NEW MEXICO LAW REVIEW

Volume 40
Issue 3 *Summer*

Summer 2010

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Loren Foy

THE LEARNED INTERMEDIARY DOCTRINE IN NEW MEXICO: AN UNCERTAIN FUTURE

LOREN FOY*

INTRODUCTION

The tragedy giving rise to the 2008 Federal District Court of New Mexico case, *Rimbert v. Eli Lilly & Co.*, first began when, at the age of sixty-eight, Gilbert Rimbert's wife of forty-two years, Olivia, informed him that she wanted a divorce.[1] After Gilbert received this unsettling news, Gilbert developed feelings of despondence and depression and consulted his primary care physician, Dr. Hochstadt, for help.[2]

Gilbert first met with Dr. Hochstadt regarding his depression on August 18, 2003, at which time Dr. Hochstadt evaluated the severity of Gilbert's symptoms and concluded that Gilbert was suffering from moderate depression.[3] Based on this conclusion, Dr. Hochstadt prescribed Gilbert with a twenty milligram daily dose of Fluoxetine, the generic equivalent of Prozac.[4] Dr. Hochstadt then cautioned Gilbert regarding the increased risk of suicidality associated with the use of SSRIs[5] and requested that Gilbert return for a follow-up visit in three to four weeks.[6]

When Gilbert returned for his follow-up appointment, he reported that he had not noticed any dramatic improvements in his overall mood.[7] Based on this report, Dr. Hochstadt increased Gilbert's daily dose of Fluoxetine from twenty milligrams to forty milligrams, and again cautioned Gilbert to contact his office if he experienced any thoughts of suicide or worsening depression.[8] Dr. Hochstadt then instructed Gilbert that he wanted to see him back in his office for a follow-up appointment in two months.[9]

Gilbert never made that appointment.

On the morning of September 25, 2003, Gilbert shot and killed his wife Olivia, the family dog, and himself.[10] When the police arrived at the Rimbert's home, they found Gilbert seated at the kitchen table next to a bottle marked "Prozac."[11] The toxicological examination indicated that at the time of the shooting Gilbert had Fluoxetine in his system.[12]

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* Loren Foy, University of New Mexico School of Law, J.D. Candidate 2011.

1. CIV 06-0874, 2009 U.S. Dist. LEXIS 68851, at *3–4 (D.N.M. July 21, 2009).

2. Rimbert v. Eli Lilly & Co., 577 F. Supp. 2d 1174, 1179 (D.N.M. 2008) (predicting the New Mexico Supreme Court would reject the learned intermediary doctrine, the court granted in part and denied in part Eli Lilly's Motion for Summary Judgment), *modified*, No. CIV 06-0874, slip op. (D.N.M. Nov. 16, 2009) (denying Rimbert's Motion for a New Scheduling Order and granting Eli Lilly's Motion for Summary Judgment Based on Lack of Admissible Expert Testimony), *appeal docketed*, No. 09-2307 (10th Cir. Dec. 15, 2009).

3. *Id.*

4. *Id.*

5. *Id.* at 1180. For information about selective serotonin reuptake inhibitors (SSRIs), a class of antidepressants used to treat depression, see Alexandre Y. Dombrovski & Richard H. Lindner, *Recognizing and Dealing with Depression*, 32 PENN. LAW. 18, 24 (2010).

6. *Eli Lilly & Co.*, 2009 U.S. Dist. LEXIS 68851, at *5.

7. *Id.*

8. *Id.* at *6.

9. *Id.*

10. *Id.* at *7.

11. Rimbert v. Eli Lilly & Co., 577 F. Supp. 2d 1174, 1183 (D.N.M. 2008) (noting that the bottle found at the scene was labeled "Prozac" but had no other identifying information linking the bottle to Gilbert).

12. *Id.*

Gilbert's son, Mark Rimbert, filed "a products liability, personal injury, and wrongful death suit against Eli Lilly, the [manufacturer] of Prozac," alleging that, had Eli Lilly provided Gilbert with an adequate warning, the three deaths could have been avoided.[13]

Eli Lilly responded by asserting the learned intermediary doctrine as an affirmative defense.[14] The learned intermediary doctrine is an exception to the doctrine of strict products liability and requires drug manufacturers to warn the prescribing physicians, instead of the ultimate consumers, of the possible dangers posed by the use of a particular drug.[15] Thus, under the learned intermediary doctrine a manufacturer is able to insulate itself from liability in a failure-to-warn claim, so long as it provides the physician with an adequate warning.[16]

Although New Mexico has never expressly adopted the learned intermediary doctrine by name, the essence of the doctrine has been consistently applied by the New Mexico Court of Appeals for over forty years when addressing failure-to-warn claims in the prescription drug context. However, in the 2008 case *Rimbert v. Eli Lilly & Co.*, the Federal District Court of New Mexico determined that, despite the apparent adoption of the doctrine by multiple New Mexico Court of Appeals' decisions, the learned intermediary doctrine was "fundamentally inconsistent" with New Mexico's strict liability jurisprudence.[17] It is based on this conclusion that the court predicted that, if presented with the issue today, the New Mexico Supreme Court would reject the doctrine in its entirety.[18]

This note evaluates the soundness of the *Rimbert* decision, with particular emphasis on Judge Browning's conclusion that the validity of the learned intermediary doctrine did not warrant certification to the New Mexico Supreme Court. In Part I, this note provides a general overview of the learned intermediary doctrine and examines the history of the learned intermediary doctrine within New Mexico's caselaw. Part II evaluates the *Rimbert* court's prediction that, if presented with the issue today, the New Mexico Supreme Court would reject the learned

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13. *Eli Lilly & Co.*, 2009 U.S. Dist. LEXIS 68851, at *8.

14. *Rimbert*, 577 F. Supp. 2d at 1175.

15. 63A AM. JUR. 2D *Products Liability* § 1097 (2010). Strict products liability imposes a duty on the manufacturer of a product to directly warn consumers of the risks associated with the use of its product. 72A C.J.S. *Products Liability* § 7 (2004). The purpose of the doctrine is "to ensure that the costs of injuries resulting from defective products are borne by manufacturers and sellers as a cost of doing business, rather than by injured persons." *Id.*

16. *See* Richards v. Upjohn Co., 95 N.M. 675, 678–69, 625 P.2d 1192, 1195–96 (Ct. App. 1980). The court in *Upjohn* provided five criteria that courts must examine when determining whether a manufacturer's warning is adequate: (1) the scope of danger within the warning; (2) whether the warning reasonably communicates the extent or seriousness of the harm that could result from a misuse of the drug; (3) whether the physical aspects of the warning itself are such that a reasonably prudent person would be put on notice; (4) whether the warning indicates the consequences that might result from a failure to follow the warning; (5) whether the means used to convey the warning were adequate. *Id.* at 679; 625 P.2d at 1196; *see also* 63A AM. JUR. 2D *Products Liability* § 1097 (2010).

17. 577 F. Supp. 2d at 1215. The *Rimbert* court relied on the New Mexico Supreme Court opinion, *Brooks v. Beech Aircraft*, which held:

> Although the manufacturer has provided a valuable service by supplying the public with a product that it wants or needs, it is more fair that the cost of an unreasonable risk of harm lie with the product and its possibly innocent manufacturer than it is to visit the entire loss upon the often unsuspecting consumer who has relied upon the expertise of the manufacturer when selecting the injury-producing product.

Id. at 1201 (citing Brooks v. Beech Aircraft, 120 N.M. 372, 375–76, 902 P.2d 54, 57–58 (1995)).

18. *See id.* at 1215.

intermediary doctrine. Part III reviews the *Rimbert* court's interpretation of New Mexico's certification rules. Finally, Part IV examines the procedural and substantive implications of the *Rimbert* decision and suggests that, when addressing failure-to-warn claims in the future, the New Mexico courts should adopt a case-by-case approach in determining whether a manufacturer should benefit from the learned intermediary doctrine.

I. THE LEARNED INTERMEDIARY DOCTRINE

The learned intermediary doctrine permits a manufacturer to discharge its duty to warn of the risks associated with the use of its product and to insulate itself from liability in a failure-to-warn claim by providing a physician with an adequate warning.[19] Therefore, under the doctrine, it is the physician, not the manufacturer, that must inform his or her patients of the risks associated with the use of any prescribed medication.[20] In a failure-to-warn claim, this typically results in the patient only being able to recover damages from the physician, as it is the physician, not the manufacturer, who bears the burden of warning the patient of the risks associated with the use of a particular medication.[21]

A. History of the Learned Intermediary Doctrine

The learned intermediary doctrine was first conceptualized by the New York Supreme Court in its 1948 case, *Marcus v. Specific Pharmaceuticals*.[22] In that case, the plaintiff alleged that the manufacturer failed to provide consumers with adequate information regarding the risks associated with the manufacturer's medication.[23] In addressing the plaintiff's claim, the New York Supreme Court distinguished between prescription and non-prescription medications and held that the plaintiff may have had a viable failure-to-warn claim had the medication in question been available to the public generally.[24] However, because the plaintiff's claim involved a medication that was only available with a prescription and because the manufacturer made no representations regarding the product to the consumer, the court determined that there was no basis on which to hold the manufacturer liable.[25]

Shortly thereafter, the distinction between prescription and non-prescription drugs was codified with Congress's passing of the Durham-Humphrey Amendment of 1951.[26] The purpose of the Amendment was to prevent consumers from engag-

19. *Richards*, 95 N.M. at 679, 625 P.2d at 1196; *see also* text accompanying notes 17–19.

20. 63A AM. JUR. 2D *Products Liability* § 1097 (2010).

21. *Id.* A manufacturer may be held directly liable to a patient if the manufacturer of the medication failed to provide the prescribing physician with an adequate warning. *Id.* In order for a plaintiff to recover against the manufacturer in a failure-to-warn claim, the learned intermediary doctrine requires that the patient establish: (1) that the manufacturer failed to provide the physician with an adequate warning regarding the risks associated with the use of its product; (2) that said risk was not otherwise known to the physician; (3) that the manufacturer's failure-to-warn was both the cause in fact and the proximate cause of the plaintiff's injury; and (4) that but for the inadequate warning the physician would not have prescribed the product. *Id.*

22. 77 N.Y.S.2d 508, 509 (N.Y. Sup. Ct. 1948).

23. *See id.*

24. *Id.*

25. *Id.* at 509–10.

26. Durham Humphrey Amendment of 1951, Pub. L. No. 82-215, 65 Stat. 648 (1951) (codified at 21 U.S.C. § 353 (2000)); *see also* Susan Poser, *Unlabeled Drug Samples and the Learned Intermediary: The Case*

ing in "self-diagnosis and self-administration of sophisticated and potentially harmful drugs."[27] The Amendment classified prescription drugs as being those medications that are not safe for use except under the direct supervision of a medical practitioner, and exempted manufacturers of prescription medications from complying with the labeling requirements imposed on manufacturers of non-prescription medications.[28]

By the 1960s, the concept behind the physician acting as a "learned intermediary" between the manufacturer and the patient had been widely adopted; however, the phrase "learned intermediary doctrine," was not coined until the 1967 opinion, *Sterling Drug, Inc. v. Cornish*.[29] In *Sterling*, the Eighth Circuit Court of Appeals addressed a failure-to-warn claim in the prescription drug context by examining the extent of a prescription drug manufacturer's duty to warn.[30] In so doing, the court held that a manufacturer's duty to warn of the risks associated with the use of its product extends only to the physician, as the physician functions as a "learned intermediary" between the pharmaceutical company and the patient.[31]

B. History of the Learned Intermediary Doctrine in New Mexico

Although the rationale behind the learned intermediary doctrine emerged in 1948, the New Mexico Court of Appeals did not address the concept of the learned intermediary doctrine until its 1974 case, *Hines v. St. Joseph's Hospital*. There, the plaintiff filed strict liability and negligence claims against St. Joseph's Hospital, asserting that she had contracted serum hepatitis when the hospital's blood bank, Blood Services, used blood containing the serum hepatitis virus during the course of her blood transfusions at St. Joseph's Hospital.[32] Hines further asserted that Blood Services had failed to warn her that there was a risk of contracting hepatitis associated with blood transfusions.[33] The court determined that the blood used for blood transfusions was to be classified as a prescription drug and noted that, although New Mexico had adopted the doctrine of strict liability, prescription drugs were unavoidably unsafe products and fell within an exception to New Mexico's strict liability jurisprudence.[34] On this basis, the court held that the manufacturers and sellers of prescription drugs are not strictly liable for the resulting harm if the

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for Drug Company Liability without Preemption, 62 FOOD & DRUG L.J. 653, 656–57 (2007); Charles J. Walsh et al., *The Learned Intermediary Doctrine: The Correct Prescription for Drug Labeling*, 48 RUTGERS L. REV. 821, 827 (1996).

27. Walsh et al., *supra* note 26, at 827.

28. Poser, *supra* note 26, at 658; *see also* Walsh et al., *supra* note 26, at 827.

29. 370 F.2d 82, 85 (8th Cir. 1965) ("The sole issue [in a pharmaceutical failure-to-warn claim is] whether [the manufacturer] negligently failed to make reasonable efforts to warn [the patient's] doctors. If [the manufacturer] did so fail, it is liable regardless of anything the doctors may or may not have done. If it did not so fail, then it is not liable for the [patient's] injury.").

30. *Id.*

31. *Id.*

32. Hines v. St. Joseph's Hosp., 86 N.M. 763, 764, 527 P.2d 1075,1076 (Ct. App. 1974).

33. *Id.* at 765, 527 P.2d at 1077.

34. *Id.* at 764–65, 527 P.2d at 1076–77 (stating that the unavoidably unsafe product exception to the general strict liability doctrine recognizes that although there are situations in which certain products cannot be made safe for their intended or ordinary use, such products are not to be deemed defective or unreasonably dangerous due to the potential benefit such products provide).

drug has been properly prepared and has been distributed with appropriate warnings.[35]

In examining the public policy basis for preventing liability from attaching to sellers and manufacturers of prescription drugs, the court determined that because sellers and manufacturers of prescription drugs have provided the public with a useful product, they should not be held strictly liable for the unintended consequences associated with the use of that product.[36] In reaching its conclusion, the court employed the learned intermediary doctrine in its analysis, and held that Blood Services's duty to warn of the dangers of using the blood was to the attending physician, not the patient.[37] The New Mexico Court of Appeals, therefore, refused to recognize Hines' failure-to-warn claim and determined that Hines was unable to recover from either St. Joseph's Hospital or Blood Services as neither party had a duty to warn Hines of the risks associated with use of the blood.[38]

Shortly thereafter, the New Mexico Court of Appeals shed more light on a manufacturer's liability in the prescription drug context. In *Richards v. Upjohn Co.*, the court held that "a drug manufacturer has a duty to warn the medical profession of the dangers [associated with the use] of its drugs [that] it knew or should have known to exist."[39] If a manufacturer is determined to have breached that duty, then a manufacturer can be held liable to a patient for the injuries stemming from that breach.[40] Based on this rationale, the court held that a manufacturer cannot be held directly liable to a patient for harm resulting from a physician's failure-to-warn so long as the manufacturer provided the doctor with an adequate warning.[41]

The New Mexico Court of Appeals again employed the reasoning behind the learned intermediary doctrine in the 1983 opinion, *Perfetti v. McGhan Medical*, where it addressed whether the manufacturer's duty to warn was owed to the plaintiff or to the physician.[42] Again, the court concluded that when "[a] manufacturer of a product . . . which is obtainable only through the services of a physician" provides an adequate warning to the physician, it "need not warn the patient as well."[43] This holding reaffirmed the principle in *Richards*, by reiterating that once the manufacturer has provided the physician with an adequate warning, it is the physician who has the duty to warn the patient of the risks associated with the medication as the physician is better able to consider the dangerous "propensities of the product and the susceptibilities of the patient."[44] Thus, by the mid-1980s it was clear that, although never explicitly addressed by name, the learned intermediary doctrine was fully entrenched within New Mexico's jurisprudence.

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35. *Id.* at 765, 527 P.2d at 1077.
36. *See id.*
37. *See id.* The court then determined that Blood Services had fulfilled its duty to warn by placing a warning directly on the container of blood and by "constantly distribut[ing] an Official Circular of Instructions for Use to the hospital staff." *Id.* (internal quotation marks omitted).
38. *See id.*
39. 95 N.M. 675, 678, 625 P.2d 1192, 1195 (Ct. App. 1980) (citations omitted).
40. *Id.* at 678–79, 625 P.2d at 1195–96.
41. *See id.* at 679–81, 625 P.2d at 1196–98. For a discussion of when a manufacturer may be held directly liable to a patient, see *supra* note 21.
42. 99 N.M. 645, 650, 662 P.2d 646, 649 (Ct. App. 1983).
43. *Id.* (internal quotation marks and citations omitted).
44. *Id.* at 658, 662 P.2d at 657.

II. REJECTING THE LEARNED INTERMEDIARY DOCTRINE: *RIMBERT V. ELI LILLY & CO.*

At the time the Federal District Court of New Mexico rendered its decision in *Rimbert v. Eli Lilly & Co.*, the New Mexico Court of Appeals had not examined the status of the learned intermediary doctrine since its 1984 opinion, *Serna v. Roche Laboratories*.[45] Thus, in *Rimbert,* when Eli Lilly pled the learned intermediary doctrine as an affirmative defense to Mark Rimbert's claim, the Federal District Court of New Mexico had to examine an issue of New Mexico state law that had not been addressed in over twenty years.[46]

In an effort to convince the *Rimbert* court that the learned intermediary doctrine was the law in New Mexico, Eli Lilly directed the court's attention to *Serna v. Roche Laboratories*.[47] In *Serna*, the New Mexico Court of Appeals employed the language of the learned intermediary doctrine and held, "[w]here the product is a prescription drug, the manufacturer's duty to warn is fulfilled if it warns the physician, not the patient."[48] Eli Lilly asserted that, pursuant to *Serna,* it had no legal duty to directly warn Gilbert of the risks associated with the use of its product.[49] Eli Lilly, therefore, asserted that pursuant to the learned intermediary doctrine, it had fulfilled its legal duty to warn by providing warnings in both the Prozac package insert and in the *Physician's Desk Reference*.[50]

Rimbert, on the other hand, contended that Eli Lilly's reliance on the learned intermediary doctrine was misplaced, as *Serna*, the principal case on which Eli Lilly relied, never mentioned the learned intermediary doctrine by name and therefore failed to demonstrate that New Mexico had explicitly adopted the learned intermediary doctrine.[51] Rimbert further asserted that because the law surrounding the learned intermediary doctrine was unclear, the court must either render a prediction as to whether the New Mexico Supreme Court would reject the learned intermediary doctrine, or certify the question regarding the learned intermediary doctrine to the New Mexico Supreme Court.[52] Rimbert contended that by certifying the issue to the New Mexico Supreme Court, New Mexico would finally have a "definitive authoritative answer" as to whether the learned intermediary doctrine was currently the law in New Mexico.[53] Eli Lilly opposed the motion for certification and again asserted that the opinions from the New Mexico Court of

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45. 101 N.M. 522, 684 P.2d 1187 (Ct. App. 1984). The New Mexico Court of Appeals again stated its position that when the product in question "is a prescription drug, the manufacturer's duty to warn is fulfilled if it warns the physician, not the patient." *Id.* at 527, 684 P.2d at 1189 (citation omitted).

46. Defendant Eli Lilly & Co.'s Answer to Plaintiff's Complaint at 14, Rimbert v. Eli Lilly & Co., 577 F. Supp. 2d 1174 (D.N.M. 2008) (No. CIV-06-0874), 2006 WL 6069043; *Rimbert*, 577 F. Supp. 2d 1174, 1175.

47. *Rimbert*, 577 F. Supp. 2d at 1186 (referencing *Serna*, 101 N.M. 522, 684 P.2d 1187; Perfetti v. McGhan Med., 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983); Hines v. St. Joseph's Hosp., 86 N.M. 763, 527 P.2d 1075 (Ct. App. 1974)).

48. *Serna*, 101 N.M. at 524, 684 P.2d at 1189.

49. *See id.*

50. Defendant Eli Lilly & Co.'s Memorandum in Support of its Motion for Summary Judgment on all Claims, *Rimbert*, 577 F. Supp. 2d 1174 (No. CIV-06-0874), 2008 WL 4487043.

51. Plaintiff's Response Memorandum in Opposition to Defendant's Motion for Summary Judgment on all Claims at 20, *Rimbert*, 577 F. Supp. 2d 1174 (No. CIV-06-0874), 2008 WL 4487044.

52. *See Rimbert*, 577 F. Supp. 2d at 1186.

53. *Id.*

Appeals demonstrated New Mexico's acceptance of the learned intermediary doctrine.[54]

The court denied Rimbert's motion for certification.[55] In so doing, the court held that that under the doctrine of *Erie R.R. Co. v. Tompkins*, when a federal court's jurisdiction rests on diversity of citizenship, the federal court's task is not to substitute its judgment for the state's supreme court, but is rather to simply ascertain and apply the state's law.[56]

> [When attempting to ascertain and apply the state's law] the court must follow the most recent decision of the state's highest court. . . . Where no controlling state decision exists, the federal court must attempt to predict what the state's highest court would do [if confronted with the issue]. . . . In doing so, [the court] may seek guidance from decisions rendered by lower courts in the relevant state, . . . appellate decisions in other states, . . . and the general weight and trend of authority in the relevant area of law. . . . *Ultimately, however, the Court's task is to predict what the state supreme court would do*.[57]

The *Rimbert* court, therefore, determined that its primary task was to "predict what the state supreme court would do" if presented with the issue today.[58]

In an effort to predict what the New Mexico Supreme Court would do if confronted with the question regarding New Mexico's adoption of the learned intermediary doctrine, the court examined the history of the learned intermediary doctrine within the state.[59] The court recognized that the New Mexico Court of Appeals had employed the learned intermediary doctrine in the 1970s and 1980s, but concluded there was "convincing evidence" to suggest that if presented with the issue today, the New Mexico Supreme Court would decline to follow the New Mexico Court of Appeals precedent and would reject the learned intermediary doctrine.[60]

This holding was based, in part, on the *Rimbert* court's conclusion that the learned intermediary doctrine was "fundamentally inconsistent with [the] strict-liability jurisprudence" expressed in the New Mexico Supreme Court's 1995 case, *Brooks v. Beech Aircraft*.[61] In *Brooks*, the New Mexico Supreme Court explained

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54. Defendant Eli Lilly & Co.'s Reply in Support of Its Motion for Summary Judgment on All Claims at 9–10, *Rimbert*, 577 F. Supp. 2d 1174 (No. CIV-06-0874), 2008 WL 4329182.

55. *Rimbert*, 577 F. Supp. 2d at 1187 (stating that "under such circumstances, certification of a question concerning New Mexico's recognition of the learned intermediary doctrine would not be justified or appropriate under NMRA [sic] Rule 12-607(A)(1)"); *see also id.* at 1189 ("Pursuant to N.M.S.A. 1978, § 39-7-4, the Supreme Court of New Mexico may answer questions [certified by the federal district court] if they involve propositions of New Mexico law that may be determinative of the matter before the certifying court and there are no controlling precedents from New Mexico appellate courts.").

56. *Rimbert*, 577 F. Supp. 2d at 1189 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), and Stoner v. N. Y. Life Ins. Co., 311 U.S. 464, 467 (1940)).

57. *Id.* at 1188 (emphasis in original) (citations omitted).

58. *Id.* at 1190 (citing Wade v. Emcasco Ins. Co., 483 F.3d 657, 665–66 (10th Cir. 2007)).

59. *Id.* at 1214.

60. *Id.* For the author's summary of the doctrine in New Mexico, see discussion *supra* Part I.B. For a discussion of the Rimbert court's rejection of the justifications offered in support of the learned intermediary doctrine, see *infra* text accompanying notes 68–84.

61. *Rimbert*, 577 F. Supp. 2d. at 1215.

the rationale behind its decision to adopt a strict products liability approach when it held:

> [A]lthough [a] manufacturer has provided a valuable service by supplying the public with a product that it wants or needs, it is more fair that the cost of an unreasonable risk of harm lie with the product . . . manufacturer than it is to visit the entire loss upon the often unsuspecting consumer who has relied upon the expertise of the manufacturer when selecting the injury-producing product.[62]

The court interpreted *Brooks* as an indication of the New Mexico Supreme Court's desire to ensure that the risk of loss for injuries resulting from defective products is borne by the suppliers, as well as a desire to ensure that "plaintiffs [who are] injured by . . . unreasonably dangerous product[s] are compensated for their injuries."[63] This interpretation led to the court's conclusion that the New Mexico Supreme Court would likely apply the *Brooks* products liability rationale to the prescription drug context, as by allowing "drug manufacturers to shift the burden of [a] defective product to physicians would undermine the Supreme Court of New Mexico's conclusion that the burden should be on the manufacturer" upon whose expertise the consumer and physician have relied.[64] The court, therefore, read *Brooks* as having foreshadowed the rejection of the learned intermediary doctrine.[65]

After surmising that the New Mexico Supreme Court would likely reject the learned intermediary doctrine, the court directed its attention to the West Virginia Supreme Court of Appeals case, *State ex rel. Johnson & Johnson Corp. v. Karl*, in which the court examined the primary justifications for adopting the learned intermediary doctrine and determined them to be "largely outdated and unpersuasive."[66]

The *Rimbert* court then employed the same justifications as applied in *Johnson* in an attempt to demonstrate that the New Mexico Supreme Court would hold the learned intermediary doctrine to be "fundamentally inconsistent with [New Mexico's] strict liability jurisprudence."[67]

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62. *Id.* at 1216 (quoting Brooks v. Beech Aircraft, 120 N.M. 372, 375–76, 902 P.2d 54, 57–58 (1995)).
63. *Id.* at 1215.
64. *Id.* at 1217.
65. *Id.* at 1225.
66. *Id.* at 1217 (quoting State *ex rel.* Johnson & Johnson Corp. v. Karl, 647 S.E.2d 899, 906 (W. Va. 2007)). For further discussion of the *Johnson* case, see Victor E. Schwartz et al., *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 W. VA. L. REV. 757, 781 (2009) (noting that West Virginia is the only state to have formally rejected the learned intermediary doctrine).
67. *Rimbert*, 577 F. Supp. 2d at 1215–21; The *Johnson* court examined the following five justifications for having the duty to warn fall on the physician rather than on the manufacturer:

> (1) the difficulty manufacturers would encounter in attempting to provide warnings to the ultimate users of prescription drugs; (2) patients' reliance on their treating physicians' judgment in selecting appropriate prescription drugs; (3) the fact that it is the physicians who exercise their professional judgment in selecting appropriate drugs; (4) the belief that physicians are in the best position to provide appropriate warnings to their patients; and (5) the concern that direct warnings to ultimate users would interfere with doctor/patient relationships.

Johnson, 647 S.E.2d at 905. The *Rimbert* court also cited *Brooks v. Beech Aircraft*, 120 N.M. 372, 902 P.2d 54 (1995), to support its position that: "[a]llowing drug manufacturers to shift the burden of defective product to physicians would undermine the Supreme Court of New Mexico's conclusion that the burden should be on the

In applying the justifications in *Johnson*, the *Rimbert* court first concluded that the potential difficulty in providing warnings to the ultimate consumer was not a legitimate concern that would result in the New Mexico Supreme Court adopting the learned intermediary doctrine.[68] The court pointed to direct-to-consumer advertising which allows the manufacturer to communicate with the ultimate user as the basis for this rejection.[69] In so doing, the court concluded that direct-to-consumer advertising allows for manufacturers to communicate with consumers for the purpose of increasing "their market share by making their product well known to both patients and physicians," and that such communication "generates a corresponding duty" that requires manufacturers to directly warn the ultimate users of potential defects or dangers associated with their products.[70]

Moreover, the *Rimbert* court found that a patient's reliance on a physician's judgment in selecting an appropriate prescription medication had no bearing on whether the patient should be provided with an adequate warning from the drug manufacturer.[71] The *Rimbert* court reasoned that because a drug does not react exactly the same way in all individuals, physicians must rely on their patients to inform them as to how they are reacting to the prescribed medication.[72] Therefore, the court concluded that having manufacturers provide warnings directly to the consumer would result in more "informed consumer[s who would be more] likely to ask the physician more questions . . . [which] may [actually] increase [patients'] reliance [on physicians]."[73] Based on this line of reasoning, the *Rimbert* court concluded that the physician-patient relationship would not be adversely affected, but rather may be improved, by requiring that manufacturers provide warnings to both the consumers and the physicians.[74]

The court then addressed the assumption that because physicians exercise their professional judgment in the selection of the patients' medications, they automatically assume the role of a "learned intermediary," thus meriting the application of the doctrine. In its evaluation of this justification, the *Rimbert* court held that a "refusal to adopt the learned intermediary doctrine does not impact adversely the exercise of [a physician's] professional judgment in any way."[75] The *Rimbert* court determined that a "better informed [patient would] likely . . . help, not hinder, the doctors' exercise of their professional judgment," because physicians would likely be forced to better articulate and justify their prescribing choices.[76]

The court then addressed the assumption that the physician, not the manufacturer, is the party that is best equipped to warn a patient regarding the possible risks associated with a medication.[77] Like the *Johnson* court, the *Rimbert* court was skeptical as to whether physicians are in the best position to provide warnings to

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manufacturer, upon whose 'expertise' an 'often unsuspected consumer' has relied in 'selecting the injury-producing product.'" *Rimbert*, 577 F. Supp. 2d at 1217.

68. *Id.* at 1218–19.
69. *Id.* at 1218.
70. *Id.* at 1219 (citations omitted).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 1220.

their patients, as it is the manufacturers that are able to access the "research and developmental history" of a particular medication.[78] The court further noted that because managed care has reduced the amount of time that physicians are able to spend with each patient, physicians have less time to inform patients of the risks and benefits of a drug.[79] Ultimately, the court concluded that because the "role of the private physician [has become] one of passive reliance on the manufacturer," physicians should not bear the sole responsibility of providing patients with adequate warnings.[80]

In concluding its analysis of the *Johnson* factors, the *Rimbert* court rejected the assertion that the doctor-patient relationship would be jeopardized by having a manufacturer directly warn the ultimate consumer. In so doing, the court reasoned that by providing patients with more information, patients would be better informed, and such would result in more meaningful doctor-patient relationships, as patients would be able to ask more informed questions.[81] The *Rimbert* court then concluded that the New Mexico Supreme Court would not adopt the learned intermediary doctrine based on the "speculative fear" that such communications would damage doctor-patient relationships.[82]

After examining the possible justifications for adopting the learned intermediary doctrine, the *Rimbert* court concluded that a patient's reliance on a physician as a "learned intermediary" is not the same as it was in the 1970s and 1980s.[83] Thus, the *Rimbert* court predicted that, based on the "erosion of the justifications for adoption" and New Mexico's strict liability jurisprudence, there was convincing evidence to suggest that the New Mexico Supreme Court would reject the learned intermediary doctrine.[84]

III. *RIMBERT*'S INTERPRETATION OF NEW MEXICO'S CERTIFICATION PROCEDURES

As Part I.B of this note demonstrated, a straightforward reading of the New Mexico Court of Appeals' precedent indicates that at the time that the Federal District Court of New Mexico laid down its decision in *Rimbert v. Eli Lilly & Co.*, the substance of the learned intermediary doctrine was entrenched within New Mexico's jurisprudence. This raises the question as to how, in light of the New Mexico Court of Appeals' precedent, the *Rimbert* court could have concluded that the New Mexico Supreme Court would reject the learned intermediary doctrine and hold the doctrine to be outdated. In attempting to understand the court's prediction in *Rimbert*, it is important to first understand the basis of the court's jurisdiction and why it departed from the New Mexico Court of Appeals' precedent.

Because in *Rimbert* the court's jurisdiction rested solely on diversity of citizenship and involved a state law issue,[85] the court was required to abide by the Erie

78. *Id.*
79. *Id.*
80. *Id.* at 1221.
81. *Id.*
82. *Id.*
83. *See id.* at 1218.
84. *Id.*
85. *See generally id.*

Doctrine.[86] The Erie Doctrine provides that when a federal court's jurisdiction rests solely on diversity of citizenship, the "federal court's task is not to reach its own [conclusion] regarding the substance of the common law, but [is] simply to ascertain and apply the state['s] law" to the issue presented.[87] This is not such a difficult feat when the law governing the issue before the court is clearly settled, as then the court's task is merely to ascertain and apply the controlling state law to the issue before it.[88] When, however, a state's highest court has yet to render a decision on the particular issue before a federal court, a federal court is faced with the much more difficult task of attempting to ascertain the current status of state law. In attempting to decipher the status of a particular state law, a federal court may look to decisions rendered by a state's intermediate court for guidance.[89]

In looking to New Mexico's intermediate court for guidance, it would appear that the *Rimbert* court could easily have held the learned intermediary doctrine to be the law in New Mexico and to have issued a decision in accordance therewith.[90] Had the *Rimbert* court reached such a conclusion, the court's decision would have allowed for the consistent application of New Mexico law within both branches of the judiciary. Moreover, such a decision would have allowed for manufacturers defending failure-to-warn claims in state and federal court to reasonably expect to benefit from the learned intermediary doctrine.

Instead, however, since there were no controlling Supreme Court of New Mexico cases on the issue, the *Rimbert* court appears to have concluded the law within New Mexico to be unsettled.[91] Based on this conclusion, the Erie Doctrine provided the court with the option of engaging in abstention,[92] certification,[93] or pre-

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86. *See* 28 U.S.C. § 1332 (2006); *see also* Sheldon R. Shapiro, Annotation, *Federal or State Law as Governing Federal Court's Authority in Diversity Action after* Erie R.R. Co. v. Tompkins*, to Take Judicial Notice of Law of Sister State or Foreign Country*, 7 A.L.R. FED. 921, § 2(a) (1971) (discussing the historical evolution of the Erie Doctrine).

87. *Rimbert*, 577 F. Supp. 2d at 1188 (quoting Wade v. Emcasco Ins. Co., 483 F.3d 657, 665–66 (10th Cir. 2007)). "Substantive rules of decision . . . must come from the states." Jed I. Bergman, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 973 (1996).

88. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1467 (1997).

89. *Rimbert*, 577 F. Supp. 2d at 1188.

90. *See supra* Part I.B (discussing New Mexico Court of Appeals cases addressing the learned intermediary doctrine).

91. *Rimbert*, 577 F. Supp. 2d at 1214 ("A lack of appellate decisions from New Mexico is not the situation here. The problem is that there is no controlling Supreme Court of New Mexico decision."). State law is indeterminate when: (1) a particular legal question allows for more than one reasonable answer; (2) when a federal court is faced with a question not addressed by the state's highest court; (3) when the state's lower courts have not provided a clear answer; or (4) when the decisions governing the issue "no longer represent[ ] the way in which the court would resolve the question today." Clark, *supra* note 88, at 1468–69. "When state law fails to provide a determinate answer to a particular legal question," the role the federal court is supposed to play in the application of the law is less clear and much more difficult. *Id.*

92. *See* Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943) (asserting that abstention is only appropriate in cases involving exceptional circumstances); Bergman, *supra* note 87, at 998 (defining abstention as a process in which a federal court can abstain from ascertaining or predicting the state law, therefore, leaving the issue to be addressed by the state's highest court); Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847, 862 (1996) (discussing three categories of abstention).

93. *See* Bergman, *supra* note 87, at 1000 (stating that certification allows for the state's highest court to clarify the law concerning the issue before the federal court and "avoids the difficulties" created by predictive decisions). Certification is similar to abstention in that the federal court defers the issue to the state's highest court; however, with certification the state's highest court provides the basis upon which the federal court is to

diction[94] when resolving the ambiguous state law issue.[95] Although the decision regarding which course of action to take lies within the sole discretion of the court, the ability of a state's highest court to answer a certified question of state law is subject to a state's certification rules.[96]

Based on the procedures governing the certification process within New Mexico, the *Rimbert* court concluded that any attempt at certification would prove to be fruitless as the language of both the New Mexico's certification rule and statute prohibited the New Mexico Supreme Court from answering any issue certified by the federal court that involved an area of law to which New Mexico's appellate court had spoken.[97] Although the *Rimbert* court noted that it would have preferred to have obtained a definitive answer on the issue from the New Mexico Supreme Court, it concluded that, in light of the New Mexico Court of Appeals' decisions, New Mexico's certification process barred the New Mexico Supreme Court from immediately resolving this state law issue.[98] The *Rimbert* court then concluded that, despite the existence of the New Mexico Court of Appeals' decisions, the Erie Doctrine authorized it to depart from such decisions if it found "convincing evidence" that those decisions were not an adequate reflection of the state's law.[99]

Based on this interpretation of New Mexico's certification rules, the *Rimbert* court held that New Mexico's statute and rule, coupled with the Erie Doctrine, required that it deny Rimbert's motion for certification and that it "divine, as much as possible, what the Supreme Court of New Mexico would do" if presented with the issue.[100]

In engaging in its "Erie analysis," the *Rimbert* court inquired into whether the New Mexico Court of Appeals cases were a "good indication of how the Supreme Court of New Mexico would rule" if presented with the question today.[101] The court concluded that in light of New Mexico's strict liability jurisprudence and the

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reach a decision in the case. *See id.* The decision whether or not to certify the question to the state's highest court lies within the sound discretion of the federal court. *See* Lehman Bros. v. Shein, 416 U.S. 386, 391 (1974).

94. The predictive approach allows the federal court to render a decision based on its prediction of what the state's highest court would do if faced with the issue. *See* Clark, *supra* note 88, at 1495.

95. *See* Hanna v. Plumer, 380 U.S. 460, 467–68 (providing the purpose of the Erie Doctrine was to prevent forum-shopping and the "inequitable administration of the laws"). The decision regarding whether to engage in abstention, certification, or prediction is left to the sole discretion of the federal court. *See* Bergman, *supra* note 87, at 1000.

96. *See* Bergman, *supra* note 87, at 1000 n.193 (stating that a state court may decline to answer a certified question of state law).

97. Rimbert v. Eli Lilly & Co., 577 F. Supp. 2d 1174, 1189 (D.N.M. 2008) (considering NMSA 1978, Section 39-7-4 (1997) and Rule 12-607(A)(1)(a) NMRA). Rule 12-607 NMRA addresses the Supreme Court of New Mexico's ability to answer certified questions of state law and provides that the New Mexico Supreme Court may answer a certified question of state law when there is no controlling "appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals." Rule 12-607(A)(1)(a) NMRA.

98. *Rimbert*, 577 F. Supp. 2d at 1213–14. This interpretation rests on the assumption that the New Mexico Supreme Court is reluctant to examine issues on which its appellate courts have spoken, but that it is comfortable with a federal judge reaching his or her own conclusions about the status of a law in New Mexico. It is hard to imagine that the New Mexico Supreme Court would prefer to defer to a federal judge regarding an ambiguous issue of state law, rather than address the issue itself.

99. *Id.* at 1222 n. 5 (quoting Stoner v. N.Y. Life Ins. Co., 311 U.S. 464 (1940)).

100. *Id.* at 1214 (considering NMSA 1978, § 39-7-4 and Rule 12-607(A)(1)(a) NMRA).

101. *Id.*

outdated justifications offered in favor of the learned intermediary doctrine, the New Mexico Supreme Court would not adopt the learned intermediary doctrine.[102]

By departing from the New Mexico Court of Appeals' precedent, the *Rimbert* court's prediction created a state of ambiguity surrounding the status of the learned intermediary doctrine in New Mexico. After *Rimbert*, plaintiffs and defendants may be subjected to inconsistent judgments depending on the court in which a claim is filed. Moreover, the *Rimbert* court's departure from the New Mexico Court of Appeals' precedent has increased the chances that a plaintiff will engage in forum shopping when deciding where to file a claim. Thus, it is ironic that the Federal District Court of New Mexico's application of the Erie Doctrine has created the two problems which the Erie Doctrine was designed to protect against, forum shopping and inconsistent judgments.[103]

Therefore, in light of the New Mexico Court of Appeals decisions that were directly on point and New Mexico's rules governing certification, it appears that the *Rimbert* court failed to effectuate the purpose of the Erie Doctrine and erred in its interpretation of Rule 12-607(A)(1)(a) NMRA and NMSA 1978, Section 39-7-4 (1997), when it departed from the New Mexico Court of Appeals precedent and held the New Mexico Supreme Court would reject the learned intermediary doctrine.

IV. PROCEDURAL AND SUBSTANTIVE IMPLICATIONS OF *RIMBERT*

The implications stemming from the *Rimbert* court's decision on the future of the learned intermediary doctrine in New Mexico are yet to be seen as the *Rimbert* court's decision lacks the power to bind future cases brought in state or federal district court.[104] Thus, the current state of ambiguity surrounding the learned intermediary doctrine in New Mexico will remain present until the New Mexico Supreme Court issues a decision regarding whether the learned intermediary doctrine is the law in New Mexico. Moreover, as discussed next, the ambiguities surrounding the potential effect of the *Rimbert* decision and the future of the learned intermediary doctrine have created several important procedural and substantive issues.

A. Procedural Implications

The ambiguity surrounding the learned intermediary doctrine has presented patients who are looking to recover in failure-to-warn situations with a "crapshoot" when trying to decide in which forum they should file their claims. This crapshoot is a result of the fact that a plaintiff who files in state court will be subject to the New Mexico Court of Appeals' precedent and, therefore, the learned intermediary

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102. *Id.* at 1215–17 ("[T]he Supreme Court of New Mexico also expressed a specific 'judgment . . . that although the manufacturer has provided a valuable service by supplying the public with a product that it wants or needs, it is more fair that the cost of an unreasonable risk of harm lie with the product and its possibly innocent manufacturer than it is to visit the entire loss upon the often unsuspecting consumer who has relied upon the expertise of the manufacturer when selecting the injury-producing product.'") (quoting Brooks v. Beech Aircraft Corp., 120 N.M. 372, 375–76, 902 P.2d 54, 57–58 (1995)). For a discussion of the learned intermediary doctrine, see *supra* text accompanying notes 68–84.

103. *See supra* note 95.

104. For a discussion on the precedential value of predictive decisions, see Bergman, *supra* note 87, at 975 n. 29, 983 n. 74.

doctrine, while the patient who opts to file in federal court will find himself at the mercy of the Federal District Court of New Mexico's interpretation of the state certification procedures and potentially its "Erie predictions" regarding the status of the learned intermediary doctrine in New Mexico. Thus, even though the decision in *Rimbert* has no binding effect on the Federal District Court of New Mexico's future Erie predictions, patients would be wise to take their chances and file their failure-to-warn claims in federal court with the hope that the federal court will again find the learned intermediary doctrine to be contrary to New Mexico's strict liability jurisprudence.

Moreover, although the prediction rendered in *Rimbert* does not have a binding effect on the Federal District Court of New Mexico's future Erie predictions, the potential exists that a future Federal District Court of New Mexico's Erie prediction could influence state law.[105] For example, when a patient files a failure-to-warn claim against a drug manufacturer in the Federal District Court of New Mexico, the court will again be faced with the task of interpreting New Mexico's certification rules. Depending on its interpretation, the federal court will either choose to certify the issue to the New Mexico Supreme Court or to predict how the New Mexico Supreme Court would rule if presented with the issue today.[106] If the federal court concludes that certification would be improper and that the New Mexico Supreme Court would reject the learned intermediary doctrine, the manufacturer subject to that decision could then appeal that decision to the Tenth Circuit Court of Appeals, asserting that the federal court erred in its prediction and interpretation of New Mexico state law.

As long as the New Mexico Supreme Court does not render a definitive decision on the issue and the Tenth Circuit concludes that the Federal District Court of New Mexico's prediction was correct, the federal court will essentially have engaged in New Mexico state lawmaking.[107] Therefore, if New Mexico's certification rules are continued to be interpreted as they were in *Rimbert*, then the New Mexico Supreme Court will continue to be deprived of the opportunity to address this state law issue, which in turn could allow the federal court's prediction to determine the law in New Mexico.

The potential for a New Mexico federal court decision to have broad implications within New Mexico's state law is largely due to the fact that, in this instance, such a decision would be beneficial to the plaintiff. The fact that the plaintiff is the party benefitting from the rejection of the learned intermediary doctrine is significant as it is the plaintiff who decides whether a particular claim is filed in state or federal court.[108] Furthermore, because there is no mechanism available for a defendant to remove a case properly brought in federal court to state court, the only

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105. Clark, *supra* note 88, at 1523 (suggesting that "[h]ow a federal court resolves an open question of state law will affect the rights of future litigants in federal court, especially when the state courts do not authoritatively resolve the question for a substantial period of time.").

106. *See id.* at 1495 (discussing the predictive approach to resolving state law issues).

107. The predictive approach permitted by the Erie Doctrine has the potential to allow for the District Court of New Mexico to "make and implement significant policy choices on behalf of [New Mexico] before the state itself has adopted applicable rules [governing the issue] and without any assurance that it will do so [in the future]." *Id.* at 1539–40.

108. "[V]enue statutes typically let the plaintiff choose among a number of courts in which to file his or her claim." *See* Antony Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV 167, 170 (2000).

manner in which the New Mexico Supreme Court will be able to answer the question regarding the learned intermediary doctrine will be if a patient chooses to file a complaint in state court, or the issue is certified to the New Mexico Supreme Court by either the Federal District Court of New Mexico[109] or the New Mexico Court of Appeals.[110]

B. Substantive Implications of Rimbert *and Its "Erie" Prediction*

Predicting how the Supreme Court of New Mexico would rule today required the *Rimbert* court to both be mindful of past decisions within New Mexico while at the same time keeping an eye towards future trends within New Mexico law. Therefore, determining whether the New Mexico Supreme Court would formally adopt the learned intermediary doctrine requires examining how New Mexico courts have traditionally addressed product liability cases involving a manufacturer's failure-to-warn.

In the 1970s and 1980s when the New Mexico Court of Appeals was addressing the liability of manufacturers in the context of failure-to-warn claims, it held that a manufacturer had a non-delegable duty to warn of the risks associated with the use of its product and, therefore, such a duty could not be discharged by a third-party.[111] This position was articulated in *First National Bank in Albuquerque v. Nor-Am Agricultural Products, Inc.*, where the New Mexico Court of Appeals held that:

> [B]y placing goods on the market, a manufacturer represents to the public that they are safe; and by packaging and advertising, [the manufacturer] does everything possible to further induce that belief. The middleman, in contrast, is no more than a conduit through which the product reaches the ultimate user. [Therefore, a] manufacturer should not be permitted to avoid liability by asserting his lack of direct contact with the user.[112]

This clearly indicates that in general product liability cases, the New Mexico Court of Appeals intended to prohibit a manufacturer from being able to insulate itself from liability by relying on an intermediary to inform the ultimate consumer of the risks associated with the use of its product.

The New Mexico Court of Appeals, however, indicated a contrary intention when addressing a manufacturer's failure-to-warn in the prescription drug context by carving out an exception to the general principle espoused in *First National Bank*, and holding that a manufacturer of prescription medications may discharge its duty to warn by providing the doctor with an adequate warning.[113] The fact that the court treated failure-to-warn cases in the prescription drug context differently than it treated failure-to-warn cases generally appears to be indicative of the

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109. *See* Rule 12-607 NMRA.

110. *See* Rule 12-606 NMRA.

111. *Compare* Serna v. Roche Labs., 101 N.M. 522, 684 P.2d 1187 (Ct. App. 1984) (employing the learned intermediary rationale in the prescription drug context), *with* First Nat'l Bank in Albuquerque v. Nor-Am Agric. Products, Inc., 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975) (holding, generally, that a manufacturer of products cannot delegate its duty to warn to a third party).

112. 88 N.M. 74, 87, 537 P.2d 682, 695.

113. *See, e.g.*, *Serna*, 101 N.M. at 528, 684 P.2d at 1190.

court's intent to take a different approach to liability when the product is a prescription drug.

Based on the New Mexico judiciary's intent to treat failure-to-warn claims in the prescription drug context differently than a typical failure-to-warn claim, it is not likely that the New Mexico Supreme Court would entirely abandon the learned intermediary doctrine. There are, however, certain situations where a manufacturer's ability to successfully assert the learned intermediary doctrine as an affirmative defense to liability should no longer hinge solely on whether the manufacturer provided the physician with an adequate warning. Instead, when addressing whether the learned intermediary doctrine should insulate a prescription drug manufacturer from liability in a failure-to-warn claim, the New Mexico Supreme Court should require lower courts to determine a manufacturer's liability on a case-by-case basis. Such an approach would entail a court examining, in addition to the adequacy of the warning provided to the physician, whether the manufacturer engaged in direct-to-consumer advertising and the extent to which the manufacturer communicated with the plaintiff's physician prior to the physician prescribing the manufacturer's medication.[114]

The rationale behind having liability attach on a case-by-case basis is the simple principle of fairness. By rejecting a bright-line rule and examining what is fair and just the court would be able to recognize instances where actions taken by manufacturers, prior to litigation, have triggered a duty to warn on behalf of manufacturers that cannot simply be fulfilled by providing an adequate warning to the physician. For example, when a manufacturer intentionally communicates with a consumer with the intent to both influence a patient's choice in medication and profit from that communication, it is reasonable for the court to find that that communication gives rise to a duty to warn on behalf of the manufacturer. Moreover, such a duty can be viewed as arising from the fact that the manufacturer is making representations regarding the medication to the consumer and in so doing is attempting to influence the consumer's choice in medication. Because drug manufacturers are communicating with both patients and physicians with the intent to persuade each group to use their medications, it is neither fair nor responsible for society to impose the duty to warn solely upon physicians. Thus, the direct communications that are occurring between manufacturers and patients should be seen as giving rise to a duty to warn on behalf of the manufacturers.

Furthermore, when a patient asserts that he has not been adequately warned of the risks associated with the use of a prescription medication, the court should attempt to determine the extent to which both the manufacturer and the physician are liable based on the relationships that exist between each party. Such an inquiry is warranted based on the actions that drug manufacturers are taking in an effort to influence medication selection and the effect such actions are having on patient care. After examining the extent of the relationships between each party, the court should determine, in light of the manufacturer's relations with a patient or a physician, whether the manufacturer should be permitted to successfully assert the learned intermediary doctrine as a defense to liability. Therefore, it should no

114. I believe these two factors give rise to a duty to warn as both have a direct impact on the selection of which medication a patient consumes.

longer be presumed that so long as a manufacturer has provided the physician with an adequate warning that a prescription drug manufacturer will be insulated from liability in the context of a failure-to-warn claim.

CONCLUSION

The *Rimbert* court's interpretation of New Mexico's certification procedures has left the status of the learned intermediary doctrine in New Mexico in a state of ambiguity. This ambiguity has created the risk that inconsistent judgments will be rendered depending upon where a plaintiff's complaint is filed.[115] Therefore, whether a manufacturer of prescription drugs will be able to successfully assert the learned intermediary doctrine as a defense to a failure-to-warn claim will depend not only on whether a plaintiff files a complaint in state or federal court, but on the current status of New Mexico law within that branch of the judiciary. In attempting to resolve the ambiguity surrounding whether the learned intermediary doctrine should be available to a manufacturer as a defense to liability, a court should evaluate the extent of a manufacturer's liability on a case-by-case basis by examining the degree to which a manufacturer's actions have influenced patient care.

115. The state court will be bound to follow New Mexico Court of Appeals precedent; whereas, the federal court will be free to conduct a fresh Erie analysis on each case presented. *See supra* note 104.