

# RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCT LIABILITY

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## INTRODUCTION

From October 1995 to October 1996, the Indiana federal and state appellate courts addressed a number of issues specifically relating to product liability actions. The courts addressed the definition of a “product”; the economic loss rule; the strict liability of pharmaceutical companies under Indiana’s Blood Shield Statute; the retroactive application of amendments to the Product Liability Act; proof of a product defect where the product is destroyed; the open and obvious danger rule; alterations and misuse; the admissibility and use of expert scientific evidence in product liability actions; preemption by federal law; and the use of collateral estoppel in product liability cases.

### I. DEFINITION OF “PRODUCT”

#### A. *Electricity Is a “Product” Only When It Reaches the End User or Consumer*

In *Bamberger & Feibleman v. Indianapolis Power & Light Company*,<sup>1</sup> the law firm of Bamberger & Feibleman appealed the trial court’s entry of summary judgment in favor of Indianapolis Power & Light Company (IPL). The law firm had filed an action against IPL seeking damages resulting from the closure of their offices during an electrical power outage. They asserted strict liability and negligence claims, complaining of losses resulting from their inability to work while their law offices were closed. The alleged damages included lost billable time, lost time of staff employees, lost rental value of the law offices, and lost value of access to the parking garage. The trial court held that the “economic loss rule” precluded recovery on both the strict liability and negligence claims, and the firm’s complaint was dismissed with prejudice.<sup>2</sup>

On appeal, the Indiana Court of Appeals considered whether under Indiana’s Product Liability Act<sup>3</sup> (1) a claim arising from an electrical power outage is viable

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1. 665 N.E.2d 933 (Ind. Ct. App. 1996).

2. *Id.* at 935.

3. The Act provides in relevant part:

[A] person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property is subject to liability for *physical harm* caused by that product *to the user or consumer or to the user’s or consumer’s property* if that user or consumer

and (2) whether a claim of product defect that alleges only economic losses can be maintained against a public utility.<sup>4</sup>

In answering the first question, the court held that “[a] plain reading of the statute suggests that it does not apply in this case because the allegedly defective product did not reach the user or consumer.”<sup>5</sup> The court reasoned that, although electricity can be a product under the Act, “the electricity must be in a marketable and marketed state at the time it causes the injury in order to be treated as a product under the strict liability doctrine. Thus, it must be reduced from a transmission voltage to a consumption voltage.”<sup>6</sup> The court cited with favor its prior decision in *Petroski v. Northern Indiana Public Service Co.*,<sup>7</sup> where Judge Staton observed:

Technically, until the electricity reaches its destination in a home or factory, it is transmitted by equipment over lines under the exclusive control of [the electric company]. The electric company’s transmission and distribution lines are not a part of the end product which reaches the consumer as in the case of bottles and cans which are part of the finished product.<sup>8</sup>

The factual basis for the plaintiffs’ claim in *Bamberger* was the failure of the product to reach the user or consumer. The alleged “defect” existed in the underground power lines, which are not a part of the end product. Because the electricity had not reached its destination, it had not been placed into the stream of commerce.<sup>9</sup> Thus, the *Bamberger* court held that IPL could not be liable under the Act for an electrical power outage because no product had been delivered.<sup>10</sup> The court was not required to address whether the law firm could recover purely economic damages under the statute because the issue of whether the electricity

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.

IND. CODE § 33-1-1.5-3(a) (Supp. 1996) (emphasis added). Physical harm is defined in this statute as: “[B]odily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic losses from such damage.” *Id.* § 33-1-1.5-2(2).

4. *Bamberger*, 665 N.E.2d at 933-34.

5. *Id.* at 937.

6. *Id.* (citing *Public Serv. Ind., Inc. v. Nichols*, 494 N.E.2d 349, 355 (Ind. Ct. App. 1986)).

7. 354 N.E.2d 736 (Ind. App. 1976).

8. *Bamberger*, 665 N.E.2d at 937 (citing *Petroski*, 354 N.E.2d at 747).

9. *Id.*

10. *Id.*



could be considered a product was determinative.<sup>11</sup>

*B. Economic Losses Are Not Recoverable in Negligence Actions  
Premised on Product Defects*

With respect to the firm's negligence claim, the court held that the law firm did not incur a compensable injury.<sup>12</sup> "[W]hen a negligence action is premised on the failure of a product to perform as expected, economic losses are not recoverable unless such failure also causes personal injury or physical harm to property other than to the product itself."<sup>13</sup> The Indiana Court of Appeals noted that it had been reluctant to extend this economic loss rule to all actions for negligence;<sup>14</sup> however, the *Bamberger* court upheld the application of this rule in product actions under the following rationale:

At the heart of the question of whether economic damages can be recovered under a negligence theory is the basic distinction between the theories of tort and contract law. Negligence theory protects interests related to safety or freedom from physical harm. This includes not only personal injury but damage caused by defective personal property. However, when there is no accident and no physical harm so that the only loss is pecuniary in nature, courts have denied recovery under the rule that purely economic interests are not entitled to protection against mere negligence.<sup>15</sup>

The court refused to characterize the economic loss rule as either anachronistic or turning on luck:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the luck of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumers' demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the

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11. *See id.*

12. *Id.* at 939.

13. *Id.* at 938 (citing *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1091 (Ind. 1993)).

14. *Id.* (citing *Runde v. Vigus Realty, Inc.*, 617 N.E.2d 572, 578 (Ind. Ct. App. 1993)).

15. *Id.* (citations omitted).

manufacturer agrees that it will.<sup>16</sup>

The trial court's entry of summary judgment in favor of IPL was affirmed due to the negation of the damage element of the law firm's negligence claim.<sup>17</sup>

### C. *Selling a Product vs. Providing a Service*

In *Hill v. Reith-Riley Construction Co.*,<sup>18</sup> the plaintiffs sued two construction companies under Indiana's Product Liability Act, claiming that they had manufactured a component of a dangerously designed and defectively installed product. The contractors had, by agreement with the Indiana Department of Transportation, removed and reset guard rails along an existing roadway so that the shoulder of the road could be resurfaced. As part of the project, the contractors installed new concrete plugs and replaced some rusted rails. The contractors moved for summary judgment, arguing that they were not liable under the Act because they merely provided a service, rather than having sold a product. The trial court granted the motion, and the plaintiffs appealed.

The Indiana Court of Appeals noted that the Product Liability Act specifically excludes from the definition of "product" transactions that are "wholly or predominately" a service.<sup>19</sup> "Predominately" is defined as "for the most part."<sup>20</sup> The contractors' agreement with the Indiana Department of Transportation required the removal and resetting of thousands of feet of guard rail incidental to the resurfacing of the highway. The plaintiffs admitted that the resurfacing of the highway was a service. The court stated that the plaintiffs' product liability claim "must fail because the removal and resetting of the guard rail does not fall within the statutory definition of a product for the purposes of the Product Liability Act."<sup>21</sup>

In support of its holding, the court cited *Sapp v. Morton Buildings, Inc.*,<sup>22</sup> a Seventh Circuit opinion involving a similar issue: "whether the remodeling of a barn into a stable was a service or the sale of a product under Indiana's Product Liability Act."<sup>23</sup> In *Sapp*, all of the materials used to remodel the barn were manufactured and custom-fitted at the site. Nonetheless, the Seventh Circuit ruled that the transaction was primarily a sale of a service, affirming the trial court's grant of summary judgment in favor of the defendant.<sup>24</sup> The *Hill* court considered resurfacing a road to be analogous to remodeling a barn.<sup>25</sup> Moreover, new materials were used much less extensively in *Hill* than in *Sapp*, "making the

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16. *Id.* at 939 (quoting *Martin Rispens*, 621 N.E.2d at 1090).

17. *See id.*

18. 670 N.E.2d 940 (Ind. Ct. App. 1996).

19. *Id.* at 943 (citing IND. CODE § 33-1-1.5-2(6) (Supp. 1996)).

20. *Id.* (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 927 (9th ed. 1983)).

21. *Id.*

22. 973 F.2d 539 (7th Cir. 1992).

23. *Hill*, 670 N.E.2d at 943.

24. *Sapp*, 973 F.2d at 543.

25. *Hill*, 670 N.E.2d at 943.



resurfacing project even more predominantly a service than the remodeling of the barn.”<sup>26</sup> Consequently, the “incidental installation of the new concrete plugs and rails” did not change the predominate thrust of the contract from “service” to “product.”<sup>27</sup>

## II. INDIANA’S BLOOD SHIELD STATUTE

In *JKB, Sr. v. Armour Pharmaceutical Co.*,<sup>28</sup> the Indiana Court of Appeals defined the scope of Indiana’s Blood Shield Statute,<sup>29</sup> which precludes strict liability actions against certain entities involved with the procurement and processing of whole blood, plasma, blood products, blood derivatives, and other human tissues.<sup>30</sup> In *JKB*, the plaintiff alleged that several pharmaceutical companies were negligent and strictly liable in tort for the plaintiff’s contraction of AIDS from blood factor concentrate used in the treatment of hemophilia.

The pharmaceutical companies moved for summary judgment with respect to *JKB*’s strict liability count, arguing that under Indiana’s Blood Shield Statute, the provision of factor concentrate constituted a rendition of a service and not the sale of a product and thus could not give rise to a product liability action.<sup>31</sup> After the trial court granted the pharmaceutical companies’ motion, the Indiana Court of Appeals accepted jurisdiction of the plaintiff’s interlocutory appeal.

In their summary judgment motions, the pharmaceutical companies argued that (1) they each constituted a “storage facility,” and (2) they satisfied the Blood Shield Statute’s requirement that they be licensed “under the laws of any state for storage of human bodies or parts thereof” by virtue of their licenses issued by the FDA for the manufacture of blood products.<sup>32</sup> The Indiana Court of Appeals strictly construed the Blood Shield Statute, finding that it is in derogation of the common law.<sup>33</sup> Under this strict construction, the court held:

[W]e simply cannot conclude that our legislature intended to include a pharmaceutical company, which commercially produces blood products

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26. *Id.*

27. *Id.*

28. 660 N.E.2d 602 (Ind. Ct. App. 1996), *trans. denied*.

29. IND. CODE § 16-41-12-11 (1993).

30.

[The] procurement, processing, distribution, or use of whole blood, plasma, blood products, blood derivatives, or other human tissue, such as corneas, bones, or organs, by a *bank, storage facility or hospital*; . . . is the rendition of a service and not the sale of a product. Such services do not give rise to an implied warranty of merchantability or fitness for a particular purpose, nor do the services give rise to strict liability in tort.

*Id.* (emphasis added). “Bank or storage facility” is defined in the Uniform Anatomical Gift Act as a “facility license, accredited or approved under the laws of any state for storage of human bodies or parts thereof.” *Id.* § 29-2-16-1.

31. *JKB*, 660 N.E.2d at 604.

32. *Id.* at 605.

33. *Id.* at 604-05.

for mass distribution, as an entity within the same class described as an organ or blood “[b]ank or storage facility.” The manufacture and distribution of blood products by pharmaceutical companies is better characterized as the sale of a product rather than a provision of a service. . . . It is quite unlikely that our legislature intended to include pharmaceutical companies in its definition of “[b]ank or storage facility” simply because the manufacture or production of blood products incidentally involves their storage.<sup>34</sup>

The court reasoned that the legislature could have expressly listed pharmaceutical companies in the statute if it had intended for them to be shielded from liability.<sup>35</sup>

### III. NO RETROACTIVE APPLICATION OF AMENDMENTS TO PRODUCT LIABILITY ACT

During the last survey period, the Indiana legislature amended<sup>36</sup> the Comparative Fault Act<sup>37</sup> and the Product Liability Act.<sup>38</sup> During this survey period, the Indiana Court of Appeals addressed whether certain of these amendments could be applied retroactively.

Although not a product liability case, the court in *Chestnut v. Roof*,<sup>39</sup> provided some important dicta regarding the retroactivity of amendments to the Product Liability Act. In *Chestnut*, the plaintiff was injured in a car accident while a passenger in a car driven by her father. The plaintiff filed a lawsuit against the other driver. At the time the plaintiff’s cause of action accrued, section 34-4-33-2 of the Indiana Code defined a “non-party” under the Comparative Fault Act as “a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant.”<sup>40</sup> The plaintiff’s father could not be named as a non-party because Indiana’s Guest Statute<sup>41</sup> precludes a child’s action against his or her parent. The father was not one who “is, or may be, liable” to the plaintiff.<sup>42</sup>

During the pendency of the action, the statute<sup>43</sup> was amended to change the definition of a non-party to “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.”<sup>44</sup> This permitted the allocation of fault to a non-party even

34. *Id.* at 605 (citation omitted).

35. *Id.*

36. Act effective July 1, 1995, No. 278, 1995 Ind. Acts 4051.

37. IND. CODE §§ 34-4-33-1 to -13 (1993 & Supp. 1996).

38. *Id.* §§ 33-1-1.5-1 to -10.

39. 665 N.E.2d 7 (Ind. Ct. App. 1996).

40. *Id.* at 8 (citing IND. CODE § 34-4-33-2 (1988)).

41. IND. CODE §§ 34-4-40-1 to -4 (1993).

42. *Chestnut*, 665 N.E.2d at 8.

43. IND. CODE § 34-4-33-2(a)(2) (Supp. 1996).

44. *Id.*



where that non-party could not be found liable to the plaintiff.<sup>45</sup> After the trial court permitted the defendant to amend its answer to name the plaintiff's father as a non-party, the plaintiff brought an interlocutory appeal.

The Indiana Court of Appeals held that, because the legislature did not express an intent to apply the amendments retroactively, the amendment must only be applied prospectively.<sup>46</sup> Rejecting the defendant's argument that the legislature intended that the amended definition of a non-party apply retroactively. The court relied in part on a memorandum opinion by the District Court for the Northern District of Indiana in *Smith v. Ford Motor Co.*,<sup>47</sup> in which Judge Lee held that amendments to the Product Liability Act that were omitted from the statute setting forth effective dates were to be applied prospectively only. The *Chestnut* court noted: "[I]f we were to accept [the defendant's] argument . . . , then necessarily the same interpretation would operate with respect to all of the amendments included in the statute. However, amendments that affect existing rights or obligations cannot be applied retroactively."<sup>48</sup> Several of the other amendments were found to affect substantive rights: the abolishment of strict liability in tort for design defect and duty-to-warn cases;<sup>49</sup> application of the Product Liability Act to all actions for physical harm brought by a consumer against a manufacturer or seller of a product regardless of the legal theory;<sup>50</sup> and, the abolishment of the state-of-the-art defense.<sup>51</sup> Therefore, the court concluded that the amendments to the non-party definition were not meant to be applied retroactively.<sup>52</sup>

#### IV. DESTRUCTION/LOSS OF PRODUCT AND "SPOILATION" OF EVIDENCE

In *Greco v. Ford Motor Co.*,<sup>53</sup> the plaintiffs brought an action against Ford on a design defect theory. After the accident, but before the lawsuit was filed, the vehicle was surrendered to the plaintiff's insurance company. Once the suit against Ford was contemplated, the plaintiffs attempted to re-obtain possession of the vehicle but were unsuccessful. Ford argued that the loss or destruction of various missing components of the vehicle deprived it of an adequate defense and requested dismissal of the action as a sanction. Ford cited a long list of authorities for the proposition that the product is central to the action and, without the entire

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45. See *Chestnut*, 665 N.E.2d at 8.

46. See *id.* at 9.

47. No. 1:93CV0143 (N.D. Ind. Nov. 2, 1995) (unpublished mem. opinion).

48. *Chestnut*, 665 N.E.2d at 10 (citing *Brane v. Roth*, 590 N.E.2d 587, 590 (Ind. Ct. App. 1992)).

49. See IND. CODE § 33-1-1.5-1 (Supp. 1996).

50. See *id.* § 33-1-1.5-3.

51. See *id.* § 33-1-1.5-4 (The old state-of-the-art defense statute was replaced with a new statute that provides a rebuttable presumption that the product is not defective if it conformed to the state-of-the-art.).

52. See *Chestnut*, 665 N.E.2d at 10.

53. 937 F. Supp. 810 (S.D. Ind. 1996).

vehicle, it might be deprived of an “irreplaceable part” of its defense.<sup>54</sup>

The district court noted, however, that Ford ignored the fact that “allegations of a product or manufacturing defect differ from those alleging design defects.”<sup>55</sup> In design defect cases, the focus is on the design rather than the product itself.<sup>56</sup> “[A] design defect, if it exists, is a constant that is unaffected by the accident equation.”<sup>57</sup> Ford’s expert proposed that “[m]arks on the vehicle’s wheels and tires can provide critical, physical evidence about the causes of a rollover which cannot be obtained from other sources.”<sup>58</sup> The district court concluded that, although this evidence was undisputably gone and its absence might be prejudicial to Ford, the extent of the prejudice to Ford was insufficient to award the “draconian remedy” of dismissal.<sup>59</sup> Moreover, the court did not view the case as presenting intentional or even grossly negligent conduct resulting in the destruction of critical evidence.<sup>60</sup>

Likewise, the district court rejected Ford’s invitation to exclude the plaintiffs from presenting any expert testimony regarding the role of the Bronco II’s design or any of its components in causing the plaintiff’s accident.<sup>61</sup> Without evidence of design, there would not be a *prima facie* case,<sup>62</sup> which would be tantamount to a dismissal.<sup>63</sup>

## V. INCURRED RISK

In *Meyers v. Furrow Building Materials*,<sup>64</sup> the Indiana Court of Appeals was asked to consider whether concrete mix is an “unreasonably dangerous” product as defined by the Indiana Product Liability Act, and whether the mix used by the plaintiff was “defective” due to inadequate warnings. The court, however, addressed neither issue, concluding as a matter of law that the plaintiff incurred

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54. *See id.* at 814. *See e.g.*, *Pries v. Honda Motor Co.*, 31 F.3d 543, 544 (7th Cir. 1994) (“The car itself may be the best witness about the conditions at the time of the accident. Strong forces leave telltale signs in physical objects, signs that can be read by people who know what to look for and have the right instruments.”).

55. *Greco*, 937 F. Supp. at 814.

56. *Id.*

57. *Id.*

58. *Id.* at 815.

59. *Id.*

60. *Id.* at 815-16.

61. *Id.* at 816.

62. *See id.*

63. *See id.* Ford also argued that summary judgment was appropriate because the plaintiffs would not be able to establish the requisite elements of their product liability claim without the product. According to Ford, the plaintiffs would not be able to prove that the vehicle was configured the way that Ford designed it at the time plaintiffs crashed or that the Bronco II’s design, rather than some other factors, proximately caused the plaintiff’s injuries in this action. The district court held, however, that the plaintiff had established a *prima facie* product liability case. *Id.*

64. 659 N.E.2d 1147 (Ind. Ct. App. 1996), *trans. denied.*



the risk of injury.<sup>65</sup>

The plaintiff, an owner and operator of a campground, purchased thirty-five bags of Rite Concrete Mix from Furrow in order to build a goldfish pond at the campground. The plaintiff had been working with concrete for fourteen years prior to his injury. In the five-year period preceding his injury, he had poured approximately two thousand bags of packaged cement mix. He had previously used the brand of cement manufactured, distributed, and sold by the various defendants and had read the warnings on the bags. Although he had never suffered burns or skin irritation working with concrete before, he knew that other persons had suffered such injuries. After mixing and pouring approximately thirty bags of the concrete the following day, the plaintiff began to trowel some freshly mixed concrete onto an area of the pond. His knees slipped off the board he had placed into the wet concrete, and he immediately felt a burning sensation. Despite his extensive knowledge and experience, the plaintiff continued to work with his knees in wet concrete for five or six minutes. Afterwards, he used a garden hose to rinse off his pants. He did not remove his pants to check his knees or rinse the wet concrete mix off his skin. After finishing his work and cleaning up about twenty-five minutes later, he discovered the skin on his legs had been injured.<sup>66</sup>

Assuming for summary judgment purposes that wet concrete was an “unreasonably dangerous” product subject to the warning requirements of the Act, the court held that judgment for the defendants was proper because the plaintiff was aware of the risk of using the product that injured him.<sup>67</sup> According to the court, although the incurred risk defense is normally a question of fact, the defense may be found to exist as matter of law, if the evidence is without conflict and the sole inference to be drawn is that the plaintiff knew and appreciated the risk but nevertheless accepted it voluntarily.<sup>68</sup> More than a general awareness of the potential for injury is required—the plaintiff must have had actual knowledge of the specific risk.<sup>69</sup> On the other hand, the plaintiff need not have foresight that the particular injury which in fact occurred was going to occur.<sup>70</sup> Based upon the plaintiff’s extensive knowledge and experience and the facts and circumstances surrounding his injury, the court concluded that, as a matter of law, the plaintiff incurred the risk of injury.<sup>71</sup>

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65. *Id.* at 1149. “It is a defense to an action brought under the Products Liability Act that the user or consumer bringing the action knew of the defect and was aware of the danger in the product and nevertheless proceeded to make use of the product and was injured.” *Id.* (citing IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1996)).

66. *Id.* at 1150.

67. *Id.*

68. *Id.* at 1149 (citing *Perdue Farms, Inc. v. Pryor*, 646 N.E.2d 715, 718 (Ind. Ct. App. 1995)).

69. *See id.* at 1149-50.

70. *Id.* at 1150.

71. *Id.*

## VI. OPEN AND OBVIOUS DANGERS

In *Anderson v. P.A. Radocy & Sons, Inc.*,<sup>72</sup> the Seventh Circuit considered Indiana's open and obvious danger rule.<sup>73</sup> In that case, Anderson was electrocuted while repairing a commercial sign using a non-insulated crane with a metal basket. The trial court granted summary judgment in favor of the defendants; Anderson's estate appealed, arguing that Indiana's open and obvious danger rule does not bar the plaintiff's negligence claims and that the crane and/or generator was in a defective condition and unreasonably dangerous.

The Seventh Circuit noted that Indiana's open and obvious danger rule "bars assessing liability against a manufacturer in product cases based on negligence where defects are latent<sup>74</sup> and normally observable."<sup>75</sup> In determining whether a given danger is open and obvious, the court employs an objective test based on what the reasonable consumer would have known.<sup>76</sup> "[I]f 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."<sup>77</sup>

The *Anderson* court had to resolve the parties' dispute as to whether the open and obvious danger rule could be used as a defense to a product claim based upon negligence.<sup>78</sup> The estate argued that the open and obvious danger rule no longer exists as a defense to a negligence claim due to the enactment of the Comparative Fault Act.<sup>79</sup> The court noted, however, that each of the Indiana Supreme Court cases discussing the open and obvious danger rule suggest that the rule survives as to product liability claims based on negligence.<sup>80</sup> Furthermore, three product cases decided by the Indiana Court of Appeals suggested to the Seventh Circuit that the open and obvious danger rule survives.<sup>81</sup> Because the Indiana legislature

72. 67 F.3d 619 (7th Cir. 1995).

73. "Indiana's open and obvious danger rule bars assessing liability against a manufacturer in product cases based on negligence where defects are latent and normally observable." *Id.* at 621 (citation omitted).

74. The court should have used the word "patent."

75. *Id.* at 621 (citing *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814-15 (Ind. Ct. App. 1995)).

76. *Id.* at 622.

77. *Id.* (citing *McDonald v. Sandvik Process Sys., Inc.*, 870 F.2d 389, 394 (7th Cir. 1989) (quoting *Kroger Co. Sav-On Store v. Presnell*, 515 N.E.2d 538, 544 (Ind. Ct. App. 1987))).

78. Indiana law does not apply the common-law open and obvious rule to strict liability claims under Indiana's Product Liability Act because the open and obvious danger rule is not listed as an available defense under the Act. *Id.* (citing IND. CODE § 33-1-1.5-4(b) (Supp. 1996)). The Indiana Legislature replaced this defense with the defense of incurred risk. *See id.*

79. *Id.*

80. *Id.* (citing *Miller v. Todd*, 551 N.E.2d 1139, 1143 (Ind. 1990); *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 938 (Ind. Ct. App. 1994) (relying on *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981); *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437, 442 (Ind. 1990)).

81. *See id.* (citing *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814-15 (Ind. Ct. App.



did not expressly abrogate the open and obvious danger rule and the state's lower courts continued to apply it after the enactment of comparative fault, the Seventh Circuit held that the open and obvious danger rule may be raised to defeat a product claim based on negligence.<sup>82</sup>

The court then turned to whether the lower court correctly applied the open and obvious danger rule to summarily resolve the case before it. The estate conceded that the decedent realized the metal basket and metal crane arm would not provide him protection from an electrical shock. In addition, the decedent's co-worker testified that he was aware that the generator did not have a ground fault interrupter (GFI). The court reasoned:

[R]easonable journeymen electricians would be aware of the hazards associated with a noninsulated crane, metal basket, and generator without a GFI. That the tools in question were not neophyte-safe does not mean that the tools were unreasonably dangerous. Instead, reasonable journeymen electricians would recognize that the tools must be used with a certain degree of caution. Anderson . . . used caution when [he] disengaged power from the sign once Anderson had experienced the first shock. . . . The precaution of disengaging power from the sign illustrates that the men were aware that electricity could surge through the system. It was only after Anderson believed he had repaired the sign that the power was again engaged. Unfortunately, Anderson was mistaken in believing that he had repaired the sign. Without precautions, he reached for his tools and was electrocuted. The alleged danger surrounding the products was open and obvious.<sup>83</sup>

The decedent was aware that both caution and certain precautions were necessary to safely complete the repair of the sign. Therefore, the danger surrounding the crane and the generator constituted a recognized condition whose potential harm could have been avoided with the proper precautions.<sup>84</sup>

## VII. ALTERATION AND MISUSE

In *Leon v. Caterpillar Industrial, Inc.*,<sup>85</sup> the Seventh Circuit determined that the plaintiff failed to establish the prerequisites to impose strict liability upon the defendant because the defendant's product was substantially altered by the time it reached the user.<sup>86</sup> The plaintiff was injured while operating a Caterpillar forklift at Inland Steel ("Inland"). Inland purchased its Caterpillar forklifts from the Caterpillar dealer, Calumet. Inland required that each forklift be equipped

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1995); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990); *Moore v. Stizmark Corp.*, 555 N.E.2d 1305 (Ind. Ct. App. 1990)).

82. *Id.* at 623.

83. *Id.*

84. *Id.* at 624.

85. 69 F.3d 1326 (7th Cir. 1995).

86. *Id.* at 1341.

with a deadman's switch. Because Caterpillar neither manufactured nor installed a deadman's switch, Calumet installed a deadman's switch manufactured by one of Caterpillar's competitors. Additionally, when Inland requested that the forklifts be equipped with bucket seats, Calumet replaced the Caterpillar seats with the competitor's seats. The deadman's switch was activated when pressure was released when the operator arose from the seat. Although Caterpillar was aware of Inland's specifications and Calumet's alterations, it did not inspect the forklifts after the alterations, nor did it consult with Calumet about the alterations.

The plaintiff's job at Inland required him to use one of the altered Caterpillar forklifts. When the plaintiff dismounted the forklift, the deadman's switch should have disengaged the transmission gears. Instead, the forklift suddenly lurched forward, striking the plaintiff in the back and pinning him against a steel column. Heat from a nearby blast furnace caused the forklift seat to collapse, which led to the deadman switch's malfunction.

The court noted that "Indiana courts have held that any change which increases the likelihood of a malfunction . . . is a substantial change."<sup>87</sup> The court then analyzed the facts with a focus on whether the alterations were foreseeable to Caterpillar. The alleged defect in the forklift was the deadman's switch and seat, which was added by someone other than the manufacturer. Caterpillar was not consulted by Calumet and was unaware that the deadman's switch would be joined to a seat other than its own. In fact, it had no knowledge that its seats would be replaced at all. Thus, Caterpillar had no duty to ensure that its competitor's seats would not malfunction in the furnace building merely because its representatives had knowledge that the forklifts would be operated in an area of extreme heat.<sup>88</sup> The deadman's switch "affect[ed] the very operation and control of the unit, and its addition constituted a substantial change because by its very installation, it increased the likelihood that the unit would malfunction."<sup>89</sup> Under the circumstances, the court concluded that the forklift was substantially altered by the time it reached Inland.<sup>90</sup>

The plaintiff cited several non-Indiana cases holding that, because the manufacturer delegated the duty of completing the product to the dealer, the manufacturer would be held liable for any errors on the part of the dealer due to faulty assemblies that were reasonably foreseeable.<sup>91</sup> The court found these cases distinguishable because Caterpillar had delivered a fully assembled product to Calumet.<sup>92</sup> Furthermore, the parties did not dispute the fact that the forklift was *not* in a defective condition or unreasonably dangerous at the time it left Caterpillar. Caterpillar had no knowledge that the deadman's switch would be joined to a seat other than the one it had installed on the forklift before it left the

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87. *Id.* at 1339 (quoting *Bishop v. Firestone Tire & Rubber Co.*, 814 F.2d 437, 443 (7th Cir. 1987)).

88. *See id.* at 1339-40.

89. *Id.*

90. *Id.* at 1338.

91. *Id.* at 1340.

92. *Id.*



factory. Caterpillar did not participate in the design or the installation of the switch, nor did it delegate this task to the dealer where it delivered the assembled forklift as a complete and functional unit. The court refused to “be a party to the extension of strict products liability to such an unreasonable degree, especially when [the plaintiff] is trying to avoid the reality that if the deadman’s switch was, in fact, defective, he should have brought his claim against [the installer of that switch] and not Caterpillar.”<sup>93</sup>

The Seventh Circuit’s analysis properly focused on the core issue of foreseeability and is clearly consistent with Indiana decisions requiring that a product’s alteration be foreseeable in order to impose strict liability on the manufacturer.<sup>94</sup>

The plaintiff also argued on appeal that the trial court erred in instructing the jury on product misuse. The Seventh Circuit held that there was ample evidence presented at trial to support the instruction.<sup>95</sup> The plaintiff failed to properly inspect the forklift’s parking brake, failed to turn the ignition off before leaving the forklift unattended, and failed to lower the forks to the ground before dismounting.<sup>96</sup> Although noting that a product manufacturer may still be strictly liable in the face of misuse where the misuse is reasonably expected, the court concluded “it strains the limits of credulity for [the plaintiff] to assert that Caterpillar should have reasonably expected one to fail to comply with *four independent safety regulations*, when . . . if [the plaintiff] had followed any one of the precautions . . . he would not have been injured.”<sup>97</sup>

#### VIII. APPLICATION OF *DAUBERT* IN PRODUCTS CASES

In *Cummins v. Lyle Industries*,<sup>98</sup> a worker who severed three fingers while operating a trim press brought design defect and inadequate warning claims against the trim press manufacturer. The plaintiff appealed a jury verdict for the manufacturer, arguing that the district court abused its discretion in excluding the plaintiff’s expert testimony that there were feasible alternative designs which should have been used in the braking system of the trim press and in excluding that expert’s testimony about the life cycle of the trim press limit switch whose failure allegedly led to the accident.

In finding no abuse of discretion by the trial court, the Seventh Circuit first determined that the district court properly followed the analytical framework established in *Daubert*<sup>99</sup> Under *Daubert*, the court must first determine whether

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93. See *id.* at 1341.

94. See *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932 (Ind. Ct. App. 1994).

95. *Leon*, 69 F.3d at 1342.

96. *Id.* at 1342-43.

97. *Id.* at 1343-44 (footnotes omitted).

98. 93 F.3d 362 (7th Cir. 1996).

99. *Id.* at 367 (citing *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

In *Daubert*, the Supreme Court rejected the long-standing *Frye* test, which had required courts to exclude opinion testimony unless the expert’s technique was “generally accepted” as reliable in the

the expert's testimony is reliable.<sup>100</sup> Reliability is determined by insuring that the proffered testimony pertains to scientific knowledge or has been subjected to the scientific method.<sup>101</sup> Second, the district court must determine whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue.<sup>102</sup>

In *Cummins*, the plaintiff's expert had not tested his proposed alternative designs. He instead contended that his designs did not require testing because they involved simple components and widely accepted engineering principles. Stressing the importance of testing in alternative design cases,<sup>103</sup> the Seventh Circuit noted that the opinions offered by the plaintiff's expert clearly lent themselves to testing and substantiation by the scientific method. The district court was thus well within its discretion in concluding that the absence of such testing indicated that the expert's opinions could not fairly be characterized as scientific knowledge.<sup>104</sup> The district court was found to have "carefully performed its gate keeping function under Rule 702 and heeded the Supreme Court's admonition that 'the focus . . . must be solely on the principles and methodology, not on the conclusions they generate.'"<sup>105</sup>

Further, the appellate court upheld the district court's exclusion of evidence concerning the useful life of the limit switch.<sup>106</sup> The district court excluded this testimony because "the plaintiff failed to disclose the cycle life of the switch as a basis for the expert's opinion prior to trial, and failed to supplement [the expert's] discovery responses to reflect this newly discovered information."<sup>107</sup> Also, the source of the plaintiff's expert's information was hearsay that would not be

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scientific community. The Court held that the Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony. Under *Daubert*, expert scientific testimony that will assist the trier of fact may be admitted if the proponent of the evidence can establish that it is both reliable and relevant. To be reliable, an inference or assertion must be derived from the scientific method. Proposed testimony must be supported by appropriate validation. To be relevant, the testimony must "fit" the facts of the case such that it will assist the trier of fact in resolving a factual dispute. Rule 702's helpfulness standard requires a valid scientific connection to the pertinent inquiry as a pre-condition to admissibility. In addition, *Daubert* provided four factors for trial courts to consider in determining whether the reasoning or methodology supporting the proposed testimony is scientifically valid and can be applied to the facts at issue: (1) whether the scientific theory or technique can be empirically tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) what is the known or potential rate of error of a particular scientific technique; and (4) whether the theory or technique has garnered wide spread acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 593.

100. *Cummins*, 93 F.3d at 367.

101. *Id.* at 368.

102. *See id.* (quoting *Porter v. Whitehall Labs*, 9 F.3d 607, 616 (7th Cir. 1993)).

103. *See id.*

104. *Id.* at 369.

105. *Id.* at 370 (quoting *Daubert*, 509 U.S. at 594).

106. *See id.* at 371.

107. *Id.* (citations omitted).



reasonably relied upon by others in the field.<sup>108</sup> The appellate court reasoned that allowing plaintiff's expert to render an opinion based on newly acquired evidence would have imposed an unfair burden on the defendant to locate and depose a witness competent to give testimony on the cycle life of the limit switch.<sup>109</sup> Even if the defendant had been granted a continuance, the prejudice to the defendant from the admission of the plaintiff's expert's evidence would not have been fully cured.<sup>110</sup> This prejudice would have been compounded by the plaintiff's expert's inability to identify the sources of his information so that they could be questioned by the defendant.<sup>111</sup> Under these circumstances, the district court was entitled to conclude that there had been an inadequate showing that the hearsay statements relied upon the expert in formulating his opinion were of a type reasonably relied upon by experts in the field.<sup>112</sup>

The Indiana Court of Appeals also addressed *Daubert* issues during this survey period. In *Hottinger v. Trugreen Corp.*,<sup>113</sup> the plaintiff claimed that she suffered damages as a result of being exposed to a broad leaf herbicide known as Trimec 2-4-D. The plaintiff's expert, Dr. Heuser, had concluded that Trimec 2-4-D had been the proximate cause of her permanent and continuing injuries. The trial court excluded Dr. Heuser's opinion and entered summary judgment accordingly. On appeal, Trugreen asserted that it was entitled to summary judgment based in part, upon the inadmissibility of the plaintiff's expert's opinion.<sup>114</sup>

Adopting *Daubert* as the test for determining the admissibility of expert scientific testimony, the *Hottinger* court concluded that the expert's testimony was sufficiently reliable because the expert was a medical doctor and a Ph.D.<sup>115</sup> who specialized in internal medicine with an emphasis on the problems experienced by the plaintiff, and the expert's conclusions were supported by scientific

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108. *See id.*

109. *Id.*

110. *Id.*

111. *Id.* The plaintiff's expert testified that he obtained his figures with respect to the life cycle of the limit switch in conversations with "several representatives from Allen Bradley," the manufacturer of the limit switch. He could not recall the names of the individuals that he spoke with or the dates on which he had obtained this information. *See id.* at 366.

112. *See id.* at 372 (citing FED. R. EVID. 703).

113. 665 N.E.2d 593 (Ind. Ct. App. 1996), *trans. denied.*

114. As an alternative basis for summary judgment, Trugreen asserted that the plaintiff's common law claims based upon the failure to warn were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). *See* 7 U.S.C. § 136v(b) (1994). The court held that:

[t]he broad prohibition imposed by FIFRA against state regulation of warning labels on hazardous substances bars common-law liability attempts to impose liability on top of that provided by federal laws. Accordingly, FIFRA preempts state common law strict liability and negligence claims for defective warnings or the failure to warn of the hazards associated with the products subject to regulation under the Act.

*Hottinger*, 665 N.E.2d at 598 (citations omitted).

115. The court did not reveal the subject of Dr. Heuser's Ph.D.

publications subject to peer review.<sup>116</sup> Based on his expert status, the doctor was permitted to testify that, in his opinion, the plaintiff's injuries were caused by her exposure to the herbicide.<sup>117</sup> The doctor's opinion was based upon the temporal proximity of the onset of the plaintiff's symptoms to her exposure to the herbicide, her medical history, his examination, the diagnostic evaluations performed, and his own education and experience. Thus, the scientific principles upon which the expert based his opinion were considered sufficiently reliable to be helpful to the trier of fact.<sup>118</sup>

In responding to the defendant's allegations that the expert's testimony was "shaky," the court emphasized that the defendant could rely on vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof as "appropriate safeguards."<sup>119</sup> The trial court was thus found to have abused its discretion in determining that the physician's opinion did not meet the standards of Rule 702.<sup>120</sup>

Because the court expressly adopted the *Daubert* standards for evaluating proffered expert testimony, Indiana lawyers are now able to specifically rely upon existing court decisions interpreting *Daubert* as persuasive authority in Indiana state courts for the interpretation of Indiana Rule of Evidence 702 and the introduction of expert scientific testimony.

## IX. FEDERAL PREEMPTION

### A. *Federal National Traffic & Motor Vehicle Safety Act Does Not Preempt State Law Negligence Claims for Failure to Install Airbags*

In *Wilson v. Pleasant*,<sup>121</sup> the estate of a fatal automobile accident victim brought a negligence action against the automobile manufacturer based upon the manufacturer's failure to install an airbag.<sup>122</sup> The automobile manufacturer argued that the plaintiff's state common-law tort claim of negligence was preempted by the Federal National Traffic and Motor Vehicle Safety Act.<sup>123</sup> The Indiana

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116. *Hottinger*, 665 N.E.2d at 597-98. Dr. Heuser submitted a peer-reviewed paper of his own that outlined a methodology for using a brain scan to confirm the effects of toxic chemical exposure on the brain.

117. *Id.* at 598.

118. *Id.* at 597.

119. *Id.* at 598.

120. *Id.*

121. 660 N.E.2d 327 (Ind. 1995).

122. See generally Note, Cipollone & Myrick, *Deflating the Airbag Preemption Defense*, 30 IND. L. REV. 827 (1997).

123. 15 U.S.C. §§ 1381-1431 (1988) (the current version of the Safety Act is found at 49 U.S.C. §§ 30101-30169 (1994 & Supp. I 1995), pursuant to a 1994 recodification of the transportation provisions. This case was decided prior to the recodification and, as such, all cites will be to Title 15). Congress passed the Safety Act in 1966 to "reduce traffic accidents and death and injuries to persons resulting from traffic accidents." *Wilson*, 660 N.E.2d at 329 (quoting 15



Supreme Court disagreed.

Pursuant to the authority granted in the Safety Act, the Secretary of Transportation promulgated Federal Motor Vehicle Safety Standard 208 ("Rule 208").<sup>124</sup> Rule 208 gave automobile manufacturers three possible choices for providing passenger crash protection.<sup>125</sup> "The choices were: 'First option—frontal/angular automatic protection system. . . . Second option—head-on automatic protection system. . . . Third option—lap and shoulder belt protection system with belt warning.'"<sup>126</sup> Although an airbag system would have complied with the first or second option in *Wilson*, the automobile *Wilson* was driving at the time of the accident was equipped with a manual seatbelt system that fully complied with the third option.<sup>127</sup> The Indiana Supreme Court rejected General Motors' argument that the plaintiff's airbag claim was expressly preempted by the Safety Act.<sup>128</sup> The court based its decision on the Safety Act's preemption clause's explicit reference only to "state safety standard[s] applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard."<sup>129</sup> Additionally, the Safety Act contains a savings clause providing "compliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from liability under common law."<sup>130</sup> After a very lengthy discussion of the appropriate manner in which to analyze an implied preemption argument,<sup>131</sup> the Indiana Supreme Court held that the preemption clause of the Safety Act forecloses any possibility of implied preemption.<sup>132</sup> Moreover, the court concluded that even if it were to apply the principles of implied preemption,<sup>133</sup> it would be improper to imply preemption to the facts of the case.<sup>134</sup>

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U.S.C. § 1381 (1988)).

124. 49 C.F.R. § 571.208 S4.1.2.1-S4.1.2.3 (1994).

125. *Wilson*, 660 N.E.2d at 329.

126. *Id.* (quoting 49 C.F.R. § 571.208).

127. *Wilson*, 660 N.E.2d at 329.

128. *Id.* at 330.

129. *Id.* (quoting 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30103(b) (1994)).

130. *Id.* at 329 (quoting 15 U.S.C. § 1397(k) (1988) (current version at 49 U.S.C. § 30103(e) (1994)).

131. *Id.* at 329-36.

132. *Id.* at 336.

133. An implied preemption analysis was performed due to the unsettled nature of the law. *See id.*

134. *Id.* at 339. The court concluded that there existed no conflict between state common law in the case at bar and the choices presented by Rule 208 because state law did not stand as an obstacle to the execution of the purposes of the federal law. *Id.* Because the scope of preemption is a matter of federal law, defendants would be well-advised to remove cases to federal court if possible. The federal courts are not bound by *Wilson*.

*B. The Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act Preempts Many State Law Claims*

In *Mitchell v. Collagen Corp.*,<sup>135</sup> Barbara Mitchell received several injections of collagen-based products used to correct skin tissue anomalies such as wrinkles. Following her injections in 1988, Mitchell developed serious medical complications. In 1993, she and her husband filed suit against Collagen in Indiana state court. The lawsuit included counts sounding in strict liability, negligence, fraud, mislabeling, misbranding, adulteration, and breach of warranty. After the case was removed to federal court, the Mitchells moved to amend their complaint to add a claim under Indiana's Deceptive Consumer Sales Act.<sup>136</sup> Collagen filed for summary judgment on the ground that the Mitchells' claims were preempted by federal law.

The district court denied the Mitchells' motion for leave to amend based on the amendment's futility because their claim was time barred. The court then determined that the Mitchells' remaining state law claims were preempted by the Medical Device Amendments of 1976<sup>137</sup> (MDA) to the federal Food, Drug, and Cosmetic Act.<sup>138</sup>

On appeal, the Seventh Circuit noted that, under the Supremacy Clause, the "Laws of the United States . . . shall be the supreme Law of the Land."<sup>139</sup> Pursuant to this authority, Congress may preempt state law.<sup>140</sup> Whether federal law preempts a state law establishing a cause of action is a question of congressional intent.<sup>141</sup> If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause.<sup>142</sup> The existence of an express preemption clause supports an inference that Congress intended to limit the federal statute's preemptive scope to the express terms of the clause. But the existence of an express clause does not entirely foreclose the possibility of implied preemption.<sup>143</sup> Preemption is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in the statute's structure and purpose.<sup>144</sup>

The *Mitchell* court noted that the MDA contains an express preemption provision at 21 U.S.C. § 360k(a), which provides:

[N]o State or political subdivision of a State may establish or continue in

135. 67 F.3d 1268 (7th Cir. 1995), *vacated*, 116 S. Ct. 2576 (1996). The Supreme Court remanded this case for reconsideration in light of *Medtronic v. Lohr*, 116 S. Ct. 2240 (1996).

136. IND. CODE §§ 24-5-0.5-1 to -10 (1993 & Supp. 1996).

137. Pub. L. No. 94-295, 90 Stat. 539 (codified as amended at 21 U.S.C. §§ 360c-360k, 379, 379a (1994)).

138. 21 U.S.C. §§ 301-395 (1994 & Supp. I 1995).

139. *Mitchell*, 67 F.3d at 1274 (citing U.S. CONST. art. VI, cl. 2).

140. *Id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.* at 1274-75.



effect with respect to a device intended for human use any requirement— (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.<sup>145</sup>

The court held that this language is broad enough to include some state common law causes of action.<sup>146</sup> “This view is buttressed by an FDA [Food and Drug Administration] regulation that interprets the statute’s preemptive sweep as encompassing state requirements established by ‘statute, ordinance, regulation, or court decision.’”<sup>147</sup> Indeed, the court noted that every circuit considering the question had concluded that the MDA’s preemption clause preempts at least some common law causes of action.<sup>148</sup> Therefore, the court explicitly held that “[t]he phrase ‘any requirement’ in 21 U.S.C. § 360k(a) is broad enough to include at least some common law causes of action within the statute’s preemptive scope.”<sup>149</sup>

Next, the *Mitchell* court undertook the task of determining the precise scope of the MDA’s preemption provision. The court held that the breadth of the language in § 360k(a) expressly preempts claims relating not only to “safety and effectiveness,” but also to “any other matter included in a requirement.”<sup>150</sup> Therefore, the section “encompasses state law claims that add requirements ‘different from, or in addition to,’ any requirement set forth in the MDA.”<sup>151</sup>

The plaintiffs contended that their common law causes of action survived preemption because the FDA had not established “specific requirements” with respect to the particular product used by the plaintiff as required by regulation.<sup>152</sup> Collagen responded that the detailed premarket approval process required for the “Class III” product at issue constitutes a “specific requirement.” Therefore, any state laws that seek to add requirements different from or in addition to the premarket approval process are preempted under the MDA.

The Seventh Circuit agreed that the FDA’s premarket approval process constitutes a “specific requirement.”<sup>153</sup> “In doing so, we align ourselves with the majority of circuits to have considered this question,” reasoned the court.<sup>154</sup> Consequently, the plaintiffs’ strict liability and negligence claims were found to be preempted: “[W]ith respect to a Class III device that has undergone the [premarket approval] process, such claims are preempted because they undoubtedly would add requirements ‘different from, or in addition to,’ those set

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145. *Id.* at 1275 (citing 21 U.S.C. § 360k(a) (1994)).

146. *Id.* at 1276.

147. *Id.* at 1275-76 (quoting 21 C.F.R. § 808.1(b) (1995)).

148. *Id.* at 1276.

149. *Id.*

150. *Id.* at 1278.

151. *Id.* (citations omitted).

152. 21 C.F.R. § 808.1(d) (1996).

153. *Mitchell*, 67 F.3d at 1279.

154. *Id.*

forth in the MDA.”<sup>155</sup> Likewise, the plaintiffs’ claims for mislabeling, misbranding, and adulteration were found to be preempted,<sup>156</sup> as were their claims for fraud, misrepresentation, breach of implied warranty.<sup>157</sup> Although a breach of express warranty claim would not be preempted by the MDA, the plaintiffs failed to demonstrate a genuine issue of material fact on that theory.<sup>158</sup>

## X. COLLATERAL ESTOPPEL

### A. *Former Employee as Expert Witness in Products Case*

In *Hayworth v. Schilli Leasing, Inc.*,<sup>159</sup> the Indiana Supreme Court considered an interlocutory appeal challenging the trial court’s order enjoining a defendant’s former employee from consulting with, or providing trial or deposition testimony on behalf of, the plaintiff in a wrongful death product liability case.

The plaintiff filed a wrongful death action against Fruehauf Corporation after her husband was killed in a work-related accident involving a dump trailer manufactured by Fruehauf. During pre-trial investigation and discovery, the plaintiff retained a registered professional engineer, as an expert witness. The expert had been employed as an engineer by Fruehauf from 1965 until his retirement in 1982. He had testified on behalf of Fruehauf in thirteen or fourteen lawsuits. He thereafter formed his own consulting corporation, providing technical advise and expert testimony to plaintiffs’ attorneys in product liability litigation.

On the day before the expert was to be deposed by one of Fruehauf’s co-defendants, Fruehauf asked the trial court to enjoin the expert from consulting with or testifying for any person or attorney participating in the litigation. The trial court ordered the expert deposition stayed pending resolution of Fruehauf’s motion. Fruehauf then initiated an action against the expert in a Michigan state court, seeking injunctive relief to prevent him from acting as an expert witness or consultant in any litigation brought by any plaintiff against Fruehauf. The Michigan court denied Fruehauf’s motion for preliminary injunction and dismissed the petition for permanent injunction. The trial court was subsequently affirmed by the Michigan Court of Appeals. Notwithstanding Michigan’s rejection of Fruehauf’s efforts to prohibit the expert’s participation in litigation, the Indiana trial court granted Fruehauf’s motion to enjoin the expert’s participation in the present case.

The Indiana Supreme Court first addressed plaintiff’s contention that the injunction was erroneous because collateral estoppel operated to bar Fruehauf from relitigating an issue that had previously been resolved by the Michigan state court. The court noted that “[c]ollateral estoppel generally ‘operates to bar a

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155. *Id.* at 1280 (citation omitted).

156. *Id.* at 1281.

157. *Id.* at 1283.

158. *Id.*

159. 669 N.E.2d 165 (Ind. 1996).



subsequent relitigation of the same fact or issue where that fact or issue is necessarily adjudicated in a former suit and the same fact or issue is presented in the subsequent lawsuit.”<sup>160</sup>

A trial court must consider two factors in determining whether to apply collateral estoppel: whether the party against whom the judgment obtained had a full and fair opportunity to litigate the issue, and whether it would be otherwise unfair under the circumstances of the particular case to apply collateral estoppel.<sup>161</sup>

This two-part test applies to both the defensive and offensive use of collateral estoppel. However, the offensive use of collateral estoppel may pose “particular risks of unfairness” while the defensive use of collateral estoppel is “more likely to promote judicial economy.”<sup>162</sup>

The Indiana Supreme Court found that collateral estoppel did not operate to entirely foreclose Fruehauf’s request for injunctive relief in the Indiana court because Fruehauf’s requested injunction in Indiana covered issues that were not litigated in the Michigan proceedings, including issues of trade secrets, confidential information, and work product.<sup>163</sup> The Indiana trial court enjoined the expert from testifying in the action and from consulting or discussing with any party Fruehauf’s trade secrets, confidential information, and matters of attorney-client privilege or work product. On the other hand, the Michigan court was asked to enjoin the expert from discussing with anyone any information related to Fruehauf and from consulting or testifying as an expert in any products liability case brought against Fruehauf under the rationale that the expert’s consultation and expert services allegedly violated the attorney-client privilege. The Michigan ruling did not encompass issues of trade secrets, confidential information, or work product.<sup>164</sup>

The Indiana Supreme Court’s decision in this case may be open to criticism. First, the opinion omits any reference to the Full Faith and Credit Clause<sup>165</sup> which is supposed to control the outcome of this case. The Indiana Supreme Court was bound to give the Michigan judgment the same effect as it would have in Michigan.<sup>166</sup> The decision also fails to mention Michigan law concerning the res judicata effect of Michigan judgments.

The court also did not evaluate whether issue preclusion or claim preclusion

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160. *Id.* at 167 (quoting *Sullivan v. American Cas. Co.*, 605 N.E.2d 134, 137 (Ind. 1992)).

161. *Id.* (citing *Tofany v. NBS Engine Sys., Inc.*, 616 N.E.2d 1034, 1038 (Ind. 1992)).

162. *Id.* at 168 (citing *Tofany*, 616 N.E.2d at 1038).

163. *Id.*

164. *See id.*

165. U.S. CONST. art. IV, § 1.

166. *See Durfee v. Duke*, 375 U.S. 106, 109 (1963) (“Full faith and credit thus generally requires every state to give a judgment at least the *res judicata* effect which the judgment would be accorded in the state which rendered it.”). *See also Conglis v. Radcliffe*, 889 P.2d 1209 (N.M. 1995).

applied to this case.<sup>167</sup> Almost certainly, claim preclusion applied here. Fruehauf requested in the Michigan action that the expert be enjoined from participating in all litigation involving Fruehauf. That request was denied, and the denial was affirmed on appeal. That the Michigan court did not discuss certain issues<sup>168</sup> is not dispositive.

The operation of claim preclusion is not predicated on whether the court rendering the judgment “discussed the issues” or even whether the party raised them.<sup>169</sup> Fruehauf sought a broad order barring the expert from participating in all proceedings against it. It failed. Fruehauf could have limited the scope of its claim in the Michigan court to the pending litigation in Indiana. It did not. Had Fruehauf’s claim succeeded in Michigan, the expert could not have testified in the Indiana action. Fruehauf was then permitted to relitigate in the Indiana court whether the expert could testify in the Indiana action. The doctrine of claim preclusion was meant to prevent such a result.

### *B. The Use of Offensive Collateral Estoppel to Prove Design Defect*

In *Rogers v. Ford Motor Co.*,<sup>170</sup> the court considered whether the plaintiffs were entitled to partial summary judgment under the theory that the defective design of the seatbelt in their Lincoln Town Car (known in the automotive industry as a “Type I” buckle) was conclusively adjudicated by a California plaintiffs’ verdict. In the California case, the jury returned a special verdict finding that the design of the seatbelt in the subject automobile was defective at the time it left the seatbelt manufacturer’s control. Accordingly, the plaintiffs in *Rogers* argued that the seatbelt manufacturer should be collaterally estopped from relitigating the issue of the seatbelt’s defectiveness.

The court noted that “collateral estoppel is termed ‘offensive’ when . . . [the] plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.”<sup>171</sup> The court also noted that the question whether the device of offensive collateral estoppel should be allowed is within the trial court’s discretion.<sup>172</sup>

According to the in *Rogers* court, the defendant presented convincing evidence that the second threshold requirement—an identity of issues—was not present.<sup>173</sup> There was a substantial question whether the seatbelt buckle found to be defectively designed in the California case and alleged to have failed in the *Rogers*’ vehicle presented an identity of issues for purposes of collateral estoppel.<sup>174</sup> Although the plaintiff’s expert stated in his affidavit that the seatbelt

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167. See RESTATEMENT (SECOND) JUDGMENTS §§ 19, 27 (1982).

168. *Hayworth*, 669 N.E.2d at 168.

169. RESTATEMENT (SECOND) JUDGMENTS § 24 (1982).

170. 925 F. Supp. 1413 (N.D. Ind. 1996).

171. *Id.* at 1418 (quoting *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.4 (1979)).

172. *Id.*

173. *Id.*

174. *Id.*



buckle in the Rogers' 1988 Lincoln was designed identically to that in the California plaintiff's 1987 Ford Bronco II, the affidavit of the defense expert provided "sworn testimony that the two buckles were manufactured and assembled largely from different components with distinct part numbers and dissimilar weights."<sup>175</sup>

Besides the lack of issue identity, the plaintiffs in *Rogers* faced an additional impediment to the use of collateral estoppel. The court held that collateral estoppel should not be used to preclude relitigation of the issue of defective design related to mass-produced products where injuries arise out of distinct incidents.<sup>176</sup> Here, the incidents in the California case and the present action were found to be sufficiently distinguishable to foreclose the use of collateral estoppel.<sup>177</sup> The California case involved a fatal, seven-car accident in which the driver was ejected through the sunroof when the vehicle rolled over two or three times. In *Rogers*, the plaintiffs claimed that the passenger-side seatbelt failed when their car sustained a driver's side impact in the collision with another vehicle.

The conclusion in a prior proceeding that the product failed due to defective design necessarily rests upon the determination that the design was inadequate to withstand specific, foreseeable circumstances of the incident. It does not automatically follow that the product would fail due to defective design in a different *type* of incident, where the forces acting upon the product may have been distinct from those in the earlier litigated incident (and possibly unforeseeable).<sup>178</sup>

The *Rogers* court articulated an additional reason for prohibiting the use of collateral estoppel under the circumstances presented. After the California verdict, the National Highway Traffic Safety Administration announced that an exhaustive investigation revealed no basis for the allegation that "Type I" seatbelt buckles were subject to inadvertent release during roll-over vehicle crashes. "Confidence in the correctness of the earlier determination is fundamental to the principles of collateral estoppel, based at least in part upon a conviction that, even if the issue were relitigated, the result would not change."<sup>179</sup> Because confidence in the California verdict was undermined by the existence of additional evidence on the safety of the seatbelt, the use of collateral estoppel in *Rogers* was found to be inappropriate.<sup>180</sup>

## XI. PUNITIVE DAMAGES FOR DESIGN DEFECT

During this survey period, the District Court for the Southern District of Indiana refused to prohibit a potentially duplicative punitive damage award in a

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175. *Id.*

176. *Id.* at 1419.

177. *Id.*

178. *Id.* (citations omitted).

179. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982)).

180. *Id.* at 1418.

design defect case against Ford Motor Company. In *Greco v. Ford Motor Co.*,<sup>181</sup> Ford argued that the plaintiff's punitive damages claim should be summarily resolved because such would be duplicative of prior punitive sanctions assessed by the courts of Indiana against Ford and would therefore violate the Due Process Clause of the Fourteenth Amendment and Article I of the Indiana Constitution. Prior to *Greco*, a Marion County jury yielded a \$58,000,000 punitive damages award against Ford for its design of the Bronco II line,<sup>182</sup> which Ford claimed to be sufficient punishment and deterrence for the Bronco II's shortcomings. Ford also contended that additional punitive damages in Indiana would be contrary to due process. Although the court found this argument intriguing, Ford's position was ultimately rejected.<sup>183</sup> The court noted that, although Ford no longer manufactures the Bronco II, Ford and other automobile producers continue to manufacture sports utility and other vehicles.<sup>184</sup> The court could not declare as a matter of law that further deterrence was unnecessary simply because Ford was once punished for its "now defunct Bronco II line."<sup>185</sup> The question "[w]hether Ford needs to be dissuaded from defective engineering in this case or otherwise additionally punished is a first question for the jury."<sup>186</sup>

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181. 937 F. Supp. 810 (S.D. Ind. 1996).

182. *See id.* at 816.

183. *Id.* at 817.

184. *Id.*

185. *Id.*

186. *Id.*