AN END TO PREEMPTIVELY LIMITING THE SCOPE OF A MANUFACTURER'S DUTY: Why the Arizona Court of Appeals Was Right in Striking Down the Learned Intermediary Doctrine

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I. INTRODUCTION

On January 29, 2015, the Arizona Court of Appeals rejected one of the most contentious tort doctrines in modern U.S. history. Amanda Watts began taking the drug Solodyn for acne treatment when she was a minor, as prescribed by her physician.[1] After long-term use of Solodyn, she developed drug-induced hepatitis and drug-induced lupus, and now "she may suffer from lupus for the rest of her life."[2] She brought suit against the drug manufacturer, Medicis, for consumer fraud, product liability, and punitive damages.[3] Although Amanda suffered obvious side effects as a result of taking Solodyn, the trial court granted the defendant's motion to dismiss based on the learned intermediary doctrine ("the doctrine").[4]

This tort liability doctrine can be traced back to 1925.[5] It provides that "a manufacturer is not liable for failing to warn consumers of a product's potential risk so long as it provides a proper warning to the specialized class of people who are authorized to sell, install, or provide the product."[6] Thus,

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1. Watts v. Medicis Pharm. Corp., 342 P.3d 847, 849 (Ariz. Ct. App. 2015), *vacated*, 365 P.3d 944 (Ariz. 2016).
2. *Id.*
3. *Id.*
4. Watts v. Medicis Pharm. Corp., No. CV 2012-008081, 2012 WL 12110689, at *1–2 (Ariz. Super. Dec. 12, 2012).
5. *See* State *ex rel.* Johnson & Johnson Corp. v. Karl, 647 S.E.2d 899, 906 (W. Va. 2007).
6. *Watts*, 342 P.3d at 853.

the trial court held that under the doctrine, Watts's physician was an intervening party in prescribing the medication, and thus her claims failed.[7]

The Arizona Court of Appeals vacated the judgment and remanded for further proceedings.[8] The court of appeals' decision held that Arizona's Uniform Contribution Among Tortfeasors Act ("the UCATA") superseded the doctrine because the doctrine "preemptively limit[ed] the scope of a manufacturer's duty."[9] The Arizona Supreme Court vacated the decision by the court of appeals, holding that the doctrine generally applied to drug manufacturers and was not displaced by the UCATA.[10] This Note will argue that the decision by the Arizona Court of Appeals was correct and that this view should be adopted throughout the country. Pharmaceutical manufacturers should not be able to escape liability by way of an outdated doctrine.

This Note will examine the doctrine in Part II, including its history, justifications, the development of direct-to-consumer ("DTC") advertising, and how other states have approached the doctrine's applicability. Part III will observe the coexistence of the doctrine and Arizona's comparative fault scheme before the decision. Part IV will review the analysis of *Watts* by the trial court, court of appeals, and supreme court. Following this, Part V will formulate a response to the decision, including an analysis of the supreme court's reasoning and why the UCATA is a better approach in the instance of drug manufacturer liability. Part VI will conclude that a special exception for pharmaceutical companies in product liability law does not make sense in the present day.

II. DEVELOPMENT OF THE LEARNED INTERMEDIARY DOCTRINE

The Arizona Supreme Court has never explicitly adopted the doctrine until now.[11] The trial court, however, had compelling reason, and indeed precedent, to follow the doctrine in *Watts v. Medicis Pharmeutical Corp*.[12] In Arizona, the doctrine was originally applied in 1978 in *Dyer v. Best Pharmacal*, on the grounds that the prescribing physician is an intervening party between the drug manufacturer and the patient and that "[i]t would be virtually impossible for a manufacturer to comply with the duty of direct

7. *Watts*, 2012 WL 12110689, at *1.
8. *Watts*, 342 P.3d at 856.
9. *Id.* at 854–56.
10. Watts v. Medicis Pharm. Corp., 365 P.3d 944, 945, 951 (Ariz. 2016).
11. *Id.* at 949.
12. *See, e.g.*, Dyer v. Best Pharmacal, 577 P.2d 1084, 1088 (Ariz. Ct. App. 1978).

warning, as there is no sure way to reach the patient."[13] The history of the doctrine will show why its application once made sense but also shed light on why it is an improper legal standard today.

A. History

The doctrine made sense in shielding liability from pharmaceutical companies early in its adoption. The doctrine's origins can be traced back to 1925.[14] In *Hruska v. Parke, Davis & Co.*, the Eighth Circuit, while still holding the manufacturer responsible for damages, suggested that liability could be shifted if the public were to seek expert advice from another party other than the manufacturer regarding the drugs.[15]

A few decades later, pharmaceutical companies did not make representations to patients, but they did make representations to physicians; therefore, courts would deny liability from the companies to the patients.[16] The first instance of this reasoning was in *Marcus v. Specific Pharmaceuticals, Inc.*; however, there, the New York Supreme Court emphasized that the situation would be different "if the product were sold to the public generally as a drug for which no physician's prescription was necessary."[17] The decision made clear that there could not be negligent failure to provide information to a patient when the pharmaceutical company did not provide any information to the patient at all.[18]

The term "learned intermediary" was first used by the Eighth Circuit in *Sterling Drug, Inc. v. Cornish*.[19] The plaintiff used the drug Aralen,[20] and she suffered "permanent impairment of her vision" as result of a side effect known as chloroquine retinopathy.[21] Sterling Drug eventually changed the card sent to prescribing physicians to include this possible side effect.[22] Chloroquine retinopathy was an extremely rare side effect based on the evidence, and Sterling Drug argued that "the duty to warn does not extend to those few individuals who are injured because of their own unusual

13. *Id.* (quoting Carmichael v. Reitz, 95 Cal. Rptr. 381, 400–01 (Ct. App. 1971)).
14. State *ex rel.* Johnson & Johnson Corp. v. Karl, 647 S.E.2d 899, 906 (W. Va. 2007).
15. Hruska v. Parke, Davis & Co., 6 F.2d 536, 538 (8th Cir. 1925).
16. *See, e.g.*, Marcus v. Specific Pharm., 77 N.Y.S.2d 508, 509 (Sup. Ct. 1948).
17. *Id.*
18. *Id.* at 509–10.
19. Sterling Drug, Inc. v. Cornish, 370 F.2d 82, 85 (8th Cir. 1966).
20. Aralen is used to treat arthritis. *Id.* at 83.
21. *Id.* at 83–84.
22. *Id.* at 84.

hypersensitivity to a product."[23] The Eighth Circuit disagreed and held that there was a duty to warn, distinguishing the case because it dealt with a prescription drug rather than an over-the-counter item.[24] The court stated:

> In such a case the purchaser's doctor is a learned intermediary between the purchaser and the manufacturer. If the doctor is properly warned of the possibility of a side effect in some patients, and is advised of the symptoms normally accompanying the side effect, there is an excellent chance that injury to the patient can be avoided. This is particularly true if the injury takes place slowly, as is the case with the injury in question here.[25]

This case made the first fully-developed suggestion that pharmaceutical companies could shield themselves from liability by providing full warnings to the prescribing physician.

Today, many jurisdictions follow the bright line rule that "as long as a physician-patient relationship exists, the learned intermediary doctrine applies."[26] Therefore, in order to recover damages in a case where the doctrine applies, a plaintiff must show insufficient the warnings provided by the pharmaceutical manufacturer to the prescribing physician and that this was the proximate cause of the plaintiff's injuries.[27]

B. Justifications for the Doctrine

There are generally four justifications cited for maintaining the doctrine.[28] The first has to do with "respect for the doctor-patient relationship"[29]: if a patient is supposed to also pay attention to warnings outside of those provided by the prescribing physician, then this may weaken the doctor-patient relationship.[30] The second rationale is that the doctor is in the best position to

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23. *Id.* at 84–85.
24. *Id.* at 85.
25. *Id.*
26. *See, e.g.*, *In re* Norplant Contraceptive Prods. Liab. Litig., 165 F.3d 374, 379 (5th Cir. 1999). In this case, the Fifth Circuit was referring to its past cases applying Texas law. *Id.*
27. *See In re* Norplant Contraceptive Prods. Liab. Litig., 215 F. Supp. 2d 795, 803–04 (E.D. Tex. 2002). The opinion also recognized that, at the time, forty-eight states, the District of Columbia, and Puerto Rico recognized or applied the learned intermediary doctrine. *Id.* at 806.
28. *See* Perez v. Wyeth Labs. Inc., 734 A.2d 1245, 1255 (N.J. 1999); *see also* Sheryl Calabro, Note, *Breaking the Shield of the Learned Intermediary Doctrine: Placing the Blame Where it Belongs*, 25 CARDOZO L. REV. 2241, 2249–53 (2004); Ashley Porter, Comment, *Old Habits Die Hard: Reforming the Learned Intermediary Doctrine in the Era of Direct-to-Consumer Advertising*, 43 MCGEORGE L. REV. 433, 439–40 (2012).
29. Porter, *supra* note 28, at 439.
30. *Perez*, 734 A.2d at 1255.

assess the patient[31] and is in the only position to secure informed consent.[32] Medical experts are in the best position to perform a cost-benefit analysis of a particular patient using a certain drug.[33]

The third rationale is that, because of the complexity of the information, manufacturers would have difficulty communicating the risk information meant for physicians to the vastly uneducated public.[34] The fourth cited rationale, which may be outdated in light of the growth and development of DTC advertising for pharmaceutical drugs,[35] is that "drug manufacturers lack effective means to communicate directly with patients."[36] Ultimately, these justifications represent why it is "necessary" for the prescribing physician to serve as an intervening party for implementing the duty to warn and assume liability away from the manufacturer.

The effect on the pharmaceutical industry is a major concern of doing away with the doctrine.[37] Prominent groups, such as the U.S. Chamber Litigation Center, the Pharmaceutical Research and Manufacturers of America ("PhRMA"), and the U.S. Chamber of Commerce were deeply concerned with the Arizona Court of Appeals' move away from the uniform liability standard.[38] These groups warned that the decision, if allowed to stand, would curb pharmaceutical companies from developing new drugs.[39]

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31. Calabro, *supra* note 28, at 2252 ("[T]he doctor, who has a personal and direct relationship with the patient, is deemed to be in the best position to evaluate each patient's individual needs.").

32. *See Perez*, 734 A.2d at 1255; *see also* Porter, *supra* note 28, at 439 ("Additionally, proponents [of the learned intermediary doctrine] find that patients are passive in the treatment process and rely on doctors to make decisions that they accept almost blindly.").

33. *See* Reyes v. Wyeth Labs., 498 F.2d 1264, 1276 (5th Cir. 1974).

34. *Perez*, 734 A.2d at 1255; *see also* Porter, *supra* note 28, at 440 ("Physicians, on the other hand, have extensive education in the area of medicine and therefore have the ability to communicate complicated information regarding prescription drug treatments to patients. The inability of most patients to comprehend the complexity of warnings would further inhibit a manufacturer from adequately warning lay patients without the assistance of physicians.").

35. *See* discussion *infra* Part II.C.

36. *Perez*, 734 A.2d at 1255; *see also* Calabro, *supra* note 28, at 2252–53 ("[I]t would be virtually impossible for the manufacturer to reach out and warn all end users about the dangers of their product except with printed labels. Printed labels, however, are of limited usefulness since drugs often ship to pharmacies in bulk, requiring re-labeling of individual units before distribution to the patient. Moreover, many end users might not read the labels, and even if they do read the label, they may be unable to understand or decipher the complex medical terminology or severity of the warnings.").

37. *See* Brief for the Pharm. Research & Mfrs. of Am. et al. as Amici Curiae Supporting Petitioner, Watts v. Medicis Pharm. Corp., 365 P.3d 944 (Ariz. 2016) (No. CV-15-0065-PR), 2015 WL 5081647, at *1.

38. *Id.*

39. *Id.*

The amicus brief filed by these groups in regard to the Arizona Supreme Court granting certiorari to *Watts* notes that in 2014, PhRMA members invested over $51 billion in new medicine development.[40] If pharmaceutical companies are now exposed to more liability, as well as different liability standards in different states, there could be drastic effects on the U.S. economy, as much of the investment in new, innovative drugs could be halted.[41] The U.S. Chamber Litigation Center noted that "the doctrine has become the overwhelmingly common law of the nation" and that only one state, West Virginia, has rejected it.[42]

C. Direct-to-Consumer Advertising

In the 1990s, DTC advertising by pharmaceutical companies increased dramatically.[43] Three primary factors drove this increase: the increased number of managed healthcare plans, DTC advertising's ability to reach those who were previously inaccessible, and increased competition among pharmaceutical companies.[44] From 1991 to 1998, the pharmaceutical industry shifted from spending $55 million on DTC advertising to $1.3 billion.[45] This shift forced the FDA to react.[46]

Three main types of advertisements came about.[47] Product claims dealt with the benefits and risks for one specific drug.[48] Additionally, without mentioning a particular drug, "help-seeking advertisements encourage[d] consumers with particular symptoms, diseases or conditions to consult their physicians," while reminder advertisements mentioned a particular drug without stating its purpose.[49]

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40. *Id.*
41. *Id.* at *1–2.
42. *Id.* at *5.
43. *See, e.g.*, Tamar V. Terzian, *Direct-to-Consumer Prescription Drug Advertising*, 25 AM. J.L. & MED. 149, 151 (1999).
44. *Id.*
45. Ozlem A. Bordes, *The Learned Intermediary Doctrine and Direct-to-Consumer Advertising: Should the Pharmaceutical Manufacturer be Shielded from Liability?*, 81 U. DET. MERCY L. REV. 267, 275 (2004).
46. Terzian, *supra* note 43, at 152.
47. Monica Renee Matter, *Emerging DTC Advertising of Prescription Drugs and the Learned Intermediary Doctrine*, 69 DEF. COUNS. J. 79, 82 (2002) ("[T]hree main forms of advertisements emerged: (1) product claims, (2) help seeking and (3) reminders.").
48. *Id.* at 82–83.
49. *Id.* at 83.

The FDA first tried applying the same standards to DTC advertising as it did to advertisements directed at physicians.[50] This fairly loose guidance made it so pharmaceutical companies just had to ensure that they included both a prescription drug's benefits and risks.[51] Once this proved insufficient, the FDA issued new guidance regulations in 1997 to require advertisements to strike a more consistent balance between the description of benefits and possible side-effects.[52]

The 1997 guidance required help-seeking and reminder advertisements to include an "adequate provision."[53] The advertisements must provide a toll-free phone number, web address, and reference to public places where one can obtain more information about a specific drug, as well as recommending that a person first consult with his or her physician.[54] Product-claim advertisements required a brief summary.[55]

Many pharmaceutical companies chose to advertise in the form of either help-seeking or reminder advertisements[56] because the brief summary was a much more stringent standard.[57] The brief summary mainly applied to broadcast advertisements and required "including a summary and description of side effects, contraindications and effectiveness."[58] The FDA emphasized disclosure of the risks involved.[59]

The debate on the applicability of the doctrine largely centers around the deterioration of the fiduciary relationship between the patient and the physician in light of the growth of DTC advertising.[60] Furthermore, advertising directly to consumers shows that, today, consumers are in control of their healthcare decisions.[61]

While DTC advertising avails pharmaceutical companies to more potential liability, they have found defenses, mainly by way of providing an adequate disclosure to consumers.[62] Many state statutes require that warnings

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50. *See* Bordes, *supra* note 45, at 275.
51. *Id.*
52. Bordes, *supra* note 45, at 282–83.
53. *See, e.g.*, Patrick Cohoon, *An Answer to the Question Why the Time Has Come to Abrogate the Learned Intermediary Rule in the Case of Direct-to-Consumer Advertising of Prescription Drugs*, 42 S. TEX. L. REV. 1333, 1345 (2001).
54. *Id.* at 1345–46.
55. *Id.* at 1345.
56. *Id.* at 1346.
57. *See id.*; Matter, *supra* note 47, at 83.
58. Matter, *supra* note 47, at 83.
59. *Id.*
60. *See, e.g.*, *id.* at 84.
61. *Id.*
62. *Id.* at 85–86.

comply with FDA guidelines; therefore, pharmaceutical companies usually must comply with both state law and FDA regulations to receive immunity.[63] Following these guidelines creates a presumption that the duty to provide an adequate warning has been met.[64]

D. Crucial Exceptions Limiting the Scope of the Doctrine

There have been a few widely recognized exceptions to the doctrine. Moreover, both West Virginia and New Jersey have found the arguments of groups like the United States Chamber Litigation Center to be unpersuasive.[65] Through different means, both of these states have disposed of the doctrine as a means for pharmaceutical companies to preemptively limit their liability.[66]

1. Mass Immunizations and Oral Contraceptives

Two of the most widely recognized exceptions to application of the doctrine have been in situations of mass immunizations and oral contraceptives.[67] Even the Third Restatement of Torts recognizes an exception for vaccines.[68]

The exception for mass vaccinations was first recognized in *Davis v. Wyeth Laboratories, Inc*.[69] Although the doctrine would normally apply, the Ninth Circuit found that the prescription vaccine for polio was not dispensed in the usual manner of prescription drugs.[70] In this case, where consumers go to mass clinics to obtain the cure for the virus, the manufacturer is still responsible for ensuring that consumers received adequate warning, which did not occur here.[71] A key aspect of the decision rested on the fact that patients were not receiving a proper individualized assessment from a physician.[72]

In 1985, the Supreme Judicial Court of Massachusetts recognized an exception for oral contraceptives in *MacDonald v. Ortho Pharmaceutical*

63. *Id.* at 86.
64. *Id.*
65. *See* discussion *infra* Part II.D.1.a, b.
66. *See id.*
67. *See, e.g.*, Matter, *supra* note 47, at 81–82.
68. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 cmt. e (AM. LAW INST. 1998).
69. Davis v. Wyeth Labs., Inc., 399 F.2d 121, 130–31 (9th Cir. 1968).
70. *Id.* at 131.
71. *Id.*
72. *Id.*

Corp.[73] The plaintiff received a prescription for birth control pills that included a warning of possible side-effects—fatal blood clotting being the most serious.[74] The warning also referred the plaintiff to a booklet from her gynecologist that had more details on possible side effects.[75] The warnings did not mention the possibility of a stroke, and after three years use, the plaintiff suffered a stroke that killed off nearly twenty percent of her brain tissue.[76]

The Supreme Judicial Court of Massachusetts found that the doctrine was not applicable because oral contraceptives bear characteristics that require the manufacturer to warn the user directly.[77] In the case of oral contraceptives, the physician's role is limited because healthy females actively seek out the prescriptions.[78] Additionally, the patient may only see the prescribing physician once a year, making risk warnings from the manufacturer that much more necessary.[79]

a. Perez v. Wyeth Laboratories, Inc.

Norplant is an FDA-approved contraceptive that is implanted and removed in women through in-office surgical procedures.[80] In 1991, Wyeth Laboratories began an advertising campaign for Norplant directed at women, rather than physicians, "advertis[ing] on television and in women's magazines such as *Glamour*, *Mademoiselle*, and *Cosmopolitan.*"[81] The advertisements did not discuss any of the dangers or side-effects of using the drug, and in 1995, New Jersey consolidated cases involving claims of a failure to warn.[82] The trial court ruled that the doctrine applied and subsequently dismissed the plaintiffs' complaints.[83]

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73. MacDonald v. Ortho Pharm. Corp., 475 N.E.2d 65, 69–70 (Mass. 1985).
74. *Id.* at 66.
75. *Id.* at 66–67.
76. *Id.* at 67.
77. *Id.* at 69.
78. *Id.*
79. *Id.*
80. Perez v. Wyeth Labs. Inc., 734 A.2d 1245, 1247 (N.J. 1999).
81. *Id.* at 1248.
82. *Id.* ("Plaintiffs' principal claim alleged that Wyeth, distributors of Norplant in the United States, failed to warn adequately about side effects associated with the contraceptive. Side effects complained of by plaintiffs included weight gain, headaches, dizziness, nausea, diarrhea, acne, vomiting, fatigue, facial hair growth, numbness in the arms and legs, irregular menstruation, hair loss, leg cramps, anxiety and nervousness, vision problems, anemia, mood swings and depression, high blood pressure, and removal complications that resulted in scarring.").
83. *Id.* at 1249.

The plaintiffs appealed, seeking to provide expert testimony on the issues of the adequacy of the warning and whether this was the proximate cause of the injuries suffered.[84] The Appellate Division affirmed the ruling in favor of the defendants.[85] In reviewing the case, the Supreme Court of New Jersey stated that the four justifications for the doctrine mentioned in the previous section are absent when DTC advertising takes place.[86] The court found aggressive marketing efforts to be persuasive in its opinion: "having spent $1.3 billion on advertising in 1998 . . . drug manufacturers can hardly be said to 'lack effective means to communicate directly with patients,' . . . when their advertising campaigns can pay off in close to billions in dividends."[87]

Because the premises for the doctrine are absent in the wake of DTC advertising, the court stated that there is a duty to warn the ultimate consumer.[88] Rather than strike down the doctrine entirely, however, the court carved out an exception for DTC advertising in New Jersey.[89] The exception dictated that "[t]he direct marketing of drugs to consumers generates a corresponding duty requiring manufacturers to warn of defects in the product."[90] While this seems like a breakthrough opinion, the application of the *Perez* decision has been fairly weak.[91]

Lower courts have narrowly applied the DTC advertising exception, in part, because the "decision did not explain whether a failure to show actual influence from direct advertising would defeat the applicability of the DTC exception or simply defeat causation."[92] Since 2006, no New Jersey court since *Perez* has imposed liability for DTC advertising.[93]

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84. *Id.*

85. *Id.*

86. *Id.* at 1255 ("These premises: (1) reluctance to undermine the doctor patient-relationship; (2) absence in the era of 'doctor knows best' of need for the patient's informed consent; (3) inability of drug manufacturer to communicate with patients; and (4) complexity of the subject; are all (with the possible exception of the last) absent in the direct-to-consumer advertising of prescription drugs.").

87. *Id.* at 1255–56 (citation omitted).

88. *Id.* at 1256 ("When all of its premises are absent, as when direct warnings to consumers are mandatory, the learned intermediary doctrine, 'itself an exception to the manufacturer's traditional duty to warn consumers directly of the risk associated with any product, simply drops out of the calculus, leaving the duty of the manufacturer to be determined in accordance with general principles of tort law.'") (citation omitted).

89. *Id.* at 1263.

90. *Id.*

91. *See* Kyle T. Fogt, *The Road Less Traveled: West Virginia's Rejection of the Learned Intermediary Doctrine in the Age of Direct-to-Consumer Advertising*, 34 J. CORP. L. 587, 595 (2009).

92. *Id.* (citation omitted).

93. *See id.*

b. State ex rel. Johnson & Johnson Corp. v. Karl

The Supreme Court of Appeals of West Virginia is the first court to explicitly decline to adopt the doctrine.[94] In *State ex rel. Johnson & Johnson Corp. v. Karl*, the highest court of West Virginia started where the *Perez* court left off.[95] In *Karl*, the decedent was prescribed Propulsid[96] by her primary care physician and died on the third day after she began taking the drug.[97] As it faced an issue of first impression, the court recognized that there was a lot of mixed authority on how many jurisdictions had adopted the doctrine.[98] Through its own research, the court found that only twenty-two jurisdictions recognized the doctrine "either by decision of the highest court or by statute."[99]

Ultimately, the *Karl* court found the "justifications for the learned intermediary doctrine to be largely outdated and unpersuasive."[100] The court analyzed the history of the doctrine, noting that DTC advertising of prescription drugs did not exist when it was first developed.[101] Significant changes in consumer behavior and the pharmaceutical industry aided the court's decision.[102] In addition to the expansion of DTC advertising and its effect on the doctor-patient relationship, the *Karl* decision noted "the development of the internet as a common method of dispensing and obtaining prescription drug information" as crucial to its declination.[103]

The *Karl* court emphasized that DTC advertising is a recent phenomenon.[104] In 1997, the FDA issued supplemental guidelines for regulations on broadcast advertising in response to the phenomenon.[105] Since

94. State *ex rel.* Johnson & Johnson Corp. v. Karl, 647 S.E.2d 899, 914 (W. Va. 2007); *see also* Fogt, *supra* note 91, at 598.

95. Fogt, *supra* note 91, at 599 ("Despite the strong support for the learned intermediary doctrine, the *Karl* court did not hesitate in building upon *Perez* to reject the learned intermediary doctrine outright. As a result, the *Karl* decision has sparked an assault upon the learned intermediary doctrine.").

96. Propulsid was used to treat patients with gastroesophageal reflux disease. *Propulsid*, RXLIST (last updated Feb. 3, 2017), http://www.rxlist.com/propulsid-drug/indications-dosage.htm. It was discontinued in the U.S. market in 2000. *Propulsid (cisapride)*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Safety/MedWatch/SafetyInformation/SafetyAlertsforHumanMedicalProducts/ucm173074.htm (last updated Aug. 14, 2013).

97. *Karl*, 647 S.E.2d at 901.

98. *Id.* at 902–04.

99. *Id.* at 904.

100. *Id.* at 906.

101. *Id.* at 907.

102. *Id.*

103. *Id.*

104. *Id.* at 908.

105. *Id.*

then, "only four high courts [had] adopted the learned intermediary doctrine."[106] The court cited many arguments regarding the phenomenon, including how the advertising has caused patients to pressure physicians to prescribe drugs they have seen advertised.[107] The over-promotion of prescription drugs perverts the doctor-patient relationship.[108] The court noted that even the Third Restatement of Torts has exceptions for when the manufacturers should know that the physician cannot provide a complete detail on the possible risks associated with a drug.[109] The Restatement states:

> (d) A prescription drug or medical device is not reasonably safe due to inadequate instructions or warning if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to:
>
> (1) prescribing and other health-care providers who are in a position to reduce the risks of harm in accordance with instructions or warnings; or
>
> (2) the patient when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.[110]

Thus, the court saw little point in adopting a doctrine that it would have to create exceptions for as well.[111] In the name of public policy, the court

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106. *Id.* at 908–09 (citations omitted).

107. *Id.* at 909 ("[P]hysicians state that they are increasingly asked and pressured by their patients to prescribe drugs that the patient has seen advertised. For example, the diet drug combinations known as fen-phen was prescribed despite little hard scientific evidence of its potential side-effects. Physicians are under attack for prescribing the pills too often and too readily to inappropriate patients. Physicians argue that it is not their fault; rather, they claim pushy patients, prodded by DTC advertisements, pressed, wheedled, begged and berated them for quick treatments. . . . Physicians complain that it is impossible to compete with pharmaceutical companies' massive advertising budgets, and resign themselves to the fact that if consumers make enough noise, they will eventually relent to patient pressure.") (alteration in original) (citation omitted).

108. *Id.* ("Moreover, industry critics of DTC advertisements argue that the advertisements distort doctor-patient relationships and may actually increase the use of prescription drugs. They also believe that drug advertisements are created to sell products and thus are inadequate sources of information and poor substitutes for medical advice. Critics also argue that the advertisements do not discuss other medications, alternative treatments and the wisdom of doing nothing. Furthermore, these advertisements are unable to diagnose an ailment. All these factors may create a misinformed patient whom the physician will have to educate.") (citation omitted).

109. *Id.* at 911.

110. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(d) (AM. LAW INST. 1998).

111. *Karl*, 647 S.E.2d at 913 ("Given the plethora of exceptions to the learned intermediary doctrine, we ascertain no benefit in adopting a doctrine that would require the simultaneous adoption of numerous exceptions in order to be justly utilized. This is particularly so when our existing law of comparative contribution among joint tortfeasors is adequate to address issues of liability

declined to adopt the doctrine and instead stated that West Virginia's comparative fault scheme would adequately address the issue of warnings.[112]

III. THE DOCTRINE'S PREVIOUS APPLICATION IN ARIZONA

While they may seem contradictory, the doctrine and Arizona's comparative fault scheme coexisted for over thirty years. Not until *Watts* did a court take note of the clash between the two.[113]

A. The Doctrine Has Officially been in Arizona Since the Late 1970s

The Arizona Court of Appeals first adopted the doctrine in 1978 in *Dyer v. Best Pharmacal*.[114] In 1974, Betty Dyer sought medical assistance for weight control, and her primary physician administered an injection of NOL-L.A., an anorexiant drug that the physician obtained directly from Best Pharmacal.[115]

Dyer went to the hospital the next morning after experiencing loss of orientation and received "a primary diagnosis of subarachnoid hemorrhage. She lapsed into a coma for several weeks, and developed cardiovascular complications."[116] The information provided to the physician by Best Pharmacal expressly stated not to administer NOL-L.A. to anyone suffering from hypertension, and the record eventually showed that Dyer was suffering from that.[117]

The Arizona Court of Appeals affirmed the summary judgment in favor of Best Pharmacal.[118] The court of appeals found the package insert detailing the administration instructions and possible side effects provided by the

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among physicians and drug companies in those cases where patients sue for injuries related to the use of prescription drugs.").

112. *Id.* at 914 ("West Virginia's law as to comparative contribution among tortfeasors will adequately address the issues of warnings as between the manufacturer and Dr. Wilson, without adopting a legal concept not yet embraced by the West Virginia Supreme Court of Appeals.").

113. Watts v. Medicis Pharm. Corp., 342 P.3d 847 (Ariz. Ct. App. 2015).

114. 577 P.2d 1084, 1087–88 (Ariz. Ct. App. 1978).

115. *Id.* at 1085.

116. *Id.*

117. *Id.* at 1088 ("[W]e believe that a drug manufacturer cannot be required legally to foresee that a licensed physician will disregard express warnings regarding a drug's use. While the package insert recommended injecting NOL-L.A. for anorexiant purposes, it also expressly directed the doctor administering the drug to refrain from giving it to a patient with hypertension. It is undisputed that Mrs. Dyer suffer [sic] from hypertension.").

118. *Id.*

manufacturer to the physician to be conclusive.[119] It held that once a pharmaceutical manufacturer provides a physician with possible side effects, it has satisfied its duty to warn.[120] The court justified its finding in favor of the manufacturer because it was unforeseeable that Dyer would be administered NOL-L.A. once Best Pharmacal had expressly warned the physician against administering the drug to patients with hypertension.[121] The court represented the doctrine as one of proximate causation.[122] Essentially, the doctor's action broke the chain of causation between the drug manufacturer and Dyer's injuries.[123]

Despite *Dyer*'s representation, "[i]n its application [in Arizona], the learned intermediary doctrine appears to be less a rule of causation and more a standard for determining when a drug manufacturer has satisfied its duty to warn."[124] In *Piper v. Bear Medical Systems, Inc.*, the court of appeals agreed with the defendant that the doctrine applied, but its analysis centered around the sufficiency of the warnings provided by the medical device manufacturer to the doctors.[125] The court ultimately found the provided warning was too inadequate for the manufacturer to escape liability.[126]

In *Dole Food Co., Inc. v. N.C. Foam Industries Inc.*, the court of appeals assessed factors to determine when the duty to warn is normally satisfied by the manufacturer.[127] According to the court, an official standard would be impossible, as it is an issue for the trier of fact on a case-by-case basis, but it suggested factors for consideration:

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119. *Id.* at 1087.

120. *Id.* ("A drug manufacturer has discharged his duty to the public if he has properly warned the administering physician of the contraindications and possible side effects of the drug. Causation is broken between the manufacturer and patient when the doctor disregards warnings.") (citations omitted).

121. *Id.* at 1088.

122. *Id.* at 1086 ("The ultimate question here thus becomes whether the appellees' alleged negligence proximately caused Mrs. Dyer's injuries.").

123. *Id.* at 1087–88.

124. Watts v. Medicis Pharm. Corp., 342 P.3d 847, 853 (Ariz. Ct. App. 2015), *vacated*, 365 P.3d 944 (Ariz. 2016).

125. Piper v. Bear Med. Sys., Inc., 883 P.2d 407, 415 (Ariz. Ct. App. 1993) ("Bear argues because Bear 2 could be sold only to physicians and was intended for use only by doctors or qualified practitioners, any duty to warn was satisfied by warning doctors under the 'learned intermediary doctrine.' Although we agree the learned intermediary doctrine is applicable to this product, there was conflicting evidence whether the provided warnings were adequate to alert doctors and other trained professionals.") (citations omitted).

126. *Id.* at 415. Likewise, a similar analysis took place in *Davis v. Cessna Aircraft Corp.*, where the court applied the doctrine to an airplane parts manufacturer. Davis v. Cessna Aircraft Corp., 893 P.2d 26, 38 (Ariz. Ct. App. 1994).

127. Dole Food Co. v. N.C. Foam Indus. Inc., 935 P.2d 876, 880–81 (Ariz. Ct. App. 1996).

> [T]he likelihood or unlikelihood that harm will occur if the vendee does not pass on the warning to the ultimate user, the trivial or substantial nature of the probable harm, the probability or improbability that the particular vendee will not pass on the warning and the ease or burden of the giving of warning by the manufacturer to the ultimate user.[128]

In sum, these lower court rulings found that "a manufacturer satisfies its duty to warn so long as it provides adequate information to the party who prescribes, installs, or facilitates the use of a product."[129] This has been where the analysis has ended because, up until now, the Arizona Supreme Court had never ruled on the issue.[130]

B. Uniform Contribution Among Tortfeasors Act

In 1984, Arizona adopted the UCATA,[131] which amended the common law system of joint and several liability.[132] Under the previous system of joint and several liability, when there were multiple tortfeasors, "a co-defendant who paid more than his or her proportionate share of a plaintiff's damages did not have the right to seek contribution from his fellow tortfeasors . . . [and] was therefore left to bear the risk of a co-defendant's insolvency."[133] Under the UCATA, a co-defendant could seek contribution from his fellow tortfeasors.[134] The act was amended further in 1987 so each co-defendant was responsible only for his "respective percentage of fault" (several-only liability).[135] In product liability cases, this meant that the plaintiff now had the hardship of an insolvent defendant.[136] The relevant sections of the UCATA covering the right of contribution are dictated below:

> (A) Except as otherwise provided in this article, if two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

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128. *Id.* at 881 (quoting Shell Oil Co. v. Gutierrez, 581 P.2d 271, 278 (Ariz. Ct. App. 1978)).
129. *Watts*, 342 P.3d at 854.
130. *Id.*
131. 1984 Ariz. Sess. Laws 879 (codified as amended at ARIZ. REV. STAT. ANN. §§ 12-2501 to -2509 (2016)).
132. *Watts*, 342 P.3d at 854.
133. *Id.* (citations omitted).
134. *Id.*
135. *Id.*
136. *Id.*

> (B) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.[137]

The UCATA never addressed the doctrine nor provided for its elimination, and the two coexisted for nearly three decades.[138] The relevant sections of the UCATA covering the apportionment of fault are as follows:

> (A) In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.
>
> (B) In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit.[139]

Medicis Pharmaceutical argued that the two systems were not contrary to one another because the manufacturer still must comply with the duty to warn to avoid fault.[140] Additionally, Medicis contended that the Arizona Legislature would have explicitly stated that the UCATA abrogated the doctrine when it was enacted if that was the legislative intent.[141]

In *Young v. Beck*, the Arizona Supreme Court refused to find that the UCATA had abrogated the family purpose doctrine or the doctrine of

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137. ARIZ. REV. STAT. ANN. §§ 12-2501(A) to (B) (2016).

138. Defendant/Appellee's Answering Brief at 20, Watts v. Medicis Pharm. Corp., 342 P.3d 847 (Ariz. Ct. App. 2015) (No. 1 CA-CV 13-0358), 2014 WL 272643, at *20.

139. ARIZ. REV. STAT. ANN. §§ 12-2506(A) to (B) (2016).

140. Defendant/Appellee's Answering Brief, *supra* note 138, at 21 ("Watts contends that the learned intermediary doctrine shifts the risk of all of a manufacturer's wrongful conduct onto the prescribing physician, which she contends runs contrary to Arizona's comparative fault scheme. Not so. Even under the learned intermediary doctrine, a drug manufacturer has a duty to warn of the risks of medications, but it fulfills its duty to warn the public if it has warned the prescribing physician of the contraindications and possible side effects of a drug.") (emphasis omitted).

141. *Id.* at 20.

vicarious liability.[142] In defining fault under the UCATA, however, the court has also upheld the principle that "[i]n a strict products liability action, every party in the chain of distribution of a defective product has committed its own 'actionable breach of legal duty.'"[143] Therefore, Watts contended that the Arizona Legislature did not intend to allow the doctrine to be such wholesale exception to the UCATA.[144]

Thus, without the Arizona Legislature dictating the doctrine as an exception, the argument is that "Medicis is responsible for its own wrongful conduct in distributing Solodyn without adequate warnings."[145]

IV. THE *WATTS* DECISION

The trial court's quick analysis displays how strong the presumption in favor of pharmaceutical companies is under the doctrine.[146] Undoing this presumption required a drastic shift from precedent by the Arizona Court of Appeals.

A. The Superior Court of Arizona

Amanda Watts's physician prescribed her Solodyn for long-term use of twenty weeks, despite information on Medicis Pharmaceutical's website that the drug "had not been studied for long-term use more than twelve weeks."[147] The manufacturer had also published a list of side-effects that included lupus.[148] After the first twenty weeks, Watts's physician prescribed Solodyn for an additional twenty weeks.[149] Amanda Watts then developed lupus, and

142. Young v. Beck, 251 P.3d 380, 383–84 (Ariz. 2011) ("We generally do not find that a statute changes common law unless 'the legislature . . . clearly and plainly manifest[s] an intent' to have the statute do so.").

143. State Farm Ins. v. Premier Manufactured Sys., Inc., 172 P.3d 410, 415 (Ariz. 2007); *see also* § 12-2506(F)(2) ("'Fault' means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.").

144. Plaintiff-Appellant's Opening Brief at 17–18, Watts v. Medicis Pharm. Corp., 342 P.3d 847 (Ariz. Ct. App. 2015) (No. 1 CA-CV 13-0358), 2013 WL 5823324, at *17–18.

145. *Id.* at *18.

146. Watts v. Medicis Pharm. Corp., No. CV 2012-008081, 2012 WL 12110689, at *1 (Ariz. Super. Ct. Dec. 12, 2012).

147. *Id.*

148. *Id.*

149. *Id.*

brought suit against Medicis Pharmaceutical "for consumer fraud, product liability and punitive damages."[150]

The Superior Court of Arizona granted the defendant's motion to dismiss in September of 2012.[151] In holding that the doctrine applied, the court stated that "the doctor is intended to be an intervening party in the full sense of the word."[152] According to the court, no exceptions to the doctrine were applicable.[153] Because Amanda Watts was not able to provide a "viable theory of relief," her punitive damages claim also failed.[154]

B. The Arizona Court of Appeals

If the Arizona Court of Appeals chose to apply the doctrine to Watts's case, it agreed with Medicis Pharmaceutical that this would effectively shield the manufacturer from liability for failure to warn the plaintiff.[155] The court of appeals, however, instead agreed with Watts's contention that, under the UCATA and the several-only liability system, each defendant is liable for its own action in the chain of distribution.[156] Thus, the three-judge panel "conclude[d] that protecting a prescription drug manufacturer from possible liability for its own actions in distributing a product, simply because another participant in the chain of distribution is also expected to act, is inconsistent with [the] UCATA."[157] In this case, applying the doctrine would directly conflict with precedent.[158]

The court of appeals also discussed how the evolution of DTC advertising made it time to part with the doctrine, as the idea that patients get their sole

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150. *Id.*

151. *Id.* at *2.

152. *Id.* at *1 (quoting Carmichael v. Reitz, 95 Cal. Rptr. 381, 400 (Ct. App. 1971)).

153. *Id.* ("Plaintiff's claimed exceptions to the learned intermediary doctrine do not apply. 1) Arizona has not adopted the exception for 'direct to consumer' marketing by drug companies. 2) Plaintiff conceded that warnings about Solodyn's possible side effects were included in the prescribing information and that Plaintiff was treated by a medical professional. 3) Plaintiff conceded that the prescribing information clearly listed the exact conditions that Plaintiff allegedly suffered; for that reason, the warnings clearly were 'reasonable.'").

154. *Id.*

155. Watts v. Medicis Pharm. Corp., 342 P.3d 847, 854 (Ariz. Ct. App. 2015).

156. *Id.*

157. *Id.*

158. *Id.* at 855 ("[A]pplying the learned intermediary doctrine in the context of prescription pharmaceuticals conflicts with both UCATA and the holding of *Premier Manufactured Systems* that each defendant in a tort case is liable for his or her own respective share of fault, no more and no less.") (citation omitted).

information about a drug or device from their physician is obsolete.[159] The court found the reasoning of the West Virginia Supreme Court of Appeals in *Karl* to be persuasive in this regard.[160] Ultimately, the sufficiency of the warning must be determined by looking at the actions of the physician, manufacturers, and the rest of those involved in the chain of distribution.[161] If the court did not use this approach, then there could be "a situation where an adequate warning to a prescribing physician is undermined or negated by the flawed or incomplete representations of the manufacturer to the consumer."[162] Because the UCATA requires the court to assess each defendant's percentage of fault, the liability scheme cannot coexist with the doctrine.[163]

The outcome of this case did not mean that Medicis Pharmaceutical would automatically be liable for damages to Watts; it just meant that a defendant is not entitled to a Rule 12(b)(6) motion to dismiss without a trial.[164] While it may seem like a relatively minor formality, this case's outcome promised potentially drastic effects on future litigation against pharmaceutical companies.[165]

C. The Arizona Supreme Court

The Arizona Supreme Court noted that the court of appeals was correct in declaring the doctrine "less a rule of causation and more a standard for determining when a drug manufacturer has satisfied its duty to warn."[166] Regardless, in a unanimous opinion, the court disagreed with application of this distinction.[167] Instead, the court adopted the Third Restatement's expression of the doctrine in Section 6(d).[168] The court stated that this adoption "place[d] [it] with the majority of jurisdictions that have considered

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159. *Id.* ("Consumers are regularly presented with advertisements for medications to treat a variety of symptoms, prompting them to ask, encourage, and even pressure their medical providers to prescribe these brand-name medications. Similarly, Internet sites and medical databases give consumers access to a wealth of third-party and manufacturer-provided information about pharmaceutical products.") (citation omitted).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *See* discussion *supra* Part II.B.

166. Watts v. Medicis Pharm. Corp., 365 P.3d 944, 949 (Ariz. 2016) (citation omitted); s*ee also Watts*, 342 P.3d at 853.

167. *Watts*, 365 P.3d at 950–51.

168. *Id.* at 949; s*ee also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(d) (AM. LAW INST. 1998).

the matter."[169] The decision was highly persuaded by the reasoning of a 2012 Texas Supreme Court case that adopted the doctrine.[170]

It is critical to note that adoption of the doctrine does not leave the plaintiff without a remedy.[171] In addition to recovering from a prescribing physician, a plaintiff can also recover from a drug manufacturer by proving that the prescribing physician was not provided an adequate warning.[172] This carried much weight in the opinion, as the court attacked *Karl* and was persuaded by the common rationales for the doctrine.[173] The court also rejected the idea of an exception for DTC advertising because the adopted Third Restatement's expression of the doctrine already provided an exception when the warning to the prescribing physician is inadequate.[174] The court specifically pointed out the lack of courts that follow *Perez*.[175] Most critically, the court stated that "[t]he court of appeals erred by concluding that the [doctrine] is incompatible with [the] UCATA."[176]

Thus, the court strived to dictate the duty/causation distinction.[177] The court ruled that the UCATA and the doctrine "are not mutually exclusive" because the UCATA only specifies the apportionment of liability while the doctrine provides a means to satisfy the duty to warn.[178] The court artificially cut off the manufacturer's duty, stating that "[a] manufacturer that properly warns the learned intermediary fulfills its duty, a result that comports with [the] UCATA because the drug manufacturer in that circumstance has not breached its duty and therefore is not at fault."[179]

Finally, the court ruled that the doctrine comported with the Arizona Constitution.[180] Because "the [doctrine] does not abrogate a right to recover damages, but instead provides a means for a manufacturer to fulfill its duty to warn," it does not violate the anti-abrogation clause of the Arizona Constitution.[181] As a common-law doctrine rather than a statutory limitation,

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169. *Watts*, 365 P.3d at 949.

170. *See id.* at 950–53. *See generally* Centocor, Inc. v. Hamilton, 372 S.W.3d 140 (Tex. 2012).

171. *Watts*, 365 P.3d at 952.

172. *Id.*

173. *Id.* at 950–52; *see* discussion *supra* Part II.B for common rationales of the doctrine.

174. *Watts*, 365 P.3d at 950; *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6(d) (AM. LAW INST. 1998).

175. *Watts*, 365 P.3d at 950–51.

176. *Id.* at 951.

177. *Id.* at 948.

178. *Id.* at 951.

179. *Id.*

180. *Id.* at 952.

181. *Id.*; *see also infra* note 184 and accompanying text.

the court was free to declare its adoption without offending Watts's state constitutional rights.[182]

V. THE ARIZONA COURT OF APPEALS' DECISION WAS THE CORRECT APPROACH

After the court of appeals' decision, there was no consensus among critics of the decision. While some suggested that it was a victory for plaintiffs and victims, others argued that the court of appeals had done away with an economic necessity. The other major issue was whether Arizona's current comparative fault scheme is an appropriate substitute. The Arizona Supreme Court's opinion is an obvious victory for the pharmaceutical industry that maintains the status quo in terms of protection that drug manufacturers are used to.

A. The Pitfalls of the Arizona Supreme Court's Opinion

Since Arizona achieved statehood, "the right to seek a recovery for personal-injury damages has been a constitutional right."[183] The Arizona Constitution states that this right "shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."[184] Under the doctrine, the prescribing doctor or other person authorized to distribute a product is an intervening party between the manufacturer and the ultimate consumer. Once this pass in the chain of distribution is made, the manufacturer is completely shielded from liability.

This seems to be directly contradictory to Arizona's statutes, which state that "[i]n assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit."[185] While application of the doctrine may have once made sense, it no longer has a place in modern society. In a proper

182. *Watts*, 365 P.3d at 952.

183. Amicus Curiae Brief of the Ariz. Ass'n for Justice/Ariz. Trial Lawyers Ass'n at 1, Watts v. Medicis Pharm. Corp., 342 P.3d 847 (Ariz. Ct. App. 2015) (No. CV-15-0065-PR), 2015 WL 5081648, at *1; *see* ARIZ. CONST. art. 2, § 31 ("No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person, except that a crime victim is not subject to a claim for damages by a person who is harmed while the person is attempting to engage in, engaging in or fleeing after having engaged in or attempted to engage in conduct that is classified as a felony offense.").

184. ARIZ. CONST. art. 18, § 6.

185. ARIZ. REV. STAT. ANN. § 12-2506(B) (2016).

comparative fault system, analyzing the sufficiency of a drug warning should require courts to review "the actions of all involved in the chain of distribution."[186] Pharmaceutical companies and other product manufacturers should not be able to game the Arizona tort system by use of a nearly century-old common law doctrine, thus depriving personal injury victims of their rights.

The Arizona Supreme Court justified distinguishing the doctrine and the UCATA through almost circular reasoning:

> [The] UCATA's scheme is premised on notions of fault, which necessarily presuppose a breach of duty. Under the [doctrine], however, a manufacturer satisfies its duty to warn the end user by adequately warning the learned intermediary, which duty, if satisfied, means that no actionable breach of a legal duty to the end user occurs.[187]

This argument is fine if one does not question why this is so. The only reasons provided, however, were the outdated rationales for the doctrine in light of the evolution of DTC advertising.[188] Duty should run all the way to the consumer for all parties involved in the chain of distribution. Consumers are able to sue up the chain of distribution without having an artificial rule of privity in other areas of strict liability. The theory, as displayed in the UCATA, is that defendant parties will then dispute among themselves for apportionment of liability.

When faced with an argument to adopt an exception to the doctrine for DTC advertising, the court sidestepped the issue altogether with reference to the Third Restatement.[189] Forcing the plaintiff to prove that "the manufacturer [knew] . . . that health-care providers [would] not be in a position to reduce the risks of harm in accordance with the instructions or warnings"[190] is not a proportional alternative to an exception, thus placing an undue burden on plaintiffs. To be sure, the pharmaceutical manufacturer remains on the hook if a warning to an intermediary is inadequate. Equally important, plaintiffs can recover from the prescribing physicians. Still, the legislative intent of the UCATA dictates that coexistence with the doctrine was not possible, despite the court's attempt at distinguishing between duty and causation.

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186. *Watts*, 342 P.3d at 855.

187. *Watts*, 365 P.3d at 951.

188. *See id.* at 951.

189. *Id.* at 950–51.

190. *Id.* at 949 (quoting RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 (AM. LAW INST. 2016)).

In other strict liability actions, Arizona has held that the principles of comparative fault under the UCATA "are applicable to the participants in the chain of distribution of an allegedly defective product."[191] When causation is found, apportionment of fault is meant to be left to the trier of fact. The goal of the UCATA "is to make each tortfeasor responsible for only its share of fault."[192] Ultimately, the Arizona Supreme Court preferred to rely on the Third Restatement rather than to truly address why a certain industry is able to sidestep Arizona's several-only liability approach. A Restatement, however, is supposed to be a restatement of the current law, rather than be groundbreaking.

Regardless, the Arizona Supreme Court contradicted earlier principles of strict liability that it had previously adopted.[193] In 1990, the court stated:

> The underlying objective of [strict liability of manufacturers] was to place the risk of loss on those in the chain of distribution of defective, unreasonably dangerous goods. [Strict liability of manufacturers] was considered a policy device to spread the risk from one to whom a defective product may be a catastrophe, to those who marketed the product, profit from its sale, and have the know how to remove its defects before placing it in the chain of distribution.[194]

The court then expanded strict liability to other key players in the chain of distribution, outside of just the seller or manufacturer.[195] Nevertheless, the court has now chosen to move as far as possible in the exact opposite direction, significantly limiting the risk from the entity that markets the drug, profits the most from its sale, and has the know-how to remove its defects before placing it in the chain of distribution. The decision effectively disregards the recognized duty not to distribute a defective product.[196]

B. Application of the UCATA is the Proper Approach

As described earlier, there are several justifications for maintenance of the doctrine.[197] What each of these justifications has in common, however, is that

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191. State Farm Ins. v. Premier Manufactured Sys., Inc., 142 P.3d 1232, 1233, 1239 (Ariz. Ct. App. 2006).
192. *Id.* at 1236.
193. *See* Torres v. Goodyear Tire & Rubber Co., 786 P.2d 939, 942 (Ariz. 1990).
194. *Id.* (citation omitted).
195. *Id.* at 943.
196. *See* State Farm Ins. v. Premier Manufactured Sys., Inc., 172 P.3d 410, 414 (Ariz. 2007).
197. *See* discussion *supra* Part II.B.

they should be examined by a trier of fact rather than automatically accepted.[198] The categorical rationales no longer make sense. The rationale of respecting the doctor-patient relationship seems tenuous, and the rationale that the doctor is in the best position to assess the patient is an easy way for a manufacturer to sidestep any harm that may come to that patient.

The rationale that manufacturers would have a hard time communicating risks to the uneducated public is tantamount to saying that because pharmaceutical companies are engaged in complicated work, the tort system should work differently for them. Lastly, the justification for the doctrine that manufacturers lack the effective means to communicate directly with consumers is no longer tenable in the age of the Internet and DTC advertising. There is evidence that consumers regularly prompt physicians to prescribe certain medications, doing private research on these medications beforehand.[199]

Rather than create unnecessary and potentially endless exceptions to an age-old doctrine, the Arizona Court of Appeals took the correct approach in applying the UCATA to the case at hand. The court of appeals stayed true to the strict products liability principle that every party in the chain of distribution of a defective product has committed its own actionable breach of legal duty[200]: "[e]limination of the learned intermediary doctrine in these circumstances allows a fair allocation of fault under [the] UCATA, and a consumer who is harmed by false or misleading information from either a manufacturer or the prescribing physician may recover in accordance with each defendant's percentage of fault."[201] Because Watts relied on manufacturer-provided materials in addition to her physician's recommendation,[202] she had a state constitutional right to seek recovery against Medicis Pharmaceutical for its percentage of fault, which should have been determined by a jury. It is unjust on its face to bar the trier of fact from at least considering whether Medicis provided an adequate warning.

Moreover, the doctrine encompasses several categorical assumptions which may not be true depending on the facts of a case.[203] Among these critical assumptions are that the manufacturer provided sufficient information to the physician and that the physician read all of the materials supplied by

198. *See, e.g.*, Amicus Curiae Brief of the Ariz. Ass'n for Justice/Ariz. Trial Lawyers Ass'n, *supra* note 183, at 8–9.

199. Watts v. Medicis Pharm. Corp., 342 P.3d 847, 855 (Ariz. Ct. App. 2015).

200. *See supra* note 143 and accompanying text.

201. *Watts*, 342 P.3d at 855.

202. *Id.*

203. *See* Amicus Curiae Brief of the Ariz. Ass'n for Justice/Ariz. Trial Lawyers Ass'n, *supra* note 183, at 8–9.

the manufacturer.[204] These are facts that need to be determined by a trier of fact for a just outcome.[205] Pharmaceutical companies may not be granted motions to dismiss so easily, but in a several-only liability system, they will only be responsible for the percentage of harm caused, as determined by a jury. This is how the judicial system is meant to work. All parties involved in the chain of distribution are meant to owe a duty to the ultimate consumer.

VI. CONCLUSION

The Arizona Court of Appeals made the correct decision in not artificially cutting off the manufacturer's duty and following the UCATA over the doctrine. In the wake of DTC advertising, the patient-physician relationship is not what it once was, and the justifications for sustaining the doctrine are no longer prevalent. It is an exaggeration to assume that drug companies will stop innovating just because they are not preemptively shielded from liability. The benefit of properly warning consumers of the side-effects of complicated prescription drugs greatly outweighs the costs.

One of the major arguments against the Arizona Court of Appeals' decision was that, without the doctrine, pharmaceutical companies would be less likely to invest in new medicines and devices.[206] The court, however, should not consider the benefit of the U.S. economy above the rights of personal injury victims in determining the appropriate product liability scheme. Comparatively, other major industries are required to adapt all the time to changes in law. There should not be any special exception for the pharmaceutical industry. One of the most susceptible industries in terms of product liability is the automobile industry. Application of the doctrine is the equivalent of allowing automobile manufacturers to shed all of their liability onto dealerships. Other industries have fared fine while still being susceptible to liability. Fear of lost revenue is not an adequate policy reason to maintain a doctrine that strays so far from the tenets of product liability law. The key for pharmaceutical companies will be for them to be more efficient and

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204. *See id.*

205. *See id.* ("At every rung of the ladder of presumptions, there is a question of fact that only a jury can resolve. For instance, the trier of fact must weigh the drug maker's warnings to decide if the warnings sufficiently apprised physicians of the risks associated with the drug's use . . . . And only the jury can determine if the ultimate consumer was so obtuse or uneducated that no product warnings would have protected him or her or determine if the prescribing doctor read, understood, and transmitted the product warnings in any understandable form to the ultimate consumer. The learned-intermediary doctrine, however, removes these fact questions from the trier of fact.") (citation omitted).

206. *See* discussion *supra* Part II.B.

diligent in the information they put out to consumers, not to be less innovative.

The over-promotion of prescription drugs has undermined the physician-patient relationship, and courts should take an active approach in recognizing this change. In every other form of product manufacturing, the manufacturer is held accountable for the effects of its products. There should be no special exception for the pharmaceutical industry. Each entity in the chain of distribution owes a duty to the ultimate consumer not to distribute an unsafe product, especially the entity that profits the most and has the most power to remove defects from the product. Arizona has now manufactured an inadequate means for pharmaceutical manufacturers to satisfy their duty. Arizona should have recognized the true purpose of product liability law in protecting Amanda Watts rather than the drug manufacturer that caused her harm.