On another occasion, Consec first officer Robert Chatterton blocked Mr. Inlow's path as he stepped towards the front of the nose after exiting the helicopter. Chatterton Dep. at 55-56; 64-65. Chatterton said to Mr. Inlow something to the effect of "let's go out this way." Mr. Inlow followed Chatterton's instruction. Chatterton did not tell Mr. Inlow that proceeding on the path he had started was dangerous. *Id.* at 56.

Additional facts are included below as needed, keeping in mind the standard for deciding a summary judgment motion.

Discussion

I. *Negligence and Product Liability for Failure to Warn*

There is no claim in this case that the Dauphin helicopter malfunctioned or suffered from some design or manufacturing defect. The Inlow Plaintiffs base their negligence and statutory product liability claims on the same premise: that the Eurocopter Defendants had a duty to warn Consec pilots and/or Mr. Inlow of the risks associated with the Dauphin's rotor blades, that they failed to provide adequate warnings, and that the failure was a proximate cause of Mr. Inlow's death.

⁷(...continued)
as they had appeared to him when he saw Mr. Inlow walk under them. Rowe attributed this to a problem of depth perception. Rowe Dep. at 28-29.

The Inlow Plaintiffs' negligence and product liability claims are governed by the same legal standards. See Ind. Code § 33-1-1.5-3 (in an action based on an alleged failure to warn, the plaintiff must establish that the manufacturer failed to exercise reasonable care under the circumstances in providing the warnings or instructions); *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"). The 1995 amendments to the Indiana Product Liability Act (IPLA) "abolish[ed] the theory of strict liability in tort for design defect and duty to warn cases, injecting negligence standards in those cases, and making the Product Liability Act applicable to all actions for physical harm brought by a consumer against a manufacturer or seller of a product, regardless of the substantive legal theory." *Chestnut v. Roof*, 665 N.E.2d 7, 10 (Ind. App. 1996).⁸

To prove negligence in a failure to warn case, a plaintiff must prove that the defendant: (1) supplied a product with a concealed danger; (2) knew or had reason to know of the danger; (3) failed to adequately warn of the danger; and must prove (4) that the failure to warn was a proximate cause of injuries.

⁸The IPLA was repealed and recodified effective July 1, 1998 at Indiana Code §§ 34-20-1-1 *et seq.* The prior version cited above is controlling because the Inlow Plaintiffs' claims accrued in 1997 when Mr. Inlow was killed. See *Ritchie v. Glidden Co.*, 242 F.3d 713, 720 n.4 (7th Cir. 2001) (earlier version of product liability statute controlled where plaintiff was injured and brought suit prior to effective date of 1998 amendments).

Lucas v. Dorsey Corp., 609 N.E.2d 1191, 1198 (Ind. App. 1993). Under the IPLA, Ind. Code §§ 33-1-1.5-1 *et seq.*, a plaintiff must prove: (1) the “defective” product was “unreasonably dangerous”; (2) the defect existed at the time the product left the defendant’s control; (3) the product was expected to, and did, reach the consumer without substantial alteration; and (4) the plaintiff’s injuries were proximately caused by the defect in the product. See *Moss v. Crosman Corp.*, 136 F.3d 1169, 1171 (7th Cir. 1998) (citation omitted) (observing that showing that the product was “defective” could be considered a fifth element). A product is defective under the Act if, among other things, a manufacturer failed to give appropriate warnings about how to use it. See Ind. Code § 33-1-1.5-2.5(b). A product is unreasonably dangerous if it causes unexpected injury. See Ind. Code § 33-1-1.5-2(7); *Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 624-26 (7th Cir. 1995).

In support of their motion for summary judgment, the Eurocopter Defendants contend that, as a matter of law, (1) the risks associated with walking under moving and/or decelerating helicopter rotor blades are known and obvious so that the Eurocopter Defendants had no duty to warn about them; (2) any failure to warn was not a proximate cause of Mr. Inlow’s death; and (3) they are entitled to a complete defense based on the doctrine of incurred risk.⁹

⁹The Eurocopter Defendants have asserted the same arguments on behalf of all defendants without any specific discussion of the claims against Mr. (continued...)

As explained below, the Eurocopter Defendants are entitled to summary judgment on the Inlow Plaintiffs' negligence and product liability claims because they had no duty to warn of the hazards that resulted in Mr. Inlow's death. The undisputed evidence shows that the general risks associated with moving rotor blades were obvious to any passenger and were actually known to Mr. Inlow. The more specific risks of walking under decelerating helicopter rotor blades were obvious to any trained helicopter pilot and were actually known to the Consec pilots, including Carl Deaton. A manufacturer has no duty to provide warnings to a "learned" or "sophisticated intermediary" about dangers already known to him or her. A manufacturer can assume that a helicopter will always have a trained pilot in command who will know of those risks, who will be responsible for passenger safety under a wide range of circumstances, and who will be responsible for giving appropriate commands. The sophisticated intermediary doctrine under Indiana law relieves the Eurocopter Defendants of any duty to provide warnings to passengers or pilots about dangers already known to the pilots. See *Taylor*, 150 F.3d at 808-09 (affirming summary judgment based on sophisticated intermediary issue); *Phelps v. Sherwood Medical Industries*, 836 F.2d 296, 303 (7th Cir. 1987) (affirming defense verdict based on "learned intermediary" issue). In addition, based on essentially the same evidence, the

⁹(...continued)

Williams and Mr. Schauger. As mentioned above, Mr. Williams was the AEC salesperson who called on Consec. The parties have not identified Mr. Schauger's role.

court also finds as a matter of law that the Dauphin helicopter was not “defective” or “unreasonably dangerous” under the IPLA.

A. *Duty to Warn*

There can be no claim for failure to warn under common law or under the IPLA without a duty to warn. A manufacturer has a duty to warn of latent defects in its products. *Ritchie v. Glidden Co.*, 242 F.3d 713, 720-21 (7th Cir. 2001) (applying Indiana law). The duty to warn consists of two duties: (1) to provide adequate instructions for safe use, and (2) to provide a warning as to dangers inherent in improper use. *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. App. 1997). If a duty to warn exists, a manufacturer has a duty to warn those persons it should reasonably foresee would be likely to use its product or who are likely to come into contact with a latent danger inherent in the product’s use. *Id.* at 162. Whether a duty to warn exists is a question of law for the court to decide. See *Ritchie*, 242 F.3d at 721.

However, there is no duty to warn of known or obvious risks. See, *e.g.*, *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 655 (7th Cir. 1998) (applying Indiana law, no duty to remind consumers of known danger, such as fact that coffee is served hot); *American Optical Co. v. Weidenhamer*, 457 N.E.2d 181, 188 (Ind. 1983) (no duty to warn where “the risk of injury from the breaking of the lens [of safety glasses] through some fortuitous event is obvious to all”). This concept

has been described as the “open and obvious” rule or defense. See *Bemis Co. 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-Tokai Corp.*, 651 N.E.2d 810, 815 (Ind. App. 1995) (no duty to warn of the obvious risks inherent in butane cigarette lighter).

The Inlow Plaintiffs contend that the open and obvious rule is not available to the Eurocopter Defendants since the Indiana Supreme Court’s decision in *Koske v. Townsend Engineering Co.*, 551 N.E.2d 437 (Ind. 1990). In *Koske*, the Indiana Supreme Court held that the “open and obvious rule” from *Bemis* did not apply to *strict* product liability claims under an earlier version of the IPLA because the defense was not listed in the statute. See *Koske*, 551 N.E.2d at 441-42. 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).

As discussed above, the 1995 amendments to the Indiana Product Liability Act abolished strict liability in failure to warn cases. 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 the Inlow Plaintiffs' claims. Although the plaintiffs described their statutory claims as "strict liability" claims in the Second Amended Complaint, they acknowledge in their brief that the claims are based on negligence. See Pl. Br. at 3.

The *Bemis* court articulated the following test for determining whether a danger is open and obvious: "to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product." *Bemis*, 427 N.E.2d at 1061; *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 938 (Ind. App. 1994). In examining whether a given danger is open and obvious, the court employs an objective test based on what the user of the product should have known. *E.g.*, *Schooley*, 631 N.E.2d at 939; *Ragsdale v. K-Mart Corp.*, 468 N.E.2d 524, 527 (Ind. App. 1984). However, "if people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious." *Anderson*, 67 F.3d at 621-22 (internal quotation marks and citation omitted).

There is a presumption against granting summary judgment on the basis of the open and obvious danger rule, though summary judgment can be appropriate in some cases. See *Anderson*, 67 F.3d at 623 (affirming summary judgment where risk of electric shock was open and obvious to journeyman electrician working on an ungrounded, powered sign from a noninsulated metal crane basket). The application of the open and obvious rule may be decided as a matter of law by the court if “from the uncontested facts no reasonable jury properly instructed in Indiana law could infer that the danger was not open and obvious.” *Ruther v. Robins Eng’g & Constructors*, 802 F.2d 276, 278 (7th Cir. 1986).

The Inlow Plaintiffs’ negligence and product liability claims depend on whether the relevant risks should have been obvious to foreseeable users of the helicopter including the Consec pilots who operated the Dauphin and/or to Mr. Inlow, a passenger. For purposes of this case, it is useful to distinguish between the general risk that moving rotor blades pose to passengers and the more specific enhanced risk of “blade flap” posed when the moving rotor blades are decelerating with the engines off, especially in windy conditions. The difference may be important because of the different levels of knowledge needed to recognize the different risks. See, e.g., *Hoffman v. E. W. Bliss Co.*, 448 N.E.2d 277, 285 (Ind. 1983) (“The question turns on how broadly one construes the word ‘danger’ in the ‘open and obvious danger rule’”; distinguishing between general danger that sheet

metal press posed to operator, which was open and obvious, and more specific danger of unexpected malfunction, which was hidden).

1. *The General Risk Posed by Moving Rotor Blades*

The general risk of moving rotor blades is obvious to anyone, including passengers with no special training or expertise in helicopter flight or operations. With the cyclic control in neutral and under full power of 320 to 370 rpms, the 19-foot long rotor blades were moving about three feet above Mr. Inlow's head. See Deaton Dep. at 183; Allard Dep. at 54. The blades were moving at about 150 rpms when they struck Mr. Inlow. Allard Dep. at 154. At that speed, geometry and arithmetic indicate that the tips of the rotor blades (diameter 38 feet, 2 inches) would have been moving approximately 200 miles per hour. The need to avoid coming in contact with moving blades is open and obvious to any reasonable person.

Under Indiana law, a manufacturer has no duty to warn of known dangers. *E.g.*, *McMahon*, 150 F.3d at 655 (no duty to warn that coffee is served hot); *Ragsdale*, 468 N.E.2d at 527 (lawn mower blade poses an open and obvious danger to a person placing her hand into the running mower); *Bryant-Poff, Inc. v. Hahn*, 454 N.E.2d 1223, 1224-25 (Ind. App. 1982) (reaching hand into chain and sprocket assembly was an obvious danger); see also *Motley v. Bell Helicopter Textron, Inc.*, 892 F. Supp. 249, 253 (M.D. Ala. 1995) ("It is difficult to conceive of

a more open and obvious hazard than that presented by the rotating blades and swash plate of a helicopter. . . No reasonable person would need to be told that caution should be exercised when working in close proximity to those components of a helicopter.”).

In addition, even though the standard is an objective one, any reasonable jury would have to find on this record that Mr. Inlow himself actually knew of the general risk. He had flown frequently on this helicopter for five years. He had received warnings from crew members in the past to stay away from moving rotor blades, including warnings to avoid the area in front of the helicopter when he exited while the rotor blades were still moving. In addition, Mr. Inlow also had received instructions from Consec pilots about how to exit the aircraft. On at least three occasions, Consec pilots directed Mr. Inlow to exit the helicopter at a 90 degree angle, either orally or with a hand motion.

The Inlow Plaintiffs have dismissed the Eurocopter Defendants’ contention that the risk was known and obvious, and that Mr. Inlow knew about the risks, by pointing out that there is no evidence that Mr. Inlow was suicidal. See Pl. Br. at 1; see also *Ruther v. Robins Eng’g and Constructors*, 802 F.2d 276, 279 (7th Cir. 1986) (reversing summary judgment for manufacturer on open and obvious issue: “[c]ertainly, none [of the four employees] would have been bent on suicide”). That’s true, but it does not mean that the risk was not open and obvious. Many

people routinely take risks that are potentially deadly, like jaywalking or driving too fast on icy roads. The fact that many people take those risks without being injured or killed does not diminish the obviousness of the possibility of a serious or fatal accident.

Accordingly, the Eurocopter Defendants cannot be held liable on the theory that they failed to warn Conesco pilots or helicopter passengers like Mr. Inlow of the obvious fact that moving rotor blades can be extremely dangerous.

2. *The Specific Risk of Blade “Flap” with Decelerating Rotor Blades and the “Sophisticated Intermediary” Issue*

Assuming that the difference between the general risk posed by moving blades and the enhanced risk posed by decelerating blades is legally relevant here, see *Hoffman v. E. W. Bliss Co.*, 448 N.E.2d at 285, the Eurocopter Defendants are still entitled to summary judgment. The more specific risk of blade “flap” or flex posed by decelerating rotor blades is known, according to the evidence here, to any trained helicopter pilot. Some of the extensive evidence showing such knowledge on the part of all pilot-witnesses is set forth above at pages 15-16. That risk was actually known to pilot Deaton at the time of the accident. He testified that he needed no warning of the risk because he already knew about it. Deaton Dep. at 61. A reasonable jury could not reach any other conclusion on this record.

However, the same cannot be said about passengers. To appreciate the specific and enhanced risk, one must have some understanding of aerodynamics and the forces that affect the movement of rotor blades. There is no reason to assume that the average helicopter passenger would appreciate the fact that risks are greater when rotor blades are decelerating than when they are under full power. A passenger accustomed to walking near fully powered rotor blades, which move in a more stable plane, might not appreciate the greater risk posed by gusting winds as the slowing blades flap below the original plane of travel.

This difference in knowledge brings into play the “sophisticated intermediary” doctrine under Indiana product liability law. The doctrine provides that there is no duty to warn when the product is sold to a “knowledgeable or sophisticated intermediary” whom the manufacturer has adequately warned. *Taylor*, 150 F.3d at 808. In *Taylor*, the Seventh Circuit explained that the doctrine makes “particular sense where the manufacturer cannot control how the intermediary will use the product” and “where the form of the product does not easily lend itself to direct labeling.” “In order for the exception to apply, however, the intermediary must have knowledge or sophistication equal to that of the manufacturer, and the manufacturer must be able to rely reasonably on the intermediary to warn the ultimate consumer.” *Id.*

The sophisticated intermediary doctrine grew out of cases claiming that manufacturers of prescription drugs failed to give the patients adequate warnings about certain dangers. The doctrine focused on the role of the patient's physician:

Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative. Pharmaceutical companies then, who must warn ultimate purchasers of dangers inherent in patent drugs sold over the counter, in selling prescription drugs are required to warn only the prescribing physician, who acts as a "learned intermediary" between manufacturer and consumer.

Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir. 1974), quoted in *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 549 (Ind. App. 1979) (recognizing doctrine in Indiana); see also *Phelps v. Sherwood Medical Industries*, 836 F.2d 296, 303 (7th Cir. 1987) (affirming verdict for catheter manufacturer under Indiana law; no duty to warn patient or doctor about risk that doctor recognized himself); *Peters v. Judd Drugs, Inc.*, 602 N.E.2d 162, 164-65 (Ind. App. 1992) (affirming summary judgment; pharmacy had no duty to warn patient about danger of poisonous chemical that was provided to medical clinic and mistakenly given to patient); *Ingram v. Hook's Drugs, Inc.*, 476 N.E.2d 881, 885-87 (Ind. App. 1985) (affirming summary judgment; pharmacy owed no duty to warn patient of possible side effects of prescription drug).

The reasoning behind the sophisticated intermediary defense extends beyond cases of prescription drugs and medical devices. The critical foundations for the doctrine are the specialized knowledge or training of the intermediary and the need for or value of the exercise of individualized judgment in specific situations. The doctrine has been applied in a range of other situations in Indiana law, often on summary judgment. See, *e.g.*, *Taylor*, 150 F.3d at 808-09 (affirming summary judgment under Indiana law for supplier of PCBs; buyer Westinghouse Electric Corp. was sophisticated intermediary in using PCBs to manufacture power transformers, so supplier had no duty to warn individual employees of Westinghouse of health and environmental dangers); *Burton v. L. O. Smith Foundry Products Co.*, 529 F.2d 108, 111-12 (7th Cir. 1976) (affirming summary judgment for defendant under Indiana law; manufacturer of flammable liquid had no duty to warn all individual employees of buyer about dangers that were obvious to those who actually used liquid); *Downs v. Panhandle Eastern Pipeline Co.*, 694 N.E.2d 1198, 1212 (Ind. App. 1988) (affirming summary judgment; supplier of natural gas had no duty to warn a gas distributor of dangers of natural gas already known to distributor); *York v. Union Carbide Corp.*, 586 N.E.2d 861, 868-69 (Ind. App. 1992) (affirming summary judgment; supplier of argon gas to steel manufacturer had no duty to warn all individual employees of buyer after it had warned those employees actually receiving the product).

The Conseco pilots in this case, and pilot Deaton in particular, qualify as sophisticated intermediaries with respect to the dangers of decelerating helicopter rotor blades. First, the Eurocopter Defendants sold the Dauphin to Conseco for operation by trained, professional, licensed pilots. At the risk of stating the obvious, a helicopter is a complex piece of machinery that requires special training to operate safely. Also, a manufacturer cannot control how a pilot will use a helicopter. See *Taylor*, 150 F.3d at 808 (noting that manufacturer's inability to control intermediary's use of product tends to support defense).

Second, the pilots had knowledge or sophistication regarding this risk equal to that of the manufacturer. All the Conseco pilots testified that they were aware of the risk that decelerating rotor blades could flex down and strike a person. Deaton, who piloted the Dauphin on May 21, 1997, knew about this risk both from his training and because it simply was "intuitive." Deaton himself was uncomfortable with Conseco's deboarding policy. He would not have implemented that policy if it were up to him, and he complained about the policy to Conseco along with other pilots. Pilots like Deaton simply did not need to be warned about the risks associated with decelerating rotor blades. They already knew about them. The evidence here shows that the risks of blade flap are widely known from publicly available information. See Def. Exs. R, S, T, V, W; Pl. Ex. 1; see also 29 C.F.R. § 1910.183. There is no evidence here that the Eurocopter Defendants knew more about the risks of blade flap than helicopter pilots.

The sophisticated intermediary doctrine also requires that “the manufacturer must be able to rely reasonably on the intermediary to warn the ultimate consumer,” or in this case the passengers. See *Taylor*, 150 F.3d at 808, citing *Natural Gas Odorizing*, 685 N.E.2d at 164. That condition is clearly met in this case. A passenger helicopter will be piloted by a trained pilot who is responsible for the safety of his passengers. A manufacturer can reasonably rely on the pilot to make a judgment about safe boarding and exiting for passengers under whatever circumstances the pilot might confront. A pilot also has the ability to control the movements of passengers, whether that ability is exercised or not. In this case, after the engines were turned off and the rotor blades were starting to decelerate, the flight observer (Conseco employee Michael Sojka) exited the helicopter and “hugged the nose” because of the moving rotor blades. He then opened the door for the passengers. Rather than guide the passengers or control their movements, the flight observer retrieved their briefcases from the cargo hold, leaving the passengers unescorted as they exited the area under the rotor. A manufacturer is not required to predict that pilots or crews (or those who supervise them in a corporate situation) will be so lax about operational safety with passengers, which is also the subject of pilot training.

Some “sophisticated intermediary” cases focus on the adequacy of the warnings to the intermediary. See, *e.g.*, *York*, 586 N.E.2d at 869-71. In this case, the Eurocopter Defendants did not warn the Conseco pilots about the risks of

blade flap when rotor blades were decelerating. However, the doctrine has also been applied when the manufacturer did not warn the sophisticated intermediary at all about a danger, as long as the manufacturer could reasonably expect the “sophisticated intermediary,” such as the pilot, to know about the risk. “Actual or constructive knowledge may arise where either the supplier has provided an adequate explicit warning of such dangers *or information of the product’s dangers is available in the public domain.*” *Smock Materials Handling Co., Inc. v. Kerr*, 719 N.E.2d 396, 403 (Ind. App. 1999) (emphasis added).

In this case, the Eurocopter Defendants have presented extensive evidence showing that the risks posed by decelerating rotor blades, especially in gusty wind conditions, were widely known to helicopter pilots. That evidence includes the testimony from the pilot witnesses in this case. That evidence also includes the documents from the public domain quoted above – the FAA advisory circulars, the occupational safety regulations, the pilot training materials, and the safety manual of the Helicopter Association International – which provide extensive warnings to helicopter pilots about the same danger that the Inlow Plaintiffs contend the Eurocopter Defendants had a duty to warn against.

A manufacturer does not have a duty to warn the sophisticated intermediary “of those dangers which he already knew.” *Phelps*, 836 F.2d at 304 (manufacturer had no duty to warn surgeon that heart catheter might break if attempt were

made to remove it after it had been sutured to pulmonary vein). Thus, surgeons do not need to be warned by manufacturers of scalpels about the risk of infection during surgery. Natural gas distributors do not need to be warned that natural gas is flammable and dangerous. See *Downs*, 694 N.E.2d at 1212. Similarly, helicopter pilots do not need to be warned that decelerating rotor blades can flex below the normal plane of their movement and injure or kill persons in their path.¹⁰

Indiana courts have indicated that the sophisticated intermediary defense requires consideration of several factors derived from comment n to Section 388 of the Restatement (Second) of Torts: “the likelihood or unlikelihood that harm will occur if the intermediary does not pass on the warning to the ultimate user, the trivial nature of the probable harm, the probability or improbability that the particular intermediary will not pass on the warning and the ease or burden of the giving of the warning by the manufacturer to the ultimate user.” *Ritchie*, 242 F.3d at 724, quoting *Natural Gas Odorizing*, 685 N.E.2d at 163, citing *Dole Food v. N.C. Foam Indus., Inc.*, 935 P.2d 876, 881 (Ariz. 1996), quoting *Shell Oil Co. v. Gutierrez*, 581 P.2d 271, 278 (Ariz. App.1978), citing Restatement (Second) of Torts § 388, comment n. The court in *Natural Gas Odorizing* cautioned that these factors will

¹⁰For similar reasons but at a more prosaic level, an automobile manufacturer has no duty to warn drivers that it can be easy to lose control on icy roads or that their passengers should wait until the vehicle has stopped completely before they get out.

usually cause the sophisticated intermediary doctrine to present questions of disputed fact:

Whether a manufacturer has discharged its duty under the sophisticated intermediary doctrine is almost always a question for the trier of fact. *See Dole Food*, 188 Ariz. at 303, 935 P.2d at 881. The manufacturer's reliance on the intermediary's alleged sophistication may be more or less reasonable given the product's nature, complexity and associated dangers, the likelihood that the intermediary will communicate warnings to the ultimate consumer, the dangers posed to the ultimate consumer by an inadequate or nonexistent warning, and the feasibility of requiring the manufacturer to directly warn the product's ultimate consumers. Ultimately, those factors must be balanced by the trier of fact.

685 N.E.2d at 164. Notwithstanding these cautions, of course, many of the Indiana cases on the sophisticated intermediary doctrine have been decided as a matter of law. *See, e.g., Taylor*, 150 F.3d at 808-10 (affirming summary judgment); *Burton*, 529 F.2d at 111-12 (affirming summary judgment); *Downs*, 694 N.E.2d at 1208 (affirming summary judgment); *York*, 586 N.E.2d 861 (affirming summary judgment); *Peters*, 602 N.E.2d at 164 (affirming summary judgment); *Ingram*, 476 N.E.2d at 885-887 (affirming summary judgment).

In terms of the risks of decelerating blades, the likelihood that harm will occur if the intermediary did not warn passengers of the danger appears to have been extremely low – passengers are aware of the general danger of moving rotor blades, and it appears to take an unusually large “blade flap” to take the Dauphin's blades low enough to hit a man standing upright. Of course, in this

case, no one would dream of calling the harm of a strike “trivial.” But there was no reason for Eurocopter Defendants to expect that the Consecos pilots would fail to control their passengers or to give adequate warnings under the circumstances.

As for the ease or burden of manufacturer warnings directly to passengers, this court addressed that issue when granting the motion for summary judgment filed by the supplier of the automated passenger briefing system installed in Consecos Dauphin. If the message had been played, it would have instructed Mr. Inlow to leave his seatbelt on until the seat belt light was turned off and that the “crew will assist you in departing the aircraft after we have completely stopped.” The court wrote: “In light of the pilot’s control of the aircraft, crew and passengers, and the varying circumstances for landings and exits, which may include exits with the rotors still turning, it is difficult to see both how a more specific briefing would be appropriate and how a different briefing would have avoided an accident that happened under the supervision of the pilot and crew.” 2001 WL 331625, at *21. In short, a helicopter manufacturer is entitled to rely on trained pilots to manage the obvious risks that moving (and especially decelerating) rotor blades can pose to passengers as they board and exit the aircraft.

The Inlow Plaintiffs have emphasized that the Eurocopter Defendants held the Dauphin out as being safer than other helicopters, and that it appeared safer,

because of its high set rotor blades. In addition, Deaton, Rice, and Hilbert testified that they would not have allowed passengers to exit the helicopter under moving blades if they had known that the rotor blades could go as low as 5 feet, 2 inches, based on the drawing in the Coast Guard manual. This evidence does not create a disputed issue of material fact for trial.

First, the evidence regarding the calculations that Eurocopter performed for the Coast Guard evidence shows that when (a) the Dauphin's rotor blades are under full power at 350 rpms, and (b) the cyclic control is pushed to 13 degrees forward, far beyond its normal operating limit of 5.2 degrees, the rotor blades have only 5 feet, 2 inches clearance in front of the helicopter. When Deaton was shown the diagram showing ground clearance of 5 feet, 2 inches, without being provided the information about the conditions (full power and collective at 13 degrees forward), he testified that the information told him nothing about the extent of the danger of blade flap with slowing blades. Deaton Dep. at 102. The Coast Guard measurement simply does not provide any meaningful information about how low the rotor blades might flap when decelerating without power in gusty conditions with the cyclic control in neutral position. The Coast Guard measurement does not show that the Eurocopter Defendants had any specialized knowledge about the risks of blade flap that would undermine reliance on the sophisticated intermediary doctrine.

Second, the undisputed evidence shows that Deaton and the other Consecos pilots were aware of the risk of blade flap. They did not know *exactly* how low the blades might flap under any given conditions, but no one else had that information, either. The risk itself is no less obvious because precise details about the degree or nature of the risk are not obvious. See *McMahon*, 150 F.3d at 656 (where plaintiffs knew coffee burns, no duty to provide specific warning about third-degree burns: “[Indiana law] expects consumers to educate themselves about the hazards of daily life – of matches, knives, and kitchen ranges, of bones in fish, and of hot beverages – by general reading and experience”). As Deaton testified, there is always a possibility of a rotor blade strike when working or walking around helicopters.

Third, there is no evidence that the Eurocopter Defendants had tested the maximum extent of blade flap. (Also, it is hard to imagine how reliable such results would be in light of the varying conditions a helicopter might encounter.) There is no evidence that the Eurocopter Defendants provided any incorrect specifications about the maximum extent of blade flap for decelerating blades. The risk called for an individual pilot to exercise trained judgment under the particular circumstances.

There also is no evidence that the Eurocopter Defendants ever encouraged Consecos to load or unload passengers under decelerating rotor blades. On the

contrary, the AEC manual states that passengers should exit the helicopter after the blades have stopped rotating “when practical.” See Pl. Ex. 12. The Eurocopter Defendants left to trained operators like the Conseco pilots the decision whether to unload passengers while the blades were moving. It is true that in some emergency applications, such as by law enforcement, emergency medical personnel, and military and search and rescue applications, the relatively high rotors of the Dauphin helicopter make it safer to work under the rotor blades when they are spinning under full power, under the control of the pilot. But there is no evidence that the Eurocopter Defendants ever encouraged the Conseco practice of loading and unloading passengers under decelerating blades.

The Inlow Plaintiffs also rely on the evidence from former AEC chief pilot Shirey to the effect that it was “routine” for helicopters to be loaded or unloaded with decelerating rotor blades, in both civilian and military uses. Shirey Dep. at 41. The court assumes that testimony is correct, but it does not present a genuine issue of fact for trial. The sophisticated intermediary doctrine assumes that, just as a physician can evaluate the risk of giving a particular patient a prescription drug, a helicopter pilot can exercise judgment about whether it is sufficiently safe under the circumstances to allow passengers to board or exit with decelerating blades. The fact that many pilots exercise such judgment safely does not show that helicopter manufacturers have a duty to warn about the dangers of decelerating blades that are known to helicopter pilots. Shirey himself

acknowledged, for example, that he knew that unloading passengers with the blades decelerating was “probably the least desirable way to do it.” Shirey Dep. at 40. He added that he would conduct that operation by either escorting passengers, instructing them to observe the rotor-disk plane, to use caution, and to keep their heads down. *Id.* at 41-42.

Thus, the Inlow Plaintiffs’ negligence and product liability claims fail as a matter of law because the Eurocopter Defendants had no duty to warn of the risks associated with helicopter rotor blades. Accordingly, the Dauphin helicopter was not defective under the IPLA.

B. *Unreasonable Danger*

The Inlow Plaintiffs’ product liability claim also fails because the undisputed evidence shows that the Dauphin helicopter, although dangerous, was not “unreasonably dangerous” under the IPLA. Under the Act, “unreasonably dangerous” “refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge about the product’s characteristics common to the community of consumers.” Ind. Code § 33-1-1.5-2(7); see also *Cox v. American Aggregates Corp.*, 580 N.E.2d 679, 685 (Ind. App. 1991). Although closely related to the question of whether a product is defective because of a failure to warn, a plaintiff must show that the

product was unreasonably dangerous as a separate element of a product liability claim. *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998).

The requirement that the product be in a defective condition “focuses on the product itself while the requirement that the product be unreasonably dangerous focuses on the reasonable expectations of the consumer.” *Welch*, 651 N.E.2d at 814. A product is not unreasonably dangerous if it “injures in a way which, by objective measure, is known to the community of persons consuming the product.” *Anderson v. P.A. Radocy & Sons, Inc.*, 865 F. Supp. 522, 531 (N.D. Ind. 1994), *aff'd*, 67 F.3d 619 (7th Cir. 1995).

Thus, a product “may be ‘dangerous’ in the colloquial sense but not ‘unreasonably dangerous’ . . . under the Act.” *Welch*, 651 N.E.2d at 814-15 (affirming summary judgment; although a cigarette lighter may be dangerous in the hands of a child, it is not “unreasonably dangerous” because an adult, the ordinary consumer, contemplates the risks posed by a lighter, including flame ignition and the dangers associated with children who play with lighters); accord, *Moss*, 136 F.3d 1175 (as a matter of law, BB gun was not “unreasonably dangerous” because people in the community knew it could cause serious physical injury); *Smith v. AMLI Realty Co.*, 614 N.E.2d 618, 622-23 (Ind. App. 1993) (although weight machine was potentially dangerous when used by children, it

was not “unreasonably dangerous” under the Act because it functioned properly as exercise equipment).

The Inlow Plaintiffs’ IPLA claim fails as a matter of law because Mr. Inlow’s death was caused by the known risk of physical injury from being struck by a decelerating rotor blade. The Dauphin did not place Mr. Inlow at risk “of injuries different in kind from those the average [user] might anticipate.” See *Moss*, 136 F.3d at 1175 (affirming summary judgment on failure to warn claim). Mr. Inlow was killed by the very risk that a reasonable passenger or pilot would have anticipated – a general risk anticipated by a reasonable passenger and the greater and more specific risk from decelerating blades anticipated by a reasonable pilot. The Dauphin was not unreasonably dangerous.

II. *Fraud and Constructive Fraud*

The Inlow Plaintiffs did not respond to the Eurocopter Defendants’ motion for summary judgment on their fraud and constructive fraud claims. Accordingly, the court grants the unopposed motion as to these claims.

Conclusion

Mr. Inlow’s death was tragic and avoidable. As a matter of law, however, his death was not the result of a defective product, it was not the result of a

manufacturer's failure to fulfill a duty to warn, and it was not the legal responsibility of the Eurocopter Defendants. The Inlow Plaintiffs' claims fail as a matter of law because the Eurocopter Defendants did not have a duty to warn Mr. Inlow or Conseco pilots about the known risks posed by helicopter rotor blades. In addition, as a matter of law, the Dauphin was not a defective and unreasonably dangerous product under the Indiana Product Liability Act. Accordingly, the Eurocopter Defendants' motion for summary judgment is granted. This decision resolves the last remaining claims in this consolidated action. The court will enter final judgment accordingly.

So ordered.

Date: April 16, 2002

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

James T. Crouse
Crouse Law Offices
First Union Capital Center
Suite 1700
150 Fayetteville Street
Raleigh, NC 27601

John R. Howie
Howie and Sweeney, LLP
Suite 1400, Park Place On Turtle Creek
2911 Turtle Creek Boulevard
Dallas, TX 75219

William V. Hutchens
Locke Reynolds, LLP
201 N. Illinois St., Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961

Gerard Lear
Speiser Krause
2300 Clarendon Boulevard
Suite 306
Arlington, VA 22201

Richard M. Malad
Cohen & Malad
136 North Delaware St.
Suite 300
Indianapolis, IN 46204

Joseph H. Yeager, Jr.
Baker & Daniels
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204

Jon C. Abernathy
Goodin & Kraege
8555 River Road
Suite 400
Indianapolis, IN 46240-4306

William V. Hutchens
Locke Reynolds LLP
201 N. Illinois St., Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961

Stephen C. Johnson
Lillick & Charles
Two Embarcadero Center
27th Floor
San Francisco, CA 94111

John D. Nell
Wooden McLaughlin & Sterner
1600 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204

Martin E. Rose
Rose Walker, LLP
1701 North Market Street, Suite 200
Dallas, TX 75202