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ABOUT THE SEVENTH CIRCUIT REVIEW

Purpose

The SEVENTH CIRCUIT REVIEW is a semiannual, online journal dedicated to the analysis of recent opinions published by the United States Court of Appeals for the Seventh Circuit. The SEVENTH CIRCUIT REVIEW seeks to keep the legal community abreast of developments and trends within the Seventh Circuit and their impact on contemporary jurisprudence. The articles appearing within the SEVENTH CIRCUIT REVIEW are written and edited by Chicago-Kent College of Law students enrolled in the SEVENTH CIRCUIT REVIEW Honors Seminar.

The SEVENTH CIRCUIT REVIEW Honors Seminar

In this seminar, students author, edit, and publish the SEVENTH CIRCUIT REVIEW. The REVIEW is entirely student written and edited. During each semester, students identify cases recently decided by the Seventh Circuit to be included in the REVIEW, prepare initial drafts of case comments or case notes based on in-depth analysis of the identified cases and background research, edit these drafts, prepare final, publishable articles, integrate the individual articles into the online journal, and “defend” their case analysis at a semester-end roundtable. Each seminar student is an editor of the REVIEW and responsible for extensive editing of other articles. Substantial assistance is provided by the seminar teaching assistant, who acts as the executive editor.
The areas of case law that will be covered in each journal issue will vary, depending on those areas of law represented in the court’s recently published opinions, and may include:

- Americans with Disabilities Act
- antitrust
- bankruptcy
- civil procedure
- civil rights
- constitutional law
- copyright
- corporations
- criminal law and procedure
- environmental
- ERISA
- employment law
- evidence
- immigration
- insurance
- products liability
- public welfare
- securities

This is an honors seminar. To enroll, students must meet one of the following criteria: (1) cumulative GPA in previous legal writing courses of 3.5 and class rank at the time of registration within top 50% of class, (2) recommendation of Legal Writing 1 and 2 professor and/or Legal Writing 4 professor, (3) Law Review membership, (4) Moot Court Honor Society membership, or (5) approval of the course instructor.
PREFACE

All third-year law students at IIT Chicago-Kent participate in a seminar and produce a scholarly work, but only the best and brightest are afforded the opportunity to participate in the Honors Seminar and have their final seminar paper published to the entire legal community in the SEVENTH CIRCUIT REVIEW. It is with great pleasure that I present Volume 7 of the SEVENTH CIRCUIT REVIEW—the culmination of two semesters of hard work and dedication by student authors.

In addition to having their hard work rewarded with the opportunity to receive a publication credit, seminar students take active roles in this journal’s production process. Students are dealt a demanding schedule from the first meeting of the semester, where they are asked to identify a recent decision or currently relevant topic of law to focus on, through the final meeting, where they present an oral synopsis of their article. In between, they are constantly challenged to develop their theses, analyze counterarguments, and streamline their prose. While working on their articles, students also critique their peers’ work and edit a bulk of the REVIEW’s citations for proper spelling, grammar, and BLUEBOOK format—a feat for which I am greatly indebted to them. This process forces students to enhance their writing skills, while holding peers to the same standards.

Because the SEVENTH CIRCUIT REVIEW focuses on recent decisions of the Seventh Circuit Court of Appeals, rather than a specific area of law, the articles written by this year’s students cover a broad range of topics. Each student brings unique ideas and experiences to their article. This year’s REVIEW discusses Bivens suits by military contractors, the scope of state legislative immunity, and the Alien Tort Statute, in the fall, as well as expert evidentiary standards and the Driver’s Privacy Protection Act, this spring.

Volume 7 of the SEVENTH CIRCUIT REVIEW was a team effort and many people deserve their share of the credit. To each of the student authors/editors in the Fall 2011 and Spring 2012 Honors Seminar,
thank you for your tireless work. You may have been skeptical at the start of the semester, but you showed strength and dedication in forging ahead to produce credible, professional articles that enter the legal academic community and live on as authoritative works.

I would like to thank the Chicago-Kent Audiovisual team for supporting the seminar class throughout the semester and allowing us to produce a high-quality audio recording of each student’s oral presentation. A special thank you also goes out to Jackie Seaberg at the Office of Public Affairs for taking the time to teach me the formatting and templates used by the REVIEW, for having the patience to await my edits of each semester’s student work, and for working hard to promptly post the final product on the Internet.

Finally, I would like to thank Professor Morris for allowing me to work with him on this year’s edition of the SEVENTH CIRCUIT REVIEW. It has been a pleasure and a privilege not only to contribute as Executive Editor of the REVIEW, but to participate in each week’s class discussion. Law school teaches us all to think like a lawyer, but with his engaging and challenging style Professor Morris teaches us to question the “right answer” and consider the “wrong answer” in coming to a defensible conclusion.

Jennifer Nimry Eseed succeeds me as the Executive Editor for Volume 8 of the SEVENTH CIRCUIT REVIEW. I participated in the Executive Board that selected her as an Executive Articles Editor with the CHICAGO-KENT LAW REVIEW this spring. Upon her selection, I thought Jennifer was the obvious choice to lead the SEVENTH CIRCUIT REVIEW to continued excellence in the future and was delighted when she expressed an interest in doing so.

Very respectfully,
Andrew P. Medeiros
Executive Editor, SEVENTH CIRCUIT REVIEW
THE SEVENTH CIRCUIT PULLS THE LADDER OUT FROM UNDER DESIGN DEFECT PLAINTIFFS: BIELSKIS V. LOUISVILLE LADDER AND THE LIMITS OF JUDICIAL DISCRETION IN ASSESSING THE RELIABILITY OF AN EXPERT’S METHODOLOGY

BEVIN CARROLL*


INTRODUCTION

Trial judges are considered the gatekeepers of expert testimony and have vast discretion in determining whether an expert’s methodology is reliable.¹ The Seventh Circuit recently addressed the discretionary role that district courts play in assessing the reliability of an expert’s opinion in Bielskis v. Louisville Ladder, where it upheld the exclusion of plaintiff’s expert in a design defect action due to the plaintiff’s failure to meet the standards of reliability set forth under the Federal Rules of Evidence and Daubert.² Bielskis illustrates not only the subjective nature of the district court’s assessment, but also the difficulty in successfully challenging a district court’s determination of

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² Bielskis v. Louisville Ladder, 663 F.3d 887, 897, 893-94 (7th Cir. 2011).
admissibility due to the deferential standard applied on appeal. Further, Bielskis reminds us of the importance of ensuring that expert witnesses utilize a reliable methodology in formulating their opinions so as to avoid presenting the court with an opportunity to dismantle the entire case due solely to its subjective dissatisfaction with a party’s expert.4

Part I of this note will discuss how to establish liability in design defect cases by exploring the history of the risk-utility and consumer-expectation tests as well as the standards of proof for design defect cases required by each state comprising the Seventh Circuit. Part II of this note will then discuss federal procedural standards for the admissibility of expert testimony under Federal Rule of Evidence 702 and the Duahert Trilogy. Part III of this note will provide an overview of both the Seventh Circuit and the United States District Court for the Northern District of Illinois’ rulings in Bielskis. Part III will also argue that while the Seventh Circuit was correct in affirming the district court’s exclusion of plaintiff’s expert in this instance, district courts must adhere to the liberal underpinnings of Federal Rule of Evidence 702 and its subsequent case law when performing the admissibility inquiry, rather than take advantage their discretionary power and deferential standard of review in order to dismiss those experts that do not meet their personal satisfaction.

ESTABLISHING LIABILITY IN DESIGN DEFECT CASES

A. History of the Risk-Utility Test v Consumer Expectation Test

The first articulated standard of liability in design defect cases was set forth in the Restatement (Second) of Torts § 402A, which provided that liability exists “only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.”5 Although the text of Section 402A did not explicitly mandate the use

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4 See id.
5 RESTATEMENT (SECOND) OF TORTS § 402A (1965).
of the consumer expectation test as a means of proving a product was unreasonably dangerous, comment i to Section 402A implicitly established the test by stating, “[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”

The consumer expectation test was intended to provide an objective standard of proof based on the normal, ordinary and reasonable expectations of the average person, but dissatisfaction with the consumer expectation test arose soon after its implementation. First, scholars found that the expectations of consumers provide an unwieldy, amorphous basis on which to assess manufacturer liability and that application of such a subjective and intuitive test could be easily manipulated to achieve a desired outcome. In addition, some attacked the test’s lack of guidance in cases where the product-caused harm affects third parties who have neither purchased nor consumed the product, and in situations where consumers have not formed specific expectations as to the product. Lastly, concerns arose that the test has the practical effect of working against consumers under circumstances in which the manufacturer’s liability would further the interests of products liability law. This could occur if consumers’ expectations lag behind manufacturers’ advancing technologies or if consumers have pre-existing expectations that a product may be defective.

In response to these concerns, the Supreme Court of California in Barker v. Lull Engineering Co. established the risk-utility test, which provides that a design defect may be proven by a demonstration that either: (1) the product failed to perform as safely as an ordinary

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6 Id. at cmt. i.
7 See American Law of Products Liability 3d § 17:21.
9 See id.
10 See id. at 1716.
11 See id.
12 See id.
consumer would expect under normal operating circumstances; or (2) the risks inherent in the product's design outweigh the benefits of that design. In 1997, the Restatement (Third) of Torts adopted its own version of this risk utility test requiring plaintiffs to show that “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design”. Most states now apply the Restatement’s risk utility test to design defect cases; however there are still a handful of states that apply a two prong test similar to the court in Barker, and few others still adhere only to the consumer expectation test.

B. Standard of Proof in Design Defect Cases as Applied by District Courts Comprising the Seventh Circuit

This section discusses the standards of proof for design defect cases required by each state comprising the Seventh Circuit. Under the well-established Erie doctrine, a federal court sitting in diversity jurisdiction will apply the substantive law of the state in which it sits, while simultaneously using federal law to resolve procedural and evidentiary issues. Therefore, a federal court sitting in diversity will apply the state law regarding the standards of proof and elements required to show a product was defectively designed.

1. Indiana

Indiana’s substantive law pertaining to liability for defective design is set forth in the Indiana Product Liability Act. To establish a prima facie case of liability under the Act, the plaintiff must show that: “(1) the product is defective and unreasonably dangerous; (2) the

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15 See generally American Law of Products Liability 3d § 17:21.
16 Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (7th Cir.1994).
17 Colip v. Clare, 26 F.3d 712, 714 (7th Cir. 1994).
18 See Erie, 304 U.S. at 78.
defective condition existed at the time the product left the defendant's control; and (3) the defective condition was a proximate cause of the plaintiff's injuries.”

In determining whether a product design is “unreasonably dangerous”, Indiana is one of the few states that still applies only the consumer expectation test.\(^{21}\)

2. Wisconsin

Wisconsin is also part of the minority that applies solely the consumer expectation test when determining whether a product is defectively designed.\(^{22}\) Although Wisconsin has recognized the new insights into products liability provided by the Restatement (Third) of Torts,\(^{23}\) it has thus far rejected the adoption the Restatement’s risk-utility test.\(^{24}\) However, Justice Prosser’s concurrence, which was joined by Justice Ziegler and Justice Gablema, in Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co., suggests that the Wisconsin Supreme Court may be willing to adopt the risk-utility test should the opportunity present itself.\(^{25}\) In Godoy, the plaintiffs brought product liability and negligence claims against manufacturers of lead pigment under a risk-utility theory.\(^{26}\) The defendants moved to dismiss the design-defect claims arguing that white lead carbonate cannot be made without lead, and therefore, the plaintiff’s complaint essentially asserted that the defendants should have made a different product.\(^{27}\)

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\(^{23}\) Haase v. Badger Mining Corp., 682 N.W.2d 389, 394 (Wis. 2004).

\(^{24}\) Id.

\(^{25}\) See Godoy, 768 N.W.2d at 692-700.

\(^{26}\) Id. at 679.

\(^{27}\) Id. at 679-80.
The Wisconsin Supreme Court majority agreed that a claim for defective design cannot be maintained when the alleged defect is an essential characteristic of the product itself.28 The majority opinion also reaffirmed that Section 402A of the Restatement (Second) of Torts continues to remain the touchstone of Wisconsin’s analysis for strict products liability.29 Although the court was not tasked with deciding upon the application of a risk utility test in this case, the tenor of Justice Prosser’s concurrence suggests that the court would if given the opportunity.30 The concurring opinion expressed concerns that section 402A of the Restatement (Second) of Torts no longer reflects the emerging complexities of products liability law.31 Justice Prosser also notes that Wisconsin is one of only six states that “clings to the consumer contemplation test” as the sole means of analyzing design-defect claims.32

3. Illinois

In 1965, the Illinois Supreme Court adopted the Second Restatement of Tort’s doctrine of strict liability, which imposed strict liability on a seller of “any product in a defective condition unreasonably dangerous to the user or consumer or to his property” through the consumer expectation test.33 Illinois courts, however, recognized the problems associated with the consumer expectation test34 and have accepted the rationale for the risk utility test as laid out

28 Id. at 687. The court’s holding seems to suggest that there can be no products liability when a design defect is a characteristic of the product itself. However, in instances where the product is inherently dangerous (i.e. it cannot be made safer, yet is useful in spite of its dangers), plaintiffs can bring failure to warn claims against defendant manufacturers. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).
29 Godoy, 768 N.W.2d at 682.
30 See Godoy, 768 N.W.2d at 692-700
31 See id. at 694 (Prosser, J., concurring).
32 Id. at 696 (Prosser, J., concurring).
34 See Blue v. Envtl. Eng’g, Inc., 828 N.E.2d 1128, 1138 (Ill. 2005) (explaining that, “[i]t became apparent, however, that [the Restatement] created to address
by the California Supreme Court in *Barker* as an alternative means for proving liability.\(^{35}\) Such rationale includes the concepts that the consumer expectation test should be reserved only for use in cases in which the everyday experiences of a product’s consumers allow them to make a valid judgment on its safety and that not all consumers will be able to understand how safe an inherently complex and dangerous product could be made.\(^{36}\)

Thus, Illinois courts permit a plaintiff to use either the consumer expectation test or the risk-utility test to prove that the product is “unreasonably dangerous” in a strict liability design defect case.\(^{37}\) A plaintiff can employ the consumer expectation test by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or the “risk utility test” by introducing evidence that the product’s design proximately caused his injury and that the risk of danger inherent in the challenged design outweighs the benefits of such design.\(^{38}\)

C. Expert Testimony is Required to Establish Liability in Most Design Defect Cases.

Expert testimony has historically been required to establish a design defect through the risk-utility test, when the design is not blatantly defective\(^{39}\) and when an understanding of the technical, scientific nature of the defect is beyond the general experience or common understanding of laypersons.\(^{40}\) Correspondingly, courts have manufacturing defects, did not adequately cover design defects or defects based on inadequate warnings\(^{35}\).  

\(^{36}\) See id. at 255-256.  
\(^{39}\) Meaning, where the *existence* of a defect is not beyond the common understanding of a lay juror. See, e.g., Owens v. Ford Motor Co., 297 F. Supp. 2d 1099, 1103-04 (S.D. Ind. 2003).  
\(^{40}\) Id. at 1103.
generally held that expert testimony is not always required to establish a design defect through the consumer expectations test when the lay person's understanding would constitute a basis for a legal inference and not mere speculation. However, the Seventh Circuit's recent decision in Show v. Ford demonstrated the need for expert testimony to establish liability in most design defect claims regardless of whether they are brought under the risk utility test or the consumer expectations test.

In Show, a 1993 Ford Explorer was struck by another car near the left rear wheel while passing through an intersection. The Explorer rolled over, injuring the driver of the car and a passenger. The plaintiffs filed suit against Ford alleging that the Explorer's defective design rendered it unstable. The plaintiffs did not retain an expert to testify as to the vehicle's defective design and argued that expert testimony was unnecessary under the consumer-expectation test because "jurors, as consumers, can find in their own experience all of the evidence required for liability." The Seventh Circuit affirmed the district court's holding that the plaintiffs could not establish a prima facie case of a design defect in the Explorer without expert testimony, even under the consumer expectations test. The court reasoned that the consumer-expectation test is not an independent theory of recovery, but rather a factor subsumed within the broader risk-utility

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41 Id.; See also Mikolajczyk v. Ford Motor Co., 231 Ill. 2d 516, 554, (2008) (explaining, "[t]he consumer-expectation test is a single-factor test and, therefore, narrow in scope . . . The jury is asked to make a single determination: whether the product is unsafe when put to a use that is reasonably foreseeable considering its nature and function. No evidence of ordinary consumer expectations is required, because the members of the jury may rely on their own experiences to determine what an ordinary consumer would expect" (citing Besse v. Deere & Co., Ill. 3d 497, 500 (1992) and Mele v. Howmedica, Inc., Ill. 3d 1, 14 (2004))).

42 See Show v. Ford Motor Co., 659 F.3d 584, 587. (7th Cir. 2011).

43 Id. at 584.

44 Id.

45 Id.

46 Id. at 585.

47 Id. at 587-588 (noting that it “takes expert evidence to establish a complex product’s unreasonable dangerousness through a consumer-expectations approach”).
Just as the risk-utility test indisputably requires expert testimony, the consumer expectations test does as well.\(^{49}\) The court also emphasized that expert testimony is required to establish the unreasonable dangerousness of a complex product, such as a car, through a consumer-expectations approach.\(^{50}\) Without the assistance of expert testimony in a complex products-liability case, a jury would have to speculate about matters outside its understanding.\(^{51}\) However, given the court’s reference to the vehicle as a “complex product”\(^{52}\), it is unclear whether the Seventh Circuit’s holding requiring expert testimony extends to simple product defects that can be easily understood through the jurors’ own experiences and understanding.

It should be noted that the Seventh Circuit focused much of its opinion in Show on whether the need for expert testimony is one of substantive or procedural law.\(^{53}\) Ultimately, because both parties assumed that state law determines whether expert testimony is required, the court decided it under Illinois law and did not have to rule on the issue.\(^{54}\) However, the court’s dicta indicates that there may be a question as to whether Illinois treats the risk-utility and consumer-expectation tests as substantive or procedural in nature.\(^{55}\) The court highlights the Illinois Supreme Court’s statement in Mikolajczyk that “[the consumer-expectation test and the risk-utility test] . . . are not *theories of liability*; they are *methods of proof* by which a plaintiff ‘may demonstrate’ that the element of unreasonable dangerousness is met.”\(^{56}\) Thus, the court suggests that the two tests are

\(^{48}\) Id. at 587.

\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) Id. at 588.

\(^{52}\) Id. at 585.

\(^{53}\) See id. at 585-87.

\(^{54}\) Id. at 585 (explaining, “[t]he assumption rests on a belief that the quality of proof is part of the claim's substantive elements, which depend on state law under the *Erie* doctrine even when substantive doctrine is implemented through evidentiary rules”).

\(^{55}\) Id.

\(^{56}\) Id. at 585-86 (citing Mikolajczyk, 231 Ill.2d at 548).
simply procedural in nature and thus federal law would apply when determining whether expert testimony is required to sustain a products liability claim.\textsuperscript{57}

\textbf{FEDERAL ADMISSIBILITY OF SCIENTIFIC EVIDENCE}

\textit{A. Frye v. United States}

The United States Court of Appeals for the District of Columbia Circuit’s 1923 decision in \textit{Frye v. United States} marked the first judicial establishment of an evidentiary standard for the admissibility of scientific expert evidence.\textsuperscript{58} In \textit{Frye}, the defendant offered an expert witness to testify as to the results of a systolic blood pressure deception test, a precursor to the polygraph lie detector, as evidence of his innocence of a murder conviction.\textsuperscript{59} The court established the general acceptance test, which provides that novel scientific expert evidence is only admissible when the scientific principle or technique from which it is deduced has gained general acceptance in its field.\textsuperscript{60} Because the systolic blood pressure deception test had not yet gained scientific standing among physiological and psychological authorities, the court excluded the defendant’s expert from testifying as to the test’s results.\textsuperscript{61}

Since \textit{Frye}’s general acceptance test was the sole requisite for expert admissibility, theories or techniques not generally accepted in the scientific community were inadmissible without exception.\textsuperscript{62} By “abdicating . . . to scientists the responsibility for ruling on the admissibility of evidence”, \textit{Frye} diminished judicial discretion and

\textsuperscript{57} Id. at 586.


\textsuperscript{59} Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923).

\textsuperscript{60} Id. at 1014.

\textsuperscript{61} Id.

removed a judge’s ability to independently review the merits of the specific scientific evidence in a case.\textsuperscript{63} The judiciary responded to Frye’s restraints on judicial discretion by manipulating their definitions of the scientific community or general acceptance in order to influence the determination of admissible evidence.\textsuperscript{64} In this light, Frye failed to provide a workable cohesive standard of admissibility and effectively denied litigants the opportunity to present valid scientific evidence to support their claims.\textsuperscript{65}

In 1975, Congress enacted the Federal Rules of Evidence, including Rule 702 which provided that “if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue”, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.\textsuperscript{66} With no mention of Frye or the general acceptance test in either the language of Rule 702 or its legislative drafting history\textsuperscript{67}, a debate arose regarding whether the common law general acceptance standard continued to be a viable means of determining the admissibility of expert testimony.\textsuperscript{68} Many scholars interpreted the rule’s silence to

\begin{itemize}
  \item \textsuperscript{64} See id. at 482-483; see also David E. Bernstein, \textit{The Admissibility of Scientific Evidence After Daubert v. Merrell Dow Pharmaceuticals, Inc.}, 15 CARDOZO L. REV. 2139, 2140 (1994) (explaining, “[s]ome judges interpreted [the general acceptance] rule as allowing almost any credentialed scientist's testimony, however implausible, to be presented to a jury. This became known as the ‘let-it-all-in’ approach”).
  \item \textsuperscript{65} See Hasko, \textit{supra} note 57 at 482-83.
  \item \textsuperscript{66} FED. R. EVID. 702.
  \item \textsuperscript{67} FED. R. EVID. 702; PUB. L. NO. 93-595 (1975).
  \item \textsuperscript{68} See, e.g., Becker & Orenstein, \textit{supra} note 58 at 879; Hasko, \textit{supra} note 57 at 484; Randolph N. Jonakait, \textit{The Supreme Court, Plain Meaning, and the Changed Rules of Evidence}, 68 TEX. L. REV. 745, 747 (1990).
\end{itemize}
suggest that the Frye test still applied as “[i]t would be odd if the Advisory Committee and the Congress intended to overrule the vast majority of cases excluding such evidence . . . without explicitly stating so.” However, plain meaning jurisprudence restricted the continued application of Frye due to the absence of its mention in the rule or committee notes. Thus, a split persisted amongst the federal courts as to the standard of expert admissibility.

**B. The Daubert Trilogy**

1. Daubert v. Merrell Dow Pharmaceuticals, Inc.

In *Daubert v. Merrell Dow Pharm., Inc.*, the United States Supreme Court rejected Frye’s rigid general acceptance standard for admissibility and established a liberal approach, which placed complete discretion to screen scientific expert evidence in the hands of the judiciary. In *Daubert*, plaintiffs sued the defendant pharmaceutical company to recover for limb reduction birth defects allegedly caused by the mothers’ prenatal ingestion of defendant’s anti-nausea drug Bendectin. The plaintiffs offered the testimony of eight experts, who relied upon “in vitro” (test tube) and “in vivo” (live) animal studies, pharmacological studies, and reanalysis of previously published studies in concluding that Bendectin could cause birth defects. However, the district court granted defendant’s motion for summary judgment, which contended that the plaintiffs would be

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71 *Compare*, Viterbo v. Dow Chem. Co., 826 F.2d 420 (5th Cir. 1987) and United States v. Downing, 753 F.2d 1224 (3rd Cir.1985) (both finding the Rules do not incorporate Frye), with United States v. Smith, 869 F.2d 348 (7th Cir. 1989); United States v. Christophe, 833 F.2d 1296 (9th Cir.1987) and United States v. Distler, 671 F.2d 954 (6th Cir.) (all holding Rules do incorporate Frye).
73 *Id.*
74 *Id.* at 583.
unable to come forward with admissible evidence showing Bendectin caused birth defects. In relying on Frye’s general acceptance test, the United States Court of Appeals for the Ninth Circuit subsequently affirmed the District Court’s decision on the grounds that plaintiffs’ expert evidence was based on methodology that was not generally accepted as a reliable technique in the scientific community. The Supreme Court vacated and remanded the judgment, holding that the Frye test was superseded by the adoption of the Federal Rules of Evidence and that such “a rigid ‘general acceptance’ requirement would be at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to opinion testimony.’”

The Supreme Court noted that the Federal Rules of Evidence require the trial judge to act as a gatekeeper in determining whether an expert is proposing to testify as to scientific knowledge that will assist the trier of fact to understand or determine the fact at issue. Such a determination entails a preliminary assessment of whether the methodology underlying the testimony is scientifically valid (i.e. reliable) and of whether the methodology can be applied to the facts in issue (i.e. relevant). The Daubert Court set forth the following non-exhaustive guideposts to assist the district courts in determining whether proffered scientific expert testimony can be characterized as a reliable: (1) whether the theory has been or is capable of being tested; (2) whether the theory has been subjected to peer review and publication; (3) the theory's known or potential rate of error; and (4) the theory's level of acceptance within the relevant community.

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75 Id. at 582.
76 Id. at 584.
77 Id. at 587.
78 Id. at 588 (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)).
79 Id. at 592.
80 Id. at 592-93
81 Id. at 593–94.
2. General Electric Co., et. al. v. Joiner

In General Electric Co., et. al. v. Joiner, the United States Supreme Court expanded on Daubert by establishing abuse of discretion as the proper standard to review a district court’s ruling as to whether to admit or exclude expert scientific evidence.\(^82\) In Joiner, the plaintiff, after being diagnosed with small-cell lung cancer, brought a claim alleging that his disease was promoted by workplace exposure to chemical polychlorinated biphenyls (PCB's) present in materials manufactured by the defendants.\(^83\) The district court granted General Electric’s motion for summary judgment, reasoning that plaintiff’s experts’ opinion that exposure to PCBs caused small-cell lung cancer did not rise above “subjective belief or unsupported speculation.”\(^84\) The Eleventh Circuit reversed and held that the district court erred in excluding the plaintiff’s expert.\(^85\) The court explained, “[b]ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge’s exclusion of expert testimony.”\(^86\) The Supreme Court of the United States granted certiorari and reversed the Appellate Court’s decision.\(^87\)

The Supreme Court majority held that the Court of Appeals erred in its holding of the exclusion of plaintiff’s experts' testimony by applying an overly “stringent” review and failing to give the district court the “deference that is the hallmark of abuse-of-discretion review.”\(^88\) Abuse of discretion is the proper standard of review of a district court's evidentiary rulings and an appellate court will reverse a district court’s ruling only if it is manifestly erroneous.\(^89\) In applying an abuse of discretion review, a court of appeals may not categorically

\(^{83}\) Id. at 139.
\(^{84}\) Id. at 140.
\(^{85}\) Id.
\(^{86}\) Id.
\(^{87}\) Id. at 141.
\(^{88}\) Id. at 143.
\(^{89}\) See id. at 141-142.
distinguish between rulings allowing expert testimony and those that do not.  
Further, a court of appeals may not subject a district court’s ruling to a more searching standard of review simply because its holding is outcome determinative, such as in the case of a ruling in favor of a motion for summary judgment. The Seventh Circuit has explicitly affirmed its intention of applying this deferential standard of review. For example, in Bradley v. Brown, the Seventh Circuit explained, “[the] decision to allow expert testimony is within the broad discretion of the trial judge and is to be sustained on appeal unless manifestly erroneous.”

3. Kumho Tire Co., Ltd. v. Carmichael

In Kumho Tire Co., Ltd. v. Carmichael, the plaintiffs brought a product liability action against the defendant tire manufacturer for injuries sustained when the right rear tire on a vehicle failed. The plaintiffs’ case relied heavily upon the opinion of their expert tire failure analyst that the blowout was caused by a defect in the tire’s design. His opinion was based upon a visual inspection of the tire and an application of his knowledge pertaining to tire blowouts to the facts at issue. The district court granted defendant’s motion to exclude the plaintiffs’ expert on the basis that his methodology was unreliable; however, the Eleventh Circuit reversed the district court’s holding on the belief that Daubert was only applicable to the scientific testimony and not to skill or experience based testimony. The Supreme Court disagreed and held that a federal trial judge's gate keeping obligation applies not only to scientific testimony, but to all

90 See id. at 136.
91 See id. at 142-143. Practically, a trial court can avoid reversal of motion for summary judgment ruling on appeal by first striking the expert testimony necessary to establish the plaintiff’s case.
92 See Bradley v. Brown, 42 F.3d 434, 437 (7th Cir. 1994).
93 Id.
95 Id.
96 See id. at 144.
97 Id. at 145-146.
expert testimony. The Court also held that the Rule 702 inquiry is “a flexible one” and a district court has broad discretion in determining which of the Daubert factors are pertinent in assessing reliability. District courts may fulfill their gate keeping duty by performing any inquiry it chooses “so long as the content and purpose of Daubert is not forgotten.” Thus, a court of appeals must give deference to both the trial court’s decision whether to admit expert testimony as well as the criteria used to make that decision.

C. JUDICIAL DISCRETION IN ASSESSING ADMISSABILITY OF EXPERT TESTIMONY

In 2000, Congress responded to Daubert and its progeny by amending Federal Rule of Evidence 702 to read as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

98 Id. at 149.
99 Id. at 150 (explaining, “The [Daubert] factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.” Id. at 138).
100 See id. at 152.
102 See Kumho Tire at 158 (holding, “Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case”).
103 5 Handbook of Fed. Evid. § 702:5 (7th ed.) (citing FED. R. EVID. 702 (effective December 1, 2000)). FED. R. EVID. 702 was restyled effective December
The Advisory Committee expressly noted that it did not amend Rule 702 in a specific attempt to codify the Daubert factors. In fact, the committee note explains that any procedural requirements for the exercise of the trial court’s gate keeping function are purposely absent from the amended rule in order to allow trial courts both flexibility and discretion in considering expert admissibility. The committee note goes on to state, “[a] review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule.” Opinions are excluded when they are unhelpful and therefore superfluous and a waste of time.

The amendment does not provide an automatic challenge to all expert testimony; rather, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” District courts do not have discretionary authority to “accept or reject” expert testimony, as this is part of the jury’s fact finding role. The district court need not determine whether the proposed expert testimony is irrefutable or correct since an expert’s opinion is admissible so long as he can account for “how and why” the it was reached. Therefore, an

1, 2011, but all changes were intended to be stylistic in nature and did not effect the functionality of the rule. See id. and Fed. R. Evid. 702 advisory committee’s note. See Fed. R. Evid. 702 advisory committee’s note; see also Craig Lee Montz, Trial Judges As Scientific Gatekeepers After Daubert, Joiner, Kumho Tire, and Amended Rule 702: Is Anyone Still Seriously Buying This?, 33 UWLA L. REV. 87, 100-02 (2001).

105 Fed. R. Evid. 702 advisory committee’s note.

106 Fed. R. Evid. 702 advisory committee’s note (citing 7 Wigmore § 1918).

107 Fed. R. Evid. 702 advisory committee’s note (citing Kumho Tire, 526 U.S. at 158).

108 Daubert, 509 U.S. at 595.

109 See Fed. R. Evid. 702 advisory committee’s note (stating, “the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise”).

110 Joiner, 522 U.S. at 144.
expert’s opinion is not considered unreliable simply because all other potential causes cannot be excluded, so long as the expert offered an explanation as to why a proffered alternative was not the sole cause.\textsuperscript{112} The suggestion of an alternative cause affects the weight that the jury should give the expert's testimony rather than the admissibility of that testimony.\textsuperscript{113}

Various circuits have articulated the need to restrict the district court’s gate keeping function. The Second Circuit has explained that district courts must be restrained in their gate keeping function, as limitless discretion would “inexorably lead to evaluating witnesses credibility and weight of the evidence, the ageless role of the jury.”\textsuperscript{114} The Second Circuit further elaborated that “[d]isputes as to the strength of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony.”\textsuperscript{115} The Third Circuit has also stressed that the court is only a gatekeeper, as “[a] party confronted with an adverse expert witness who has sufficient, though perhaps not overwhelming, facts and assumptions as the basis for his opinion can highlight those weaknesses through effective cross-examination.”\textsuperscript{116} Finally, the Fifth Circuit has emphasized that “the trial court's role as gatekeeper is not tended to serve as a replacement for the adversary system”.\textsuperscript{117}

\textsuperscript{112} See Westberry v. Gislaved Gummi AB, 178 F.3d 257, 265-266 (4th Cir. 1999).
\textsuperscript{113} See id. at 265.
\textsuperscript{114} McCullock v. H.B. Fuller Company, 61 F.3d 1038, 1045 (2nd Cir. 1995).
\textsuperscript{115} Id. at 1044.
\textsuperscript{116} Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 414 (3d Cir.2002).
\textsuperscript{117} United States v. 14.38 Acres of Land Situated in Leflore Cnty., Miss., 80 F.3d 1074, 1078 (5th Cir. 1996)
BIELSKIS V. LOUISVILLE LADDER

A. The Facts

Raymond Bielskis, an acoustical ceiling carpenter, occasionally required a scaffold in order to perform his job duties. In 1997, Bielskis employer, R.G. Construction, provided him with an assembled Louisville Ladder SM 1404 mini-scaffold ladder. The mini-scaffold was a four-foot long mobile unit with hinged sides allowing for collapsible storage, rungs for planks the user stands on, and four wheels that can be locked in place while in use. Each wheel was screwed to a leg of the scaffold with a caster and threaded metal stem.

In 2001, Bielskis began working for a new employer, International Decorators, who provided him with new scaffolding. Thus, between 2001 and 2005, he had used his Louisville Ladder mini scaffold on only one or two occasions to haul tools to and from his car. On March 17, 2005, Bielskis used the Louisville Ladder mini-scaffold while working on ceiling tiles at a Motorola jobsite in Libertyville, Illinois because he lent the scaffolding supplied by International Decorators to his coworker. After working on the mini-scaffold for several hours, Bielskis wheeled it into another room, stepped up onto the scaffold and began to work when the caster stem above one of the scaffold’s wheels broke, causing him to collapse to the floor and suffer injuries to his hand and knee. Bielskis brought a products liability design defect claim against the defendant ladder manufacturer, Louisville Ladder, under Illinois’ risk-utility test.

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118 Bielskis v. Louisville Ladder, Inc., 663 F.3d 887, 889 (7th Cir. 2011).
119 Id.
120 Id. at 890.
121 Id.
122 Id. at 889.
123 Id.
124 Id.
125 Id. at 889-890.
126 Id. at 891. Bielskis also filed negligence, manufacturing defect, failure to warn, and res ipsa loquitur claims against Louisville Ladder.
B. Plaintiff’s Expert

Bielskis retained mechanical engineer Neil J. Mizen to provide expert testimony as to what caused the scaffold’s caster stem to break.\textsuperscript{127} Mizen had extensive engineering experience: he obtained both a bachelor’s and master’s degree in Mechanical Engineering; developed packaging machinery and manufacturing processes at Cornell laboratory; founded Mizen Engineering Company, Inc., where he designed and built equipment and computer-based control systems used in manufacturing processes; and testified as an expert in a various cases pertaining to manufacturing and design flaws.\textsuperscript{128}

Mizen provided a written report in which he opined that tensile stress\textsuperscript{129} generated from over-tightening the caster during installation into the leg caused a brittle fracture in the threaded stud secured to the top flange of the caster.\textsuperscript{130} He observed that the fractured surface revealed a clean break consistent with a brittle fracture, rather than a dull and fibrous appearance or plastic deformation common in ductile fractures.\textsuperscript{131} He further concluded that the brittle fracture could have been avoided by either attaching the wheel with a different mechanism than the threaded stud, or by simply not over-tightening the stud.\textsuperscript{132}

Mizen relied on his basic engineering background and experience, research pertaining to brittle fractures obtained from the internet, and an hour-long visual examination in forming his opinion that the caster stem failed due to a brittle fracture induced by over tightening.\textsuperscript{133} He also observed the fracture at the end of the caster through a

\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} The court explained tensile stress as the stress that leads to expansion (usually in length) while the volume stays constant; it is the opposite of compressive stress, which occurs when the material is under compression and the volume decreases. Id. at 892. Mizen defined tensile strength as “the ability of an object to resist tensile forces.” Id.
\textsuperscript{130} Id. at 891-892.
\textsuperscript{131} Id. at 892. A ductile fracture is one “where the material pulls apart instead of snapping or cracking suddenly.” Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 894-895.
microscope during the parties’ joint inspection and reviewed the calculations generated by the defendant’s expert.\textsuperscript{134} Mizen did not, however, test his theory in an attempt to quantify the tensile strength of the caster stem or test his proposed alternate design.\textsuperscript{135}

\textit{C. Defendant’s Expert}

Louisville Ladder also retained an expert, Engineering Systems, Inc. (“ESI”) who, concluded that the caster stem sustained a brittle fracture caused by the loosening of the caster stem.\textsuperscript{136} ESI used digital calipers to measure the height between the HEX mating surface, the caster insert mating surface, and the corresponding fracture surfaces.\textsuperscript{137} ESI also created positive and negative replicas of the caster stem in order to examine the fractured surfaces in detail.\textsuperscript{138} Finally, ESI performed stress analysis calculations in order to assess the stresses present at the stud site with different degrees of tightness.\textsuperscript{139}

\textit{D. The District Court Rejects Plaintiff’s Expert’s Methodology}

The defendant moved to bar Mizen’s testimony under \textit{Daubert}, arguing that his failure to test or examine the proposed design alternatives rendered his scientific methodology unreliable.\textsuperscript{140} Although the district court found that Mizen’s education and experience rendered him qualified to testify as an expert, it granted defendant’s motion.\textsuperscript{141} The district court held that absent testing or data reflecting an acceptance of his theory within the scientific community, Mizen’s conclusion that the brittle fracture was caused by

\textsuperscript{135} \textit{Bielskis}, 663 F.3d at 894-895.
\textsuperscript{136} \textit{Id.} at 892.
\textsuperscript{137} \textit{Id.} at 895.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 892.
\textsuperscript{141} \textit{Id.} at 894.
over tightening constituted nothing more than an illogical leap or an off-the-cuff conclusion.\textsuperscript{142} The district court explained, “Bielskis's failure to establish admissibility under any single \textit{Daubert} factor is not dispositive, but [his] failure to establish admissibility under any of the factors leaves the Court no choice but to bar Mizen's testimony.”\textsuperscript{143} The district court then denied Bielskis’ motion to reopen discovery in order to obtain a new liability expert and granted defendant’s motion for summary judgment, as Bielskis could not establish his products liability claim without expert evidence.\textsuperscript{144}

\textit{E. The Seventh Circuit Affirms}

Bielskis appealed to the Seventh Circuit, arguing that the district court abused its discretion by excluding Mizen’s testimony.\textsuperscript{145} Like the district court, the Seventh Circuit took issue with the reliability of Mizen’s methodology and held that the district court did not abuse its discretion by barring Mizen’s testimony as his methodology lacked “recognized hallmarks of scientific reliability.”\textsuperscript{146} The court determined that Mizen used no particular methodology at all in reaching his conclusions as he failed to: (1) test the caster stem for measurements, alloy composition and tensile strength; (2) test his proposed design alternatives; (3) submit information demonstrating a consensus within the engineering community in support of his conclusion; or (4) subject his opinion to peer review as it was based on a visual examination.\textsuperscript{147} The Seventh Circuit noted the discretion afforded to district courts in assessing the reliability of expert testimony: “we give the district court wide latitude in performing its gate-keeping function in determining both how to measure the reliability of expert testimony and whether the testimony itself is

\begin{footnotesize}
\begin{enumerate}
\item[142] Id.
\item[143] Id. at 896.
\item[144] Id. at 892.
\item[145] Id. at 893.
\item[146] Id. at 897.
\item[147] Id. at 895.
\end{enumerate}
\end{footnotesize}
reliable”. Thus, the Seventh Circuit deferred to the lower court’s belief that Mizen’s methodology amounted to nothing more than “‘talking off the cuff’—without data or analysis.”

The Seventh Circuit also affirmed the district’s court’s denial of Bielskis’ motion for a continuance to obtain another expert. The court observed that given the case-management nature of such a request, district courts have broad discretion when ruling whether or not a plaintiff should be allowed to retain another expert. The court reasoned that granting Bielskis’ motion would give him a “second bite at the expert witness apple”, which would run afoul to notions of efficient case management.

Lastly, the Seventh Circuit affirmed the district court’s entry of summary judgment in favor of Louisville Ladder. The court gave credence to Bielskis’ argument that under Illinois law, product liability cases where the cause of action rests upon the assertion that the product failed “to perform in the manner reasonably to be expected”, (i.e. failed per the consumer expectation test) do not require expert testimony in order to establish a prima facie case. However, the court denied Bielskis’ attempt to apply the consumer expectation test because he failed to establish a prima facie element to a manufacturing defect claim – that the mini-scaffold was defective at the time it left Louisville Ladder’s control.

148 *Id.* at 894 (citing *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir.2010)).
149 *Id.*
150 *Id.* at 897.
151 *Id.*
152 *Id.*
153 *Id.* at 899.
154 *Id.* at 898. As discussed in Part I of this note, the rule of law has since changed and now Illinois requires expert testimony to prove liability in complex products liability cases brought under both the consumer expectation test and products liability cases brought under the risk utility test. See *Show v. Ford Motor Co.*, 659 F.3d 584 (7th Cir. 2011).
155 *Bielskis*, 663 F.3d at 898.
F. Analysis

The Daubert standard was designed to ensure that expert witnesses adhere to the same standards of intellectual rigor that are demanded in their professional work when testifying in court. As gatekeepers, district courts are tasked with the duty of ensuring that an expert does not extrapolate from an accepted premise to an unfounded conclusion. In order to ensure district courts are effective gatekeepers, they are afforded a great deal of discretion in deciding both whether to admit expert testimony as well as which criteria is used to make that decision.

This judicial discretion should be exercised in conjunction with the spirit of Rule 702, which was originally enacted to offset Frye’s general acceptance test and its effect of diminishing judicial discretion by placing the admissibility determination into the hands of the scientific community. The intent of the Rule was to relax the traditional barriers to the admission of opinion testimony by placing complete discretion back into the hands of the judiciary. District courts should be mindful of this liberal intent when applying the Daubert factors to a reliability assessment, as rejection of expert testimony is the exception rather than the rule.

This judicial discretion should also be exercised within the limits established by case law following the enactment of Rule 702. District courts do not have discretionary authority to “accept or reject” expert testimony, as this is part of the jury’s fact finding role. Further,
district courts do not have discretion to exclude shaky but admissible evidence as it is more appropriately attacked through cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.\(^{163}\) Lastly, it is not within a district court’s discretion to exclude expert testimony simply because all other potential causes cannot be disqualified, as the suggestion of an alternative cause affects the weight that the jury should give the expert's testimony rather than its admissibility.\(^{164}\)

*Bieliskis* illustrates how the perception of whether an admissibility determination is made in accordance with the spirit of Rule 702 and is within the common law limitations rests solely upon the reviewing judge’s own subjective belief.\(^{165}\) In *Bieliskis*, the district court held that the plaintiff failed to establish its expert’s admissibility under any of the *Daubert* factors.\(^{166}\) The court particularly focused on the fact that plaintiff’s expert did not personally test his theories, while the defendant’s expert did perform physical testing.\(^{167}\) However, the Seventh Circuit noted in *Cummins v. Lyle Industries* that hands-on testing or observations made by the expert himself is not an absolute prerequisite to the admission of expert testimony, as an expert’s methodology may satisfy the reliability requirement for admissibility through the review of experimental, statistical, or scientific data generated by others in the field.\(^{168}\) Mizen did just that - he reviewed the calculations generated by the defendant’s expert in order to form his conclusions.\(^{169}\) While it is possible for Mizen’s review to be considered as reliable scientific method per *Cummins*, it certainly was not considered to be so under the Seventh Circuit’s review in *Bieliskis*.

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\(^{163}\) See *Daubert*, 509 U.S. at 595.

\(^{164}\) See *Westberry*, 178 F.3d at 265-266.

\(^{165}\) *Bieliskis*, 663 F.3d at 894.

\(^{166}\) *Bieliskis*, 663 F.3d at 896.

\(^{167}\) Id. at 894.

\(^{168}\) See *Cummins v. Lyle Industries*, 93 F.3d 362, 396 (7th Cir. 1996).

Personal observation alone is not a substitute for scientific methodology and is insufficient to satisfy *Daubert*.

However, an opinion based upon observation as well as scientific knowledge and experience may constitute sufficient scientific methodology. Experts tie observations to conclusions through the use of what Judge Learned Hand called “general truths derived from ... specialized experience.”

In *Bielskis*, Mizen explicitly explained that he based his opinion partly upon his engineering knowledge and experience. Although courts may consider an application of specialized knowledge and experience as reliable scientific methodology in other instances, this was, again, not the case in *Bielskis*.

The district court was not necessarily wrong in its exclusion of Mizen - even if his opinions were based upon sound scientific methodology, he appeared to have a difficult time articulating what that methodology was. Nonetheless, the district court’s holding serves as an illustration of the vast amount of discretion judges possess when determining admissibility on a case-by-case basis. Such a subjective determination is likely to lead to an inconsistent application of the *Daubert* factors among the district courts, which will in turn have a negative effect on litigants. For example, after granting the defendant’s motion to exclude Mizen, the district court then granted defendant’s motion for summary judgment since Bielskis could not establish his products liability claim without expert evidence. Not only did the judge’s subjective dislike of Mizen’s methodology dismantle the plaintiff’s entire case, but it also likely cost the plaintiff a significant amount of money spent in preparation for litigation.

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170 Chapman v. Maytag Corp., 297 F.3d 682, 688 (7th Cir. 2002).
171 *Kumho Tire*, 526 U.S. at 148.
173 *Bielskis*, 663 F.3d at 894-895.
174 *Id*. at 894 (explaining that “[w]hen questioned as to what scientific methodology he used to reach this conclusion, Mizen replied that he had relied on “basic engineering intelligence” and “solid engineering principles that any other engineer would use”).
175 *Id*. at 899.
Given the broad discretion of the trial judge as well as the deferential standard of review on appeal, it is seemingly difficult to succeed in challenging a district court’s reliability assessment. Thus, the Seventh Circuit’s affirmation of the district court’s exclusion of Mizen was proper.

CONCLUSION

Although the Seventh Circuit’s affirmation was correct in light of the deferential standard of review on appeal, Bielskis illustrates the importance of ensuring that an expert’s testimony is based on rigorous testing, rather than simply a visual observation, personal knowledge, or an examination of available opinions and data, in order to survive both judicial scrutiny in determining reliability as well as a motion for summary judgment should the district court find the expert unreliable. The discretion afforded by the admissibility inquiry under the Federal Rules of Evidence and Daubert, as well as the stringent standard of appellate review, gives trial judges unfettered ability to dismiss an expert, and thus completely dismantle a plaintiff’s cause of action, based solely on the judge’s subjective liking of that expert.

176 See Joiner, 522 U.S. at 141-142.
THAT’S THE TICKET: ARGUING FOR A NARROWER INTERPRETATION OF THE EXCEPTIONS CLAUSE IN THE DRIVER’S PRIVACY PROTECTION ACT

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Cite as: Katherine Hutchison, That’s the Ticket: Arguing for a Narrower Interpretation of the Exceptions Clause in the Driver’s Privacy Protection Act, 7 SEVENTH CIRCUIT REV. 126 (2012), at http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v7-2/hutchison.pdf.

INTRODUCTION

In 1994, Congress enacted the Driver’s Privacy Protection Act (DPPA, or the Act)\(^1\) out of concern that states were disclosing personal information contained in motor vehicle records to parties who often used it for illegal and harmful purposes.\(^2\) Specifically, the highly publicized murder of a young actress by an obsessed fan who obtained her unlisted address this way, and other incidents of stalking and harassment, provided the impetus for the legislation.\(^3\)

DPPA prohibits state departments of motor vehicles from selling or otherwise “disclosing” certain personal information—including name, address, social security or driver’s license number, and various

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*J.D., May 2012, Chicago-Kent College of Law, Illinois Institute of Technology.

\(^1\) Driver’s Privacy Protection Act, 18 U.S.C.A. § 2721-2725 (West 1994).


\(^3\) Id.
other “identifying” information—without the individual’s express consent.\(^4\) However, the Act contains a fairly expansive list of exceptions which pertain mainly to safety, government functions, and litigation.\(^5\) Disagreement over what is permissible under these exceptions, contained in subsection (b) of the Act, has been the source of recent litigation,\(^6\) including Senne v. Village of Palatine, considered by the Seventh Circuit in 2011.\(^7\) In Senne, the plaintiff brought a putative class-action against a police department alleging that its practice of including detailed personal information, including name and address, on parking tickets placed on motorists’ vehicles on public streets violated his rights under the Act.\(^8\) In the since-vacated decision, the majority ruled this was a “permissible use” under the statute’s exceptions.\(^9\) The full court heard oral arguments in the case en banc in February 2012.\(^10\)

The congressional record makes clear that the purpose of DPPA was to prevent the tragic consequences that can occur when sensitive

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\(^4\) 18 U.S.C.A. § 2721(a), 2725(3).
\(^5\) Id. at § 2721(b).
\(^6\) § 2724(a) of DPPA allows for a private cause of action.
\(^7\) Senne v. Village of Palatine, 645 F.3d 919, vacated, reh’g en banc granted (7th Cir. Sept. 13, 2011).
\(^8\) Id.
\(^9\) Id. In an opinion issued Aug. 6, 2012, the full court reversed the district court’s dismissal of Senne’s case and the three-judge panel decision affirming it. See Senne v. Village of Palatine, No. 10-3243, Aug. 6, 2012. Writing for the majority, Judge Ripple, who had dissented from the earlier decision, held that the plaintiff had alleged sufficient facts that Palatine’s disclosure of his information “exceeded that permitted by [DPPA].” Remanding the case to the lower court, the majority concluded that “…the text of the statute limits the content of authorized disclosures of protected information in motor vehicle records through its requirement, clear on its face, that any such disclosure be made “[f]or use” in effecting a particular purpose exempted by the Act” — and Palatine had yet to show how it used all of the disclosed information toward that end. Id. at 19.
personal information gets into the wrong hands. However, the Seventh Circuit and other federal courts have generally construed the Act’s language in favor of public and private entities that claim to be disclosing and using private information pursuant to the enumerated exceptions, and against the drivers whose privacy and safety the Act was created to protect. These courts have broadly interpreted the exceptions clause and given wide latitude to would-be “disclosers” and “users” in a way that frustrates the purpose of the Act. To date, no cases have been brought alleging serious crime or violence resulting from a “permissible” disclosure under the Act, but the litigation indicates the exceptions are being exploited to provide some private and state actors a loophole to circumvent the law’s restrictions and to use individuals’ personal information in ways Congress never intended.

Even areas of the statute that would seem to be unambiguous—for example, distinguishing between the original “disclosing” (presumably done by the state) and subsequent “redisclosures” by recipients of the information and setting forth different requirements for both—do not appear to be helping plaintiffs in trying to assert their rights under the law. In fact, the Seventh Circuit majority entirely overlooked this distinction in Senne.

This Comment proposes that the plain language of the subsection (b) exceptions clause in DPPA is ambiguous. Therefore, courts should adopt a much narrower interpretation of what disclosures and uses of private information are permissible under the subsection consistent with congressional intent. For instance, the Senne three-judge and en banc panels divided over the question of whether the exception

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12 For example, the 11th Circuit held that a law firm fell under the “investigation in anticipation of litigation” permissible-use exception when it obtained personal information on more than 200,000 drivers from the Florida motor vehicle department in order to contact some of them as “possible witnesses” in its fraud action against several auto dealerships. See Thomas v. George, 525 F.3d 1107 (11th Cir. 2008).
13 18 U.S.C.A. § 2721(c).
14 Senne, 645 F.3d at 924-25.
providing: “for use in connection with any ... criminal [or] administrative ... proceeding ... including service of process”."\textsuperscript{15} meant that a law enforcement agency may use personal information from state motor vehicle records only to identify and contact (i.e., serve or arrest) an individual, or whether the agency may “use” this information in any conceivable way it chooses so long as its ultimate purpose is service of process.\textsuperscript{16} As Judge Diane Wood suggested at the \textit{en banc} hearing, does the latter interpretation mean the agency can even post it on the Internet?\textsuperscript{17} This would seem to not only frustrate the purpose of DPPA, but to interpret the language of the Act in a way that leads to an absurd result.

This Comment argues that, consistent with congressional goals in enacting DPPA, protecting drivers’ privacy and safety is not incompatible with efficient government administration and that courts should employ a more restrictive interpretation of the terms “use” and “disclose” as contained in the Act. Part I of this Comment reviews DPPA’s legislative purpose and history as set forth in the congressional record, federal case law interpreting the subsection (b) exceptions, and a recent district court opinion calling for a narrower construction. Part II returns to the Seventh Circuit’s analysis of subsection (b) in the since-vacated \cite{Senne}—including a powerful dissenting opinion by Judge Ripple that this Comment argues should control—and the February 2012 \textit{en banc} rehearing. Part III ties together court opinions addressing informational privacy, the “plain meaning” rule of statutory interpretation, and Seventh Circuit precedent to support a narrower interpretation. This Comment concludes by proposing that until the United States Supreme Court recognizes a constitutional privacy interest in personal information or until Congress revisits and amends DPPA, courts should read the plain language of the exceptions clause in the context of the statute’s purpose.

\textsuperscript{15} 18 U.S.C.A. § 2721(b).
\textsuperscript{16} \cite{Senne}, 645 F.3d 919 \textit{et seq.}; \textit{en banc} hearing, \textit{supra} note 10.
\textsuperscript{17} \textit{En banc} hearing, \textit{supra} note 10.
I. BACKGROUND

A. Senne v. Village of Palatine

The case that the Seventh Circuit was asked to review in early 2011 began with a routine parking ticket issued the previous summer. In August 2010, Jason Senne received a twenty-dollar citation for parking in a restricted area overnight in the Village of Palatine, Illinois. Compounding the consternation provoked by such an unpleasant discovery, Senne realized that, per the Village’s policy, detailed personal information including his name, home address, driver’s license number, date of birth, and even his height and weight were electronically printed on the ticket that had been sitting on his windshield for nearly six hours. Palatine’s attorney later conceded that the Village is alone among Illinois jurisdictions in printing this extent of personal information on parking tickets, although some jurisdictions include the registered vehicle owner’s name and home address.

Senne filed a putative class-action complaint against the Village in federal district court alleging that this practice violated his privacy rights under the Driver’s Privacy Protection Act (DPPA), and that it did not fall under any of the statute’s exceptions. Moreover, Senne maintained, the citation that the personal information is printed on doubles as a return envelope for the payment, forcing individuals to “unwittingly” disclose it once more to others who come into contact.

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18 Senne, 645 F.3d at 920.
19 Id.
20 Id. at 921.
21 En banc hearing, supra note 10 (counsel for Village explained that ten other northern Illinois municipalities include a registered owner’s name on a parking ticket, six include name and address, and one other also includes driver’s license number). See also Saukstelis v. City of Chicago, 932 F.2d 1171, 1174 (7th Cir. 1991) (most jurisdictions, including the city of Chicago, identify the vehicle owner on a ticket only by tag number).
with it once it is sent by mail.\textsuperscript{23} He accused the Village of “facilitating the potential for crime” by publicly displaying his personal information.\textsuperscript{24}

District Court Judge Matthew F. Kennelly granted Palatine’s motion to dismiss, holding that the parking ticket was not even a “disclosure” under the Act, and if it were, it was permissible under the exception allowing use by a law enforcement agency in carrying out its functions.\textsuperscript{25} The Seventh Circuit reversed the lower court’s disclosure determination but still found Palatine’s policy a permissible use, instead under the exception for service of process in an administrative proceeding.\textsuperscript{26}

\textbf{B. Driver’s Privacy Protection Act}

Prior to DPPA’s enactment in 1994, motor vehicle departments in roughly 34 states routinely sold private information of licensed drivers to marketers and other businesses, as well as to any member of the public who requested it, for a nominal fee.\textsuperscript{27} Indeed, some states had garnered substantial revenue from such disclosures.\textsuperscript{28} By the early 1990s, it was recognized that this practice resulted not only in an invasion of personal privacy, but occasionally in criminal acts.\textsuperscript{29} The passage of DPPA was inspired by several tragic incidents in which individuals were harassed or killed by people who obtained their

\begin{thebibliography}{9}
\bibitem{23} Id. at 5.
\bibitem{24} Id. at 6.
\bibitem{25} Senne, 645 F.3d at 921; \textit{also see} 18 U.S.C. § 2721(b)(1).
\bibitem{26} Senne, 645 F.3d at 923-24; \textit{see also} 18 U.S.C. § 2721(b)(4).
\bibitem{27} 139 \textsc{Cong. Rec.} S14381 (Oct. 26, 1993) (statement of Sen. Warner: “Citizens who wish to operate a motor vehicle have no choice but to register with the Department of Motor Vehicles and they should do so with full confidence that the information they provide will not be disclosed indiscriminately.”); Rep. Moran statement, \textit{supra} note 2: “[V]ery few Americans realize that by registering their car or obtaining a driver’s license through the DMV, they are surrendering their personal and private information to anyone who wants to obtain it.”).
\end{thebibliography}
personal information from state motor vehicle departments.\(^{30}\) Most famously, the television actress Rebecca Schaeffer was shot and killed by an obsessed fan outside her Los Angeles apartment after he used her motor vehicle records to find her.\(^{31}\) Lesser-known crimes were also cited by congressional sponsors. An Arizona woman was murdered by a man who acquired her address the same way.\(^{32}\) In Iowa, teenagers wrote down license tag numbers of expensive cars, obtained the owners’ home addresses from the state, and burglarized the homes.\(^{33}\) A California man sent threatening letters to five young women whose addresses he located through the DMV.\(^{34}\)

DPPA was a bipartisan effort included in omnibus crime legislation passed in 1993 as the “Violent Crime Control and Law Enforcement Act.”\(^{35}\) It was sponsored in the U.S. House of Representatives by Rep. Moran and in the U.S. Senate by Democratic Senator Barbara Boxer (Cal.) and Republican Senator John Warner (Va.).\(^{36}\) Its stated purpose was “to protect the personal privacy and safety of licensed drivers consistent with the legitimate needs of business and government.”\(^{37}\)

1. Devil is in The Details

The Act, codified as 18 U.S.C. § 2721 et seq., provides in pertinent part:

\(^{30}\) Id.
\(^{31}\) Id.
\(^{32}\) Sen. Boxer statement, supra note 2.
\(^{33}\) Id.; Rep. Moran statement, supra note 2.
\(^{34}\) Sen. Boxer statement, supra note 2.
Prohibition on release and use of certain personal information from State motor vehicle records

(a) In general.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. § 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section.\(^{38}\)

“Personal information” is defined as “information that identifies an individual, including . . . photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver’s status.”\(^{39}\)

After describing permitted disclosures for safety and theft purposes, motor vehicle emissions, and product recalls and advisories, the Act enumerates fourteen specific exceptions permitting disclosure, with (b)(1) and (b)(4) being the subject of most of the private action against government actors, including Senne:

(b) Permissible uses.—Personal information referred to in subsection (a) . . . may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation

\(^{38}\) 18 U.S.C.A. § 2721(a)(1).

\(^{39}\) 18 U.S.C.A. § 2725(3).
of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court. 40

The remaining exceptions include use related to research activities, insurance claims investigation and underwriting, providing notice to the owners of towed or impounded vehicles, commercial driver’s licenses, operating toll facilities, and several others requiring the express consent of the driver, including bulk distribution for surveys, marketing or solicitations by businesses. 41

Subsection (c) of the Act pertains to resale and redisclosure by “authorized recipients” who have acquired the information from a state without express consent:

(c) Resale or redisclosure.—Any authorized recipient . . . that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used . . . 42

These common-sense exceptions were an acknowledgement by Congress that there are many legitimate purposes for state disclosure of personal identifying information without the owner’s express consent, particularly to other government entities. But the language in subsection (b) is open to broad and varying interpretation. For instance, (b)(1): “for use by a government agency [such as law enforcement] in carrying out its functions” 43 may be interpreted as disclosure by the state to an agency so it can simply locate or communicate with an individual for a specific reason, such as conducting an investigation or issuing a summons. But some interpret

40 18 U.S.C.A. § 2721(b).
41 Id.
42 Id. § 2721(c).
43 Id. § 2721(b).
“for use by” as any use at all the agency chooses to make, regardless of whether the use exceeds that which is necessary or even reasonable to effectuate the agency’s purpose.  

Any person who knowingly violates DPPA may be subject to a criminal fine. Section 2724(a) of the Act allows for a private right of civil action by persons whose information is improperly disclosed against one who “knowingly obtains, discloses, or uses personal information … for a purpose not permitted under this chapter.” In addition to actual damages, the Act allows for punitive damages “upon proof of willful or reckless disregard of the law.”  

States themselves are excluded from the definition of “person” for purposes of civil actions, but municipalities and law enforcement agencies are not. Individual state actors also are “persons” who may be sued. Courts have held that to “knowingly” disclose means only that the discloser knew he was disclosing private information, not that he knew he was disclosing it for an impermissible use. In Thomas v. George, the Eleventh Circuit interpreted the private action clause as requiring a plaintiff asserting a violation of DPPA to prove impermissible use on the part of the discloser or user of his information.

44 See Senne, 645 F.3d at 923-24.
47 Id. § 2724(a)(b)(2).
48 Id. § 2725(2).
49 Id.
50 Senne, 645 F.3d at 923; Pichler v. Unite, 542 F.3d 380, 397 (3rd Cir. 2008).
51 See Thomas v. George et. al., 525 F.3d 1107, 1112 (11th Cir. 2008) (holding that permissible use under DPPA is not an affirmative defense). Impermissible use is often difficult if not impossible for a plaintiff to prove, especially in cases such as Thomas, where defendants often solely possess knowledge of their true intentions, and where a defendant claims attorney-client privilege or some other privilege preventing disclosure of crucial documents.
C. DPPA Case Law

In *Reno v. Condon*, the United States Supreme Court held DPPA constitutional under a Tenth Amendment challenge.\(^52\) *Condon* and many of the cases brought in the years shortly after passage of the Act centered on federalism challenges by various states as to whether Congress could even impose such a restriction on them.\(^53\) Besides *Condon*, there are only a handful of DPPA cases that have been decided above the district court level, including several by the Seventh Circuit.\(^54\) However, over the last decade, individuals claiming violations of their rights under the Act have increasingly brought private actions to enforce those rights.

In *Pichler v. Unite*, the Third Circuit held that union organizing was not a permissible use under the b(4) “investigation in anticipation of litigation” exception when a labor union contacted potential recruits whose license tag numbers it had collected from cars in a parking lot.\(^55\) However, the Eleventh Circuit found the same exception to apply to a law firm that obtained information on 284,000 licensed Florida drivers because some might be “potential witnesses” in its lawsuit against an automotive dealership, even though it would never contact a large number of them.\(^56\) In *Thomas*, the law firm claimed it needed the records in order to obtain evidence of custom and practice in its unfair


\(^{54}\) See, e.g., *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998) (holding that DPPA’s restrictions on access to information in public records does not violate the First Amendment (distinguishing from the Freedom of Information Act) and that it also does not implicate the 11th Amendment because it excludes states from being sued by private parties). The Seventh Circuit also held that DPPA affords a private right of action to individuals whose information is improperly disclosed, but not to those who seek disclosure. See *McCready v. White*, 417 F.3d 700 (7th Cir. 2005) (plaintiff was in the business of buying cars auctioned to satisfy mechanics’ liens and wished to obtain information on the vehicles’ owners).

\(^{55}\) *Pichler v. Unite*, 542 F.3d 380, 395-96 (3rd Cir. 2007).

\(^{56}\) *Thomas*, 525 F.3d at 1114-15.
trade practices claim. The court concluded that it did not matter that the defendant actually used only a small number of the records it acquired. (In contrast, Wemhoff v. District of Columbia held that the litigation exception did not apply to an attorney who tried to obtain the identities of motorists caught by red-light cameras in order to bring a class-action lawsuit against the city).

1. Bulk Distribution

Some of the most troubling DPPA permissible-use interpretations have involved the bulk sale of information to private businesses that resell it. In Russell v. Choicepoint Services, Inc., a Louisiana district court held that DPPA permitted an electronic database owner to obtain records from state DMVs in order to resell them to third parties that have a “permissible use,” even if it had no such use itself. Similarly, in Young v. West Publishing Corp., a Florida district court held that DPPA does not require a commercial entity to have an independent permissible use for information in order to qualify as an “authorized recipient”; it can resell or redisclose information for purposes of legal research.

In Welch v. Jones, another Florida district court decision, the court held that DPPA allowed the state to sell drivers’ personal information in bulk to a company that sold it on the Internet, because the company’s subscribers had to identify themselves and swear under penalty of perjury they would use the information for one of the fourteen statutory exceptions. The company, Public Data, had

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57 Id.
58 Id. at 1115.
62 Welch v. Jones, 770 F.Supp.2d 1253, 1259 (N.D. Fla. 2011). In a remarkable display of faith in business and personal ethics, the court scoffed at the plaintiff’s argument that a Public Data subscribing customer might falsely claim a permissible use because: (1) a subscriber would not likely pay a “substantial sum” for the records
purchased drivers’ information from the state of Florida to resell to its customers.63 In a startlingly broad reading of the exceptions clause, the court found Public Data had properly obtained the information pursuant to the §2721(b)(3) exception “for use ... by a legitimate business” to verify a customer’s identity,64 even if it may never need the information and even if the people whose information was obtained never actually became “customers.”65 The court reasoned that its interpretation was a “more comfortable” reading of the “for use” language in the exceptions clause, “especially in a statute imposing civil liabilities and fines,” and concluded that if it led to improper use of information, it was up to Congress to correct it.66

2. Privacy in Public Information: Fifth Circuit Gets It Wrong

In support of its holding, the Welch court cited Taylor v. Acxiom, a 2010 Fifth Circuit decision that also broadly interpreted the Act to allow the bulk disclosure of information to commercial entities that resell it without making permissible use of the information themselves.67 The court held that such “bulk obtainment” did not

without a legitimate purpose, and (2) it was risking prosecution for perjury if it did so.

63 Id. at 1255.
64 See 18 U.S.C.A. § 2721(b)(3) (allowing disclosure “for use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only (A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and (B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.”).
65 Welch, 770 F.Supp.2d at 1259 (“Had Congress intended §2721(b) to require actual use—rather than only a purpose to use when appropriate—it could have said so. And had Congress intended information to be disclosed only for an individual transaction, rather than in bulk, it could have said that, too. But it did not.”) (emphasis added).
66 Id. at 1260-61.
67 Id. at 1259; Taylor v. Acxiom, 612 F.3d 325, 335 (5th Cir. 2010).
violate DPPA and justified its holding by misinterpreting the §2721(b)(11) requirement of express consent for bulk disclosure of information for marketing purposes as therefore allowing bulk disclosure without express consent for any of the other permissible purposes a purchaser may have. The court described the Act as a “crime-fighting measure” and cited the legislative record to support its conclusion that DPPA was aimed only at preventing victimization from crime: “The totality of the legislative history clearly reflects that Congress did not intend to suppress legitimate business uses of motor vehicle records” (emphasis in original).

However, the record indicates that in passing DPPA, Congress was concerned not only with physical safety but with personal privacy, apart from violent or threatening criminal acts. Indeed, the very name of the Act, the Driver’s Privacy Protection Act, demonstrates

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68 See 18 U.S.C.A. § 2721(b)(12) (“for bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains”).

69 Taylor, 612 F.3d at 335 (“Of the fourteen expressly listed permissible uses, only once does Congress limit a permissible use to individual motor records. And of these … only once does Congress limit a permissible use to bulk distribution. For the remaining twelve permissible uses, the statute seems to have more than one reasonable interpretation: individual release, bulk release, or both”(internal citations omitted; emphasis in original)).

70 Id. at 336. The court noted that the purpose of the statute supports the conclusion that Congress intended bulk distribution. However, the court’s reasoning seems to overlook the possibility that the information could be improperly obtained by someone posing as a legitimate purchaser in order to commit a crime.

71 See, e.g., Sen. Moran statement, supra note 2: “By enacting this legislation, Congress will reaffirm that privacy is not a Democratic or Republican issue, but a basic human right to which every person is entitled”; Sen. Warner statement, supra note 27: “In today’s world, both personal privacy and personal safety are disappearing and this legislation would help to protect both. The bill incorporates the intentions of the 1974 Privacy Act, which addresses the collection of personal information by Federal agencies. The bill also includes the recommendations of the 1977 Privacy Protection Study Commission report.”). See also 139 CONG. REC. S15764, supra note 37: “The purpose of this Act is to protect the personal privacy and safety of licensed drivers consistent with the legitimate needs of business and government”(emphasis added).
that the intent of Congress was not only preventing crime. A further sign of this is that in 1999, Congress amended DPPA to prohibit direct marketers from obtaining personal information from motor vehicle records without a person’s express consent.\textsuperscript{72} Previously, a person had to actively opt out of this type of disclosure when applying for a license.\textsuperscript{73} This amendment has been viewed as a legislative recognition that individuals have an expectation of privacy in information they voluntarily disclose to the government that supersedes the interests of business, and they even retain the right to control its use after that disclosure.\textsuperscript{74}

3. \textit{Wiles v. Worldwide}: Call for a Narrow Interpretation of Permissible Uses

At least one federal court has called for a narrower interpretation of the exceptions clause in DPPA in light of its ambiguity.\textsuperscript{75} In \textit{Wiles v. Worldwide Information Inc.}, a Western District of Missouri court accused the Fifth Circuit of misapplying the \textit{expressio unius maxim}\textsuperscript{76} in \textit{Taylor v. Axiom} and criticized the reasoning in that case and in \textit{Russell v. Choicepoint}.\textsuperscript{77} The \textit{Wiles} case also dealt with a state’s sale of its entire driver’s license database to a reseller that did not itself use the information.\textsuperscript{78} The decision appears to be the first to hold that under DPPA, nondisclosure of personal information is the default rule

\begin{footnotesize}
\begin{enumerate}
\item Id. at n.33.
\item \textit{Expressio unius est exclusio alterius}: “The expression of one thing is the exclusion of another.” \textsc{Barron’s Law Dictionary} 176 (3d ed. 1991).
\item Wiles, 809 F.Supp.2d at1069-1072.
\item Id. at 1063-64 (a customer of the reseller could then obtain the entire license database so long as it claimed a permissible purpose to access just one of the names in it).
\end{enumerate}
\end{footnotesize}
and not the exception.\textsuperscript{79} Writing for the majority, Judge Nanette K. Laughrey observed: “[N]owhere does the DPPA enumerate any ‘prohibited purposes’ or ‘prohibited uses.’ Rather, the statute generally prohibits all but the fourteen permissible uses enumerated in section 2721(b).”\textsuperscript{80} As such, the judge concluded, a recipient should have to show a specific permissible use before obtaining information on any individual, which a reseller, such as the defendant, could not do.\textsuperscript{81}

Judge Laughrey observed that the court’s holding deviated from the majority of federal courts that have considered the issue: “The majority of courts reason that so long as the private information is not actually used in a ‘prohibited’ manner there is no violation of DPPA . . . [y]et the DPPA never explicitly lists any prohibited uses; rather it generally prohibits all but . . . fourteen . . . uses.”\textsuperscript{82} To illustrate the irony of this reasoning, Judge Laughrey proposed that a tow truck operator could obtain an entire license database, including social security numbers, because one day it might need to tow the car of an individual in the database.\textsuperscript{83}

Judge Laughrey’s opinion also seems to be one of the few to consider DPPA’s legislative purpose and history and not just its plain language.\textsuperscript{84} Having reviewed both, she concluded that “Congress did not intend the DPPA to authorize this widespread dissemination of private information untethered from the very uses that Congress listed

\textsuperscript{79} Id. at 1066.
\textsuperscript{80} Id. at 1073.
\textsuperscript{81} Id. (reasoning that the §2721(c) language limiting redisclosure by “authorized recipients” could only mean Congress intended these recipients to be individuals or entities qualified themselves to receive information under one of the fourteen exceptions; to read the section otherwise leads to the absurd result “that resellers could obtain all of the personal information in the database simply by calling themselves resellers, while everyone else—including law enforcement—would have to justify their receipt . . . under the 2721(b) exception applicable to them.” Congress could not have intended such a “gaping hole” in the statute).
\textsuperscript{82} Id. at 1061, 1063.
\textsuperscript{83} Id. at 1063.
\textsuperscript{84} See id. at 1065 (“the [c]ourt interprets the DPPA in accordance with its plain language and legislative purpose”); see also id. at 1066-68.
in the DPPA. Judge Laughrey concluded that the “overriding purpose” of the statute was to protect drivers’ privacy, made plain by its title: the Driver’s Privacy Protection Act. As such, Congress could not have intended greater latitude for an authorized recipient to disclose upon resale or redisclosure than the state has upon initial disclosure: “Congress, like its constituents, feared that private information widely circulated in vast databases would be intentionally or inadvertently leaked . . . [n]or would there be a viable way to know whether unscrupulous individuals within recipient organizations were secretly trolling through drivers’ personal information to learn about a neighbor or ex-girlfriend.”

Finally, the Wiles opinion advanced a conclusion that can be applied to most cases alleging violations of DPPA by any recipient, government or private: “The interpretation most consistent with Congressional intent requires that disclosure of personal information be narrowly tailored to a specific permissible purpose.”

II. SEVENTH CIRCUIT ANALYSIS OF DPPA EXCEPTIONS CLAUSE

In most of the litigation surrounding DPPA, the courts have addressed federalism issues and disclosure of personal information to private parties, but the issue of disclosure to or use by public entities has seldom arisen. While the district court in Senne found Palatine’s ticketing policy permissible under the subsection (b)(1) “government agency function” exception, the Seventh Circuit majority instead found for the Village under (b)(4): “service of process” in an administrative proceeding. On appeal the plaintiff had argued that

85 Id. at 1063.
86 Id. at 1068.
87 Id. at 1068-69.
88 Id. at 1076.
89 See generally Buckman, supra note 53.
90 Senne, 645 F.3d at 921.
91 Id. at 923-24.
the Village’s public display of his information was “not inextricably tied to its ability to issue, serve, or enforce parking citations.” In affirming dismissal of the complaint, the Seventh Circuit majority concluded that subsection (b)(4) does not dictate “best practices” to government agencies, but instead gives them carte blanche to use the information any way they choose, even if that use is not reasonable or necessary.

A. Plaintiff’s Case: The Meaning of “Use” in DPPA

The crux of Senne’s argument centered around the meaning of “use” and “disclose” as provided in subsection (b). He argued that publicly posting his private information on a parking ticket was not among the “uses” contemplated by Congress when it drafted the exceptions clause; specifically, Palatine’s disclosure to a stranger was not the same as a “use” by Palatine in carrying out a law enforcement function. He contended that Palatine violated DPPA by disclosing his information “to persons or entities outside its law enforcement agency.” Senne further argued that Palatine’s disclosure was more dangerous than those that facilitated the notorious incidents preceding DPPA, because an individual did not have to take any steps to obtain his information—the Village made it “immediately available” on a public street, thus “facilitating criminal activity.” The ticketing policy “is priceless to identity thieves” who get “a treasure trove of

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93 Senne, 645 F.3d at 924.
95 Id. at 6-7 (arguing that “obtain,” “use,” and “disclose” as defined in the law were distinct acts that each required a permissible use independent of each other).
96 Id. at 6.
97 Id. at 8.
98 Id. at 19.
free information” from the Village,\textsuperscript{99} made all the more eye-catching by the bright yellow form of the citation.\textsuperscript{100}

Senne also argued that the Village was making a redisclosure of his information as defined under the Act, which is further restricted by subsection (c):\textsuperscript{101} “Does Palatine have any greater right to disclose ‘personal information’ it receives from ‘motor vehicle records’ than the [states] that collect the information have themselves?” he asked.\textsuperscript{102} He argued that if someone made a direct in-person request to the Village, it would never release to them the same information which it knowingly prints on a parking citation and “slap[s] . . . on the windshield,” viewable by any passerby.\textsuperscript{103} “Palatine’s actions are a clear violation of the letter and spirit of DPPA and the core . . . principles [on] which all privacy laws are based.”\textsuperscript{104}

In its reply, Palatine argued that the only person alleged to have actually seen the ticket was Senne himself, and that it did not “knowingly” place the ticket on his windshield for third parties to use.\textsuperscript{105} Palatine argued the ticket was an administrative complaint.\textsuperscript{106} Noting that the Illinois Supreme Court has recognized parking tickets as complaints,\textsuperscript{107} it defended its practice: “the relevant inquiry [under DPPA] is not whether a defendant used the information permissibly, but whether he had a permissible purpose.”\textsuperscript{108} But does the law so distinguish between use and purpose? Only the Third Circuit seems to

\textsuperscript{99} Id. at 9 (noting that in the United States, a driver’s license is the primary source of identification).

\textsuperscript{100} Id. at 12-13.

\textsuperscript{101} See 18 U.S.C.A. § 2721(a)(c).

\textsuperscript{102} Brief of Plaintiff-Appellant, supra note 94 at 15 (also arguing “if the Illinois secretary of state can’t post personal information from motor vehicles, neither can Palatine.” Id. at 18).

\textsuperscript{103} Id. at 19.

\textsuperscript{104} Id. at 27.


\textsuperscript{106} Id. at 15-19.

\textsuperscript{107} Id. at 16.

\textsuperscript{108} Id. at 20.
have distinguished “permissible use” from “permissible purpose,” finding the fact that a party seeking information may have a permissible purpose in doing so does not make any use it then makes of the information permissible.\textsuperscript{109}

B. Majority’s Analysis

The three-judge panel of Easterbrook, Ripple, and Flaum unanimously reversed the district court’s finding that the parking ticket was not a disclosure as defined in the Act, but split over whether it was permitted by the statute.\textsuperscript{110} Writing for himself and Judge Easterbrook, Judge Joel M. Flaum explained that in examining the plain language of the statute to discern legislative intent, the court had to look at the words and their meaning in the context of the statutory scheme.\textsuperscript{111} However, this was not borne out by the reasoning that followed. Significantly, nowhere in the opinion did the majority discuss the policy or purpose behind DPPA.\textsuperscript{112}

After citing the subsection (b)(4) exception “for use in connection with . . . service of process,” Judge Flaum noted that a parking citation constitutes service of legal process under both Illinois law and Palatine

\textsuperscript{109} Pilcher, 542 F.3d at 395. Does the assumption that a person has violated the law (by getting a parking citation) make it more acceptable for a governmental entity to “use” the information in ways it could not otherwise? Palatine in its answer brief referred to the plaintiff as a “ticket scofflaw” who was looking to skirt his fine and get a “payday.” Brief of Defendant-Appellee, supra note 105 at 5. (This was factually erroneous as: (1) plaintiff claimed he did pay his fine, and (2) a scofflaw is generally defined not as a person who receives a fine, but who fails to pay one; See Dictionary.com: “a person who flouts the law, especially one who fails to pay fines owed,” http://dictionary.reference.com/browse/scofflaw?sa=t. Plaintiff claimed he was not aware he was parking illegally. Reply Brief of Plaintiff-Appellant, supra note 92 at 6.) The implication is that plaintiff deserved the public shaming for parking where he was not supposed to, and therefore had no right to complain about a violation of privacy.

\textsuperscript{110} Senne, 645 F.3d at 925 (Ripple, J., dissenting).

\textsuperscript{111} \textit{Id.} at 922.

\textsuperscript{112} \textit{Id.}, et seq.
municipal ordinance. Because affixing the parking citation to Senne’s vehicle constituted service of process, disclosing personal information in the citation did not violate the DPPA,” he concluded. Judge Flaum rejected the idea that the language in subsection (b) is ambiguous and noted the irony that as the Act is written, a permissible use could constitute an unlawful disclosure of otherwise protected information. He also rejected Senne’s arguments about the recklessness and senselessness of Palatine’s policy: “The statute does not ask whether the service of process reveals no more information than necessary to effect service, and so neither do we.”

The majority similarly rejected Senne’s redisclosure argument, stating that even if the act of putting the citation in the mail amounted to a redisclosure, it would be Senne himself doing the redisclosing and not the Village. This analysis fails to consider the idea that the initial disclosure of the information was made by the state to Palatine as an “authorized recipient,” and Palatine’s act of placing the information in a public place was not also a disclosure, but a redisclosure that should be subject to the Act’s restrictions on redisclosures.

C. Judge Ripple’s Dissent

In an impassioned dissent, Judge Kenneth Ripple accused the majority of “significantly frustrating” the intent and purpose of Congress. Calling Palatine’s disclosure “excessive,” he asserted that

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113 Id. at 923, citing 625 ILL. COMP. STAT. 5/11 208.3(b)(3) and Village of Palatine Ordinance 2-707(b)(3).
114 Id. at 924.
115 Id.
116 Id.
117 Id. at 924-25.
118 See 18 U.S.C.A. §2721(c) (requiring that redisclosure also be for one of the fourteen permitted purposes and that the rediscloser keep records of whom the information was released to for five years. Of course, it would be impossible for Palatine to accomplish this in the context of a parking ticket, which further supports the idea that it effects an impermissible redisclosure).
119 Senne, 645 F.3d at 926 (Ripple, J., dissenting).
its use of Senne’s information was not protected by either the (b)(1) law enforcement function or (b)(4) service of process exceptions,\textsuperscript{120} as such information is “of no consequence” for the purpose of issuing a ticket.\textsuperscript{121} He accused the majority of “largely ignor[ing] … the very problem that Congress sought to address.”\textsuperscript{122} In adding the exceptions to the statute, Judge Ripple argued, Congress had attempted to strike a balance between an individual’s privacy and security interests and the legitimate operational needs of government, which the majority had misconstrued as “administrative convenience.”\textsuperscript{123} He argued that Congress had contemplated disclosures that were “reasonable” in effecting a permitted use, and to conclude otherwise would infer that it deliberately intended to frustrate the purpose of the statute.\textsuperscript{124} The information disclosed on Senne’s ticket bore “no reasonable relationship to the purpose” of the ticket, which is to notify a vehicle owner that he is financially liable for a violation:  \textsuperscript{125} “Congress did not intend that the statutory exceptions be divorced, logically or practically, from the purpose of the statute . . . [w]e should not ascribe to Congress the intent to sanction the publication of \textit{any and all} personal information through the invocation of an exception” (emphasis in original).\textsuperscript{126}

To support his position, Judge Ripple quoted Sen. Harkin on the subject of excessive disclosure:

> In appropriate circumstances, law enforcement agencies may \textit{reasonably} determine that disclosure of this private information . . . will assist in carrying out the function of the

\textsuperscript{120}Id. at 925.
\textsuperscript{121}Id. at 926.
\textsuperscript{122}Id. at 927.
\textsuperscript{123}Id. at 926-27.
\textsuperscript{124}Id. at 926. In response, Judge Flaum’s opinion faulted the dissent for not providing a “textual foundation for its interpretation of the statute, which Congress of course remains at liberty to amend.” \textit{Id.} at n.1.
\textsuperscript{125}Id. (citing the Seventh Circuit’s previous holding in \textit{Saukstelis v. City of Chicago}, at 1174 that a license plate number alone uniquely identifies a person).
\textsuperscript{126}Id.
agency . . . However, this exception is not a gaping loophole in the law.\textsuperscript{127}

Scathing in his criticism, Judge Ripple warned that the consequences of the majority’s decision were not theoretical: “An individual seeking to stalk or rape can go down a street where overnight parking is banned and collect the home address and personal information of women whose vehicles have been tagged . . . [t]he police, in derogation of the explicit intent of Congress, effectively [have] done his work for him in identifying potential victims.”\textsuperscript{128} He added that the revealing of home addresses was the most egregious form of unreasonable disclosure, as it was the exact thing Congress had sought to prevent.\textsuperscript{129} Moreover, the majority’s decision had given “shelter” to “less sophisticated police departments, more prone to bureaucratic convenience . . . consequently, their communities will incur horrendous crimes of violence that would not otherwise have occurred.”\textsuperscript{130}

Judge Ripple did not address in his dissent the disclosure/redisclosure argument raised by Senne, nor the plain meaning of “use,” but focused almost entirely on the intent and purpose of Congress.

\textbf{D. \textit{En Banc Rehearing}}

On September 13, 2011, the Seventh Circuit granted Senne’s petition for a rehearing \textit{en banc} and vacated the panel decision.\textsuperscript{131} The \textit{en banc} rehearing was held on February 9, 2012.\textsuperscript{132} In his petition,
Senne argued that the court’s holding that Palatine’s practice was legal under state and local law characterizing parking citations as service of process was in conflict with the U.S. Supreme Court in *Reno v. Condon* and the Seventh Circuit in *Travis v. Reno*. Those cases held that DPPA pre-empts conflicting state law. He reiterated his argument that the “for use” language in the DPPA exceptions clause was in itself limiting language that requires disclosures to be “reasonably necessary” to effect a permissible purpose, and that to allow Palatine’s practice under DPPA leads to “an absurd result.”

At the rehearing, the full court appeared split on whether Palatine’s practice met the requirements for permissible use. Judge Richard Posner accused Senne of asking the court to create a “gigantic jurisprudence” in connection with DPPA and suggested the law should instead be modified by Congress. Judge Posner expressed skepticism that members of the public would actually misuse the information printed on parking tickets. He and Judge Diane Sykes seemed to come down on the side of what Judge Ripple’s dissent had called “administrative convenience” and defended the practice as an identification tool for the court. If law enforcement can identify an offender in a charging document, Judge Sykes argued, then a parking ticket is no different from any charging document that initiates the court process. Municipal practices “vary from place to place,” she

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133 Petition of Plaintiff-Appellant for Reh’g at 1, Senne v. Village of Palatine, (7th Cir. July 25, 2011) (No. 10-3243 ), (arguing that the majority in any event had misapplied the state statute it relied upon, in that the statute does not actually equate a parking ticket with an administrative complaint or service of process. *Id.* at 8.).

134 *Id.* at 4-5.

135 *Id.* at 11.

136 En banc reh’g, *supra* note 132.

137 *Id.*

138 *Id.* (asking Senne’s counsel “Have you noticed people wandering around and peeking under parking tickets?” and adding “your imagination is running wild.”).

139 *Id.;* Senne, 645 F.3d at 927 (Ripple, J., dissenting).

140 En banc reh’g, *supra* note 132.
added. Judge Ilana Rovner noted the absence of language in the Act requiring the use of only “necessary” information. Other judges said there are varying views of what is “reasonable.”

On the other hand, some of the judges raised the specter of the crimes that precipitated the Act’s passage and others such as identity theft. Judge Diane Wood was the harshest critic of the Village’s position. She allowed that name and address “might be pertinent” to a parking ticket, but not height, weight, sex or eye color, which “does not further service of process.” “Are there any limitations on how the information is used?” she demanded of Palatine. “Can you publish a person’s information in legal notices in a newspaper or on a website? I don’t see why most of this information is necessary for serving process. I would think the way to read the statute is that [disclosing] each one of these [pieces of information] needs to be justified under the (b)(4) exemptions.” Palatine’s counsel argued that much of the personal information in question is publicly available for purchase anyway on such websites as Whitepages.com and Westlaw. However, Judge John Tinder noted that Illinois does not require such information to be included on a summons, and Judge David Hamilton asked about the “for use” phrase in (b)(4), expressing doubt about the usefulness of disclosing height, weight, and other personal information.

141 Id.
142 Id.
143 Id.
144 Id. Judge Wood in particular hammered away on this point, invoking an “identity theft crisis.”
145 Id.
146 Id.
147 Id.
148 Id. Judge Wood suggested that a 12(b)(6) motion to dismiss was not the proper stage of litigation to address the issues raised by both plaintiff and defendant, asking Palatine’s counsel “which is worse, an influx of litigation or an influx of violence?”
149 Id.
150 Id.
III. SUPPORT FOR A NARROWER INTERPRETATION OF SUBSECTION 2721(b)

A narrower interpretation of §2721(b), one that would allow relief for Jason Senne and the plaintiffs in the bulk distribution cases, is supported by court opinions and accepted canons of statutory construction. It is also supported by the Seventh Circuit’s own prior interpretations of DPPA and the powers of a law enforcement agency in enforcing motor vehicle laws.

A. Privacy Interests in Personal Identifying Information

In Reno v. Condon, the only case in which the United States Supreme Court has considered DPPA, the Court did not address informational privacy issues. The Court has recognized an individual privacy interest in avoiding disclosure of certain personal matters, but not in one’s name, address, phone number or the other types of information typically contained in state motor vehicle records. However, the proliferation of technology to collect and disseminate information and its ramifications on privacy have caused concern to Congress and the courts. In Walls v. City of St. Petersburg, the Fourth Circuit cautioned that:

151 See Maginnis, supra note 71 at 820.
153 See Condon v. Reno, 155 F.3d 453 (4th Cir. 1998); Walls v. City of St. Petersburg, 895 F.2d 188 (4th Cir. 1990) (finding a privacy interest in financial information, but not in information contained in public records, since there can be no expectation of privacy in it).
technological advances have provided society with the ability to collect, store, organize, and recall vast amounts of information about individuals in sophisticated computer files. Although some of this information can be useful and even necessary to maintain order and provide communication and convenience in a complex society, we need to be ever diligent to guard against misuse. Some information still needs to be private, disclosed to the public only if the person voluntarily chooses to disclose it.\footnote{Id.}

In \textit{Whalen v. Roe}, the Supreme Court warned of “the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files . . . much of which is personal in character and potentially embarrassing or harmful if disclosed.”\footnote{Whalen, 429 U.S. at 605. Also see Maginnis, supra note 73 at 817 (arguing that a compilation of information about an individual—such as name, address, social security number, etc.—is more dangerous in the wrong hands than a single piece of information, since someone can more easily use a collection of information to impersonate an individual or do other harm).} In dicta that has particular significance to the issues raised with DPPA, the Court reasoned that the right to collect and use such data for public purposes is typically accompanied by “a concomitant statutory or regulatory duty to avoid unwarranted disclosures . . . recognizing that in some circumstances that duty arguably has its roots in the Constitution.”\footnote{Id. (emphasis added). See also id. at 607 (Brennan, J., concurring) (“The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information . . .”).} Here, it can be argued that although Palatine had the right to obtain and use Senne’s data to enforce its parking laws, it also had a statutory duty under DPPA to avoid unwarranted disclosure of his information.

Writing for the majority in \textit{United States Department of Justice v. Reporters Committee for Freedom of the Press}, Justice John Paul Stevens expanded on the dicta of \textit{Whalen}: “The compilation of otherwise hard-to-obtain information alters the privacy interest
implicated by disclosure of that information … [in Whalen we held] only that the Federal Constitution does not prohibit such a compilation.” Justice Stevens noted that even though “in an organized society, there are few facts that are not at one time or another divulged to another;” the Court has recognized “the privacy interest in keeping personal facts away from the public eye,” including “the nondisclosure of certain information even where [it] may have been at one time public.”

In Wolfe v. Schaefer, the Seventh Circuit interpreted Whalen to recognize a “constitutional right to the privacy of medical, sexual, financial, and perhaps other categories of highly personal information . . . that most people are reluctant to disclose to strangers,” which is “defeasible only upon proof of a strong public interest in access to or dissemination of the information.” However, that case dealt mainly with a plaintiff’s personal reputation. In Best v. Berard, a 2011 DPPA case also before Judge Kennelly of the Northern District, the defendants, producers of a reality police television show, argued that the plaintiff, who was filmed being pulled over and arrested, had no right of privacy in her driver’s license number because it is publicly available information. The plaintiff countered that the Supreme Court “foreclosed” this argument in Reporters Committee because of its reasoning that a “compilation of otherwise hard-to-obtain information” may be entitled to heightened privacy protection even though it consists only of “public records that might be found after a diligent search.” Judge Kennelly, however, observed that Reporters Committee was limited to interpreting the Freedom of Information Act and therefore did not address an expectation of privacy under the

158 Reporters Comm., 489 U.S. at 770.
159 Id. at 763, 767, 769.
160 Wolfe v. Schaefer, 619 F.3d 782, 785 (7th Cir. 2010).
161 Id.
162 Best v. Berard, 2011 U.S. Dist. LEXIS 131572, 1-3 (N.D. Ill. Nov. 15, 2011). The court did not address the right of privacy under DPPA because the defendants argued they did not knowingly disclose under the Act, an argument the court rejected.
163 Id. at 10 (quoting Reporters Comm., 489 U.S. at 767).
Constitution.\textsuperscript{164} “[The plaintiff] does not . . . identify any other basis for a contention that she has a constitutionally protected privacy interest in [her drivers license number].”\textsuperscript{165} The plaintiff’s citing of the Seventh Circuit’s \textit{Wolfe v. Schaefer} reasoning also failed to convince the judge, who concluded: “The categories of information that the Seventh Circuit has deemed protected by the constitutional privacy right have been far more personal, such that their disclosure would lead to greater potential for embarrassment or abuse.”\textsuperscript{166}

\textbf{B. Statutory Interpretation: Plain Meaning and the “Whole Statute” Rule}

With no express recognition of a privacy interest in personal information contained in public records from either the Supreme Court or Seventh Circuit, any protection of that right must be statutory. Congress likely enacted DPPA to protect these interests partly because constitutional law, at present, does not. This section analyzes how various constructions of DPPA can support a finding for Jason Senne and hold Palatine’s policy violative of his rights under the Act.

\textbf{1. Literal Interpretation}

DPPA’s congressional supporters made clear that privacy and safety concerns were the driving force behind the legislation.\textsuperscript{167}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{164}Id. (quoting United States v. Cuevas–Perez, 640 F.3d 272, 284 (7th Cir. 2011) (Flaum, J., concurring)).
  \item \textsuperscript{165}Id. at 11.
  \item \textsuperscript{166}Id. at 9 (citing cases involving HIV infection and use of prescription drugs).
  \item \textsuperscript{167}See Rep. Moran statement, \textit{supra} note 2; Sen. Boxer statement, \textit{supra} note 2; \textit{See also} 140 CONG. REC. H2527 (daily ed. Apr. 20, 1994) (statement of Rep. Goss): “[T]he intent of this bill is simple and straightforward: We want to stop stalkers from obtaining the name and address of their prey before another tragedy occurs ... The [DPPA] balances the legitimate public and business interests in keeping these records available with an individual driver's right to privacy”; and statement of Rep. Morella: “Allowing a government agency to aid stalkers in locating those they are harassing is untenable.”
\end{itemize}
\end{footnotesize}
Although Judge Ripple accused the *Senne* majority of frustrating the purpose and intent of Congress through a rigid reading of “for use in … service of process,” a pure textual reading still supports a finding for *Senne*. \(^{168}\) “The plain language of the statute [is] the best indication of Congressional intent”\(^ {169}\) and in this endeavor the court looks to a word or phrase’s “common, ordinary and accepted meaning,” sometimes consulting dictionary definitions and general word usage. \(^ {170}\) Black’s Law Dictionary defines “for use” as “for the benefit or advantage of another.” \(^ {171}\) Merriam-Webster defines “use” as a verb: “(a) to put into action or service; avail oneself of (employ); (b) to carry out a purpose or action by means of’”; and as a noun: “the act or practice of employing something.”\(^ {172}\) Palatine’s act of placing drivers’ private information on vehicles does not put that information “into action or service” in collecting parking fines, nor is Palatine “employing” it to collect fines, nor does it “benefit or advantage” Palatine in collecting fines. The Village can accomplish that by communicating directly with the offender privately. Further, even if the plain meaning of “use” were so all-encompassing as to allow for Palatine’s actions, it would run afoul of the accepted judicial axiom that a statute should be applied according to its plain meaning except when it produces absurd results. \(^ {173}\)

A plain language reading of subsection (c) of the Act, along with *Senne*’s holding that Palatine’s ticket policy amounts to a “disclosure,” justifies the conclusion that Palatine, as an “authorized recipient,” is

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\(^{168}\) See Caminetti v. U.S., 242 U.S. 470 (1917) (if text is clear, court won’t look at legislative history); See also 2A Sutherland Statutory Construction § 47:1 (7th ed.) (“the starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure.”).

\(^{169}\) Rodas v. Seidlin, 656 F.3d 610, 617 (7th Cir. 2011) (citing Smith v. City of Jackson, Miss., 544 U.S. 228, 249 (2005).

\(^{170}\) Sutherland, *supra* note 168 at § 46:1.

\(^{171}\) *BLACK’S LAW DICTIONARY* 567 (Abridged 9th ed. 2010).


\(^{173}\) Sutherland, *supra* note 168 at § 46:1.
actually redisclosing the information to the public, which it may not do to parties with no permissible use themselves.  

2. The ‘Whole Statute’ Rule

A more appropriate reading of the DPPA exceptions clause would be under the “whole statute rule,” which provides that “[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent,” therefore “each part should be construed in connection with every other part to produce a harmonious whole.” Thus, interpretation should not be confined to the one section to be construed (as the courts have done with §2721(b)), because “a statutory subsection may not be considered in a vacuum.” The Supreme Court expressed this “cardinal rule” in King v. St. Vincent’s Hospital: “[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.” Under “whole statute” construction it is impossible to consider the legislative scheme of DPPA and interpret “for use” in the manner the Seventh Circuit did in Senne and other recent federal court decisions have interpreted it.

In the 1943 case SEC v. C.M. Joiner Leasing Corp., the U.S. Supreme Court held that ultimately, “courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.”

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174 See 18 U.S.C.A. §2721(c); Senne, 645 F.3d at 923.
175 Sutherland, supra note 168 at § 46:5. See also U.S. Nat’l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993): “Over and over we have stressed that ‘in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.’”
176 Sutherland, supra note 168 at § 46:5.
3. Ambiguity in Subsection (b) and Absurd Results

An argument may also be made that the “for use in” language in subsection (b) is in fact ambiguous, given the disparity in how different courts, and dissenting opinions within those courts, have interpreted its meaning. A statute is considered ambiguous when it is susceptible to differing interpretations.\(^{179}\) When a statute’s language is ambiguous and applying it according to its plain meaning would lead to an absurd result, or there is clear evidence of contrary legislative intent, the court will “look to the legislative history of the statute to guide our interpretation.”\(^{180}\)

The legislative history of DPPA as contained in congressional statements discussed \textit{supra} points to an absurd result in recent federal appeals court applications. Moreover, the freedom of municipal agencies in initiating proceedings against individuals, as championed by the \textit{Senne} majority and several judges at the \textit{en banc} hearing, is not threatened by limiting those agencies’ use of personal information to what is objectively reasonable. Rep. Porter Goss, a supporter of DPPA, addressed this “balancing” of interests at a House debate: “[The Act] does not prohibit legitimate business, law enforcement and governmental access to such information. The flow of information would only be denied to a narrow group of people that lack legitimate business.”\(^{181}\)

The Seventh Circuit has already stated that it would not employ a literal interpretation of DPPA in a way that leads to an absurd result.\(^{182}\) In \textit{Lake v. Neal}, a 2009 DPPA case before the court, Judge Evans wrote for the majority: “Finally, we would not accept [plaintiff’s] argument even if a literal interpretation of the DPPA would seem to

\(^{179}\) \textit{See} Sutherland, \textit{supra} note 172.

\(^{180}\) \textit{Id.}; Kelly v. Wauconda Park Dist., 801 F.2d 269, 270 (7th Cir. 1986).


\(^{182}\) Lake v. Neal, 585 F.3d 1059, 1060-61 (7th Cir. 2009).
compel it because that would ‘lead to an absurd result.’”\(^{183}\) In the same opinion, the court acknowledged the Act’s legislative history:

“Congress passed the DPPA in response to safety and privacy concerns stemming from the ready availability of personal information contained in state motor vehicle records.”\(^{184}\) Displaying a person’s name, address, date of birth, and driver’s license number in a way that the information may be viewed by strangers who have no legitimate interest in it can be interpreted as an absurd result in light of the statute’s expressed purpose.

1. *Saukstelis v. City of Chicago*

   The Seventh Circuit—in an opinion by Judge Easterbrook, who was in the *Senne* majority—has already found that a license plate number alone is sufficient to identify an offender for authorities.\(^{185}\) In *Saukstelis v. City of Chicago*, the plaintiffs challenged the city’s practice of applying the Denver boot to vehicles that had accumulated a certain number of parking tickets.\(^{186}\) They argued that because the citations included their vehicle tag numbers but not their names, they were not given proper notice.\(^{187}\) Rejecting this argument, the court found that a tag number was sufficient in itself to identify a vehicle’s owner without name:

   Parking tickets effectively say: ‘Chicago, Plaintiff, versus Owner of the vehicle with License No. xxxx, Defendant.’ That identifies the parties to the suit even better than a name does. Only one person matches a given license plate, while there are many “John Smiths.” … A license number uniquely

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\(^{183}\) *Id.* (Plaintiffs claimed violation of DPPA because information contained in their voter registration records had been disclosed; the court held they could not rely on DPPA just because plaintiffs had registered to vote at the DMV at the time they applied for their drivers licenses.)

\(^{184}\) *Id.* (emphasis added).

\(^{185}\) *Saukstelis v. City of Chicago*, 932 F.2d 1171, 1174 (7th Cir. 1991).

\(^{186}\) *Id.* at 1172-73.

\(^{187}\) *Id.* at 1174.
identifies the person. And Chicago mails notices directly to that person, in his own name.\textsuperscript{188}

Given that the Seventh Circuit has expressed an intent not to interpret DPPA so as to produce an absurd result, has acknowledged its legislative purpose, and has concluded that a parking offender can be properly identified through his license plate number, it could easily interpret “for use in serving process” in such a way as to find Palatine’s policy impermissible under §2721(b).

C. \textit{Wiles v. Worldwide, Judge Ripple’s Dissent, and the Risk of Identity Theft}

One of Palatine’s arguments at the February 9, 2012, \textit{en banc} hearing was that DPPA was enacted before Internet use became widespread, and that the easy access to information about people on the World Wide Web has made the nondisclosure provisions of DPPA largely irrelevant.\textsuperscript{189} Even accepting this argument, one generally still must be looking for a particular individual on the Internet, and one must already know at a minimum the person’s name, and sometimes more. Under Palatine’s parking citation policy, a stalker could follow an attractive woman until she receives a ticket, copy the information on it, and learn who she is, where she lives, and how old she is. If he went directly to the state licensing authority, even if he somehow learned her name, his request for more information about her would be denied. An identity thief could copy information from a parking ticket on any luxury car, assume that it belongs to an affluent individual, and possess enough information to open a credit account in that person’s name.

\begin{footnotes}
\item[188] \textit{id.}
\item[189] \textit{En banc reh’g, supra note 132.}
\end{footnotes}
According to the Federal Trade Commission, up to nine million Americans have their identities stolen each year.\(^{190}\) Common methods employed by identity thieves are rummaging through dumpsters to find discarded bills and other documents with personal identifying information, and stealing wallets.\(^{191}\) They then use the information to open credit card accounts, bank accounts, and utility accounts in the unsuspecting victim’s name, sometimes even fraudulently filing bankruptcy.\(^{192}\) The information revealed to a potential identity thief on Palatine’s parking ticket is the same information the thief would find on a person’s driver’s license retrieved from a wallet. There is also the possibility that a person’s vehicle could be stolen and receive a parking ticket while in the thief’s possession, giving the thief a windfall of private information.

The narrow interpretation of the DPPA exceptions proposed by the Missouri district court in\(^{193}\) Wiles v. Worldwide and in Judge Ripple’s dissent in Senne should be adopted by the Seventh Circuit and other federal courts in determining what disclosures and uses are permissible under DPPA.\(^{194}\) This approach reasons that “the interpretation most consistent with congressional intent requires that disclosure of personal information be narrowly tailored to a specific permissible purpose.”\(^{194}\) Under this view, the “for use” language in the exceptions clause would be interpreted as a use reasonable in carrying out the user’s purpose. It would not prevent any law enforcement or other municipal agency from obtaining a registered vehicle owner’s identity from a state, only require that they limit their use to that necessary to their purpose. They should not redisclose the information to another—whether identified or, in the case of Senne, unidentified—unless the new recipient also has a permissible purpose under


\(^{191}\) Id.

\(^{192}\) Id.

\(^{193}\) See Wiles, 809 F.Supp.2d 1059 et seq.; Senne, 645 F.3d at 926 (Ripple, J., dissenting).

\(^{194}\) Wiles, 809 F.Supp.2d at 1076.
§2721(b). This approach would balance the personal privacy and safety concerns behind the Act’s passage with the legitimate needs of government. A more restrictive reading of what uses should be allowed under the exceptions in DPPA would be in keeping with the spirit of the law while doing no violence to the text of the statute.

CONCLUSION

With recent federal interpretation of DPPA—from the Seventh Circuit in Senne, the Fifth Circuit in Taylor, the Eleventh Circuit in Thomas, along with lower court rulings—DPPA’s exceptions clause threatens to weaken and even devour the protections Congress intended to give drivers in the Act. However, legislative history, minority judicial DPPA interpretations, long-established canons of statutory construction, and Supreme Court dicta on informational privacy point to an alternative application that courts should follow if the safeguards in the Driver’s Privacy Protection Act are not to become meaningless.

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195 See §2721(c) on redisclosure.