

Nos. 02-1437, 02-1438

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

IN RE BRIDGESTONE/FIRESTONE INC.  
TIRES PRODUCTS LIABILITY LITIGATION

Appeal from the United States District Court  
for the Southern District of Indiana, Indianapolis Division  
The Honorable Sarah Judge Evans Barker

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.  
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Kenneth S. Geller  
Miriam R. Nemetz  
William C. Paxton  
MAYER, BROWN, ROWE & MAW  
1909 K Street, N.W.  
Washington, D.C. 20006  
(202) 263-3000

Stephen M. Shapiro  
MAYER, BROWN, ROWE & MAW  
190 S. LaSalle Street  
Chicago, Illinois 60603-3441  
(312) 782-0600

*Of Counsel:*

Hugh F. Young, Jr.  
PRODUCT LIABILITY ADVISORY  
COUNCIL, INC.  
1850 Centennial Park Drive, Suite 510  
Reston, VA 20191  
(703) 264-5300

*Counsel for Amicus Curiae Product Liability Advisory Council, Inc.*

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## **RULE 26.1 DISCLOSURE STATEMENT**

*Amicus Curiae* The Product Liability Advisory Council, Inc. has no parent corporation and no company owns 10% or more of its stock.

The following are the law firms whose partners or associates have appeared or are expected to appear for the Product Liability Advisory Council, Inc., in this case.

Stephen M. Shapiro  
MAYER, BROWN, ROWE & MAW  
190 S. LaSalle Street  
Chicago, IL 60603-3441  
(312) 782-0600

Kenneth S. Geller  
Miriam R. Nemetz  
William C. Paxton  
MAYER, BROWN, ROWE & MAW  
1909 K Street, N.W.  
Washington, D.C. 20006  
(202) 263-3000

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## **INTEREST OF THE *AMICUS CURIAE***

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 123 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983 PLAC has filed hundreds of briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

PLAC has a strong interest in the development of rational standards for the certification of class actions in product liability cases. The issues raised by the district court's order granting class certification in this case are quite significant to PLAC's members. To overcome otherwise insurmountable barriers to class certification, the court construed Indiana's choice-of-law rules to create a near-presumption that a single state's law can be applied in multistate actions raising certain types of product defect claims. That decision has the potential to greatly expand the use of nationwide

class actions to adjudicate such claims. PLAC's interest in persuading this Court to reverse the district court's decision is substantial.

## **ARGUMENT**

In this high-stakes case, the district court certified nationwide classes including millions of persons who have purchased or leased Ford Explorer sport utility vehicles and/or Firestone tires. Although the class members acquired and used these products in all 50 states and the District of Columbia, the court ruled that the laws of the defendants' home states – Michigan and Tennessee – would govern all of plaintiffs' claims. Based on this ruling, the court was able to conclude that common issues of law predominate with respect to the elements of plaintiffs' claims. See Class Certification Op. at 31 n.17. Although there are many flaws in the court's decision to certify nationwide classes, the choice-of-law analysis is a linchpin of that ruling. The court would not have been able to grant class certification had it concluded that the laws of the many states in which plaintiffs purchased their vehicles and/or tires governed their claims.

As we discuss below, the district court's choice-of-law ruling departs dramatically from the approach of the vast majority of federal courts. In dozens of cases, they have refused to certify nationwide class actions alleging product defect claims because the need to apply the laws of many different states would make the

case unmanageable. The court's decision to apply the law of only two states here was based on an erroneous construction of Indiana's choice-of-law rules. That error may change the course of class action practice in product defect cases like this one. The Court should reverse the decision below.

**I. FEDERAL COURTS HAVE REFUSED TO CERTIFY NATIONWIDE PRODUCT LIABILITY CLASS ACTIONS BECAUSE THEY WOULD REQUIRE APPLICATION OF MULTIPLE STATE LAWS**

As this Court has observed, a manufacturer's liability for a defective product often is best determined through "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions \* \* \*." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Under such a decentralized process of adjudication, the manufacturer can expect to win some cases and lose others, depending upon differences among the states' laws and the inclinations of various juries. As each verdict is rendered, the parties to the remaining actions become better informed about the strengths and weaknesses of their cases and thus more able to negotiate reasonable settlements. See Linda S. Mullinex, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 781 (1995). There is a good chance under that system that, when all is said and done, the manufacturer will pay damages commensurate with its real fault.

In contrast, when product liability claims are adjudicated in a nationwide class action, the manufacturer's liability is an all or nothing proposition. With the validity of all claims determined at a single trial, the manufacturer either faces a calamitous judgment or escapes liability altogether. This scenario places the defendant under "intense pressure to settle" (*In re Rhone-Poulenc Rorer*, 51 F.3d at 1298), since "[m]any corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation." *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Without prior jury verdicts to shed light on each side's likelihood of success, however, the parties' settlement decisions are poorly informed. With no litigation "track record" to refer to, furthermore, a court reviewing a settlement may have little basis for determining whether its terms are fair to the thousands (or millions) of absent class members. See 7B Charles Alan Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 395 (2d ed. 1986) (court must consider "the likelihood of the class being successful in the litigation" in evaluating a settlement).

Applying a single state's law to the claims of a nationwide class also raises federalism concerns. As one academic commentator has written, differences among state laws "are what a federal system is all about." Larry Kramer, *Choice Of Law In Complex Litigation*, 71 N.Y.U. L. REV. 547, 579 (Apr. 1996). Thus,

there is nothing "unfair" if victims of the same mass tort are compensated differently – at least, not if they are from or were injured

in different states. Such differences in outcome reflect the fact that different states with legitimate interests have made different judgments about how to handle tort problems.

*Ibid.* If the law of a single state were applied to the claims of a nationwide class, it would interfere with the legitimate interests of other states touching the litigation, whose policies are thereby disregarded. See Robert A. Sedler, *The Complex Litigation Project's Proposal For Federally-Mandated Choice-of-Law in "Mass Tort" Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085, 1086 (1994) (applying the law of a single jurisdiction in mass tort cases represents an "assault on state sovereignty" because it sacrifices important state interests).

So far, the federal courts have generally held that liability for alleged defects in nationally-marketed products cannot be determined by reference to a single state's law. Applying the choice-of-law regimes of many jurisdictions, these courts have concluded that such cases implicate the law of each and every jurisdiction in which the challenged product was sold.<sup>1</sup> Often, they have expressly rejected arguments that

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<sup>1</sup> See, e.g., *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001); *In re Rhone-Poulenc Rorer*, 51 F.3d at 1302; *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 313-314 (5th Cir. 2000); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-743, 749-750 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-1019 (D.C. Cir. 1986) ("*Walsh I*"); *Neely v. Ethicon, Inc.*, No. 1:00-CV-00569, 2001 WL 1090204, at \*8 (E.D. Tex. Aug. 15, 2001); *Zapka v. Coca-Cola Co.*, No. 99 CV 8238, 2000 U.S. Dist. LEXIS 16552, at \*11-13 (N.D. Ill. Oct. 26, 2000); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 487-490 (D.N.J. 2000) ("*Ignition Switch*"); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 211-217 (E.D. Pa. 2000); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 500-501 (S.D. Ill. 1999); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532-534

the law of the defendants' principal place of business should be applied.<sup>2</sup> Only a few district courts have ventured in recent years to apply a single law to a purported nationwide product defect class action, and no such decision has survived appellate review. See, e.g., *Spence*, 227 F.3d at 314-315 (rejecting notion that the law of the

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(N.D. Ill. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 456-457 (D.N.J. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 224 (E.D. La. 1998); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 369 (N.D. Ill. 1998); *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 498 (N.D. Ill. 1998); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 369-371 (E.D. La. 1997) ("*Bronco II*"); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 341-342, 346-354 (D.N.J. 1997) ("*Ignition Switch I*"); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422-423 (E.D. La. 1997) ("*Masonite I*"); *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 631-632 (D. Kan. 1996); *Martin v. Am. Med Sys., Inc.*, No. IP 94-2067-C H/G, 1995 U.S. Dist. LEXIS 22169, at \*\*23-27, 34 (S.D. Ind. Oct. 25, 1995); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 271-275 (D.D.C. 1990) ("*Walsh II*"); *Raye v. Medtronic Corp.*, 696 F. Supp. 1273, 1275 (D. Minn. 1988); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 608 (S.D.N.Y. 1982).

<sup>2</sup> See, e.g., *Bronco II*, 177 F.R.D. at 370-371 (rejecting plaintiffs' proposal to apply Michigan law to warranty claims of 650,000 putative class members because that jurisdiction was defendants' principal place of business and the alleged location of key vehicle design decisions); *Clay*, 188 F.R.D. at 497-498 (rejecting proposed application of law of defendant's principal place of business in nationwide product defect class action); *Lyon*, 194 F.R.D. at 218 (in nationwide product defect class action, holding that "whether the applicable law is the place of the sale, the residency of the putative class members or the state where the boat containing the [allegedly defective engine] is docked, the applicable state law may not be limited to the [law]" of the defendant's principal place of business); *Chin*, 182 F.R.D. at 456-457 (in nationwide product defect class action, refusing to apply law of manufacturer defendant's home state to all claims, noting that each class member's home state "has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws" and that "[t]hese interests arise by virtue of each state being the place where Plaintiffs reside, or the place where Plaintiffs bought and used their allegedly defective vehicles or the place where Plaintiffs' alleged damages occurred"); *Ignition Switch I*, 174 F.R.D. at 347-348 (same); *Masonite I*, 170 F.R.D. at 422-423 ("The center of the parties' relationship lies in each of the 51 jurisdictions where plaintiffs own Masonite product; thus the analysis favors application of some law other than that of Masonite's primary place of business."); *Feinstein*, 535 F. Supp. at 605-606 ("Plaintiffs do not persuade me that Ohio [as Firestone's principle place of business] satisfies that requirement in a case involving a tire which was, say, manufactured in Pennsylvania, purchased in Massachusetts, and had its defects manifest themselves in New Jersey.").

state “where the product was manufactured and where it was placed in the stream of commerce” should control warranty claims in nationwide product defect class action). See also *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-675 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001) (vacating certification of nationwide product defect class while observing that “few warranty cases ever have been certified as class actions – let alone as nationwide classes, with the additional choice-of-law problems that complicate such a venture”). Accordingly, the vast majority of federal courts have refused to certify nationwide class actions in state-law product liability cases.<sup>3</sup> State law variations also have precluded certification of nationwide classes in many other types of cases.<sup>4</sup>

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<sup>3</sup> See, e.g., *Castano*, 84 F.3d at 749-750; *In re Am. Med Sys.*, 75 F.3d at 1085-1086; *In re Rhone-Poulenc Rorer*, 51 F.3d at 1299-1303; *Chin*, 182 F.R.D. at 461-462.

In *Simon v. Philip Morris, Inc.*, 124 F. Supp. 2d 46, 78 (E.D.N.Y. 2000), Judge Weinstein stated that it “appears” that one state’s laws might be applied to the proposed nationwide product liability class in that case. But he characterized that observation as “preliminary[] and tentative[]” and suggested that the issue should be examined by the appellate court pursuant to Fed. R. Civ. P. 23(f) in the event that a class is ultimately certified in that case. *Ibid.*

<sup>4</sup> See, e.g., *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir. 1987); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679-680 (S.D. Cal. 1999); *In re Jackson Nat’l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 225 (W.D. Mich. 1998); *Marascalco v. Int’l Computerized Orthokeratology Soc’y Inc.*, 181 F.R.D. 331, 340 (N.D. Miss. 1998); *Poe v. Sears, Roebuck & Co.*, No. 96-CV-358-RLV, 1998 WL 113561, at \*4 (N.D. Ga. Feb. 13, 1998); *Dubose v. First Sec. Sav. Bank*, 183 F.R.D. 583, 588 (M.D. Ala. 1997); *Mack v. GMAC*, 169 F.R.D. 671, 676 (M.D. Ala. 1996); *Wall v. Merrill Lynch, Pierce, Fenner & Smith*, No. 92-C-1642, 1992 WL 245540, at \*4 (N.D. Ill. Sept. 21, 1992); *Coe v. Nat’l Safety Assocs., Inc.*, 137 F.R.D. 252, 254 (N.D. Ill. 1991); *Majeski v. Balcort Entm’t Co.*, 134 F.R.D. 240, 249 (E.D. Wis. 1991); *Brooks v. S. Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 57 (S.D. Fla. 1990); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 264-265 (S.D. Cal. 1988); *Blake v. Chemlawn Servs. Corp.*, No. 86-3413, 1988 WL 6151, at \*4 (E.D. Pa. Jan. 26, 1988); *In re Storage Tech. Corp. Sec. Litig.*, 630 F. Supp. 1072, 1080-1081 (D. Colo. 1986);

The district court's choice-of-law analysis, and its related decision to certify this mammoth class action, depart radically from this trend. Unless the decision below is reversed, an entire category of claims against Ford and Firestone will be resolved, for the whole nation, by one jury applying the law of only two states. As discussed below, Indiana's choice-of-law rules do not support the district court's approach.

## **II. THE DISTRICT COURT'S DECISION TO APPLY THE LAWS OF DEFENDANTS' HOME STATES RESTS ON AN ERRONEOUS INTERPRETATION OF INDIANA'S CHOICE-OF-LAW RULES**

This Court has recognized that class certifications have tempted judges "to remake some substantive doctrine in order to render the litigation manageable." *Blair*, 181 F.3d at 834. That seems to have happened here – contrary to the Supreme Court's holding that Rule 23 must not be applied in a way that modifies substantive rights. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Faced with the prospect of having to apply the laws of 50 states and the District of Columbia to the plaintiffs' claims, the court "remade" Indiana's choice-of-law principles to support its conclusion that all of these claims should be evaluated under the laws of Michigan and Tennessee. In doing so, it effectively fashioned a new choice-of-law rule that would

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*Zandman v. Joseph*, 102 F.R.D. 924, 929 (N.D. Ind. 1984); *Brummett v. Skyline Corp.*, No. C-8I-0103-L(B), 1984 WL 262315, at \*4 (W.D. Ky. Apr. 11, 1984); *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 95 F.R.D. 168, 178 (D. Del. 1982); *Elster v. Alexander*, 76 F.R.D. 440, 442 (N.D. Ga. 1977); *Graybeal v. Am. Sav. & Loan Ass'n*, 59 F.R.D. 7, 15-16 (D.D.C. 1973).

apply the law of the defendants’ principal place of business in all multistate class actions in which plaintiffs allege economic injuries from defective products. While this new rule would make Indiana a favorite forum for class-action plaintiffs’ attorneys, it rests on a deeply flawed interpretation of the state’s choice-of-law rules, and should be reversed.<sup>5</sup>

**A. The District Court Misapplied Indiana’s Choice-Of-Law Rule Governing Tort Claims.**

1. To determine what law should govern plaintiffs’ claims under state consumer protection laws,<sup>6</sup> the district court purported to apply Indiana’s choice-of-law rule for tort claims. Indiana follows a modified version of the *lex loci delicti* rule. See *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987). Under that rule, the court presumptively applies the law of the state in which the tort was committed, which is the state “where the last event necessary to make an actor liable for the alleged wrong takes place.” *Id.* at 1073. “[W]hen the Indiana courts refer to ‘the

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<sup>5</sup> The district court accurately viewed its choice-of-law analysis as integral to its ruling on class certification, and thus expected that the choice-of-law determination would be reviewable by this Court under Rule 23(f). See Class Certification Op. at 3 (explaining that the court’s choice-of-law decision was “an important element of the class certification analysis and is hereby incorporated by reference in our ruling on class certification”).

<sup>6</sup> The complaint alleges that “Defendants violated ‘any and all state consumer protection statutes’ in a number of ways, including by representing ‘through their advertising, warranties, and other express representations, that the [Firestone tires] and Explorers had benefits or characteristics that they did not actually have.” *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1079-1080 (S.D. Ind. 2001) (quoting Compl., ¶ 308) (footnote omitted).

place of the tort,’ they are in reality asking where the place of *injury* is, for that is always the last event giving rise to a cause of action against the tortfeasor.” *Castelli v. Steele*, 700 F. Supp. 449, 453 (S.D. Ind. 1988) (emphasis in original). This rule is “rather mechanical and easily applied in ordinary tort cases.” *Id.* at 452.

The *lex loci delicti* rule “may produce curious results,” however, when “the injury and the tortious conduct do not coincide.” *Ibid.* Thus, the Supreme Court of Indiana has held that when the place of injury “bears little connection to the legal action,” the court may consider other factors in deciding what law to apply. *Hubbard*, 515 N.E.2d at 1073. This exception to the *lex loci delicti* rule is narrow; only when the place of injury is a “mere fortuity” may the court proceed to the second step of the analysis. *Land v. Yamaha Motor Corp.*, 272 F.3d 514, 517 (7th Cir. 2001).

As all parties conceded and the district court acknowledged, in this case the place of injury – and hence the presumptive source of substantive law – was “the state in which each Plaintiff purchased an Explorer or one or more of the Tires.” *In re Bridgestone/Firestone, Inc., Tire Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1079 (S.D. Ind. 2001). Moreover, it was not disputed that most of the plaintiffs negotiated for the purchase of their vehicles and/or tires, received the warranties applicable to those products, used the products, experienced any economic losses attributable to the alleged defect in the products, and resided in the same state in which they purchased

the products and hence suffered their alleged injury. On these facts, no Indiana court in an *individual* action would find that the connection to the place of injury was “insignificant” or that applying the law of that place was “anomalous.” To the contrary, noting the many connections between the action and the place of injury, the court would routinely apply the law of the state in which the plaintiff incurred the alleged injury. See *Big Rivers Elec. Corp. v. General Elec. Co.*, 820 F. Supp. 1123, 1125 (S.D. Ind. 1992) (holding in a product liability action that the “initial presumption that the place of the tort determines the choice of law is not overcome” where plaintiff did business and received and used the allegedly defective product in the same state in which it was injured); see also, *e.g.*, *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 805 (7th Cir. 1997) (ruling that Saudi Arabian law would apply to plaintiff’s tort claims against an Indiana defendant, and stating that “the condition of a ‘significant connection’ [to the place of injury] was easily satisfied” where the plaintiff was injured and resided in Saudi Arabia and the parties conducted their business there).

Here, however, the district court found that the state of purchase was “entirely irrelevant to Plaintiffs’ tort claims” because “Ford and Firestone sell their products in every state in the nation” and, “under Plaintiffs’ theory, each Plaintiff would have suffered the identical injury wherever he or she purchased or used the defective tire or vehicle.” 155 F. Supp. 2d at 1081. The court stated:

[T]he named Plaintiffs reside in 27 different states, and the proposed classes include residents of all 50 states and the District of Columbia. However, \* \* \* we find no basis on which to conclude that the residences of Plaintiffs are important to this litigation. \* \* \* Further, the relationship between the parties is simply that of buyer and seller; while Plaintiffs allegedly were injured because they bought Defendants' products, the place where they were purchased is not significant to a Plaintiffs' tort claims. What is significant, and what will be the focus of this litigation, is the conduct of Defendants as manufacturers.

*Id.* at 1082. Finding that “virtually all of the alleged tortious conduct by the Defendants took place at each Defendant’s principal place of business— Michigan for Ford and Tennessee for Firestone” (*ibid.*) – the court decided that the law of those states should govern all of plaintiffs’ tort claims.

But the court may not deviate from the *lex loci delicti* rule because numerous plaintiffs suffered injury in different places and defendants’ conduct in the state of manufacture is “significant.” Indiana’s choice-of-law rules do not operate differently simply because many people are raising claims. See *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283, 1287 (Ind. Ct. App. 1997) (rejecting “a quantitative view of state contacts which in a class action would dictate a result based upon the number of plaintiffs”). Furthermore, under the Indiana rule, the court *must* apply the substantive law of the state in which the injury occurred unless the place of injury is a “mere fortuity” – even if the law of another state is arguably “more relevant.” *Land*, 272 F.3d at 517.

In *Land*, for example, the plaintiff was injured while operating a boat in Indiana. The plaintiff argued that the law of the state where the defendant manufacturer was incorporated and committed its tortious conduct should be applied because that jurisdiction had “greater relevance” to the action. *Ibid.* This Court ruled, however, that the lower court was obliged to apply Indiana law because the place of injury was not “fortuitous.” Both the plaintiff and the boat’s owner resided in Indiana and the boat had been garaged and serviced there. *Ibid.* According to the Court, the plaintiff’s contention that the law of the state of manufacture was more “relevant” “belongs in step two of the Indiana conflicts policy, \* \* \* which we cannot reach.” *Ibid.* See also, *e.g.*, *Castelli*, 700 F. Supp. at 452 (“If the state in which the injury occurred does have other sufficient connection with the lawsuit, then the inquiry is at an end and that state’s law applies.”); *In re Estate of Bruck*, 632 N.E.2d 745, 747 (Ind. Ct. App. 1994) (“*lex loci delicti* is the rule presumptively to be applied unless the place of the tort is an insignificant contact”).

2. The district court cited two cases in support of its conclusion that it could decline to apply the laws of the many states where plaintiffs were injured: *KPMG Peat Marwick v. Asher*, *supra*, and *Castelli v. Steele*, *supra*. Neither case supports the district court’s choice-of-law analysis.

In *KPMG Peat Marwick*, the plaintiffs were a group of Indiana farmers who lost the value of their grain deposits when a company that ran grain elevators in Indiana went out of business. 689 N.E.2d at 1284-1285. They sued an accounting firm, contending that the firm's negligent audit of the elevator operator's financial statements had allowed the operator to remain in business. *Id.* at 1285. The court rejected plaintiffs' argument that the law of the place of injury (Indiana) should apply, concluding that Indiana had "little connection" to the action. *Id.* at 1287. According to the court:

[T]he audit was prepared by Peat Marwick in Missouri, for a client whose principal place of business was Missouri, for submission to a Missouri office of USDA, which office then relicensed MGI. The presence of these facts in an action for accountant negligence render insignificant, in a choice-of-law analysis, the Indiana nature of the farmers' contacts.

*Ibid.*

In *KPMG Peat Marwick*, the court had good reason for deciding that Indiana had "little connection to the action." The defendant had neither taken a relevant action nor entered a relevant business relationship outside of Missouri. Moreover, the firm's allegedly negligent conduct had no direct effect outside of Missouri. The plaintiffs did not contend that *they* had relied on the firm's audit findings, only that the federal agency in Missouri had done so. Because the accounting firm's conduct and its proximate effects were entirely confined to Missouri, it would have been anomalous

if Indiana law were found to govern the firm's liability. By contrast, Ford vehicles and Firestone tires are marketed and sold to purchasers in every state, and it would not be anomalous to assess Ford and Firestone's liability for any injuries they caused under the laws of the states where the injuries were incurred.

*Castelli v. Steele* also is easily distinguished from this case. The plaintiff in *Castelli* was an Illinois resident who underwent a medical procedure for kidney stones at an Indiana hospital. 700 F. Supp. 2d at 450. The defendant physician performed the procedure in Indiana and thereafter gave the plaintiff medical advice over the telephone. *Id.* at 454. Plaintiff contended that she suffered injury when her kidney ailment later worsened. Thus, all of the defendant's conduct and his contact with the plaintiff took place in Indiana; the plaintiff's injury occurred elsewhere, but only *after* her doctor-patient relationship with the defendant had ended. *Ibid.*

Here, in contrast, the various jurisdictions in which the plaintiffs allegedly suffered injury have a close and substantial connection to this lawsuit. With respect to most plaintiffs, defendants sold and serviced the vehicles and/or tires, negotiated the terms of sale, and warranted the products' performance in the very same jurisdictions where plaintiffs were injured. For their part, plaintiffs not only resided, but also purchased, maintained, drove, and (on occasion) sold their vehicles in these places. Thus, unlike the court in *Castelli*, the place of injury had ample connection

with the lawsuit, and the court had no basis for departure from the *lex loci delicti* presumption.

**B. The District Court Misapplied Indiana’s Choice-of-Law Rule Governing Contract Claims.**

The district court made a similar error when selecting the law applicable to plaintiffs’ breach of warranty and unjust enrichment claims. For those claims, the court purported to apply the Indiana choice-of-law rule that governs contract claims. 155 F. Supp. 2d at 1084 (citing *Hubbard*, 515 N.E.2d at 1073). In contract cases, Indiana applies the law of the state that has the “most intimate contacts” or the “most significant relationship” with the transaction. See *NUCOR Corp. v. Aceros y Maquilas de Occidente*, 28 F.3d 572, 581 (7th Cir. 1994); *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 931 (Ind. Ct. App. 1999). “[T]he test requires that a court analyze ‘all acts of the parties touching the transaction in relation to the several states involved’ and apply ‘the law of that state with which the facts are in most intimate contact.’” *NUCOR*, 28 F.3d at 581 (quoting *W. H. Barber Co. v. Hughes*, 63 N.E.2d 417, 423 (1945)). The Indiana test tracks § 188 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) (“RESTATEMENT”). See *Secor Serv. Sys., Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 412 (7th Cir. 1988). To apply the test, the court must consider (1) the place of contracting; (2) the site of contract negotiations; (3) the site of performance; (4) the location of the

contract's subject matter; (5) the domicile of the plaintiff; and (6) the domicile of the defendant. See RESTATEMENT § 188(2)(a)-(e).

Here, five of these six factors – everything but domicile of the defendant – favor application of the law of the state in which the plaintiff purchased and used the products at issue. In similar cases, courts applying Indiana choice-of-law principles — including the district court — have consistently selected the law of the state in which the contract was entered into and performed. See *Marshall v. Wellcraft Marine, Inc.*, 103 F. Supp. 2d 1099, 1113 (S.D. Ind. 1999) (Baker, J.) (applying Florida law to contract and warranty claims relating to yacht because, among other things, plaintiffs “purchased the yacht in Florida, so any alleged contracts or warranties arising from that transaction originated in that state”); *Kamel*, 108 F.3d at 805 (in contract cases, Indiana law mandates the application of the law of the place where “the contract was negotiated and performed and where its subject matter can be found”); *F. McConnell & Sons, Inc. v. Target Data Sys., Inc.*, 84 F. Supp. 2d 961, 973 n.15 (N.D. Ind. 1999) (refusing to apply law of defendant’s principal place of business to contract claims where contract was signed and performed in Indiana and subject matter of contract was located, in part, in Indiana); *Dohm & Nelke v. Wilson Foods Corp.*, 531 N.E.2d 512, 513-514 (Ind. Ct. App. 1988) (same).

Nonetheless, the district court here simply dismissed the significant contacts between the transactions and plaintiffs' home states – where they negotiated and made their equipment purchases, used their vehicles, and negotiated and received any repair or replacement – because it determined that the plaintiffs' claims would be the same regardless of where they purchased and used these products. The court stated:

While Defendants note that “Plaintiffs presumably negotiated and acquired their tires and/or vehicles, primarily used their equipment, and negotiated and received any repair or replacement in their home states,” \* \* \* these are not the most significant acts relevant to Plaintiffs' breach of warranty claims. In reality, there was no negotiation between the parties regarding either the warranties or the tire replacement under the recall. Indeed, under Plaintiffs' theories, it is entirely irrelevant where each Plaintiff purchased Defendants' products, used Defendants' products most regularly, or resided at the time of purchase or when the Master Complaint was filed. Therefore, it cannot be said that any of those states has the most intimate contacts with the facts of this case.

155 F. Supp. 2d at 1084. Asserting that the facts in dispute “all center in Tennessee and Michigan, where Defendants made and executed their decisions regarding both the formation of and the alleged breach of any applicable warranties,” the court concluded that those states had the “most intimate contact” with plaintiffs' claims. *Ibid.*

There is no support in the case law for the district court's treatment of the place of contract formation and performance as “irrelevant.” The court seems to have invented that result-oriented approach so that it could avoid applying a multitude of

state laws to the claims before it. But a court may not adopt a special choice-of-law rule simply because a case involves many plaintiffs raising similar claims. In class actions, the trial court must “apply an individualized choice of law analysis to *each plaintiff’s* claims \* \* \*.” *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (emphasis added). Because the district court failed to do that here, the class certification order should be reversed.

### **III. THE DISTRICT COURT’S DECISION WILL UNREASONABLY EXPAND THE USE OF NATIONWIDE CLASS ACTIONS IN PRODUCT DEFECT CASES**

The district court’s misinterpretation of Indiana’s choice-of-law rules has the potential to increase dramatically the use of nationwide class actions to resolve product defect claims. This ruling will not escape the attention of class action plaintiffs’ attorneys, who are certain to increase their filings in Indiana. That will burden the courts of that state with unwieldy actions that are not the fairest or most efficient means of resolving product liability claims.

#### **A. The District Court’s Choice-of-Law Analysis Is Widely Applicable.**

The reasoning of the district court appears to apply to a broad range of cases. Under the decision below, virtually any plaintiff filing a nationwide product defect

class action in Indiana could credibly argue that the law of the defendant's home state should be applied.

As noted, with respect to plaintiffs' tort claims, the district court dismissed the place of injury as irrelevant because "each Plaintiff would have suffered the identical injury wherever he or she purchased or used the defective [product]." 155 F. Supp.2d at 1081. But the same could be said of many class actions raising defective product claims. The plaintiffs in *In re Rhone-Poulenc Rorer*, for example, had been infected with HIV through ingestion of hemophilia medication manufactured by the defendants. They could say that their injuries were "identical," regardless of where they purchased the medication, and that all relevant conduct occurred in the defendants' home states. But this Court decertified the class action because the district court's trial plan did not respect the differences among state negligence standards. 51 F.3d at 1301-1302. If that same action were filed in Indiana, however, under the district court's reasoning the class would be certified and the case decided under the law of the defendants' home states.

With respect to plaintiffs' contract-based claims, the district court discounted the significance of plaintiffs' home states because "there was no negotiation between the parties" regarding warranties or product replacement and because, under plaintiffs' theory, "it is entirely irrelevant where each Plaintiff purchased Defendants' products,

used Defendants' products most regularly, or resided at the time of purchase \* \* \*." 155 F. Supp. 2d at 1084. Again, that would be equally true in any class action raising claims that a mass-produced product having a standard warranty failed uniformly to perform as promised.

The district court's decision can be read to create a presumption that the law of the defendant's home state applies to all claims that a product was defectively designed or manufactured, *unless* specific events at the site of the injury that vary from plaintiff to plaintiff are pertinent to the defendant's liability. Such a presumption would make it far easier for plaintiffs to press their claims on behalf of millions of class members in a gigantic proceeding. As discussed in Section I, *supra*, that approach is neither the fairest nor the most effective way to resolve most claims that products are defective. Moreover, it does not respect the policies of the many states whose interests may be affected by such matters.

**B. The District Court's Choice-of-Law Analysis Will Attract Class Action Litigation To Indiana.**

Because of the strong economic incentive to file class action litigation, the district court's permissive interpretation of Indiana law will have an effect on all national companies. Class action litigation tends to be filed in the jurisdictions that are most hospitable to such actions. See Thomas M. Woods, Note, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 75

N.Y.U. L. REV. 507, 515 (2000). Thus, certain courts – typically state courts – have entertained far more than their share of class action filings. For example, one survey found that, in 1998, 69% of the class actions filed against 32 Fortune 500 companies were filed in five states, including Alabama, Texas, and Louisiana. See *Class Action Litigation – A Federalist Society Survey, Part III*, I CLASS ACTION WATCH 1, 3 (Jan. 1999). The same study found that class action filings in Texas state courts alone rose by 820% between 1988 and 1998. See *id* at Figure 1. A study by the Rand Institute for Civil Justice similarly found a “pattern” of filings in “Gulf region” states, particularly Alabama and Louisiana. See Rand Inst. for Civil Justice, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOODS FOR PRIVATE GAIN, EXECUTIVE SUMMARY 7 (1999). There is nothing “local” about these cases; many of the cases brought in rural Southern counties were brought by lawyers from as far away as New York and California and sought certification of nationwide classes to raise claims against major, out-of-state corporations. See Stateside Associates, *Class Actions In State Courts: A Report On Alabama* (Feb. 26, 1998), Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong., 2d Sess. 254, 256 (Mar. 5, 1998) (studying class actions filed in six Alabama counties and noting “the frequency with which class actions are brought against national companies in the trial courts of this single state”). See also John Beisner & Jessica Miller, *They’re*

*Making A Federal Case Out Of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y 143, 148 (Winter 2002) (survey showed that “a large number of [class actions] were brought by small groups of plaintiffs’ counsel who have developed expertise in bringing massive actions against large corporations in a select number of jurisdictions”).

As noted above, federal courts have refused to certify multistate class actions that would require application of the differing laws of many jurisdictions. See generally Joel S. Feldman, *Class Certification Issues for Non-Federal Question Class Actions: Defense Perspective*, 612 PLI/LIT 41, 70-82 (Aug. 1999). The district court’s interpretation of Indiana’s choice-of-law rules, however, will encourage certification of such class actions – and those rules would apply to any class action filed in Indiana. See *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 681 (7th Cir. 1986). Thus, the federal court in Indiana may well become a favored destination for plaintiffs seeking a hospitable forum for their multistate class actions. This would impose a huge administrative burden on those courts. Allowing Indiana juries to set standards for the whole country also would infringe the rights of all other sovereign states in our federal system.

## CONCLUSION

The class certification decision of the district court should be reversed.

Respectfully submitted.

Kenneth S. Geller  
Miriam R. Nemetz  
William C. Paxton  
MAYER, BROWN, ROWE & MAW  
1909 K Street, N.W.  
Washington, D.C. 20006  
(202) 263-3000

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Stephen M. Shapiro  
MAYER, BROWN, ROWE & MAW  
190 S. LaSalle Street  
Chicago, Illinois 60603-3441  
(312) 782-0600

*Of Counsel:*

Hugh F. Young, Jr.  
PRODUCT LIABILITY ADVISORY  
COUNCIL, INC.  
1850 Centennial Park Drive, Suite 510  
Reston, VA 20191  
(703) 264-5300

*Counsel for Amicus Curiae Product Liability Advisory Council, Inc.*

## **CERTIFICATE OF COMPLIANCE**

As required by Rule 32(a)(7)(B), I certify that this brief is proportionally spaced and contains 6,299 words, as calculated by my word processing software, WordPerfect 9. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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Miriam Nemetz

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## **CORPORATE MEMBERS/PRODUCT LIABILITY ADVISORY COUNCIL, INC.**

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3M	Caterpillar Inc.
Allegiance Healthcare Corporation	Chevron Corporation
Altec Industries	Compaq
American Home Products Corporation	Continental Tire North America, Inc.
American Suzuki Motor Corporation	Cooper Tire and Rubber Company
Andersen Corporation	Coors Brewing Company
Anheuser-Busch Companies	Crown Equipment Corporation
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BASF Corporation	Deere & Company
Baxter International, Inc.	Dow Chemical Company, The
Bayer Corporation	E & J Gallo Winery
BIC Corporation	E.I. DuPont de Nemours and Company
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Biro Manufacturing Company, Inc.	Eli Lilly and Company
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Boeing Company, The	ExxonMobil Corporation
Bombardier Recreational Products	FMC Corporation
BP Amoco Corporation	Ford Motor Company
Bridgestone/Firestone, Inc.	Freightliner Corporation
Briggs & Stratton Corporation	General Electric Company
Bristol-Meyers Squibb Company	General Motors Corporation
Brown and Williams Tobacco	Georgia-Pacific Corporation
Brown-Forman Corporation	GlaxoSmithKline
Brunswick Corporation	Goodyear Tire & Rubber Company, The
C. R. Bard, Inc.	Great Dane Limited Partnership

APPENDIX A

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## **CORPORATE MEMBERS/PRODUCT LIABILITY ADVISORY COUNCIL, INC.**

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09-Jan-02

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Gridant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Heil Company, The

Honda North America, Inc.

Hyundai Motor America

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Kawasaki Motors Corp., U.S.A.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Lincoln Electric Holdings, Inc.

Lucent Technologies

Mazda (North America), Inc.

Medtronic, Inc.

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motors R & D of America, Inc.

Monsanto Company/G.D. Searle & Co.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Otis Elevator Company

PACCAR Inc.

Panasonic Company

Pentair, Inc.

Pfizer Inc.

Philip Morris Companies Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Proctor & Gamble Company, Inc.

Raymond Corporation, The

Raytheon Aircraft Company

Rheem Manufacturing

RHI Services, Inc.

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Sears, Roebuck and Co.

Shell Oil Company

Sherwin-Williams Company, The

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Sofamor Danek, Medtronic Inc.

Solutia Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

APPENDIX A

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**CORPORATE MEMBERS/PRODUCT LIABILITY ADVISORY COUNCIL, INC.**

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Sunbeam Corporation

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Textron Inc.

Thomas Built Buses, Inc.

Toro Company, The

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW, Inc.

UST (U.S. Tobacco)

Visteon Corporation

Volkswagen of America, Inc.

Vulcan Materials Company

Whirlpool Corporation

Wilbur-Ellis Company

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.