

RESCUING ACCESS TO PATENTED ESSENTIAL MEDICINES: PHARMACEUTICAL COMPANIES AS TORTFEASORS

Under the Prevented Rescue Tort Theory

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ABSTRACT

Despite some difficulties, state tort law can be argued to create a unique exception to patent law. Specifically, the prevented rescue doctrine suggests that charities and others can circumvent patents on certain critical medications when such actions are necessary to save individuals from death or serious harm. Although this Article finds that the prevented rescue tort doctrines is preempted by federal patent law, all hope is not lost. A federal substantive due process claim may be brought that uses the common law to demonstrate a fundamental right that has long been protected by our Nation's legal traditions. Moreover, this Article argues that even if this legal argument for such an exception ultimately fails, the near success of the argument should give us pause to think about whether patent law should be so untouchable that lives must be lost just to uphold it.

INTRODUCTION

Every year many Americans are unable to access essential medicines.¹ Some are lucky enough to have limited access, but even “[m]any [of those]

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1. Ann Carrns, *Many Struggling With Prescription Drug Costs*, N.Y. TIMES (Sept. 13, 2012), <http://bucks.blogs.nytimes.com/2012/09/13/many-struggling-with-prescription-drug-costs/> (“Consumer Reports’ annual prescription drug poll finds that more Americans who lack a drug benefit are failing to fill prescriptions because of cost. Almost half of Americans (45 percent) under 65 who lack drug coverage failed to fill a prescription because of cost, the report found—up from 27 percent last year.”); see also Peter B. Bach, et al., *In Cancer Care, Cost Matters*, N.Y. TIMES, Oct. 15, 2012, at A25 (“In 2006, one-quarter of cancer patients reported that they had used up all or most of their savings paying for care 2 percent of cancer patients were driven into bankruptcy . . . , and [o]ne in 10 cancer patients now reports spending more than \$18,000 out of pocket on care.”).

people, especially retirees with chronic illnesses, have long resorted to splitting pills to help control escalating drug prices.”² Fortunately, the problem in America far milder than that in developing countries.³ Nonetheless, those without essential medication and those who are under-medicated because of the high cost of drugs do not deserve to be ignored.

Most people sympathize with those that are too poor to afford essential medications, but commentators rarely claim that the drug companies are committing some legally actionable tort against those poor patients. Still, pharmaceutical companies are potentially subject to a tort claim for their use of patents to prevent access to essential medicines.⁴ This Note will focus on whether drug companies can be liable under the common law tort claim of preventing a rescue that would otherwise take place.⁵

Although commentators have considered the application of the common law doctrine concerning prevented rescues to pharmaceutical companies,⁶ the analysis is brief and lacks a discussion of defenses. This Note expands the analysis by exploring the viability of a prevented rescue claim against a pharmaceutical company and the affirmative defenses that pharmaceutical companies might raise.⁷

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2. Vivian Marino, *To Make a Pill More Affordable, Cut It in Half*, N.Y. TIMES, Apr. 13, 2004, at G10.
 3. See Donald G. McNeil, Jr., *At Front Lines, AIDS War is Falling Apart*, N.Y. TIMES, May 10, 2010, at A1 (stating that Uganda clinics turn people away and suggesting that other developing countries will soon do the same because of lack of funds).
 4. One other claim that applies to pharmaceutical companies results from the special relationship between the companies and those in need. Drug companies receive significant public aid in for research, and this funding creates a special relationship between the parties that overrides the general common law rule that parties have no affirmative duty to rescue. See Kevin Outterson & Donald W. Light, *Global Pharmaceutical Markets* 15–16 (Boston Univ. Sch. of Law, Working Paper No. 10-05, 2010) (“The duty to rescue is more salient when the bystander has received public support for the task . . . [therefore] pharmaceutical research programs that received public support should be under a similar duty.”). *But see* RESTATEMENT (SECOND) OF TORTS § 314A (1965) (suggesting companies receiving public aid have no affirmative duty to rescue); RESTATEMENT (THIRD) OF TORTS § 40 (suggesting companies receiving public aid have no affirmative duty to rescue).
 5. See *infra* Part II.
 6. See Outterson & Light, *supra* note 4, at 14–16.
 7. Robert A. Schwartz, *The Drug Company Blame Game*, THE LEGAL NEWSLETTER (Aug. 16, 2012, 2:19 PM), <http://www.thelegalnewsletter.com/?p=1041> (“drug companies love these affirmative defenses . . . which often include . . . the lawsuit fails to state a claim upon which relief can be granted; was not filed within the time allowed by that state’s law to file a lawsuit for personal injuries; was filed in the wrong court; is barred by the a doctrine called the ‘learned intermediary’ or ‘sophisticated user’ defense; the [plaintiff’s] injuries . . . were caused by the [plaintiff’s] own negligence; the tort law claim is preempted by federal law; the drug was unavoidably unsafe; the drug was reasonably safe for its normal and

State tort law arguably creates a unique exception to patent law. Tort law suggests that charities and others can circumvent patents on certain critical medications when such actions are necessary to save individuals from death or serious harm.⁸ This Note concludes that such a prevented rescue claim is preempted by federal patent law. However, relying on the common law, the indigent might have a federal substantive due process claim. Finally, even if the due process claim fails, the legislature should act to create an exception in patent law.

Part I of this Note sets forth the tort law applicable to patent infringement. Part II applies that tort law to the actions of drug companies that use their patents to prevent the poor from accessing medicine. Part III explores alternatives to a state tort claim and considers the public policy implications of a system in which one of those alternatives is implemented.

I. PREVENTED RESCUE THEORY AND ITS APPLICABILITY TO PATENT INFRINGEMENT

Although distinct, tort and patent law overlap and conflict. This Part considers the tort claim pertaining to prevented rescues and that claim might apply to the actions of a patent owner. Section A discusses claims that a plaintiff may bring against a patent owner whose use of patents prevents the plaintiff from accessing patented inventions. Section B considers the defenses available to those patent owners. This Part is not meant to address how tort law might apply to any specific patent owner's actions; instead, the application is explored in Parts II and III.

A. *Prevented Rescue Tortfeasors and Patent Enforcers*

In the United States, a person has no affirmative duty to rescue another.⁹ The classic hypothetical used to convey this idea supposes a person drowning and a busy passerby.¹⁰ Although many variations of this

foreseeable use; or the [plaintiff's] injuries were caused in whole or in part by the 'unforeseen alteration, unintended use, misuse or abuse of the drug').

8. RESTATEMENT (SECOND) OF TORTS § 323 (1965) ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if . . . (b) the harm is suffered because of the other's reliance upon the undertaking.").
9. *Id.* § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action"); *see also id.* § 37 ("An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38-44 is applicable.").
10. Outterson & Light, *supra* note 4, at 6 ("One classic problem for first year law students is the person on a bridge who could save a drowning child by simply throwing a rope.").

hypothetical exist, a common example includes a man crossing a bridge while running an errand. As the man crosses the bridge, he notices a child drowning and a rope secured to the bridge that he could easily throw to the child. Although no one else is nearby, the passerby decides to not throw the rope to the child. The child drowns and her family sues the passerby. Although most Americans find it hard to believe, the passerby is not liable for the death of the child.¹¹ Despite the minimal effort required, the passerby has no affirmative duty to save the child.¹²

Given that people have no obligation to save those in need—even when the rescue would impose little to no burden on the rescuer—it is hard to imagine that patent owners could be liable for allowing the poor to go without a patented invention. However, common law imposes certain rules that favor the poor. For example, suppose that when the man crosses the bridge, he finds the same child drowning, but this time a rescuer is trying to use the rope to save the child. In this case, the man is liable if he actively and intentionally prevents the rescuer from throwing the rope to the child.¹³ Generally speaking, when a rescuer plans to rescue someone in need, it is a tortious act to interfere with that rescue.¹⁴

The application of the Prevented Rescue doctrine to patent owners is now somewhat conceivable. Patent owners who utilize patents to prevent third parties from rescuing those in need might be liable under the Prevented Rescue doctrine.¹⁵

B. Control of Property Defense

Defendants have several defenses available to combat a Prevented Rescue claim. Defendants can argue that the Prevented Rescue theory is invalid when the defendant owns the tools used to conduct the rescue (“Control of Property Defense”). Subsection 1 explains the argument, and Subsections 2 and 3 explain limitations on the Control of Property Defense: public and private necessity.

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11. *Id.* (“The common law is clear: a duty to rescue is not imposed, even if the rescue could be done easily with no risk.”).
 12. *Id.* (stating that it makes no difference how easy the rescue could be, an innocent passerby does not have an affirmative duty to take action).
 13. RESTATEMENT (SECOND) OF TORTS § 326 (1965) (“One who intentionally prevents a third person from giving another aid necessary to prevent physical harm to him, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.”).
 14. *Id.* § 327 (“One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid is subject to liability for physical harm.”).
 15. See *infra* Parts II, III, and IV.

1. Basics of the Control of Property Defense

The Control of Property Defense hinges on the nature of the rope at issue in the drowning child hypothetical.¹⁶ The Defense is raised when the defendant owns the right to control the tool used to rescue the person in danger. Thus, this defense is relevant to all Prevented Rescue claims brought against patent owners¹⁷ but is also frequently relevant in non-patent cases.¹⁸

The Control of Property Defense attempts to distinguish the patentee from the passerby that prevents the rescue. The passerby in the earlier hypothetical does not own the rope that the rescuer attempted to use. However, if the Control of Property Defense is applicable, the passerby owns the rope. Thus, a more applicable hypothetical has a passerby crossing the bridge with his own rope. Meanwhile, a rescuer is trying to help the drowning child but has no rope. After asking the passerby for his rope and being denied, the rescuer steals the passerby's rope, which the rescuer-thief then uses to save the child. The Control of Property Defense argues that property owner is guilty of no tort because he has the authority to prevent others from using the property.

The validity of the Control of Property Defense is supported by the Restatement's only illustration of the Prevented Rescue theory.¹⁹ The illustration suggests that the absence of rightful access can be fatal to a Prevented Rescue claim.²⁰ The application of the Control of Property Defense is clear in patent actions. Rescuers do not have rightful access to patented technologies because the patent owners have the right to exclude them from infringing.²¹

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16. *See* Outerson & Light, *supra* note 4, at 6 (hypothesizing that a busy passerby on a bridge sees a drowning child, fails to throw a rope to her, and she subsequently drowns).
 17. All patent owners have the Control of Property defense available to them because it is their nature as a patent owner that gives rise to the plaintiff's claim in the first place. Thus, by necessity defendants in patent cases own the tools used in the rescue.
 18. A defendant might assert a Control of Property Defense if the defendant owned the necessary property to rescue a person.
 19. RESTATEMENT (SECOND) OF TORTS § 326 cmt. a, illus. 1 (1965).
 20. *Id.* ("A prevents the fire department from using a fireplug in front of A's premises for the purpose of putting out a fire in B's house. *This A does under an unfounded claim that he is entitled to the entire supply of water from the plug.* In consequence, the fire department is unable to put out the fire and B, while carefully attempting to rescue from his house some valuable chattels, is injured. A is subject to liability to B." (emphasis added)). The relevant aspect of this illustration is the sentence explaining that A is not entitled to the rescue tool, i.e., the entire supply of water from the plug. This suggests that had A actually owned the entire water supply, B would have no claim against A.
 21. 35 U.S.C. § 271 (2006) ("[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor,

2. Public Necessity Limitation

The Control of Property Defense is limited by the tort doctrine of necessity. Necessity establishes a broad range of circumstances that give an actor the privilege to use another's property, despite the objections of the owner.²² If necessity applies, the owner of the rescue tool is not "entitled" to prevent the rescuer from using the tool.²³ Two forms of necessity exist that can nullify the owner's entitlement: public and private.²⁴ This Subsection considers public necessity.

The Restatement explains public necessity: "One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion²⁵ if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster."²⁶ Thus, someone acting with a public necessity has rightful access to any tools needed for the rescue.²⁷ The key, however, is that public necessity doctrine is concerned with preventing a "public disaster."²⁸ Naturally, determining whether an event qualifies as a public disaster requires an individualized analysis of state

infringes the patent"); *see also* Rosenblatt et al., *A Sleeping Tiger? Business Method Patent Protection for Franchise Systems*, 22 FRANCHISE L.J. 9, 9 (2002) (stating that "a patent is a government-granted monopoly that allows the patent holder to exclude others from making, selling, offering for sale, or using the patented invention").

22. *See* RESTATEMENT (SECOND) OF TORTS §§ 262–63 (1965).
23. *Id.* *See also* RESTATEMENT (SECOND) OF TORTS § 890 (1977) (commenting that "nonconsensual privileges are given by the law for the protection of the interests of the actor, of third persons or of the public.>").
24. *See* RESTATEMENT (SECOND) OF TORTS §§ 262–63 (1965) (discussing "privilege created by public necessity" and "privilege created by private necessity" in regards to personal property). In reality, one might say that there are four forms of necessity: two forms of public necessity and two forms of private necessity. *See also id.* §§196–97 (1965) (discussing further public and private necessity, respectively, as it applies to real property). The bulk of this Note will focus on only one form of private and public necessity, the kind that applies to personal property. Real property public and private necessity are not considered as another form of necessity in this Note for two reasons. First, "land" clearly does not cover patents. *See id.* (The Restatement never clearly discusses patents in the context of land). Second, other than extending protection to land, real property necessity provides no noteworthy difference. *Id.* § 261 cmts. a-b (discussing how "the privilege stated in this Section is similar to the privilege to enter land in the possession of another for the same purpose as stated in §196 and § 197").
25. The Restatement identifies public necessity as applying to trespass to a "chattel" and conversion, which might be argued to not include patent infringement. This argument is addressed in Part II.
26. RESTATEMENT (SECOND) OF TORTS § 262 (1965).
27. *Id.* §§ 262, 890 ("One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege . . .").
28. *Id.* § 262.

precedent and the facts of each circumstance.²⁹ Thus, the remainder of public necessity is discussed below where public necessity is applied to specific factual situations.³⁰

3. Private Necessity Limitation

In addition to public necessity, a privilege exists for private necessity.³¹ Private necessity is explained in the Restatement:

One is privileged to commit an act which would otherwise be a trespass to the chattel of another or a conversion of it, if it is or is reasonably believed to be reasonable and necessary to protect the person or property of the actor, the other or a third person from serious harm, unless the actor knows that the person for whose benefit he acts is unwilling that he shall do so.³²

Thus, someone acting with a private necessity has rightful access to the property of another.³³

Ploof v. Putnam illustrates the private necessity privilege.³⁴ In *Ploof*, Ploof was sailing when a storm forced him to moor his boat to Putnam's dock.³⁵ Putnam objected to Ploof's mooring and sent his servant to unmoor Ploof's boat.³⁶ The servant followed Putnam's direction and Ploof's ship floated out to sea where the storm severely damaged the ship.³⁷ Claiming that he had a private necessity to moor his boat to the Putnam's dock, Ploof sued Putnam.³⁸ The court agreed; Putnam was liable for the damages that arose because under the private necessity doctrine he was not entitled to unmoor Ploof's ship.³⁹

The private necessity argument might function similarly in the tort-patent setting. If the infringer has a private necessity, she may argue that the patent owner has no authority to exclude her from utilizing the technology. Exploring this argument any further requires a case-by-case analysis,⁴⁰ which is found Part II below.⁴¹ There is, however, a unique

29. *See id.*

30. *See infra* Parts II.C.3, IV.A.

31. RESTATEMENT (SECOND) OF TORTS § 263 (1965).

32. *Id.* § 263(1).

33. *Id.* § 890 (“One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege . . .”).

34. *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188, 189 (1908) (holding that private necessity can justify trespassing on another person's personal property).

35. *Ploof*, 71 A. at 189.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. RESTATEMENT (SECOND) OF TORTS § 263 cmt. d (1965) (describing the case-specific balancing process required for private necessity analysis).

aspect of private necessity concerning damages that is worth mentioning here.⁴² The actor claiming private necessity while protecting her own interest or that of a third party is liable for “any harm caused by the exercise of the privilege.”⁴³

C. Preemption Defense

In addition to the Control of Property Defense, tortfeasors subject to a Prevented Rescue claim may raise the Preemption Defense. The Preemption Defense is relevant if federal law addresses the actions of the defendant.⁴⁴ Under the defense, a defendant can argue that the plaintiff’s Prevented Rescue claim is preempted by federal law.⁴⁵

Because Prevented Rescue claims are rooted in state tort law, the Preemption Defense is successful if the federal law preempts a particular Prevented Rescue claim.⁴⁶ Any further analysis of this defense, however, depends on which federal law the defendant asserts as part of its defense.⁴⁷ Thus, because the success of any particular Preemption Defense requires individualized analysis, the remaining analysis of the Preemption Defense is in Parts II, III, and IV below.⁴⁸

II. APPLYING A PREVENTED RESCUE CLAIM TO PATENTED ESSENTIAL MEDICINE MAKERS

Because the success of a Prevented Rescue theory depends on the facts of a particular case, determining its viability requires individualized analysis.⁴⁹ This Part considers how Prevented Rescue claims apply to owners of patents on essential medicines. Section A provides context. Section B applies the prima facie argument for Prevented Rescue liability against the owners of patented essential medicines. Section C considers the

41. *See infra* Parts II.C.2, IV.A.

42. RESTATEMENT (SECOND) OF TORTS § 263(2) (1965).

43. *Id.* § 263 cmt. e.

44. Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682, 684–86 (2011) (discussing the Supreme Court’s unpredictable jurisprudence on preemption and defining the different types of federal preemption).

45. *Id.*

46. Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 KY. L.J. 913, 914 (2004) (“[W]hen the federal government preempts state tort law doctrines, it ousts states from an area where they have historically exercised their police powers.”).

47. *See id.* at 918–19 (discussing what type of law preemption should be analyzed under; the Supremacy Clause, the Commerce Clause, or the Necessary and Proper Clause).

48. *See discussion infra* Part II, III, IV.A.

49. *See supra* text accompanying notes 32, 52.

drug companies' Control of Property Defense. Lastly, Section D considers the drug companies Preemption Defense.

A. *Context and Definitions*

It is important to understand the concepts to which this Section and the rest of this Note refer. The following definitions serve only to define how these terms are used in the remainder of this Note.

Essential Medicines: medicines that save a person from otherwise certain death or serious bodily harm.

Indigent Sick: a select group of poor people who currently do not have access to essential medications that they need but who would receive the medications—through charity or by purchasing them on their own—if patents did not allow the manufacturer to charge monopoly prices.

Charities: charities which would provide essential medicines to the indigent sick if it were not for the existence of drug patents. The charities could do so either through purchasing essential medicines at generic prices (perhaps from out of the country) or, conceivably, by manufacturing the essential medicines on their own. This term could also be used to refer to any other person or group seeking to act in a similar way, such as a philanthropist or generic drug manufacturer.

Drug Companies: drug companies that own the patent to an essential medicine that at least one indigent sick person needs and is not receiving.

In the remainder of this note, the Prevented Rescue theory is used offensively by the indigent sick to establish a tort cause of action against certain drug companies. The indigent sick bring a Prevented Rescue claim against a drug company under the theory that it used its patents in a way that either prevented a charity from providing the indigent sick with essential medicines or made those essential medicines so expensive that the indigent sick could not afford them. The indigent sick may seek damages, but this Note is mainly concerned with whether an injunction would be granted.⁵⁰

B. *Prima Facie Case for Drug Company Prevented Rescue Liability*

As mentioned in Part I, plaintiffs cannot assert a duty to rescue claim.⁵¹ However, a Prevented Rescue claim is more plausible.⁵² This Section

50. Another setting involves charities as defendants to a patent infringement claim. In this scenario, the charity provides essential medicines to the indigent sick. In response, the drug company sues the charity for an injunction and damages. In this case, the arguments addressed in this Note are used by the charities as a counterclaim or a defense against the drug companies.

51. See RESTATEMENT (THIRD) OF TORTS § 37 (2005) (stating there is no general duty to rescue when risk was not created by the actor); *Id.* § 314 (stating that an actor's awareness of another's need for "aid or protection does not of itself impose upon him a duty to take such action"). *But see* Outtersson & Light, *supra* note 4, at 6-7 (stating that special legal relationships or risk creation are exceptions to the common law concept of no general duty to rescue).

52. See discussion *supra* Part I.A.

analyzes how the indigent sick might assert a Prevented Rescue claim against a drug company.

A prima facie case asserting a Prevented Rescue claim against a drug company is fairly straightforward. The argument is similar to the argument made in the bridge-rescue hypothetical discussed in Part I.⁵³ Recall the passerby who terminated the rescue of a drowning child by preventing a rescuer from throwing a rope to the drowning child.⁵⁴ In the drug context, the rescuer is the charity, the passerby is the drug company, the drowning child is the indigent sick, and the rope is the patented essential medicine.

The analogy is clear: drug companies prevent generic drug manufacturers and charity groups from saving the indigent sick by threatening to sue anyone who manufactures or distributes infringing medicines, just as the man crossing the bridge prevents the rescuer from throwing a rope to the drowning child.

Similarly, the argument can be made by plugging the appropriate words into the Restatement: drug companies “intentionally prevent[] [charity groups] from giving [the indigent sick] aid [in the form of generic essential medicines that are] necessary to prevent physical harm to [those indigent sick people.]”⁵⁵ Thus, a drug company that uses a patent to prevent the indigent sick from accessing essential medicines must rely on an affirmative defense to preclude liability.

C. Control of Property Defense

The Control of Property Defense is a defense that every drug company can raise in response to a Prevented Rescue claim.⁵⁶ Subsection 1 explains the drug company’s argument. But Subsection 2 rejects—through the private necessity privilege—the defense. And Subsection 3 rejects—through public necessity—the defense.

1. Applicability of the Control of Property Defense

The Control of Property Defense is easily applied in the patent context.⁵⁷ The drug companies can utilize the defense in the same way that the passerby whose rope was stolen to save the life a drowning child.⁵⁸ In short, a drug company can argue that the charity did not have the right to rescue the indigent sick by infringing a patent. Because the drug company

53. See discussion *supra* Part I.A.

54. See discussion *supra* Part I.A.

55. See RESTATEMENT (SECOND) OF TORTS § 326 (1965) (stating that “[o]ne who intentionally prevents a third person from giving to another aid necessary to prevent physical harm to him, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.”).

56. See 35 U.S.C. § 154 (2006) (codifying a patent holder’s right to exclude).

57. See *supra* text accompanying note 16.

58. See *supra* Part I.B.

owned the patent to the technology, no charity can infringe the patent without prior permission from the drug company. As discussed above, if a defendant has the right to prevent access to the tools of rescue, a Prevented Rescue claim will fail.⁵⁹ Nonetheless, private and public necessity limit the Control of Property Defense.

2. Limitations Created by Private Necessity

The Control of Property Defense is limited by the doctrine of necessity. This Subsection considers how private necessity might limit the extent to which drug companies can claim the Control of Property Defense.

The drug companies' use of the Control of Property Defense depends on the assertion that the charities have no rightful access to the essential medications that the indigent sick need.⁶⁰ Clearly, patents give drug companies the right to exclude the charities from using the drug companies' patented technology.⁶¹ Nonetheless, private necessity might give charities the privilege to use patented medications without the consent of the drug company.⁶²

To prove private necessity, the indigent sick need to show that a charity's act of distributing patented essential medicines to them is "an act which would otherwise be a trespass to the chattel of [the drug company] or a conversion of it[, and that] it is or is reasonably believed to be reasonable and necessary to protect the person . . . [of the indigent sick] from serious harm."⁶³ This argument has two parts, and one is easily met. By their nature, essential medicines are—or, at a minimum, are reasonably believed to be—necessary to save the indigent sick from death or serious harm.⁶⁴ Thus, the only remaining question is whether a charity's patent infringement would constitute an act that "would otherwise be a trespass to the [drug company's] chattel of or a conversion of it."⁶⁵

Although this is not considered a textbook trespass to chattel or conversion, there is a strong argument that patent infringement constitutes

59. *See supra* Part I.B.1; RESTATEMENT (SECOND) OF TORTS § 326 cmt. a, illus. 1 (1965).

60. *See supra* Part II.C.1.

61. 35 U.S.C. § 154 (2006) (granting patent holders the right to exclude); *see also* Gregory Rosenblatt, et al., *supra* note 25, at 9 (stating that "a patent is a government-granted monopoly that allows the patent holder to exclude others from making, selling, offering for sale, or using the patented invention").

62. *See supra* Part I.B.3.

63. RESTATEMENT (SECOND) OF TORTS § 263(1) (1965) (stating that private necessity will not apply if "the actor knows that the person for whose benefit he acts is unwilling that he shall do so."). This will clearly not be the circumstance in any case resembling those discussed in this Part. Any indigent sick person engaging in a lawsuit like the one discussed in this Part would only be doing so because she wanted the essential medicines made inaccessible to her by patent prices.

64. *See supra* Part II.A.

65. RESTATEMENT (SECOND) OF TORTS § 263(1) (1965).

one or both of these torts. The first issue to address is whether patents are considered “chattel.” The answer appears to be “yes.” Black’s Law Dictionary includes in its definition of personal chattel a “tangible good or an intangible right (*such as a patent*).”⁶⁶ Moreover, the patent statute itself explains, with some limited but irrelevant exceptions, that “patents shall have the attributes of personal property,”⁶⁷ and “the English word for personal property is ‘chattel.’”⁶⁸ Thus, on at least two accounts it appears that patents do qualify as “chattel.”

Having determined that patents qualify as chattel, it is important to consider whether patent infringement can be construed as a trespass to or conversion of chattel.⁶⁹ Because almost all trespasses to chattel are conversions, most courts and commentators merely discuss conversion.⁷⁰

In court, the argument that patent infringement constitutes trespass to chattel or conversion has been made on several occasions. Plaintiffs asserting this argument usually fail to win a judgment in state court, but rarely do they fail on the merits of the claim.⁷¹ As one court put it, “[b]ecause ‘[a] patent is a species of property[,]’ a patent holder not preempted under federal law may assert . . . conversion claims in state court.”⁷² Thus, courts have usually suggested that conversion extends to infringement, but it is preemption (and jurisdiction)⁷³ that prevents most, but not all, plaintiffs from succeeding when making this argument.⁷⁴

66. BLACK’S LAW DICTIONARY 268 (9th ed. 2009) (emphasis added).

67. 35 U.S.C. § 261 (2006).

68. Dean Lueck, *The Extermination and Conservation of the American Bison*, 31 J. LEGAL STUD. 609, 642–43 (2002); Wesley D. Greenwell, *State Immunity from Patent Infringement Lawsuits: Inverse Condemnation as an Alternative Remedy*, 63 S.C. L. REV. 975, 988 (2012) (stating that “[c]hattels include personal property”).

69. See RESTATEMENT (SECOND) OF TORTS § 263(1) (1965) (mentioning that private necessity will not apply if “the actor knows that the person for whose benefit he acts is unwilling that he shall do so.”).

70. Paul M. Janicke, *Implementing the “Adequate Remedy at Law” for Ongoing Patent Infringement After Ebay v. Mercexchange*, 51 IDEA: INTELL. PROP. L. REV. 163, 178 (2011) (“The Restatement tells us that all but the most fleeting forms of trespass to chattels should be regarded as conversions.”).

71. See, e.g., *Fire ‘Em Up, Inc. v. Technocarb Equip. (2004) Ltd.*, 799 F. Supp. 2d 846, 852 (N.D. Ill. 2011) (acknowledging that patent infringement claim was “improperly and redundantly cloaked as a conversion claim”); *Miracle Boot Puller Co. v. Plastray Corp.*, 269 N.W.2d 496, 498 (Mich. Ct. App. 1978) (conceding that “the intangible right to benefit from a patent right can be converted,” but stating that the claim ultimately fails because “state court has no jurisdiction to resolve this dispute”).

72. *Jacobs Wind Elec. Co. v. Dep’t of Transp.*, 626 So. 2d 1333, 1337 (Fla. 1993). See also *Sarver v. Detroit Edison Co.*, 571 N.W.2d 759, 762 (Mich. Ct. App. 1997) (“[P]laintiff’s idea could be subject to conversion if she could establish an exclusive right of ownership in the idea.”).

73. Preemption and jurisdiction are regularly conflated in the infringement-conversion context. See, e.g., *Jacobs Wind Elec. Co.*, 626 So. 2d at 1337 (finding

Many commentators have also noted that patent infringement is conversion. However, state law does not protect these conversion claims due to preemption concerns.⁷⁵ As explained by one commentator in 2012:

[P]atent owners seeking redress in state court for unauthorized use of their inventions may try to establish trespass to chattels or conversion--state causes of action similar to a patent infringement lawsuit.

Someone “who dispossesses another of a chattel . . . is liab[le] in trespass for the damage done” to the chattel or “for the loss of the value of its use.” If the dispossession is a serious interference with the owner’s right to control the chattel, the dispossession might rise to the level of conversion. Conversion and trespass to chattels are both based on the interference with possession of property, differing only in the seriousness of the interference and the available remedies. Chattels include personal property, such as a patent owner’s intangible right to exclude others from using its inventions. Therefore, *ignoring jurisdiction concerns and*

jurisdiction after concluding that there was no preemption); *Fire ‘Em Up, Inc. v. Technocarb Equip. (2004) Ltd.*, 799 F. Supp. 2d 846, 852 (N.D. Ill. 2011) (dismissing the plaintiff’s claim with ambiguous language that suggests either preemption or lack of jurisdiction); Greenwell, *supra* note 75, at 988 (mentioning preemption and lack of jurisdiction and analyzing each as one). One reason for the confusion might be that the concepts usually stand or fall together. Jurisdiction is infrequently an issue in infringement-conversion cases because the plaintiff couples the state conversion claim with a patent infringement claim, which is the exclusive jurisdiction of the federal government. 28 U.S.C. § 1338 (2006). Preemption, on the other hand, exists where federal law occupies the field or conflicts with state tort law. *See infra* text accompanying note. Because federal courts have exclusive jurisdiction over patent claims, conversion claims that are functionally identical to patent claims are preempted and the state court has no jurisdiction.

74. *See supra* text accompanying notes 74–77 (discussing patent infringement as a form of conversion). *See also* *Mannsfield v. Evonik Degussa Corp.*, No. 10-0553-WS-M, 2011 WL 53098, at *9 (S.D. Ala. Jan. 5, 2011) (explaining that “Federal patent law does not occupy exclusively the fields of . . . conversion law”). It is worth noting that the preemption issues discussed in this Section are different than those discussed in Part II.D. Here, the preemption issue addressed is whether a patent infringement claim that is couched in terms of a trespass to chattel or conversion claim is preempted. Preemption issues addressed outside of this Section are different in two ways: (1) they discuss whether a Prevented Rescue claim, not a conversion or trespass claim, is preempted, and (2) the potentially preempted claim is asserted against a patent owner, not by one. *See infra* Part II.D.
75. *E.g.*, Greenwell, *supra* note 75, at 988 (stating that patent owners could establish state causes of action as trespass to chattel or conversion in connection with an infringement on a patent); Janicke, *supra* note 78, at 178 (“It does seem . . . that ongoing infringement can be a serious interference with the patent owner’s rights. The Restatement tells us that all but the most fleeting forms of trespass to chattels should be regarded as conversions.”); Ted D. Lee & Ann Livingston, *The Road Less Traveled: State Court Resolution of Patent, Trademark, or Copyright Disputes*, 19 St. Mary’s L.J. 703, 712 (1988) (explaining that “a claim for conversion of patent rights is equivalent to a patent infringement claim” but will not succeed because “state court has no jurisdiction”).

*assuming the action is not preempted by federal law, a state court might view unauthorized use of a patented invention as a serious interference with the patent owner's right to exclude, thus constituting a conversion.*⁷⁶

As demonstrated by various courts and commentators, there is noticeable support for the idea that patent infringement constitutes conversion or trespass to chattel, even if non-merit-based issues usually preclude liability.

Even though failure on non-merit-based grounds is relevant to a litigant, the result of litigation is irrelevant to the indigent sick and to the drug companies considered in this Note. As was discussed above,⁷⁷ the private necessity concern is whether a charity's infringement "would otherwise be a trespass to the chattel of [the drug companies] or a conversion of it."⁷⁸ Importantly, the charity's action constitutes conversion or trespass to chattel, even though the drug company would rarely be able to make the necessary preemption showings to prevail.

Because state tort law varies, courts vary in their approaches to conversion and trespass to chattel. For two reasons, not all courts have held that patent infringement constitutes a state tort. First, some state courts refuse to recognize intangibles as chattel.⁷⁹ Second, some courts reject the claim for the following reason:

[Patents] exist[] solely because a federal statute memorialized an idea and thereby transformed it into intellectual property protected by federal law. In contrast, property that is typically the subject of a conversion or trespass to chattel action, whether tangible or intangible, exists independently (*e.g.*, a house, a satellite signal, a customer list, etc.). Accordingly, . . . conversion and trespass to chattel counts [of this sort] fail to state a claim under [state tort] law . . .⁸⁰

The rest of this Section will focus on those states where it is possible to state a patent infringement claim as trespass to chattel or conversion. The analysis for the remaining states will resume in Part III below.

In jurisdictions where it is possible to state a claim for patent infringement through trespass to chattel or conversion, charities would be

76. Greenwell, *supra* note 75, at 988 (emphasis added) (citations omitted).

77. RESTATEMENT (SECOND) OF TORTS) § 263(1) (1965).

78. *Id.*

79. *See, e.g.*, Corporate Catering, Inc. v. Corporate Catering, LLC, No. M1997-00230-COA-R3CV, 2001 WL 266041, at *5 (Tenn. App. Mar. 20, 2001) ("Although many jurisdictions hold otherwise, Tennessee is among the jurisdictions that have declined to recognize a civil cause of action for conversion of intangible personal property."); *see also, e.g.*, Lawson v. Commonwealth Land Title Ins. Co., 69 Md. App. 476, 480–81 (1986) (recognizing intangibles only insofar as they are tied to an otherwise converted tangible).

80. Richmond v. Nat'l Inst. of Certified Estate Planners, No. 06 C 1032, 2006 WL 2375454, at *7 (N.D. Ill. Aug. 15, 2006) (rejecting plaintiff's attempt to combine "federal trademark law and Illinois law governing conversion and chattel . . .").

trespassing to or converting patents. Thus, the two aspects⁸¹ of private necessity have been proven: (1) the essential medicine is reasonably necessary to protect the indigent sick from serious harm, and (2) the charity's provision of that medicine would otherwise constitute a trespass to, or conversion of, the drug company's patent.

Having concluded that charities have a private necessity privilege to distribute essential medicines to the indigent sick, the drug companies can no longer utilize the Control of Property Defense. The Control of Property Defense hinges on the assertion that the charities do not have rightful access to the medications that the indigent sick need.⁸² However, because the charities have a private necessity, state tort law holds that they do have rightful access to the medications.

Despite defeat of the Control of Property Defense, two private necessity issues remain. First, drug companies can raise another defense. Section D below addresses other defenses. Second, private necessity is not the best argument for the indigent sick to rely on. Private necessity requires the party claiming the privilege to compensate the owner for "any harm caused by the exercise of the privilege."⁸³ Determining the harm caused by a charity's distribution of essential medicines to the poor is not as easy as it sounds. No court has answered this question, but there are two possible answers. First, arguably, no damage is done because the indigent sick, by definition, could not have afforded the essential medicines.⁸⁴ Thus, the drug companies have lost no profit. Alternatively, because of patent law guarantees patent owners nothing "less than a reasonable royalty for the use made of [the patentee's] invention by [an] infringer,"⁸⁵ a charity's use of the patented technology entitles the drug companies to at least a reasonable royalty.

Predicting whether a court would hold that the charity owes the drug companies a reasonable royalty or no compensation is tough. In any case, the indigent sick would rather not run any risk, and would therefore prefer to defeat the Control of Property Defense with an argument that creates no chance of liability. This argument is *public* necessity.

3. Limitations Created by Public Necessity

Like private necessity, public necessity limits the Control of Property Defense. This Subpart considers how public necessity might limit the extent to which drug companies can claim the Control of Property Defense.

To prove public necessity, the indigent sick must show that a charity's act of distributing patented essential medicines to the indigent sick is "an

81. *See supra* text accompanying notes 67-69 (discussing private necessity doctrine).

82. *See supra* Part II.C.1 (discussing the control of property defense).

83. RESTATEMENT (SECOND) OF TORTS § 263(2) (1965).

84. *See supra* Part II.A (discussing the application of a prevented rescues claim to patent-holding essential medicine makers).

85. 35 U.S.C. § 284 (2006).

act which would otherwise be a trespass to a chattel or a conversion . . . [and that] the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.”⁸⁶ This argument has two issues: (1) whether a charity’s patent infringement would constitute an act that “would otherwise be a trespass to chattel or a conversion” and (2) whether providing the indigent sick with essential medicines is an act that “is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.”⁸⁷

As part of the private necessity analysis, Subsection 2 addresses the trespass to chattel or conversion issue.⁸⁸ Many states view patent infringement as a form of trespass to chattel or conversion, even though plaintiffs are rarely able to win their claims due to non-merit-based issues.⁸⁹

The second issue—whether the charity’s action is necessary for purposes of avoiding a public disaster—is more complicated than the first. By their nature, essential medicines are (or are at least reasonably believed to be) necessary to save the indigent sick from death or substantial harm.⁹⁰ Thus, the real concern is whether that rescue counts as an action that prevents a “public disaster.”⁹¹

The Restatement does not define “public disaster.”⁹² However, the examples given in the comments are “a public enemy, . . . conflagration, flood, earthquake, [and] *pestilence*.”⁹³ Thus, according to the Restatement, public disaster includes acting to prevent certain sicknesses. The following illustration from the Restatement offers further clarification:

A, [who is] an agister of cattle, kills B’s bull, which is in [B’s] possession, to prevent a spread of infection which is dangerous to other cattle and to human beings. If the act is reasonably necessary to prevent the spread of the disease, A is not liable to B.⁹⁴

Following this logic, the indigent sick that suffer from certain problems might be able to succeed in showing that the patented medicine is used to prevent a public disaster. The argument’s success will vary based on the disease, with contagious diseases standing the best chance of qualifying as a public disaster. Exploring each disease and the effectiveness of available medication is beyond the scope of this Note, but at least some medicines must be necessary to avoid a public disaster.

86. RESTATEMENT (SECOND) OF TORTS § 262 (1965).

87. *Id.*

88. *See supra* Part II.C.2 (discussing the limitations created by private necessity).

89. *Id.*

90. *See supra* Part II.A (discussing the context of applying a prevented rescues claim to patented essential medicine makers).

91. *See* RESTATEMENT (SECOND) OF TORTS § 262 (1965).

92. *Id.* § 262 cmt. b.

93. *Id.* (emphasis added).

94. *Id.* § 262 cmt. e, illus. 2.

Thus, public necessity supplements private necessity, and together, the two defeat the Control of Property Defense. Drug companies cannot argue that they are entitled to prevent the indigent sick from accessing essential medicines unless they can claim that federal patent law overrides state tort law. This argument is considered separately in the following Section.

D. Preemption Defense

Preemption is perhaps the most compelling defense that drug companies can assert. The indigent sick's argument rests on the claim that state tort law prevents drug companies from doing exactly what patents authorize the drug companies to do: prevent others from utilizing the patented technology.⁹⁵ The following subsections consider two ways of preempting the Prevented Rescue claim: the Constitution and statutory patent law.

1. Preempted by the Constitution

"The Congress shall have power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"⁹⁶ The plain language of the Constitution clearly confers authority upon the federal government to grant patents.⁹⁷ If a state Prevented Rescue claim conflicts with the Constitution, the prevented rescue claim is preempted.⁹⁸

State tort claims that conflict with the Constitution are not new. For example, in *New York Times Co. v. Sullivan*, the Supreme Court considered a state libel claim that conflicted with the First Amendment.⁹⁹ As the Court explained, "[l]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."¹⁰⁰ Similarly, a Prevented Rescue cause of action can claim no magical immunity from constitutional limitations.¹⁰¹

95. See 35 U.S.C. § 271 (2006) (Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent."); Rosenblatt, et al., *supra* note 28, at 9 (stating that "a patent is a government-granted monopoly that allows the patent holder to exclude others from making, selling, offering for sale, or using the patented invention").

96. U.S. CONST. art. 1, § 8, cl. 8.

97. *Id.*

98. *Cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (discussing the First Amendment's preemption of a libel claim).

99. *New York Times Co.*, 376 U.S. at 256.

100. *Id.*

101. *Cf. id.* (holding that a libel claim has no "talismanic" immunity from constitutional limitations).

Unlike the First Amendment, which guarantees free speech protection, the Copyright and Patent Clause merely grants Congress the authority to create patent law. The clause fails to grant or guarantee any patent protection to inventors.¹⁰² Thus, the preemptive power of the First Amendment is not present in the Copyright and Patent Clause.

2. Preempted by Statutory Patent Law

Unlike the Constitution, statutory patent law preempts a Prevented Rescue claim. Courts usually apply conflict, not field, preemption in the context of patent law,¹⁰³ but the distinction is not important for this Note because the indigent sick's Prevented Rescue claim directly conflicts with federal patent law.

The court in *Hunter Douglas, Inc. v. Harmonic Design, Inc.* explained conflict preemption law in the context of patents and state torts:

To determine whether [] state law torts are in conflict with federal patent law and accordingly preempted, we assess a defendant's allegedly tortious conduct. If a plaintiff bases its tort action on conduct that is protected or governed by federal patent law, then the plaintiff may not invoke the state law remedy, which must be preempted for conflict with federal patent law.¹⁰⁴

This rule clarifies the indigent sick's Prevented Rescue claim is preempted. The state tort claim is asserted against drug companies that are acting in a way that is protected by federal patent law. However, the indigent sick might have a federal claim relates to a Prevented Rescue claim, which is what this Note considers next.

102. U.S. CONST. art. 1, § 8, cl. 8.

103. *Russo v. Ballard Medical Products*, 550 F.3d 1004, 1011 (10th Cir. 2008) (reasoning that because Congress has not “evinced an intent to occupy exclusively the entire intellectual property field associated with inventions,” the “only concern in this case is thus narrowed to conflict preemption”); *Ultra-Precision Mfg., Ltd. v. Ford Motor Co.*, 411 F.3d 1369, 1377 (Fed. Cir. 2005) (“Because federal patent law does not provide explicit preemption . . . and because Congress does not intend to occupy exclusively the field of unjust enrichment law . . . we are concerned in this case with only conflict preemption.”); *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1333 (Fed. Cir. 1998) (stating that “there is no reason to believe that the clear and manifest purpose of Congress was for federal patent law to occupy exclusively the field pertaining to state unfair competition law,” and concluding that “in conjunction with the underlying presumption disfavoring preemption, there is no field preemption of state unfair competition claims that rely on a substantial question of federal patent law”).

104. *Hunter Douglas*, 153 F.3d at 1335; *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1357 (Fed. Cir. 1999) (holding that court will apply federal circuit law in determining whether patent law conflicts with other federal statutes or preempts state law causes of action).

III. RESCUING THE PREVENTED RESCUE CLAIM

Statutory patent law preempts a Prevented Rescue claim brought by the indigent sick against drug companies that prevent access to essential medicines.¹⁰⁵ Nonetheless, the indigent sick have two options. The first is a similar claim brought under the federal Due Process Clause. The second is through legislative action.

A. Substantive Due Process

The first method of saving the indigent sick is a federal claim (which is not subject to preemption): substantive due process. Fully exploring the complexities of a substantive due process claim requires an article of its own, but one particularly relevant case cannot be overlooked.

In 2007 and *en banc*, the D.C. Circuit decided *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach* on grounds that are highly relevant to the indigent sick's Prevented Rescue theory.¹⁰⁶ In *von Eschenbach*, the court considered a suit against the Food and Drug Administration by terminally ill patients seeking access to experimental drugs, which the FDA forbids.¹⁰⁷ The FDA's actions were similar to the actions of the U.S. Patent and Trademark Office: both use their powers in a way that causes those in need to go without access to essential medicines. Thus, the decision in *von Eschenbach* is quite informative.

von Eschenbach "beg[an], as [] in all due process cases, by examining our Nation's history, legal traditions, and practices."¹⁰⁸ Highly relevant in this determination was two common law doctrines, "the doctrine of necessity [and] the tort of intentional interference with rescue,"¹⁰⁹ i.e., necessity and Prevented Rescue.

The plaintiffs in *von Eschenbach* argued (1) that some subset of the drugs they wished to take were capable of saving their lives and (2) that the FDA's rules prevented doctors from using the drugs to rescue the patients.¹¹⁰ The plaintiffs did not believe that the FDA was liable for a state Prevented Rescue tort.¹¹¹ Instead, they argued that Prevented Rescue tort shed light on our legal traditions and thereby supported a finding of a fundamental right,¹¹² just like the common law tort of battery supported the Supreme Court's holding of a fundamental right to refuse medical

105. *See supra* Part II.D.

106. *See* *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 697 (D.C. Cir. 2007).

107. *Id.*

108. *Id.* at 703.

109. *Id.* at 707 (discussing common law self-defense).

110. *Id.* at 707–10.

111. *Id.* at 707.

112. *Id.*

treatment in *Cruzan*.¹¹³ In *von Eschenbach*, the plaintiffs wanted the court to find a fundamental right to be free to ingest potentially life-saving medications when all other avenues of rescue had been exhausted.¹¹⁴

Although the eight-judge majority held otherwise, the Prevented Rescue argument was accepted as a strong indicator of a fundamental right by two dissenting judges.¹¹⁵ Both the dissent and majority accepted that a valid Prevented Rescue claim would suggest a fundamental right, but the judges disagreed over whether Prevented Rescue theory applied.¹¹⁶ The crux of the dispute concerned whether the medications at issue were “necessary,”¹¹⁷ which, as discussed above, is needed to assert a successful Prevented Rescue claim.¹¹⁸ The majority felt that these medications were not “necessary” because they had not been shown to be anything other than “ineffective and unsafe.”¹¹⁹ The dissent vigorously disputed this argument, stating that the majority’s view was “manifestly flawed” in that it “confuse[d] what is necessary with what is sufficient.”¹²⁰ To demonstrate the point, the dissent offered an example: “By the [majority]’s reasoning, it is not ‘necessary’ for the driver of a car that is hurtling toward a cliff to press the brake because we ‘cannot know until after’ he has done so whether the car will stop in time.”¹²¹

Despite a bitter dispute over the “necessary” element of the Prevented Rescue theory in the experimental drug setting, there is no dispute over the necessity of the essential medicines that the indigent sick seek to sue over.¹²² Many essential medicines have already passed FDA approval and are proven effective. Thus, given that the objections raised by the majority in *von Eschenbach* are inapplicable and that the only reasons for failure

113. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 269 (1990) (noting that informed consent, which is deeply rooted in our medical system, allows the patient the absolute right to refuse medical treatment).

114. *See Abigail Alliance*, 495 F.3d at 707. (“Such a right to self-preservation, the Alliance believes, would permit “persons in mortal peril to try to save their own lives, even if the chosen means would otherwise be illegal or involve enormous risks.”).

115. *Id.* at 717–19 (Rogers, J., dissenting) (criticizing the majority for confusing what is necessary to save a patient’s life with what is sufficient to do the same).

116. *Id.* at 718.

117. *Id.* at 721 (reasoning that without access to these potentially life-saving medications, the patients will surely die; rendering the medications ‘necessary’).

118. RESTATEMENT (SECOND) OF TORTS § 326 (1965).

119. *Abigail Alliance*, 495 F.3d at n.15 (reasoning that until FDA trials are conducted on the experimental drugs at issue, there is no way to know if the drugs are safe; thus, they cannot be considered necessary).

120. *Id.* at 719.

121. *Id.*

122. *See supra* text accompanying note 98.

found in this Note concerned preemption,¹²³ there is good reason to believe that Prevented Rescue supports a finding of a fundamental right. Nonetheless, public and private necessity might further support the finding of a fundamental right.

In addition to Prevented Rescue, the plaintiffs argued that necessity (either public or private)¹²⁴ creates a fundamental right.¹²⁵ Furthermore, they argue that their dire circumstances made their access to experimental medication a necessity.¹²⁶

Like the Prevented Rescue argument, the necessity argument was accepted as a strong indicator of a fundamental right by two dissenting judges and rejected by the eight-judge majority.¹²⁷ Presumably, the majority could have held that the drugs were not “necessary,” but it chose to focus on a different point.¹²⁸ The majority held that the plaintiffs’ argument provided only “little support” to the purposed right in the wake of Congress directly overriding the tort by statute.¹²⁹ The dissent found that it was “true” that Congress can overrule the common law “but irrelevant” to a fundamental rights analysis.¹³⁰ The dissent criticized the majority for ignoring the common law out of a fear of turning all of the common law into a fundamental right.¹³¹ Instead, the “tradition of protection does not

123. *See supra* Part II (Part II “considers how Prevented Rescue claims apply to owners of patents on essential medicines” and Section D finds that the preemption defense is “the most compelling defense that drug companies have available to them.”).

124. *See* Abigail Alliance, 495 F.3d at 708–10 (the court did not distinguish between public and private necessity in its decision).

125. *Id.* at 707–08 (“[T]he [plaintiffs] argu[e] that the concept[t] of . . . necessity . . . [is] broad enough to demonstrate the existence of [a] fundamental right . . .”).

126. *Id.* (“[Plaintiffs] argu[e] that . . . the doctrine of necessity . . . support[s] the recognition of a right to self-preservation . . . [Plaintiffs] believ[e] that a right to self-preservation would give the terminally ill a constitutionally protected right of access to experimental drugs.”).

127. *Id.* at 717–19 (The dissent argues that the majority ignores the “core concerns” of the doctrine of necessity which include the “special importance of life and attempts to preserve it.”).

128. *Id.* at 708 (failing to address the necessity argument entirely by stating that the “common law defense of necessity remains controversial and cannot override a value judgment already determined by the legislature . . .”).

129. *Id.* (“Given the Supreme Court’s conclusion that the common law defense of necessity remains controversial and cannot override a value judgment already determined by the legislature, the common law doctrine of necessity provides little support to the Alliance’s proposed right.”).

130. *Id.* at 718 (Aside from asserting that this case is not about efforts to preserve one’s life, but rather the “right to assume any level of risk,” the court further avoids the doctrines of self-defense and necessity by asserting that “Congress can override the common law.”).

131. *Id.* (asserting that “recognizing that necessity has historically been protected does not constitutionalize the doctrine of necessity.”).

alone establish a fundamental right,” it is merely a factor for consideration.¹³²

The debate between the majority and dissent over the necessity argument applies just the same to the indigent sick and patented essential medicines. Thus, although one circuit has held otherwise, other circuits might choose to side with the *von Eschenbach* dissent’s view.

In conclusion, statutory patent law preempts the indigent sick from asserting a Prevented Rescue claim in state court. However, the indigent sick might be able to use the same theory to establish a fundamental right to be free from the patent law restraints that prevent access to essential medicines. Importantly, the answer will depend on the applicability of the Prevented Rescue and public and private necessity doctrines discussed in this Note.

B. Legislative Action

If all else fails, the indigent sick are left with only one option: rely on legislators to change patent law to allow for an exception in the case of charities and the indigent sick. Unfortunately, the political will is unlikely to present itself in the near term, as the country is currently dealing with “fiscal cliff” problems and is in the middle of implementing a revolutionary new patent law.¹³³ Nonetheless, the conflicting patent law and tort law discussed in this Note, along with near finding of a fundamental right should be taken by legislators as a reason for changing the current system. To more fully explore this question, though, some public policy considerations must be considered. This Section briefly considers some obvious questions. Will drug companies continue to develop essential medicines? Are any other actors liable for preventing access to essential medicines? Will other patent and intellectual property owners be forced to grant similar licenses?

1. Implications for Other Patent and Intellectual Property Owners

Parts II and III have explored the implications of the Prevented Rescue claim in the context of patented essential medicines and the indigent sick. This Subsection considers how far that analysis applies. Can the plight of the indigent sick be generalized to other people that lack other technology.

Much of the drug analysis in this Note is applicable beyond patents on essential medicines. However, two important differences prevent the Prevented Rescue theory from being expanded much beyond essential medicines. First, to defeat the Control of Property Defense, the indigent

132. *Id.* (“A tradition of protection does not alone establish a fundamental right. The subsequent determination of whether a right is “implicit in the concept of ordered liberty” invalidates the court’s fears of a slippery slope.”).

133. *See generally* Leahy-Smith America Invents Act, 35 U.S.C. § 101 (2006) (setting forth new patent law that is split into two sections: Section 101, which relates to the “subject matter for which patents may be obtained,” and Section 102, which defines “statutory novelty and states other conditions for patentability.”).

sick must rely on arguments that are not applicable far outside of essential medicines. A defendant asserting the Control of Property Defense can argue that charities do not have rightful access to the essential medicines because patents give the drug companies the right to exclude the charities from infringing.¹³⁴ The indigent sick were able to defeat this defense only by arguing necessity,¹³⁵ and thereby showing that charities had rightful access to the patented technology.¹³⁶ However, that showing relied on facts that are virtually unique to essential medicines.

To demonstrate the necessity of access to essential medicines, the indigent sick had to argue that essential medicines were either “necessary to protect the person . . . from serious harm,”¹³⁷ or “necessary for the purpose of avoiding a public disaster.”¹³⁸ Neither argument could be made in the vast majority of intellectual property settings. The U.S. Patent and Trademark Office has issued more than 8 million patents, and millions of those patents remain active today.¹³⁹ Infringement of very few of those patents could be construed as *necessary* to prevent bodily harm or a public disaster. Moreover, necessity applies to almost no copyrighted work or trademark.

Even though necessity substantially confines a Prevented Rescue claim, the due process argument discussed in Part III, Section A. serves as

134. *See supra* Part II.C.1 (“The Control of Property Defense is easily applied in the patent context. The drug companies can utilize the defense in the same way as the passerby whose rope was stole to save the life a drowning child. In short, a drug company would argue that there is no Prevented Rescue claim available, because the charity did not have the right to conduct its rescue activities in the first place. Because the drug company owned the patent to the technology, no charity can infringe the patent without prior permission from the drug company.”).

135. *See supra* Part II.C.2 (“[T]he private necessity doctrine may be invoked to give charities the privilege to use patented medications that would otherwise require consent from the drug company.”).

136. *Id.*

137. RESTATEMENT (SECOND) OF TORTS § 263(1) (1965). The Restatement mentions that private necessity will not apply if “the actor knows that the person for whose benefit he acts is unwilling that he shall do so,” but this will clearly not be the circumstance in any case resembling those discussed in this Part. Any indigent sick person engaging in a lawsuit like the one discussed in this Part would only be doing so because she wanted the essential medicines made inaccessible to her by patent prices.).

138. *Id.* § 262. The two issues are (1) whether a charity’s patent infringement would constitute an act that “would otherwise be a trespass to chattel or a conversion,” and (2) whether providing the indigent sick with essential medicines is an act that “is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.”).

139. *Millions of Patents*, THE UNITED STATES PATENT AND TRADEMARK OFFICE (Oct. 2, 2013, 10:00 AM), http://www.uspto.gov/news/Millions_of_Patents.jsp (“The U.S. Patent and Trademark office issued patent number 8,000,000 on August 16, 2011.”).

another check on over-expansion.¹⁴⁰ Even in the view of the *von Eschenbach* dissent, proving necessity or Prevented Rescue was not sufficient to find a fundamental right.¹⁴¹ As the dissent explained, “[a] tradition of protection does not alone establish a fundamental right. The subsequent determination of whether a right is ‘implicit in the concept of ordered liberty’ invalidates the . . . fears of a slippery slope.”¹⁴² Because access free access to copyrights, trademarks, and most patents is in no way “implicit in the concept of ordered liberty,” there need be no worry that the Prevented Rescue or necessity doctrines will require access to much more than essential medicines.

2. Remaining Concerns

Two other concerns are worth briefly considering: economic incentives and other parties implicated in the application of Prevented Rescue doctrine to drug companies. First, economic incentives to develop essential medicines are not substantially hindered by allowing charities to provide essential medicines to the indigent sick. The nature of the indigent sick discussed in this Note is that they cannot afford essential medications without someone infringing the patents of the drug companies.¹⁴³ If the indigent sick had access to the essential medicines otherwise, they could not argue that infringing the patents of the drug companies is necessary to obtain access to the medicines.¹⁴⁴ Thus, drug companies will lose little to no profits by being forced to allow limited infringement.¹⁴⁵ Thus, the incentives to develop are not noticeably harmed.

The second issue concerns parties that might be implicated, along with the drug companies, by the Prevented Rescue theory. The drug companies’ business partners might have reason for concern but so might the U.S.

140. *See supra* Part III.A (discussing *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach* and the dissent’s reasoning for accepting the Prevented Rescue argument as a strong indicator of a fundamental right).

141. *See Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 718 (D.C. Cir. 2007) (Roger, J., dissenting) (“A tradition of protection does not alone establish a fundamental right. The subsequent determination of whether a right is ‘implicit in the concept of ordered liberty’ invalidates the court’s fears of a slippery slope.”).

142. *Id.*

143. *See supra* Part II.A (discussing the indigent sick’s ability to bring a tort claim under the Prevented Rescue Theory).

144. *See* RESTATEMENT (SECOND) OF TORTS § 326 (1965) (“One who intentionally prevents a third person from giving to another aid necessary to prevent physical harm to him, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.”).

145. *See supra* text accompanying note 95 (“[I]t could be argued that there is no damage done because the indigent sick would not have been able to afford the essential medicines regardless; that the defining characteristic that qualifies them as indigent sick. Thus, there can be no lost profits to the drug companies.”).

federal government.¹⁴⁶ Just like *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach* questioned the actions of the FDA,¹⁴⁷ another action might challenge the PTO's granting carte blanche patent rights on essential medicines.¹⁴⁸ Nonetheless, the government has unique defenses available to it that do not apply to the drug companies. Exploring these defenses is beyond the scope of this Note.

CONCLUSION

In a developed country, where residents go without the drugs they need, something must be done. This Note considered one solution for the indigent sick that cannot afford their essential medications: sue drug companies that both vigorously enforce their patents and sell their drugs at such high prices that poor Americans are forced to go without the drugs. One unique aspect of this argument is that it does not demand any positive action from the drug companies. Instead, the tort claim argues that drug companies merely refrain from preventing others that attempt to save the indigent sick.

The prevented rescue theory considered in this Note started strong. A prima facie case for liability was made and the only generally applicable defense could not withstand critique. Nonetheless, by arguing preemption, the drug companies prevailed over the plaintiffs. Statutory patent law specifically grants the drug companies the authority to prevent rescues, even though tort law would have otherwise supported a finding of liability.

Although patent law prevents the indigent sick from asserting a prevented rescue claim, the indigent sick have two alternatives. First, state tort law is an important tool in determining what constitutes a fundamental right that the substantive due process clause protects. By demonstrating that, were it not for preemption, the drug companies would be liable under state tort law, this Note supports a finding of a fundamental right that overrides statutory patent law.¹⁴⁹ Second, the applicability of state tort law to the actions promoted by federal patent law should give legislators pause to think. The strength of this point is bolstered by the public policy considerations addressed in this Note. Creating an exception modeled off

146. 28 U.S.C. § 1338(a) (2006) (stating that the patent system is a federal creation and patent law is subject to exclusive federal jurisdiction).

147. *Abigail Alliance*, 495 F.3d 695, 697 (D.C. Cir. 2007).

148. *See id.* (finding that an FDA policy did not constitute a tort of intentionally preventing a person from giving necessary aid to another); *see also* *United States v. Lawter*, 219 F.2d 559, 562 (5th Cir. 1955) (holding that the federal government is liable when it prevents others from attempting a rescue and takes no action itself).

149. The manner in which the Prevented Rescue claim was preempted remains important when considering due process. The prevented rescue theory conflicts with statutory patent law, not the Constitution. Therefore, despite the existence of conflicting statutory patent law, the due process clause claim remains can succeed.

of the concerns raise in this Note with increase access to essential medication without noticeably impacting the incentives to further create such medicines.