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.
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INTRODUCTION

Every year many Americans go without access to essential medicines. Some are lucky enough to have some access, but even “[m]any [of those] people, especially retirees with chronic illnesses, have long resorted to splitting pills to help control escalating drug prices.” Fortunately, the problem in America is nothing like it is in developing countries. Nonetheless, those without essential medication and those who are under-medicated due to 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. Nonetheless, pharmaceutical companies may be subject to a tort claim for their use of patents to prevent access to essential medicines. This Article will focus on one of those claims: drug companies are liable under the common law tort claim of preventing a rescue that would otherwise take place.

Though commentators have considered the application of the common law doctrine concerning prevented rescues by pharmaceutical companies, the analysis has been brief and no

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4 One other claim that applies to pharmaceutical companies arises from the special relationship present between the companies and those in need. See Kevin Outterson & Donald W. Light, Global Pharmaceutical Markets, Boston Univ. Sch. of Law Working Paper No. 10-05, 15–16. Because the drug companies receive heavy public aid in their research, it might be argued that this creates a special relationship between the parties that overrides the general common law rule that parties have no affirmative duty to rescue. See id. But see Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40 (suggesting otherwise by not including any relationship of this type); Restatement (Second) of Torts § 314A (1965) (same).

5 Restatement (Second) of Torts § 326 (1965).
defenses available to the drug companies have been considered.\(^6\) This Article distinguishes itself by fully exploring the viability of a prevented rescue claim, which includes those affirmative defenses that might be raised by the drug companies.

This Article argues that, despite some difficulties, state tort law can be argued to create a unique exception to patent law. Specifically, 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. 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 rides on the analysis of 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.

Part I of this Article lays out the basic tort law that could be considered applicable to patent infringement. Part II applies that tort law to the actions of drug companies that use their patents in a way that results in poor people going without medicine but concludes that the claim will fail. Part III looks for alternatives to the state tort claim that can use the same reasoning while navigating around its faults. Part IV considers the public policy implications of a system where one of those alternatives is put into place. Lastly, the Article concludes with a recommendation for adopting one of these alternatives.

I. PREVENTED RESCUE THEORY AND ITS APPLICABILITY TO PATENT INFRINGEMENT

Tort law and patent law are distinct areas of law, but that does not mean that they do not overlap or conflict in certain areas. The following Part considers the common law tort

\(^6\) See Outterson & Light at 14–16.
concerning prevented rescues and how that tort claim might relate to the actions of patent owners. Section A discusses claims that a plaintiff might bring against a patent owner whose use of patents causes the plaintiff to not have access to the patented invention. Section B considers the responses that might be 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 of the law laid out in this Part will be explored in Parts II, III, and IV of this Article.

A. Prevented Rescue Tortfeasors and Patent Enforcers

As every first-year law student learns, in the United States, there is no affirmative duty to rescue in tort law.\(^7\) The classic hypothetical used to convey this lesson involves a drowning person and a busy passerby.\(^8\) Many variations exist, but a common example has a man crossing a bridge while running an errand. As he crosses the bridge, he notices a drowning child struggling in the water beneath and a rope secured to the bridge that could easily be thrown to the child. No one else is around, but the man decides not to throw the rope over the handrail and continues on his way. The child drowns and her family sues the man. Though most non-lawyers find it hard to believe, common law holds that the man is not liable for the death of the child.\(^9\) Even though the man in the hypothetical could have easily saved the child’s life, he had no affirmative duty to do so.\(^10\)

Given that people have no obligation to save those that are in need—even when the rescue would impose virtually no burden on the them—it would seem that patent owners could not be liable for allowing the poor to go without a patented invention. Nonetheless, all hope for the poor is not lost, a point that is conveyed through a second hypothetical.

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\(^7\) Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 37; Restatement (Second) of Torts § 314 (1965).
\(^8\) Outterson & Light at 6.
\(^9\) Outterson & Light at 6.
\(^10\) Outterson & Light at 6.
Suppose that when the man is crossing the bridge, he finds the same child drowning, but this time there is someone else on the bridge preparing to save the child by throwing the rope over the handrail. In this case, the man would undoubtedly be liable if he actively and intentionally prevented the rescuer from throwing the rope to the child.\textsuperscript{11} As the Restatement of Torts explains (under the “Prevented Rescue” theory), “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.”\textsuperscript{12} Thus, generally speaking, when a rescuer plans to rescue someone in need, it will be a tortious act to interfere with that rescue.\textsuperscript{13}

The application of Prevented Rescue theory to patent owners is now somewhat conceivable. The full implications of this application will be explored in the remaining Parts of this Article,\textsuperscript{14} but, for now, the rough argument can be conceived of as follows: patent owners who utilize their patents to prevent third parties from rescuing those in need might be liable under a Prevented Rescue theory.

B. \textit{Control of Property Defense}

There are several defenses available to any defendants subject to a Prevented Rescue claim. This Section considers a defense that is particularly relevant to a Prevented Rescue claim brought against a patent owner. Defendants argue that the Prevented Rescue theory is invalid when the defendant owns the tools used to conduct the rescue (the “Control of Property Defense”). Subsection 1 explains the argument. Subsections 2 and 3 explain two substantial limitations on the Control of Property Defense, public and private necessity.

\textsuperscript{11} Restatement (Second) of Torts § 326 (1965).
\textsuperscript{12} \textit{Id}.
\textsuperscript{13} \textit{Id}.
\textsuperscript{14} \textit{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 hypothetical. The defense is relevant when the defendant owns the rights to control the tools utilized in rescuing a person in danger. Thus, this defense is relevant to all Prevented Rescue claims brought against patent owners but is also frequently relevant in non-patent cases.16

The Control of Property Defense attempts to distinguish the patentee (or certain other defendants) from the passerby in the hypothetical. The argument rightfully notes that the passerby in the hypothetical does not own the rope he uses, whereas—if the argument is applicable—the defendant does own the property for which he denies access. Thus, a more applicable hypothetical has the passerby crossing the bridge with his own rope tucked in his pocket. The rescuer tries to help the drowning child but does not have the necessary tools to do succeed. After asking the passerby for his rope and being turned down, the rescuer pickpockets the passerby’s rope which the rescuer-thief then uses to save the child.

The Control of Property Defense correctly observes that property ownership usually prevents others from otherwise having rightful access to the property. Nonetheless, the impact of this observation on the final result of litigation, whether in the patent context or otherwise, is not so clear.

The Control of Property Defense has some strengths but is ultimately subject to substantial limitations. As an initial point, the Prevented Rescue theory does not, at least on face, depend on the rescuer having ownership of (or consensual access to) the tools of the rescue.17

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15 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.
16 Any time the defendant owns the property needed to rescue someone, the Control of Property Defense will be relevant.
17 Restatement (Second) of Torts § 326 (1965).
The basic elements of the claim, as presented in the Restatement, do not mention anything about the rescuer having otherwise rightful access to the tools of the rescue.\(^{18}\) Nonetheless, the Control of Property Defense might be construed as an affirmative defense, which becomes relevant only after a plaintiff establishes a prima facie case of a Prevented Rescue.\(^{19}\)

The validity of an affirmative Control of Property Defense is supported by the Restatement’s only illustration of the Prevented Rescue theory.\(^{20}\) The illustration suggests, without explicitly stating, that the absence of rightful access can be fatal to a Prevented Rescue claim.\(^{21}\) Illustration 1 under Section 326—the Prevented Rescue section—presents the following example:

\begin{quote}
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. \textit{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.\(^{22}\)
\end{quote}

The relevant aspect of the Restatement’s illustration is the sentence explaining that A is not actually entitled to the rescue tool, i.e., the entire supply of water from the plug.\(^{23}\) The Restatement’s addition of this fact appears to suggest that had A actually owned the entire water supply, the viability of the claim against A would be in jeopardy.

\(^{18}\) 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.”).

\(^{19}\) Alternatively, one might maintain that the rescuer’s rightful access to the tools of rescue is a showing that the plaintiff must make as part of her prima facie case—instead of a fact that the defendant must disprove as part of an affirmative defense. \textit{But see supra} note 18 and accompanying text. Nonetheless, even if rightful access were construed as a necessary element a plaintiff’s prima facie case, the significance of the distinction exists in procedural issues and burdens as well as the specific factual issues of a particular case. Both of these concerns are beyond the scope of this Article because the ultimate success of a Prevented Rescue claim in a case with a complete, undisputed record would not be impacted by the distinction. Thus, the remainder of this Article discusses the Control of Property Defense as an affirmative defense, and even if rightful access is best construed as a burden for the plaintiff, the analysis of this Article should apply, \textit{mutatis mutandis}, just the same.

\(^{20}\) See Restatement (Second) of Torts § 326 cmt. a, illus. 1 (1965).

\(^{21}\) \textit{Id.}

\(^{22}\) \textit{Id.} (emphasis added).

\(^{23}\) \textit{Id.}
The application of the Control of Property Defense is clear in patent circumstances. Rescuers do not have rightful access to patented technologies because the owners of the patents have the right to exclude them from infringing.\footnote{35 U.S.C. § 271 (2006); see also A Sleeping Tiger? Business Method Patent Protection for Franchise Systems, 22 Franchise L.J. 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”).}

2. \textit{Public Necessity Limitation}

Despite appearing to be a powerful defense, the Control of Property Defense is seriously limited by tort law’s necessity doctrine. Necessity establishes a broad range of circumstances that give an actor the privilege to use the property of another, even despite the objections of the owner.\footnote{See Restatement (Second) of Torts §§ 262–63 (1965).} Thus, if necessity applies, the crux of the Control of Property Defense will fall because it will no longer be true that the owner of the tools of rescue was “entitled” to prevent the rescuer’s access.\footnote{Id. at § 890.} Two forms of necessity exist that can nullify the owner’s entitlement, public and private necessity.\footnote{See id. at §§ 262–63. In reality, one might say that there are four forms of necessity: two forms of public necessity and two forms of private necessity. See id. at 196–97, 262–63. The bulk of this Article will focus on only one form of private and public necessity, the kind that applies to personal property. The other form of public and private necessity applies to real property. See id. at 196–97. Real property public and private necessity are not considered as another form of necessity in this Article for two reasons. First, “land” clearly does not cover patents. See id. Second, other than extending protection to land, real property necessity has little noteworthy differences. Id. at §§ 261 cmt. a, 262 cmt. b.} This Subsection considers public necessity.

Public necessity is best explained by the Restatement: “One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion\footnote{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, like others of its kind, is addressed in Part II. See infra Part II.C.2.} if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.”\footnote{Restatement (Second) of Torts § 262 (1965) (footnoted added).} Thus, someone acting with a public necessity rightfully has access to the tools of another needed to
conduct the rescue. The key, however, is that public necessity doctrine is concerned with preventing a “public disaster.” Naturally, determining whether an event qualifies as a public disaster requires individualized analysis of the facts of each circumstance (as well as state law precedent). Thus, the remainder of public necessity will be discussed its application to specific factual situations below.

3. **Private Necessity Limitation**

In addition to public necessity, a privilege exists for private necessity. Private necessity is also 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.

Thus, like with public necessity, someone acting with a private necessity rightfully has access to the property of another.

The essence of the private necessity limitation is best demonstrated in the case of *Ploof v. Putnam*. Though the case concerned private necessity to trespass on real property, the analysis of whether the privilege exists is functionally identical in the real property and chattel setting. In *Ploof*, Ploof was sailing when a storm forced him to moor to Putnam’s dock.

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30 Id.; *id.* at § 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 . . . .”).
31 *Id.* at § 262.
32 See *id*.
33 See discussion *infra* Parts II.C.3, IV.A.
34 Restatement (Second) of Torts § 263 (1965).
35 *Id.* at § 263(1).
36 *Id.*; *id.* at § 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 . . . .”).
37 81 Vt. 471 (1908).
38 See discussion *supra* note 27.
39 *Ploof*, 81 Vt. 471.
objected and sent his servant to unmoor the Ploof’s boat.\textsuperscript{40} The servant Putnam’s direction and Ploof was let into sea where the storm caused him serious damage.\textsuperscript{41} Ploof sued, saying that he had private necessity to moor his boat to the dock and won.\textsuperscript{42} Putnam was liable for the damages that arose because, even though it was his dock, he was not entitled to unmoor Ploof because of Ploof’s private necessity.\textsuperscript{43}

The private necessity argument might function similarly in the tort-patent setting. If the infringer has a private necessity, she might argue that the patent owner does have the usual entitlement to exclude her from utilizing the technology. Exploring this argument any further, though, will require a case-by-case analysis,\textsuperscript{44} meaning that the application of private necessity to various patent circumstances will be discussed in specific factual situations in the Parts below.\textsuperscript{45} There is, however, a unique aspect of private necessity concerning damages that is worth mentioning here.\textsuperscript{46} 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.”\textsuperscript{47}

C. Preemption Defense

In addition to the Control of Property Defense, tortfeasors subject to a Prevented rescue claim might raise the Preemption Defense. The Preemption Defense is worth considering in situations where federal law addresses the actions of the defendant.\textsuperscript{48} Under this defense, the defendant argues that the plaintiffs Prevented Rescue claim is preempted by federal law.\textsuperscript{49}

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at § 263 cmt. d (describing the case-specific balancing process required for private necessity analysis).
\textsuperscript{45} See discussion infra Parts II.C.2, IV.A.
\textsuperscript{46} Restatement (Second) of Torts § 263(2) (1965).
\textsuperscript{47} Id. See also id. at § 263 cmt. e.
\textsuperscript{49} Id.
Because Prevented Rescue claims root from state tort law, the Preemption Defense will be a successful defense if the actions of the federal law does, in fact, preempt a particular Prevented Rescue claim.\(^{50}\) Any further analysis of this defense, however, will depend on which federal law the defendant claims as its shield.\(^{51}\) Thus, because the success of any particular Preemption Defense requires such individualized analysis, all remaining analysis of the Preemption Defense is conducted in Parts II, III, and IV, where specific factual settings are considered.\(^{52}\)

**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.\(^{53}\) This Part considers how Prevented Rescue claims apply to owners of patents on essential medicines. Section A fleshes out the details of the factual circumstance that this Part concerns. Section B applies the prima facie argument for Prevented Rescue liability against the owners of patented essential medicines. Section C considers the drug companies Control of Property Defense. Lastly, Section D considers the drug companies Preemption Defense.

**A. Context**

There are two primary settings in which the issues discussed in this Article might arise. The legal result will not depend on the manner in which the issue arises.\(^{54}\) Nonetheless, for the sake of clarity, envisioning the two settings is important. In addition, this Section defines several concepts will be repeatedly referred to throughout the rest of this Article.

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\(^{51}\) See id. at 918–19.

\(^{52}\) See discussion infra Part II, III, IV.A.

\(^{53}\) See supra text accompanying notes 32–33, 44–45, 51–52.

\(^{54}\) This conclusion is an inference from the discussion infra; all of the arguments below apply, mutatis mutandis, just the same in either of the litigations settings considered in this Section.
As an initial matter, it is important to understand the concepts to which this Section and the rest of this Article refer. The following definitions serve only to define how these terms are used in the remainder of this Article.

*Essential Medicines:* This term refers to medicines that save a person from otherwise certain death or serious bodily harm.

*Indigent Sick:* This term refers to 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:* This term refers to charities who 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:* This term refers to drug companies that own the patent to an essential medicine that at least one indigent sick person needs and is not receiving.

Having defined terms, it is now worth considering the two circumstances in which the arguments considered in this Article might arise.

The first circumstance is that which is focused on in this Article. In this circumstance, 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 might seek damages, but this Article is mainly concerned with whether an injunction would be granted.

The second setting involves charities as defendants to a patent infringement claim. In this scenario, the charity will have gone ahead in providing the essential medications to the indigent sick. In response to the actions of the charity, the drug company sues the charity for an
injunction and damages. In this case, the arguments addressed in this Article would be used by
the charities as a counterclaim or a defense against the drug companies.

To remain as simple as possible, the setting discussed in this Article will be the first
mentioned. The arguments mentioned, however, are equally applicable in the second scenario
with some trivial modifications.55

B. Prima Facie Case for Drug Company Prevented Rescue Liability

As was mentioned in Part I, a duty to rescue claim is not a fruitful claim, and this remains
ture for the indigent sick.56 Instead, a Prevented Rescue claim appears to be far more likely to
succeed.57 This Section analyzes how the indigent sick might bring a Prevented Rescue claim
against a drug company, and finds that a prima facie case can be made.

A prima facie case asserting a Prevented Rescue claim against a drug company is fairly
straightforward. The basis of the claim is understood by comparing the drug situation with that
of the bridge rescue discussed in Part I.58 Recall the passerby who terminates the rescue of
drowning child by preventing the rescuer from throwing a rope to the drowning child.59 In the
drug context, the rescuer is replaced with a charity; the passerby is the drug company; the
drowning child is the indigent sick; and the rope is the patented essential medicine.

Ignoring some defenses that are discussed below,60 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 generic-infringing essential

55 See supra note 54 and accompanying text.
56 See supra notes 7–10. But see supra note 4.
57 See discussion supra Part I.A.
58 See discussion supra Part I.A.
59 Id.
60 See discussion infra Part II.C–D.
medicines, just as the man crossing the bridge prevents the rescuer from throwing the rope to the drowning child.

Even without the analogy, the indigent sick’s prima facie case is fairly clear. By simply plugging the appropriate words into the Restatement, it become apparent that these plaintiffs may at least make a showing sufficient to overcome summary judgment: 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.]”\(^{61}\) Thus, a drug company excising its patents in this manner must rely on an affirmative defense to protect itself from liability.\(^{62}\)

C. \textit{Control of Property Defense}

Despite being subject to a prima facie case for liability, a drug company will almost certainly try to raise a defense. On such defense, the Control of Property Defense, is a defense that every drug company can raise in response to a Prevented Rescue claim.\(^{63}\) This Section explores how the defense applies in the drug context. Subsection 1 explains the drug company’s argument. Subsection 2 rejects the defense, however, by exploring the private necessity limitation. Subsection 3 also rejects the defense through a similar limitation arising from private necessity.

1. \textit{Applicability of the Control of Property Defense}

The Control of Property Defense is easily applied in the patent context.\(^{64}\) The drug companies can utilize the defense in the same way as the passerby whose rope was stole to save

\(^{61}\) See Restatement (Second) of Torts § 326 (1965).

\(^{62}\) It is worth noting that the prevented rescue does not require a certainty of the existence of the aid absent the defendant’s activity is a certainty; a possibility is enough. W. Page Keeton et al., Prosser and Keeton on the Law of Torts 382 (5th ed. 1984) (“The principle [that one may not prevent aid by others] has been carried even to the length of holding that there is liability for interfering with the possibility of such aid.”).

\(^{63}\) See supra note 15.

\(^{64}\) See discussion supra note 15.
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. As discussed above, if defendant has the right to prevent access to the tools of rescue, a Prevented Rescue claim will fail. Nonetheless, all hope is not lost for the indigent sick.

2. **Limitations Created by Private Necessity**

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

The Control of Property Defense rests on the assertion that the charities do not have rightful access to the medications that the indigent sick need. Clearly patents give drug companies the right to exclude the charities from using their patented technology. Nonetheless, the private necessity doctrine may be invoked to give charities the privilege to use patented medications that would otherwise require consent from the drug company.

To prove private necessity, the indigent sick need to show that a charity’s act of distributing patented essential medicines to them would be “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 poor] from

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65 See discussion supra Part I.B.
66 See supra notes 20–23 and accompanying text.
67 See supra Part II.C.1.
68 35 U.S.C. § 271 (2006); see also A Sleeping Tiger? Business Method Patent Protection for Franchise Systems, 22 Franchise L.J. 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”).
69 See supra notes 28–33 and accompanying text.
serious harm.” This argument can be broken into 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. 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.”

Though not considered to be a textbook trespass to chattel or conversion, there is a strong argument that patent infringement constitutes 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 a chattel a “tangible good or an intangible right (such as a patent).” Moreover, the patent statute itself explains, with some limited but irrelevant exceptions, that “patents shall have the attributes of personal property,” and “the English word for personal property is ‘chattel.’” Thus, on at least two accounts it appears that patents do qualify as “chattel.” However, some courts hold that patents are not chattel, an issue that will be discussed in a moment.

Having determined that patents qualify as chattel, it is now important to consider whether patent infringement can be construed as a trespass to or conversion of chattel. Because almost

70 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,” id., but this will clearly not be the circumstance in any case resembling those discussed in this Part. Any indigent poor 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.
71 See supra Part II.A.
72 Restatement (Second) of Torts § 263(1) (1965).
73 Black’s Law Dictionary 268 (9th ed. 2009).
76 See infra notes 88–90 and accompanying paragraph.
77 See supra notes 70–72 and accompanying text.
all trespasses to chattel constitute conversion, most courts and commentators simply discuss
conversion.\textsuperscript{78}

In court, the argument the argument that patent infringement constitutes trespass to
chattel or conversion has been made on several occasions. Plaintiffs making this argument
usually fail to win a judgment in state court, but rarely do they fail on the merits of the claim.\textsuperscript{79}
As one court put it, “Because ‘[a] patent is a species of property[,]’ a patent holder not
preempted under federal law may assert . . . conversion claims in state court.”\textsuperscript{80} Thus, courts
have usually suggested that conversion extends to infringement, but it is preemption (and
jurisdiction)\textsuperscript{81} that ultimately prevent most, but not all, plaintiffs from succeeding when making
this argument.\textsuperscript{82}

\begin{enumerate}
\item Paul M. Janicke, Implementing the "Adequate Remedy at Law" for Ongoing Patent Infringement After Ebay v. Mercexchange, 51 IDEA 163, 178 (2011) (“The Restatement tells us that all but the most fleeting forms of trespass to chattels should be regarded as conversions.”).
\item 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 can be “cloaked as a conversion claim,” but stating that this is “improper[] and redundant[]” because patent infringement is addressed under federal law); 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”).
\item Preemption and jurisdiction are regularly conflated when considering in the infringement-conversion context. See e.g., Jacobs Wind Elec. Co., 626 So. 2d at 1337 (finding jurisdiction after simply 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 suggesting either preemption or lack of jurisdiction); Greenwell, supra note 75, at 988 (mentioning both but appearing to analyze each as one). No court or commentator appears to have addressed this convolution. Nonetheless, one reason for the confusion might be that the two concepts will almost always stand or fall together. Jurisdiction is frequently not present in infringement-conversion contexts because the state conversion claim is used exactly like 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 source cited infra note 117 and accompanying text. Because federal patent law claims exclusive jurisdiction over patent claims, conversion claims that operate in a functionally identical way will be preempted and state courts will not have jurisdiction.
\item See sources cited supra notes 79-80; see also Mannsfeld v. Evonik Degussa Corp., CIV.A. 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 field[] of . . . conversion law”). It is worth noting that the preemption issues discussed in this Section are different than those discussed, infra, in Parts II.D. Here, the preemption issue addressed is whether a patent infringement claim presented as a trespass to chattel or patent infringement claim is preempted. Preemption issues discussed outside of this Section are different in two ways: (1) they concern whether a Prevented Rescue claim is preempted, and (2) the potentially preempted claim is waged against a patent owner, not by one. See infra Parts II.D.
\end{enumerate}
Similarly, many commentators have noted that patent infringement is (or, at least, arguably is) conversion, but these conversion claims go unprotected by state law due to preemption concerns.\textsuperscript{83} As explained earlier this year by one commentator:

\begin{quote}
[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.
\end{quote}

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, \textit{ignoring jurisdiction concerns and 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.}\textsuperscript{84}

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.\textsuperscript{85}

Even though the ultimate failure on non-merit-based grounds is relevant to a litigant making a conversion claim, the final result of that litigation is irrelevant to the indigent poor and drug companies considered in this Article. As was discussed above,\textsuperscript{86} the real private necessity concern is whether a charity’s infringement “would otherwise be a trespass to the chattel of [the

\textsuperscript{83} E.g., Greenwell, \textit{supra} note 75, at 988 (providing analysis that is quoted below); Janicke, \textit{supra} note 78, at 177–78 (“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, \textit{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 simply will not succeed because “state court has no jurisdiction”).

\textsuperscript{84} Greenwell, \textit{supra} note 75, at 988 (alteration in original) (emphasis added) (footnotes omitted).

\textsuperscript{85} \textit{See supra} notes 79–84 and accompanying text.

\textsuperscript{86} \textit{See supra} text accompanying note 72.
drug companies] or a conversion of it.”

Thus, the rub is that the charity’s action does constitute conversion or trespass to chattel, even though the drug company would rarely be able to make the necessary preemption showings to ultimately prevail in court under that theory.

Because state tort law varies from state to state, courts vary in their approaches to conversion and trespass to chattel. Accordingly, not all courts have held that patent infringement constitutes a state tort. The reasons for doing so vary, but two are popular. First, some state courts refuse to recognize intangibles as chattel, or do so in such a limited fashion that patented technology does not qualify. Second, some courts reject the claim for the following reason:

[Patents] exists 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 . . . .

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 remaining states will be resumed in Part III below, when the difference between the two is no longer important.

Even though some courts hold that it is not possible to state a claim for patent infringement through trespass to chattel or conversion, many courts hold otherwise. In at least these jurisdictions, charities would be trespassing to or converting patents. Thus, the two aspects of private necessity have been proven: (1) the essential medicine is reasonably necessary to

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87 Restatement (Second) of Torts § 263(1) (1965).
88 E.g., Corporate Catering, Inc. v. Corporate Catering, LLC, 63 U.S.P.Q.2d 1913, 2001 WL 266041 (Tenn. Ct. App. 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.”).
91 See supra text accompanying notes 70–72.
protect the indigent poor 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 would, in fact, have a private necessity privilege to distribute essential medicines to the indigent poor, the drug companies can no longer utilize the Control of Property Defense. The Control of Property Defense hinged on the assertion that the charities do not have rightful access to the medications that the indigent sick need.92 However, because the charities have a private necessity, state tort law holds that they do have rightful access to the medications. Thus, the Control of Property Defense has been defeated.

Despite defeat of the Control of Property Defense, there are two private necessity housekeeping issues that remain. First, just because the Control of Property Defense has been defeated does not mean that the drug companies cannot raise another defense. These other defenses will be considered in the Section D below.93 Second, private necessity is not the best argument for the indigent poor to fall back on. Private necessity requires the party claiming the privilege to compensate the owner for “any harm caused by the exercise of the privilege.”94 Determining the harm caused by a charity’s distribution of essential medicines to the indigent poor is not as easy as it sounds. It appears that no court has been faced with this question, but there are two potential answers. On the one hand, it could be argued that there is no damage done because the indigent poor would not have been able to afford the essential medicines regardless; that the defining characteristic that qualifies them as indigent poor.95 Thus, there can be no lost profits to the drug companies. Alternatively, it could be argued that

92 See supra Part II.C.1.
93 See infra Parts II.D.
94 See sources cited supra notes 46–47 and accompanying text.
95 See supra Part II.A.
harm is caused because of patent law’s guarantee of a reasonable royalty. Patent owners are guaranteed nothing “less than a reasonable royalty for the use made of the[ir] invention by [an] infringer.” Thus, it could be argued that the drug companies are owed at least a reasonable royalty for a charity’s use of the patented technology.

Predicting whether a court would hold that the drug companies are due a reasonable royalty or no compensation is tough. What is certain, though, is that the indigent poor 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. As it turns out, there is such an argument, public necessity.

3. **Limitations Created by Public Necessity**

In addition to the private necessity limitation, the Control of Property Defense is limited by public necessity. 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 will need to show that a charity’s act of distributing patented essential medicines to them would be “an 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.” This argument can be broken into two parts, but one has already been answered. 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 poor with essential medicines is an act that “is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.”

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97 Id.
98 Restatement (Second) of Torts § 262 (1965).
99 See Restatement (Second) of Torts § 262 (1965).
Fortunately, the first issue—the trespass to chattel or conversion issue—was answered as part of the private necessity analysis in Subsection 2. 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.

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, at minimum, are reasonably believed to be—necessary to save the indigent sick from death or substantial harm. Thus, the real concern is whether that rescue counts as an action that prevents a “public disaster.”

Acting to prevent a “public disaster” is not defined with great precision in the Restatement. The Comments do mention, however, that protected actions include “reasonable effort[s] to protect against a public enemy, or to prevent or mitigate the effect of conflagration, flood, earthquake, or pestilence.” The relevance of “pestilence” is clear in the drug context. Public disaster, according to the Restatement, includes acting to prevent certain sicknesses.

As further clarification, an illustration is given:

A, who is an agister of B’s cattle, kills B's bull, which is in his 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.

Arguing along these lines, the indigent poor suffering from certain problems may be able to succeed in showing that the medicine is used to prevent a public disaster. The argument’s

100 See supra Part II.C.2.
101 Id.
102 See supra Part II.A.
103 See Restatement (Second) of Torts § 262 (1965).
104 Id. § 262 cmt. b.
105 Id.
106 Id.
107 Restatement (Second) of Torts § 262 cmt. e, illus. 2 (1965).
success will vary from disease to disease, with contagious diseases standing the best chance. Exploring each disease and the effectiveness of available medication is beyond the scope of this Article, but it likely to be the case that at least some medicines are sufficiently important to be considered necessary to avoid a public disaster.

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 poor from accessing essential medicines; unless, however, they can claim that federal patent law overrides state tort law. This is a strong argument, but is considered separately in the following Section.

D. Preemption Defense

Preemption is, perhaps, the most compelling defense that drug companies have to draw from. After all, the indigent poor’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. To explore this argument, the following subsections consider two different ways the Prevented Rescue claim might be preempted. The text of the Constitution is discussed in Subpart 1, and Subpart 2 looks to federal 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 . . . .” The plain language of the Constitution clearly grants the

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109 U.S. CONST. art. 1, § 8, cl. 8.
authority to the federal government to grant patents.\textsuperscript{110} If this grant conflicts with a state Prevented Rescue claim, the prevented rescue claim will be preempted.\textsuperscript{111}

State tort claims that conflict with the Constitution are not new. For example, in \textit{New York Times Co. v. Sullivan}, the Supreme Court was faced with a libel state tort claim that conflicted with the First Amendment.\textsuperscript{112} As the Court explained, “Libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”\textsuperscript{113} Similarly, a Prevented Rescue cause of action can claim no magical immunity from constitutional limitations.\textsuperscript{114}

Unlike the First Amendment, which guarantees free speech protection, the patent clause of the Constitution merely grants Congress the authority to create patent law. The clause does not grant or guarantee any patent protection to inventors.\textsuperscript{115} Thus, the preemptive power of the First Amendment is not present in the patent clause of the Constitution. Drug companies are not out of luck, though. The Constitution granted the power to create patent laws to Congress, which Congress has used to create a set of laws that still may preempt a Prevented Rescue claim.

2. \textit{Preempted by Statutory Patent Law}

Even though the Constitution itself does not preempt a Prevented Rescue claim, statutory patent law does. Courts have usually applied conflict preemption in the context of patent law, instead of field preemption.\textsuperscript{116} The distinction is not important for this Article, though, because the indigent poor’s Prevented Rescue claim directly conflicts with federal patent law.

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{112} 376 U.S. 254, 269 (1964).
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Cf. id.}
  \item \textsuperscript{115} \textit{Compare} \textit{U.S. Const. art. 1, § 8, cl. 8, with U.S. Const. amend. I.}
  \item \textsuperscript{116} 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,” court's
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.117

This rule makes it clear the indigent poor’s Prevented Rescue claim is preempted. The state tort
is brought against drug companies that are acting in a way that is protected by federal patent law.
Thus, the Prevented Rescue state tort claim is dead. There is hope, however, that the indigent
poor might find a federal claim vein, which is what this Article next considers.

III. RESCUING THE PREVENTED RESCUE CLAIM

Prevented Rescue state tort claims cannot be brought by the indigent poor against drug
companies for preventing access to essential medicines, because the claim would be
preempted.118 Nonetheless, there are two hopes for the indigent poor. The first is through a
similar claim brought under the Due Process Clause of the Constitution. The second is through
legislative action. Each option will be explored, respectively, in the Sections below.

A. Substantive Due Process

The first method of saving the indigent poor comes through a federal claim that will not
be preempted, substantive due process. Fully exploring the complexities of a substantive due

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117 153 F.3d 1318, 1335 (Fed.Cir.1998), overruled on other grounds, Midwest Indus., Inc. v. Karavan Trailers, Inc.,
175 F.3d 1356 (Fed.Cir.1999).

118 See *supra* Part II.D.
process claim requires an article of its own, but one particularly relevant case cannot be overlooked.

In 2007 Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach was decided en banc on grounds that are highly relevant to the indigent poor’s Prevented Rescue theory.¹¹⁹ In von Eschenbach, the court was faced with a suit against the Food and Drug Administration by terminally ill patients seeking access to experimental drugs, which is forbidden by the FDA.¹²⁰ The FDA’s actions were very 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.

In making its decision, the von Eschenbach court “beg[an], as [it] do[es] in all due process cases, by examining our Nation's history, legal traditions, and practices.”¹²¹ Highly relevant in this determination was two common law doctrines, “the doctrine of necessity [and] the tort of intentional interference with rescue”,¹²² i.e., necessity and Prevented Rescue.

The plaintiffs in von Eschenbach argued that some subset of the drugs they wished to take were capable of saving lives and that the FDA’s rules prevented doctors from using the drugs to rescue them.¹²³ The plaintiffs did not believe that the FDA was liable for a state Prevented Rescue tort.¹²⁴ Instead, they argued that Prevented Rescue tort shed light on our legal traditions and thereby supported a finding of a fundamental right,¹²⁵ much in the same way that the common law tort of battery supported the Supreme Court’s holding of a fundamental right to

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¹¹⁹ 495 F.3d 695 (D.C. Cir. 2007).
¹²⁰ Id.
¹²¹ Id. at 703.
¹²² Id. at 707 (discussing common law self-defense as well).
¹²³ See id. at 707–10.
¹²⁴ Id. at 707.
¹²⁵ Id.
refuse medical treatment.\textsuperscript{126} Similarly, in \textit{von Eshenbach}, 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.\textsuperscript{127}

The Prevented Rescue argument was accepted as a strong indicator of a fundamental right by two dissenting judges, though the eight judge majority held otherwise.\textsuperscript{128} Both the decent and majority seemed to accept that valid Prevented Rescue claim would suggest a fundamental right, but the judges disagreed over whether Prevented Rescue theory applied.\textsuperscript{129} The crux of the dispute concerned whether the medications at issue were “necessary.”\textsuperscript{130} As was discussed above, making a Prevented Rescue claim requires showing that the rescue was “necessary.”\textsuperscript{131} The majority felt that these medications were not “necessary” because they had not been shown to be anything other than “ineffective and unsafe.”\textsuperscript{132} The majority 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.”\textsuperscript{133} 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.”\textsuperscript{134}

Despite a bitter dispute over the “necessary” element of Prevented Rescue theory in the experimental drug setting, there is no dispute over the necessity of the essential medicines that

\begin{itemize}
  \item \textsuperscript{126} Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 269 (1990).
  \item \textsuperscript{127} See \textit{von Eschenbach}, 495 F.3d at 707.
  \item \textsuperscript{128} \textit{Id.} at 709–10; \textit{id.} at 717–19 (Rodger, J., dissenting).
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} Restatement (Second) of Torts § 326 (1965); \textit{See also supra} text accompanying note 12.
  \item \textsuperscript{132} \textit{von Eschenbach}, 495 F.3d at 708 n.15.
  \item \textsuperscript{133} \textit{Id.} at 719 (Rodger, J., dissenting).
  \item \textsuperscript{134} \textit{Id.}
\end{itemize}
the indigent poor seek to sue over.\textsuperscript{135} The drugs they are interested in have already passed FDA approval and have been proven to be effective. Thus, given that the objections raised by the majority in \textit{von Eschenbach} are inapplicable and the only reasons for failure found in this Article concerned preemption,\textsuperscript{136} there is good reason to believe that Prevented Rescue supports a finding of a fundamental right. Nonetheless, public and private necessity may lend an additional hand.

In addition to Prevented Rescue, the plaintiffs argued that necessity (either public or private)\textsuperscript{137} bolstered the finding of a fundamental right.\textsuperscript{138} The plaintiffs argued that their dire circumstances made their access to medication a necessity.\textsuperscript{139}

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.\textsuperscript{140} Presumably the majority could have repeated its point that the drugs were not “necessary,” but it chose to argue a different point.\textsuperscript{141} 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.\textsuperscript{142} The dissent argued that it was “true” that Congress can overrule the common law “but irrelevant” to fundamental rights analysis.\textsuperscript{143} The dissent criticized the majority for ignoring the common law out of a fear of turning all of the common law into a

\textsuperscript{135} See supra text accompanying notes 71, 98–99, 102.
\textsuperscript{136} See supra Part II.
\textsuperscript{137} The court did not distinguish between the two in its decision. \textit{von Eschenbach}, 495 F.3d at 708–10.
\textsuperscript{138} \textit{Id.} at 707–08.
\textsuperscript{139} See \textit{Id.}
\textsuperscript{140} \textit{Id.} at 708–09; \textit{id.} at 717–19 (Rodger, J., dissenting).
\textsuperscript{141} \textit{Id.} at 708–09 (majority opinion).
\textsuperscript{142} \textit{Id.} at 708–09; \textit{id.} at 717–19 (Rodger, J., dissenting).
\textsuperscript{143} \textit{Id.} at 718 (Rodger, J., dissenting).
fundamental right.\textsuperscript{144} Instead, the dissent argued, the “tradition of protection does not alone establish a fundamental right,” it is merely a factor.\textsuperscript{145}

The debate between the majority and decent over the applicability of the necessity argument applies equally as well to the indigent poor considered in this Article. Thus, in at least one circuit, necessity would not be able to contribute to a finding of a fundamental right, but other circuits might choose to side with the \textit{von Eschenbach} decent’s view.

In conclusion, the indigent poor will be unsuccessful in asserting a Prevented Rescue claim in state court because of preemption; however, they may 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 Article.

\textbf{B. Legislative Action}

If all else fails, the indigent poor can only rely on legislators to change patent law to allow for an exception in the case of charities and the indigent poor. Unfortunately, the political will is unlikely to present itself in the near term. The country is currently dealing with “fiscal cliff” problems and is in the middle of implementing a revolutionary new patent law.\textsuperscript{146} Nonetheless, the conflict patent law and tort law discussed in this Article, 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 will need to be considered, which are discussed in the next, and last, Part.

\textsuperscript{144} Id.
\textsuperscript{145} Id.
IV. A WORLD WHERE THE DRUG COMPANIES HAVE LOST

Though the indigent poor will not succeed in making a state law Prevented Rescue claim, they stand some chance in raising a Due Process claim under the U.S. Constitution. In making that judgment, judges will surely consider public policy factors, whether they admit it or not. In any case, legislators considering exceptions to patent law modeled after the concerns addressed in this Article will have reason to consider public policy implications. Thus, this Part briefly considers the questions inevitably come to mind. Will drug companies continue to develop essential medicines? Will any other actors be liable for preventing access to essential medicines? Will other patent and intellectual property owners be forced to grant similar licenses? Each of these issues, respectively, is addressed in the Sections below.

A. Implications for Other Patent and Intellectual Property Owners

Parts II, III, and IV explored the implications of the Prevented Rescue claim in the context of patented essential medicines and the indigent poor. One issue worth considering is how far that analysis can be taken. This Section addresses whether the plight of the indigent poor can be generalized to other people lacking other technology.

Much of the drug analysis in this Article is applicable beyond patents on essential medicines. However, two important differences prevent the Prevented Rescue theory from being expanded much beyond essential medicines.

To defeat the Control of Property Defense, the indigent poor had to rely on arguments that are simply not applicable to much outside of the control of property defense. The Control of Property Defense argued that charities did not have rightful access to the essential medicines because patents gave the drug companies the right to exclude the charities from infringing.147

147 See supra Part II.C.
The indigent poor were only able to defeat this point by arguing necessity.148 By arguing necessity, the indigent poor were able to show that charities did have rightful access to the patented technology.149 However, this showing hinged on facts that are not applicable far beyond essential medicines.

To demonstrate the necessity of access to essential medicines, the indigent poor had to argue that essential medicines were either “necessary to protect the person . . . [of the indigent poor] from serious harm,”150 or “necessary for the purpose of avoiding a public disaster.”151 Clearly neither argument could be made in the vast majority of intellectual property settings.

The U.S. Patent and Trademark Office has issued over 8 million patents since its beginning, and millions of those patents remain active today.152 Infringing very few of these patents could be construed as necessary to prevent bodily harm or a public disaster. Moreover, necessity applies with even less strength to copyrighted works and trademarks.

Even though necessity substantially confines the Prevented Rescue claim advanced in this Article, the due process argument discussed in Part IV serves as another check on overexpansion.153 Even in the von Eschenbach decent’s view, proving necessity or Prevented Rescue was not sufficient to find a fundamental right.154 As the decent 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.”155 Because access for all to copyrighted, trademarks, and the bulk of patents is

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148 See supra Part II.C.2–3.
149 Id.
150 See source cited supra note 70 and accompanying text.
151 See supra Part II.C.3.
153 See supra Part III.
155 Id.
in no way “implicit in the concept of ordered liberty,” there need be no worry of the Prevented Rescue or necessity doctrines overextending themselves into protecting much more than access to essential medicines.

B. **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.

The economic incentives to develop essential medicines are not substantially hindered by freeing charities to provide essential medicines to the indigent poor. The nature of the indigent poor discussed in this Article was that they could not afford access to essential medications without someone infringing the patents of the drug companies. It is this status that gave the indigent poor the capacity to make the argument in the first place. If the indigent poor had access to the essential medication otherwise, it would be virtually impossible to argue that infringing the patents of the drug companies was necessary to obtain access to the medicines.

This means that the drug will lose little to no profits by being forced to allow limited infringement. Thus, the incentives to develop are not noticeably harmed.

A second issue concerns parties that might be implicated by the Prevented Rescue theory alongside the drug companies. Some of the partners of the drug companies very well might have reason for concern, but a less obvious party implicated is the U.S. federal government. Much in the same way that the actions of the FDA were called into question in the *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach* case, the PTO’s actions of granting

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156 *See supra* Part II.A.
157 *See* Restatement (Second) of Torts § 326 (1965).
158 *See supra* paragraph accompanying notes 96–97.
159 State governments will usually not be implicated by the Prevented Rescue theory because the patent system is a federal creation and patent law is subject to exclusive federal jurisdiction. 28 U.S.C. § 1338(a) (2006).
160 495 F.3d 695 (D.C. Cir. 2007).
carte blanche patent rights on essential medicines might be called into question. Nonetheless, it is likely that the government has unique defenses available to it that did not apply to the drug companies. Exploring these defenses is beyond the scope of this Article but is worth considering going forward.

**CONCLUSION**

In a first world country where residents go without the drugs they need every year, something must be done. This Article considered one solution for the poor: sue the companies that vigorously enforce their patents and sell their drugs at such high prices that some Americans are forced to go without the medicine they need. One unique aspect to the argument is that it does not demand any positive action from the drug companies. Instead, all that the tort claim requests is that drug companies refrain from preventing others who attempt to save those in need.

The theory concerning prevented rescues was in good shape at the start. A prima facie case for liability was made and the only generally applicable defense could not withstand critique. Nonetheless, the drug companies prevailed on preemption. Federal patent law specifically grants the drug companies the authority to prevent rescues, even though tort law would have otherwise supported a finding of liability.

Despite a failed state tort claim, all hope is not lost. The poor have two possibilities of hope. First, state tort law is an important tool in determining what constitutes a fundamental right protected by substantive due process. By demonstrating that the drug companies would be liable under state tort law if it were not for preemption, this Article supports a finding of a fundamental right that overrides statutory patent law. Second, the applicability of state tort

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161 See *id.; 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).

162 It is worth noting that the way in which the Prevented Rescue claim was preempted remains important when considering due process. It is likely that a due process claim would fail if the conflicting federal law was found in
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 Article. Creating an exception modeled off of the concerns raised in this Article would increase access to essential medication without noticeably impacting the incentives to further create such medicines.

the Constitution. As was explained in this Article, though, the prevented rescue theory conflicts with a federal statute, not the text of the Constitution. Therefore, the Due Process clause claim remains untouched, despite the existence of conflicting federal patent law.