IN THE SUPERIOR COURT OF PENNSYLVANIA

LOUISE CRAWLEY, (formerly Robert Debbs), on behalf of herself and others similarly situated, Appellee, v. DAIMLERCHRYSLER CORPORATION, Appellant.	Superior Court Docket No. 1741 EDA 2000 Superior Court Docket No. 1767 EDA 2000 Trial Court Docket Nos. 4900 July Term 1990

ADVANCED TEXT OF BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest federation of businesses, representing an underlying membership of nearly 3,000,000 businesses and organizations, with approximately 140,000 direct members of every size, in every sector of the economy, and every region of the country. While most of the country's largest companies belong to the Chamber, the vast majority of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world.

An important function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the last fifty years, courts in Pennsylvania and around the country have developed a body of law to define the duties of manufacturers of consumer products, the duties of those who use them, and the remedies for breach of those duties. The principles are basic and grounded in common sense. Hypothetical defects that have not manifested themselves have caused no injury, so they are not actionable. Warnings are only as good as the behavior they induce, so the duty to warn is tempered by the need to guard against overwarning and inducing irrational risk assessments. Product warnings not read or

relied on cannot cause injury. And manufacturers who improve their products should not be punished for having done so.

The court below, however, by treating a product liability case as a fraud/consumer protection case, turned all those principles on their head. Through fraud claims and class treatment ill-suited to product liability, the Court fundamentally changed the law relating to consumer products, adopting new liability rules grounded in fiction piled on fiction, in direct conflict with the law developed over decades.

Fiction 1: People Who Have Not Suffered Injury Are Injured.

Fiction 2: Overwarning That Endangers People Is Safe And Required.

Fiction 3: People Are Harmed By Facts Absent From Warnings They Never Read.

Fiction 4: Improvement Of A Product Shows Malice.

If allowed to stand, the decision means that by the expedient of recasting product liability claims as fraud, people can dodge the reality-based principles that have long governed product liability. The upshot would be a rule that: (1) anyone can sue for a defect they have never experienced and likely never will and can secure in effect a classwide design retrofit remedy for it; (2) their claim can posit that overwarning is fraud; (3) then they can recover damages for failure to overwarn in an owner's manual they never read; and (4) they then can get punitive damages based on efforts to improve. The Chamber submits that is a radical holding, out of step with both common sense and the law around the country, and certain to drive business from Pennsylvania and invite class-actions barred elsewhere into Pennsylvania. The Court should reject it.

ARGUMENT

I. THE DECISION BELOW INDULGES THE FICTION THAT UNINJURED PEOPLE ARE INJURED AND SO UPENDS THE LAW THAT NO CLAIM LIES FOR UNMANIFESTED DEFECT.

A central tenet of the law is that people cannot recover for injury they have not suffered. Thus, where a consumer product is at issue, people can sue only for defects that have caused actual injury to them; people cannot make claims about hypothetical defects that have not, and likely will not, ever manifest themselves in the life of a product. The reason is simple. Courts do not sit to hear potential claims, to remedy injuries that have not happened, or to award damages for products that have worked perfectly. Therefore, claims for inchoate defects state no claim – however dressed up under any theory – unless and until the supposed defect has manifested itself and caused the plaintiff injury and damages. The trial court turned that law upside down.

A. The Law: No Claim For Inchoate Defect.

Pennsylvania law recognizes no cause of action for an inchoate defect that merely poses a risk of harm. *See Angus v. Shiley Inc.*, 989 F.2d 142 (3rd Cir. 1993) (applying Pennsylvania law). In *Angus*, a plaintiff complained that her artificial heart valve suffered from a design defect that posed a "significant risk of a fracture which could lead to her death." *Id.* at 143. Although her valve had not failed, she contended the manufacturer knew of the alleged defect, "failed to warn [her] of the problem, misrepresented the product, and concealed its knowledge of the problem." *Id.* at 143. The district court granted summary judgment, and the Third Circuit affirmed, observing that plaintiff had brought what amounted to a product liability claim in disguise. *See id.*

at 147. The court held that Pennsylvania law does not recognize a claim for the mere possibility a product will one day fail: "a purchaser of a properly functioning product [cannot] recover damages against its manufacturer [where] the product has caused no direct physical harm to her and she cannot plead that it ever will." *Id.*

That is the law around the country. The Eighth Circuit, for example, affirmed dismissal of fraud, breach of warranty, and consumer protection claims under Missouri law based on alleged manufacturer concealment of dangers relating to anti-lock brakes where plaintiffs' brakes had not failed or caused injury:

> It is well-established that purchasers of an allegedly defective product have *no legally recognizable claim* where the alleged defect has not manifested itself in the product they own.
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> ***
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> An overwhelming majority of courts have dismissed these unmanifested defect claims and rejected the idea that Plaintiffs can sue manufacturers for speculative damage.

Briehl v. General Motors Corp., 172 F.3d 623, 628-30 (8th Cir. 1999) (emphasis added). The same rule has applied to bar:

- Claims in Louisiana alleging insufficient warnings of airbag risks. *See In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 795 (E.D. La. 1998) (granting summary judgment against claim that manufacturers failed to adequately warn consumers that air bags might deploy with sufficient force to "seriously injure or kill front seat occupants" where most of plaintiff class had suffered no such injuries).

- Claims in Pennsylvania, New Jersey, and Wisconsin that implanted heart valves or pacemakers were defective because they might fail, although plaintiffs' implants had not failed. *Angus v. Shiley Inc.*, 989 F.2d 142 (3rd Cir. 1993) (applying Pennsylvania law and affirming summary judgment against concealment claim); *Walus v. Pfizer, Inc.*, 812 F. Supp. 41

(D.N.J. 1993) (granting summary judgment against plaintiff on fraudulent concealment claim); *Brinkman v. Shiley, Inc.*, 732 F. Supp. 33, 34 (M.D. Pa. 1989), *aff'd*, 902 F.3d 1558 (3rd Cir. 1989) (granting summary judgment against emotional distress claim); *O'Brien v. Medtronic, Inc.*, 439 N.W.2d 151, 152-53 (Wis. Ct. App. 1989), *review denied*, 446 N.W.2d 286 (Wis. 1989) (rejecting strict liability and negligence claims).

- Claims in New York alleging a manufacturer failed to warn of a safety defect in integrated child seat where no evidence "the child seat in [*plaintiff's*] vehicle malfunctioned." *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99-100 (S.D.N.Y. 1997) ("no cause of action lies") (emphasis in original).

- Claims in the District of Columbia brought by vehicle owners who complained of a "tendency" of brakes to have "premature rear wheel lock-up" but had never experienced them. *Barbarin v. General Motors Corp.*, 1993 WL 765821, *1-*2 (D.D.C. 1993) (dismissing warranty claim).

- Claims in New Jersey where plaintiff who had experienced no engine problem alleged an engine defect was "likely" to cause "damage . . . and may create potential safety hazards." *Yost v. General Motors Corp.*, 651 F. Supp. 656, 657 (D.N.J. 1986) (dismissing fraud and warranty claims).

- Claims in New York by consumers who claimed tire defects increased their risk of injury although their tires "remained failure free" and "led full and uneventful lives." *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 601 (S.D.N.Y. 1982) (rejecting fraud and warranty claims).

- Claims in Illinois by plaintiffs who did not experience door-latch failure but "alleged only a possibility of malfunction leading to a possibility of injury." *In re General Motors Type III Door Latch Litig.*, 2001 WL 103434, *5 (N.D. Ill. 2001) (granting summary judgment on fraud and breach of warranty claims).

- Claims in Alabama that a manufacturer failed to disclose sport-utility vehicle had "an undue propensity to roll-over" where plaintiffs' vehicles had "never manifested the alleged defect." *See, e.g.*, *Ford Motor Co. v. Rice*, 726 So.2d 626, 629 (Ala. 1998) (affirming dismissal of claim for fraudulent concealment).

- Claims in Illinois that electromagnetic emissions from cellular telephones "may pose health risks" and create "a possibility that somebody may be injured down the road." *Verb v. Motorola, Inc.*, 672 N.E.2d 1287, 1294 (Ill. App. Ct. 1996) (fraud and breach of warranty claims properly dismissed).

- Claims in California that a sport-utility vehicle's design created "an unacceptable risk of . . . deadly roll-over accident[s]," brought on behalf of plaintiffs who had had no rollover accidents. *American Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526, 528 (Cal. Ct. App. 1995) (no implied warranty claim).

- Claims in Texas alleging failure to adequately warn of "inherently dangerous" restraint system, brought on behalf of people who had not experienced any restraint system failure. *Martin v. Ford Motor Co.*, 914 F. Supp. 1449, 1452 (S.D. Tex. 1996) (dismissing claims for fraud, breach of warranty, and violation of state consumer protection laws).

- Claims in Alabama complaining of "the risk that [plaintiff's] heart valve may one day fail." *Pfizer, Inc. v. Farsian*, 682 So.2d 405, 407 (Ala. 1996) (no claim for fraudulent concealment against manufacturer of heart valve based merely on "the risk that his heart valve may one day fail").

The rule against claims for theoretical inchoate defects applies whatever the risk claimed, even "risk of deadly accidents" or problems that make a vehicle "inherently dangerous." *Air Bag Prods.*, 7 F. Supp. 2d at 795 (alleging airbags might "seriously injure or kill front seat occupants"); *see Briehl*, 172 F.3d at 626 (alleging brakes were

"dangerously defective" and "unsafe"); *Farsian*, 682 So.2d at 407-08 (alleging risk of fatal heart valve failure); *American Suzuki*, 44 Cal. Rptr. 2d at 528 (alleging risk of "deadly" rollover accidents); *Martin*, 914 F. Supp. at 1452 (alleging "inherently dangerous" restraint system "renders the vehicles in question unsafe"); *see also Door Latches*, 2001 WL 103434, at *1 (complaining of "increased likelihood that passengers will be crushed, entrapped, or ejected").

> [T]he absence of manifest injury is so fundamental a deficiency in tort or implied warranty claims that such claims are more appropriately dismissed than preserved.

Air Bag Prods., 7 F. Supp. 2d at 804.

American Suzuki explained the reason for this rule. The law compensates for injury, not anticipation of it, and allowing claims like plaintiffs' would permit compensation for people who have never suffered any injury, and never will.

> [O]nly a small percentage of the [vehicles] sold . . . have been involved in rollover accidents . . . . To [allow a claim] would, in effect, contemplate indemnity for a potential injury that never, in fact, materialized. And, compensation would have to be paid for a product 'defect' that was never made manifest, in a product that for the life of any warranty actually performed as [the manufacturer] guaranteed it would.

American Suzuki, 44 Cal. Rptr. 2d at 531. As the Fifth Circuit Court of Appeals explained:

> While the sale of a defective product creates a potential for liability, the law grants no cause of action for inchoate wrongs. However egregious the legal fault, there is no cause of action for negligence or products liability until there is 'actual loss or damage' . . . . [T]he 'threat of future harm, not yet realized, is not enough' . . . .

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1136 (5th Cir. 1985) (quoting PROSSER & KEETON ON TORTS § 30, at 165 (5th ed. 1984)).

Compensating victims where there has been no injury makes no sense as a matter of policy:

> [P]laintiffs have alleged only a possibility of malfunction leading to a possibility of injury – indeed, one which has occurred to a very small percent of persons who bought the automobiles in question. . . . As a matter of policy [there is no] point in ordering the cost of repair for millions of uninjured plaintiffs who own fourteen to twenty year old automobiles which have never malfunctioned and (even accepting plaintiffs' allegations of defect) most likely never will.

Door Latches, 2001 WL 103434, at *5; *see American Suzuki*, 44 Cal. Rptr. 2d at 531; *cf. Willett v. Baxter Int'l., Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991) (compensating consumers based on the possibility of product failure undermines the loss-spreading mechanism of tort law by ultimately forcing each consumer to bear own losses through increased prices).

The rule against claims for theoretical inchoate defects applies whatever the legal theory pursued; a plaintiff cannot circumvent the ban by artful pleading. Thus the courts hold that whether pled in products liability, fraud, breach of warranty, or under state consumer protection laws, a plaintiff has no claim unless and until the alleged defect manifests itself, and the risk of which plaintiff complains materializes in the product plaintiff purchased. Other courts thus reject exactly the claims allowed here:

- Fraud and fraudulent concealment claims: *See Farsian*, 682 So.2d at 407 ("Regardless of how [plaintiff] pleads his claim, his [fraud] claim is in substance a product

liability/personal injury claim – [plaintiff] seeks damages because of the risk that his heart valve may one day fail"); *see also Briehl*, 172 F.3d at 630; *Martin*, 914 F. Supp. at 1451, 1457; *Weaver*, 172 F.R.D. at 99-100; *Rice*, 726 So.2d at 631; *Yost*, 651 F. Supp. at 657.

- Breach of warranty claims: *See Briehl*, 172 F.3d at 630; *American Suzuki*, 44 Cal. Rptr. 2d at 531; *Yost*, 651 F. Supp. at 657-58; *Barbarin*, 1993 WL 765821.

- Consumer protection law claims: *See Briehl*, 172 F.3d at 630; *Martin*, 914 F. Supp. at 1451, 1457; *Verb*, 672 N.E.2d at 1296.

The rule against claims for theoretical inchoate defects also applies whatever the remedy sought. Thus, a plaintiff cannot circumvent the bar by seeking retrofit costs or claiming diminution in the value of the product based on the alleged latent defect. *See, e.g., Briehl*, 172 F.3d at 628-29. Indeed, the Louisiana airbag case barred the exact remedy sought and awarded here. *Air Bag Prods.*, 7 F. Supp. 2d at 796 (inchoate defect rule denying "cost of retrofitting . . . vehicles with air bags . . . [that] will eliminate or significantly reduce" the alleged risk as well as claim for "diminution" of "resale value").

B. The Trial Court's New Rule: Anyone Can Sue For Everyone About Defects Suffered By No One.

This case fits squarely within the bar on claims for inchoate defects. Plaintiffs may cast their claims as fraud, but they still are a class of uninjured people, who claim a defect in a product that has not manifested itself. Although their airbags have not deployed, they claim a defect because they might sustain hand burns if the airbags ever do deploy. They attack Chrysler for not warning them about (or, in fraud nomenclature,

not disclosing) (1) that specific burn risk; and (2) that Chrysler replaced peoples' spent airbags with the same (supposedly) defective ones when its new cars had redesigned airbags. They seek as a remedy the cost of replacing airbags that never have hurt them and likely never will.

Thus, despite the fraud dressing, their claims fall directly within the inchoate claim/economic loss bar: their prospective injury is entirely hypothetical and indeed, certain not to occur for most of the plaintiffs. According to the National Highway Traffic Safety Administration (NHTSA), whose data the trial court relied on, there is only about a 4.25% chance that the airbag in any given vehicle will deploy in the lifetime of that vehicle. *See* National Highway Traffic Safety Administration (NHTSA), *Safety Fact Sheet* (November 2, 1999) (*available at* http://www.nhtsa.dot.gov/airbags/factsheets/numbers.html). Thus, only 4.25% of the plaintiffs can expect to even see an airbag deploy. Upon deploying, "the vast majority of injuries caused by air bags are both minor and temporary." 63 Fed. Reg. 45,755, 45,759 (1998). A burn of any sort will occur in roughly 10% of those deployments, according to the trial court. Thus, at most only .425% of plaintiffs (one tenth of 4.25%) face any burn risk. And more than half of those burn injuries will be minor, and many indistinguishable from abrasions – exactly what Chrysler's warning described. *See* D. Ex. 135, R. ___; N.T. 1550-51, R. ___; Trial Ct. Op. at 13, 16, R. ___ (noting NHTSA study regarding burns from airbags and quoting testimony that "skin reddening was the typical manifestation of an abrasion or minor burn in these 171 cases"). Thus, perhaps .2125% (one-half of .425%) of the plaintiffs face any burn risk not warned about, and 99.7875% will not. Plaintiffs' own expert put the risk to

the members of this class at an even smaller number; he said he would expect 12 people in a class of 75,000 to sustain burn injuries – .016%. *See* N.T. 381, R. ___. Thus, plaintiffs' own evidence confirms that 99.984% of class members will sustain no injury at all.

The trial court, however, adopted a new rule that all of those thousands of uninjured uninjured and never-to-be injured class members could recover for airbag design defects.

The Chamber respectfully submits that allowing defect claims and a replacement remedy for a whole class of plaintiffs, over 95% of whom will never even see their airbag deploy and over 99.9% of whom will never sustain burn injury from it (while all enjoy the promise of the airbag's lifesaving benefits), substitutes fiction for fact and turns the law on its head. It puts Pennsylvania out of step with the law around the country, and is unfair. If allowed, it also would wreak havoc on Pennsylvania courts. For if these claims, based on failure to warn of a remote chance of burn injuries can go forward, so can all the claims rejected elsewhere. Suddenly, Pennsylvania will become a Mecca for claims of risks from tires that work, brakes that have never failed or locked up, sport-utility instability never evidenced, integrated child seats that have never faltered, door latches that have never released, heart valves that have never broken down (pp. 5-7, above), and who knows what else. Every design that has ever caused injury in any product liability case in any jurisdiction in the country, however odd or unlikely, is fair

game for attack by uninjured people in Pennsylvania – by class action, no less.[1] One person's freak injury will become another's class action windfall. Pennsylvania will secure "the dubious distinction of becoming the class action capital of the country," for claims disallowed everywhere else. *Osborne v. Subaru of America, Inc.*, 243 Cal. Rptr. 815, 826 (Cal. Ct. App. 1988). The Chamber urges the Court to reject that outcome, and make clear that in Pennsylvania as elsewhere, people cannot recover under any theory, individually or class-wide, based on "a possibility that somebody may be injured down the road." *Verb*, 672 N.E.2d at 1294.

II. THE DECISION BELOW INDULGES THE FICTION THAT MORE WARNING IS BETTER WARNING AND DESTROYS WARNING PRINCIPLES THAT SERVE SAFETY.

Warning experts agree that more warnings, and more detailed warnings, are not necessarily better warnings, and the law tracks that learning. The trial court, however,

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[1] The 1990s saw a dramatic increase is class action filings, especially in state courts. In state courts, the number of pending putative class actions rose by over 1000% between 1988 and 1998. In federal courts, the number of class actions rose 338% in the same period. *See Analysis: Class Action Litigation – A Federalist Society Survey, Part III*, CLASS ACTION WATCH (Federalist Society for Law & Public Policy Studies, Washington, D.C.) Fall 1999 at 3 (*available at* http://www.fed-soc.org/classv1i3.pdf); Michelle Liffick, *Avery v. State Farm: The Potential for Abuse of the Class Action and its Extraordinary Impact on Insurer and Insured*, 13 LOY.CONSUMER.L.REV. 88, 92 (2001). The Federal Judicial Center found that judges spend about five times as many hours on class actions (whether ultimately certified or not) as on an average civil case; for class actions that were certified, judges spent an average of *eleven times* as many hours as they did on the average civil action. *See* Thomas E. Willging, Laura L. Hooper and Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center, Washington, D.C.) 1996 (*available at* http://www.fjc.gov/CIVILLIT/rule23/rule23.pdf).

disregarded that law with semantics: calling a "failure to warn" claim a "failure to disclose" claim. If allowed, semantics will trump substance, will destroy the principles that have governed product safety information for decades, and will paradoxically make products less safe.

A. Warning Reality: The Need For Product Safety Information Must Be Balanced Against The Risks Of Overwarning And Inducing Skewed Risk Perception.

Warnings do not come without a cost. Every warning given dilutes other warnings, and the resulting "information overload" can induce people to ignore warnings and so lead, paradoxically, to less safe products. Detailed warnings about dire but remote risks also skew the safety message, and so can lead people, paradoxically, into more significant risks to avoid remote ones. That is true whatever the terminology for the information – whether "warnings" or "material information" or something else.

Information Overload. "It is a fundamental premise of cognitive psychology that the amount of attention that can be allocated to various activities is limited, producing a bottleneck in information processing." John F. Kihlstrom, *The Cognitive Unconscious*, 237 SCIENCE 1445, 1447 (1987). Thus, people possess a "finite reservoir of concern" for any given issue. Howard Kunreuther and Paul Slovic, *Economics, Psychology, and Protective Behavior*, 68 AM. ECON. REV. 64, 67 (1978).

Given this inherent cognitive limitation, a "proliferation of warnings may dilute the impact of truly important cautionary information" and distract people from it. Lars Noah, *The Imperative to Warn: Disentangling the Right to Know From the Need to Know about Consumer Product Hazards*, 11 YALE J. ON REG. 293, 374-75 (1994). As

explained by Henderson and Twerski, the leading voices on product liability today, "[t]he most significant social cost" of imposing legal warning requirements is information overload:

> "The most significant social cost generated by requiring [defendants] to warn against remote risks is the reduced effectiveness of potentially helpful warnings directed at risks which are not remote."

James A. Henderson and Aaron D. Twerski, *Doctrinal Collapse In Products Liability: The Empty Shell Of Failure To Warn*, 65 N.Y.U. L. REV. 265, 296 (1990). *See Cotton v. Buckeye Gas Prods. Co.*, 840 F.2d 935, 938 (D.C. Cir. 1988) ("The inclusion of each extra [warning] item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print."); *Finn v. G. D. Searle & Co.*, 677 P.2d 1147, 1153 (Cal. 1984) ("If we overuse warnings, we invite mass consumer disregard and ultimate contempt for the warning process.").

In the airbag warning context in particular, the National Highway Traffic Safety Administration (NHTSA) has cautioned against too much information. In issuing its final rule on the content of visor-mounted airbag warnings, it decided to mandate a specifically-worded warning that sets forth only "the basic do's and don'ts that occupants should follow to obtain maximum protection from air bags, while avoiding a label which creates an 'information overload,' in response to which, consumers would likely pay less attention to the information." 58 Fed. Reg. 46,551, 46,554 (1993). NHTSA explained that "additional statements . . . would contribute to an 'information overload,' thereby diluting the impact of the most important information." *Id.* As the agency put it, "too

many labels can reduce the impact of all the labels." 61 Fed. Reg. 60,206, 60,213 (1996).

Skewed Risk Assessment. "By the same token, [overwarning] may cause consumers to overreact to information about relatively inconsequential risks" by elevating fears of those risks over the product's important benefits. Noah, above, at 374-75, 386. For instance, "many food products contain potentially carcinogenic nitrites, but at present these preservatives provide one of the best means available for protecting against lethal food poisoning." *Id.* at 387; *see also* Henderson & Twerski, above, at 296-97. Warnings that emphasize relatively inconsequential or unlikely risks may therefore dissuade consumers from using products that greatly enhance their safety, even though they pose some level of background risk. *See id.*

The FDA has often rejected warnings that would unduly alarm consumers who would otherwise benefit greatly from certain products that carry relatively remote background risks. For example, it rejected a suggestion that sunscreen products should include a label alerting consumers to the risk that continuous use of sunscreen might suppress coetaneous vitamin D synthesis. It reasoned that although the risk existed, it was rare: most people obtain sufficient vitamin D from their diet. *See* 58 Fed. Reg. 28,194, 28,243 (1990). And the risk from avoiding sunscreen was worse than the remote risk from using it: "such a warning might discourage the use of sunscreens," which provides important protection against a much greater risk – skin cancer. *Id.* Similarly, while the FDA recognized the risks of chlorofluourocarbons (CFCs) and required some warnings on some products about those risks, the FDA deemed some medical products inappropriate for the warnings. It judged that patients who are concerned about a medical

product's effect on the environment might inappropriately refrain from taking their medication, and so discontinue important therapies. *See* 58 Fed. Reg. 34,812 (1993).

NHTSA also has expressed concern about skewed risk assessment in connection with irrational over-reaction to the perceived risks of air bag use. After airbags were required in all cars, reports of unusual airbag-induced injuries made people fearful about airbags. NHTSA lamented that many people overestimated the risks from airbags, while ignoring the fact that "the injuries prevented by air bags are typically substantially more serious than the injuries that air bags cause" and also ignoring the "significant reduction in fatalities" they bring about. 63 Fed. Reg. at 45,758. Based on irrational overestimates of risk, people began asking to deactivate their airbags so they could avoid injuries such as burns. *See id.* at 45,759. NHTSA studied the relevant medical data and determined that even if "these types of injuries were occurring on a regular basis, like arm injuries, the level of injury is incremental and significantly less than the types of injuries which air bags are preventing." *Id.* Indeed, NHTSA concluded, as to burns, "there was no indication the air bags in question caused the burns complained of in the consumer complaints to NHTSA." *Id.* NHTSA determined that "the vast majority of injuries caused by air bags are both minor and temporary." *Id.* NHTSA judged that airbag removal was a bad idea, and that the best approach was to permit dealer-installed on-off switches, but only for individuals who fell into certified, discrete risk groups. *See id.* at 45,757. Thus, NHTSA itself has had to grapple with irrational risk assessment and disapproves warnings that scare people away from airbags.

B. The Law To Date: Not All Risks Require Warnings.

The law that has, until now, governed product warnings reflects the science on what and how warnings should (and should not) be given. Thus the law does not require manufacturers to warn of every conceivable risk inherent in its product, and every possible injury that might result from that risk. Rather, as in warning science itself, a risk is the beginning, not the end, of the decision of whether and what warning should be given.

To prevail on a failure-to-warn claim, a plaintiff must show the lack of warning made the product defective or unreasonably dangerous. *See, e.g., Ellis v. Chicago Bridge & Iron Co.*, 376 Pa. Super. 220, 231-32, 545 A.2d 906, 912-13 (Pa. Super. Ct. 1988). Due consideration must be given to the "relative degrees of danger" at issue, and, indeed, "whether any warnings are required." *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 102-03, 337 A.2d 893, 902-03 (Pa. 1975).

Again, Pennsylvania law is in line with the law around the country. The law elsewhere imposes on manufacturers a duty to warn consumers of unreasonable dangers, but not of remote, improbable or minor risks. *See, e.g., Willett*, 929 F.2d 1094 (no liability for failure to warn artificial heart valve recipient of possible design defect that increases mortality risk by only 0.03% per annum); *accord Finn*, 677 P.2d at 1153 ("it seems obvious that liability ought not to be imposed for failure to warn based on every piece of information in a manufacturer's possession"); *cf. Dudas v. Glenwood Golf Club, Inc.*, 540 S.E.2d 129, 134 (Va. 2001) (country club has no duty to warn golfer of "remote but potential danger" of armed robbery where country club was aware of only three such

incidents in prior years); *see generally* W. Page Keeton et al., PROSSER & KEETON ON TORTS §99, at 697 (5th ed. 1984) (no liability for failure to warn "unless manufacturer failed to take the precautions that a *reasonable* person would take in presenting the product to the public") (emphasis added).

Thus, for instance, a truck manufacturer has no duty to warn that vehicle exhaust might ignite hydrocarbons leaking from a pipe that had frozen, ruptured, and then thawed at a chemical manufacturing facility. *See Hall v. Mississippi Chemical Express, Inc.*, 528 So.2d 796 (Miss. 1988) (affirming directed verdict for truck manufacturer on failure-to-warn claim brought by plaintiff burned in ensuing fire). A cellular telephone manufacturer has no duty to warn users that "cellular telephones *may* pose health risks [and] *might* be unsafe" just because their safety is "unproven." *Verb*, 672 N.E.2d at 1295 (affirming dismissal of failure to warn claims) (emphasis in original). And a drug manufacturer has no duty to warn users of a rare allergic reaction that occurs in a "miniscule" percentage of users. *See Mountain v. Procter & Gamble Co.*, 312 F. Supp. 534, 537 (E.D. Wis. 1970) (dismissing complaint).

Closer to home, an automobile manufacturer need not warn of every conceivable risk inherent in its product, and every possible injury that might result from that risk. Again, the airbag case is instructive. *See Air Bag Prods.*, 7 F. Supp. 2d at 798. There, plaintiffs brought causes of action in fraud and breach of warranty, complaining that airbag warnings were not specific enough about the nature of injuries that might arise from deployment. Plaintiffs took issue with the manufacturers' owners manual warning that an airbag "inflates with considerable force" such that "[i]t can seriously hurt a front

seat passenger who is not in the proper position and wearing a seat belt properly" and "[f]ront passengers, especially children and small adults, must never sit on the front edge of the seat, stand near the glove compartment . . ., or lean over near the air bag cover when the vehicle is moving." *Id.* at 798-99. Plaintiffs claimed they were not "adequately advised" by those warnings that airbags "deploy with sufficient speed and force to seriously injure or kill front seat occupants, . . . especially women, children, the elderly, and short adults." *Id.* at 795-97. The Court granted summary judgment against the claim. It held that "buyers of the vehicles [were] alerted that air bags deserve special safety attention" and "[t]he owner's manuals contain ample warnings regarding the air bags' potential dangers" even though they did not mention the precise nature of the most severe possible injuries. *Id.* at 798; *see also Cotton*, 840 F.2d at 939 ("warnings need not spell out" every risk "in intricate detail"); *Vallillo v. Muskin Corp.*, 514 A.2d 528, 531 n.3 (N.J. Super. Ct. App. Div. 1986) (warning need not list every potential injury; it need only give general notice of danger and conduct to be avoided).

Other automotive warning cases are in accord. *See In re General Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525 (E.D. Mo. 1997), *aff'd by Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999) (granting summary judgment against fraud claim based on alleged failure to disclose a "potential" for "brake failure" because manufacturer had no duty to do so); *Martin*, 914 F. Supp. at 1454-55 (granting summary judgment against fraud claim based on alleged "material omissions" because a manufacturer had no duty to represent its restraint systems as "unsafe" when they complied with federal safety standards); *cf. Mason v. Chrysler Corp.*, 653 So.2d 951, 953

(Ala. 1995) (affirming summary judgment on fraudulent concealment claim because manufacturer had no duty to disclose alleged "recurring defects" in line of luxury vehicles that caused "sway[ing]," engine "hesitation" and other problems).

In hindsight, there will always be a warning that could have avoided a particular injury: "Any person severely injured by any product could make a claim . . . that they did not recognize the risks ex ante as clearly as they do after the accident. Insistence on more detail can make any warning, however elaborate, seem inadequate." *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 656 (7th Cir. 1998). But the ability to give that case-specific warning does not mean there necessarily is a duty to give that warning. *Id.*

C. The Trial Court's New Rule: Every Risk Must Be Warned About, In Graphic Detail, Or The Manufacturer Committed Fraud.

This case is just like the *Air Bag Prods.* case and should have been resolved the same way. Here, as there, when Chrysler learned of the risk of hand-skin injury, it told consumers that air bag deployments may cause skin injuries. In an owners manual supplement Chrysler warned of the predominant risk to skin from deployment – abrasions and/or skin reddening and suggested other problems were possible but "unlikely":

> Under certain conditions inflation of the air bag may cause the driver to experience minor abrasions and/or skin reddening. These normally heal very quickly. However, in the unlikely event that problems continue, consult your physician. . . . These minor side-effects are truly insignificant compared to the proven life saving benefits air bags provide.

D. Ex. 315, R. ___; Trial Ct. Op. at 14, R. ___. Just as the airbag warning in *Air Bag Prods.* did not specifically mention the serious-but-remote risk of death, Chrysler's warning did not specifically mention the remote risk of thermal burns. But that did not

make the warning defective there or here: as there, Chrysler "alerted [plaintiffs] that air bags deserve special safety attention" in the owners manual, and that was all that was required under product liability warning principles. *See Air Bag Prods.*, 7 F. Supp. 2d at 798.

The trial court, however, held that because plaintiffs claimed "failure to disclose" rather than "failure to warn," the manufacturer had a different duty: to disclose all risks someone might care about in some transaction, regardless whether that duty undermined safety. The resulting rule indulges more fiction – that more warning is always better – and compromises safety.

The trial court told the jury to judge Chrysler's product warnings based on materiality to plaintiff's transaction – that Chrysler should have disclosed in its owner's manual any fact a person might find important in determining a course of action – regardless of how that might compromise overall safety. *See* Trial Ct. Op. at 19, R. ___. A single-minded focus in a product warning case on a particular individual decision, even if related to use of the product, is bad law. It undermines the safety-driven mandate to consider ***all*** users and ***all*** possible risks, and the risks to ***all*** users from overwarning, in determining what warnings to give. The new rule in effect mandates that every risk be the subject of a graphic warning, for a person after-the-fact can always claim that a specific warning would have affected his or her conduct in some specific setting, regardless how counterproductive it might be for many more people in other more common settings.

Indeed, the new fraud duty to disclose all risks, however remote, runs headlong

into the product liability duty to weigh all risks and make warning judgments that will protect the most people. Under the trial court's new fraud duty, a manufacturer must warn of every conceivable risk. Under settled product liability law, however, that expansive warning is not required and, indeed, conceivably could expose a manufacturer to liability: "It seems to be only a matter of time before a plaintiff succeeds in bringing an inadequate warning claim premised on the argument that, although a completely accurate statement of the risk had been provided, the pertinent warning lacked sufficient prominence because it was lost among the clutter of too many other cautionary statements." Noah, above, at 379.

A single-minded focus in a product warning case on a particular individual decision ***to purchase*** a product is even worse law, for it compromises safety in service of still more fiction. People rarely read manuals even after buying a car, much less before. "Whether or not ideal consumers 'should' examine all warnings and directions, the caselaw provides empirical support for the conclusion that product users frequently do not read them." Howard Latin, "*Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1219 (1994). *See also Riley v. American Honda Motor Co.*, 856 P.2d 196, 200 (Mont. 1993) ("warnings are everywhere in the modern world and often go unread or, where read, ignored"). Indeed, here some plaintiffs did not even read the owners manual supplement after purchase, and none claimed to have read either Chrysler's owners or its manual supplement before purchase. Thus, a finding that omission in an owners manual (much less an owners manual supplement) of some detail

about airbag risks is material to anyone's (much less, in a class action, everyone's) purchase decision is built on pure fiction.[2]

The Chamber is interested in encouraging safe products. We respectfully suggest that Pennsylvania should not disregard settled product warning principles that protect people, especially in favor of fictions about materiality that will compromise safety and make manufacturers insurer, not just of their product's safety, but of their consumer's purchase decisions. *Azzarello v. Black Bros. Co.,* 480 Pa. 547, 553, 391 A.2d 1020, 1024 (Pa. 1978) (strict liability is not intended to make manufacturers into insurers); *Ellis*, 376 Pa. Super. at 226, 545 A.2d at 909 ("While the manufacturer's responsibility for injuries resulting from the lack of warning as a defect in the product is an expansion of the supplier's role as a guarantor of a product's safety, it was not intended to make the manufacturer an insurer of all injuries caused by the product.").

III. THE DECISION BELOW INDULGES THE FICTION THAT PEOPLE HEED ALL WARNINGS AND SO IMPROPERLY DISPENSES WITH RELIANCE.

Reliance is an element of any fraud claim. *See, e.g., Gibbs v. Ernst*, 538 Pa. 193, 207, 647 A.2d 882, 889 (Pa. 1994). As the trial court noted, no case holds that product warning claims – even if they properly can be twisted into fraud claims – are an exception to that rule. *See* Trial Ct. Op. at 23, R. ___. The trial court, however,

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[2] It is doubly fiction to presume reliance on fictional material information. *See* pp. 27-28, below.

dispensed with reliance here, again based on fictions, and so upended rational product liability law developed over decades.

A. The Causation Requirement For Warning Claims.

Just as in fraud, a product liability plaintiff who claims injury from omitting information must prove that the omission – failure to warn – in fact caused the injury. *See Sherk v. Daisy-Heddon*, 498 Pa. 594, 598, 450 A.2d 615, 617 (Pa. 1982); *Berkebile*, 462 Pa. at 101, 337 A.2d at 902. A person who did not read the warnings he or she complains about cannot meet that causation burden as a matter of law. *See Sherk*, 498 Pa. at 602-03, 450 A.2d at 620 (inadequate warning on air gun not cause of plaintiff's death as a matter of law where neither child who shot plaintiff nor child's father had read the instruction book containing warning); *Mitchell v. Modern Handling Equip. Co.*, 1999 WL 1825272, *7 (Pa. Comm. Pl. 1999) (inadequate warning regarding operation of forklift on steep grades did not cause plaintiff's injury as a matter of law because he had not read manual containing warning). That rule is grounded in common sense: even if a warning's words are inadequate, a person who did not read the warning cannot complain that the unread warning's words, had they been different, would have changed their behavior. After all, the supposed inadequacy of words you do not read cannot cause you to do or not to do anything. *Conti v. Ford Motor Co.*, 743 F.2d 195, 198 (3rd Cir. 1984) (applying Pennsylvania law and reversing jury verdict for plaintiff on inadequate warning claim where there was "absolutely no evidence in the record to suggest" that "additional warnings" in owner's manual would have changed plaintiff's behavior); *Staymates v. ITT Holub Indus.*, 364 Pa. Super. 37, 52-53, 527 A.2d 140, 147-48 (Pa. Super. Ct. 1987)

(inadequate warning cannot be a cause of injury where plaintiff testified he acted "instinctively" and "without thinking;" "liability may result only when there is sufficient evidence that additional warnings or reminders may have made a difference").

Again, that is the law all over. For example, the California Supreme Court holds that there is "no conceivable causal connection" between a person's conduct and a warning's content when the person did not read the warning:

> The evidence submitted on the motion for summary judgment precludes liability on [the ground of failure to warn]. Plaintiff's mother . . . neither read nor obtained translation of the product labeling. Thus, there is no conceivable causal connection between the representations or omissions that accompanied the product and plaintiff's injury.

Ramirez v. Plough, Inc., 863 P.2d 167, 177 (Cal. 1993). *Accord General Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993) ("There is no presumption that a plaintiff who ignored instructions that would have kept him from injury would have followed better instructions."); *Bloxom v. Bloxom*, 512 So.2d 839, 850-51 (La. 1987) (inadequate warning in automobile owner's manual did not cause plaintiff's injuries as a matter of law where plaintiff testified he had not read it); *Mampe v. Ayerst Labs.*, 548 A.2d 798 (D.C. 1988) (upholding summary judgment for drug manufacturer on inadequate warning claim where physician testified he had not relied on the warning in prescribing drug); *Safeco Ins. Co. v. Baker*, 515 So.2d 655 (La. Ct. App. 1987) (fireplace manufacturer's lack of adequate warning was not the cause of a structure fire where installer did not read instructions provided).

B. The Trial Court's New Rule: Fictional Injury Inferred From Fictional Reliance.

The trial court dispensed entirely with the causation element of plaintiffs' claim based on the fiction that people – all people, an entire class – always read warnings and act (indeed, act the same way) based upon them. It accordingly applied a heeding presumption drawn from securities cases, an inapt analogy as Chrysler explains.

Indeed, the analogy is multiply inapt in a product owners-manual warning setting. People do not read manual information before they purchase a car; a presumption that they do (much less an irrebutable presumption where we know no plaintiff here did) is pure fiction. Pp. 23-24, above. No one relies on unread information when making purchase decisions; a presumption that anyone, let alone an entire class, does (much less an irrebutable presumption where we know no plaintiff here did) is more fiction.[3] Pp. 23-

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[3] Again, an irrebutable heeding presumption where no plaintiff read the allegedly deficient information defies causation law developed in product liability cases across the country. Even when courts recognize a role for a heeding presumption in product warning cases, they hold a presumption inapplicable on these facts. First, a presumption applies only when no warning was given; there is no basis to presume an unread warning would be heeded had it said something else. *See Demmler v. SmithKline Beecham Corp.*, 448 Pa. Super. 425, 434, 671 A.2d 1151, 1155 (Pa. Super. Ct. 1996) ("In the event that a warning is [given but alleged to be] inadequate, proximate cause is not presumed."); *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 621 (Pa. Super. Ct. 1999) ("in cases where warnings or instructions are required to make a product non-defective and *a warning has not been given*, the plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning") (emphasis added). Second, even when it applies, the presumption is rebuttable and disappears upon introduction of evidence plaintiff would not have heeded the warning. *See Coward*, 729 A.2d at 621 (heeding presumption may be rebutted by "evidence that . . . a warning would not have been heeded"); *Sheehan v. Pima County*, 660 P.2d 486, 489 (Ariz. App. 1982)

(Footnote Continued on Next Page.)

24, above. It is still more fiction that class members' response to the supposedly missing information will be uniform. Car choices are personal; one person who rejects a Chrysler will buy a GM car, another will buy a Honda. It is more fiction still that the response will be to purchase a safer vehicle. All cars have risks and benefits relative to others; trading an unlikely airbag-burn risk in a Chrysler for, say, a more likely rollover risk in some other car is not safer. There is no evidence what other car any plaintiff might have bought had that person known the information he or she claimed to want in a manual he or she did not read, much less that the other car did not pose worse risks, let alone that all class members would make the same risk trade-off.

The Chamber again is concerned about the effect of this decision on the law of Pennsylvania and the companies that do business there. The presumption of reliance defies reality many times over, and really is absurd. No plaintiff read either Chrysler's owners manual or supplement before buying their car – that is why plaintiffs fought so

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(Footnote Continued from Previous Page.)

(presumption "disappears entirely upon the introduction of any contradicting evidence"); *Pavlik v. Lane Ltd./Tobacco Exporters Int'l.*, 135 F.3d 876, 883 (3rd Cir. 1999) (applying Pennsylvania law; "the heeding presumption must be rebuttable" and once rebutted it "is of no further effect and drops from the case"). *Accord Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1332-33 (10th Cir. 1996) (heeding presumption "disappeared" upon evidence plaintiff was "in a hurry and did not look at the label"); *Bloxom*, 512 So.2d at 850 (presumption rebutted where evidence shows "an adequate warning or instruction would have been futile under the circumstances"); *Calderon v. Machinenfabriek Bollegraaf Appingedam BV*, 667 A.2d 1111, 1116 (N.J. Super. Ct. App. Div. 1995) ("the [heeding] presumption normally disappears in the face of conflicting evidence"). Third, the new Restatement of Torts rejects any presumption, since the premise – that people generally heed warnings – has been proved false. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, Reporters' Note, cmt. l (1997).

hard to avoid the need to prove reliance. There should be no recovery in that case, much less a multi-million dollar classwide recovery.

* * * *

Each of the trial court's fictions is troublesome. In combination they are fundamentally unfair, and destroy the credibility of the judicial process. For combined, the rulings compel damages for non-injury, based on warning duties that compromise safety, with no rational connection between the information deficit alleged and any action of any plaintiff, compounded classwide. The Chamber respectfully asks the Court not to indulge fictions, much less cumulative classwide fictions, that occasion injustice and invite its repetition.

IV. THE TRIAL COURT'S NEW RULE PUNISHING SAFETY IMPROVEMENT IS BAD POLICY.

The fundamental policy underlying Pennsylvania's law of products liability is to make products as safe as possible as soon as possible. *See Habecker v. Clark Equip. Co.*, 36 F.3d 278, 285 (3rd Cir. 1994). Pennsylvania recognizes that it undermines that goal if it imposes on manufacturers a duty to retrofit older products with every new safety innovation a manufacturer develops; the "clear effect" of such a duty would be to "inhibit manufacturers from developing improved designs that in any way affect the safety of their products." *Lynch v. McStome and Lincoln Plaza Assocs.*, 378 Pa. Super. 430, 441, 548 A.2d 1276, 1281 (Pa. Super. Ct. 1988) (escalator manufacturer had no duty to retrofit previously manufactured product with improved braking system even though that feature may have lessened likelihood of injury from abrupt stops); PA.R.E., RULE 407

(subsequent remedial measures not admissible to prove "culpable conduct").[4] Indeed, just this year the Pennsylvania Supreme Court expanded the rule to apply not just in negligence but also in strict liability. *Duchess v. Langston Corp.*, 769 A.2d 1131 (Pa. 2001). The Court explained that "regardless of the theory employed to require a manufacturer to pay damages, the deterrent to taking remedial measures is the same, namely, the fear that the evidence may ultimately be used against the defendant." *Id.* at 1141. The Court accordingly held that the policy favoring innovation without fear of retribution requires broad protection of subsequent remedial measures:

> Since the importance of the social policy objectives sought to be advanced is unquestionable, the prospect of our rules inhibiting such policy and, correspondingly, the continual process of improvement and innovation in the marketplace, favors the broader application of the evidentiary exclusion.

Id. at 1143.

Other states concur. *See, e.g., Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 337 (Mich. 1995) ("imposing a duty to update technology would place an unreasonable burden on manufacturers" and "would discourage manufacturers from developing new designs if this could form the bases for suits or result in costly repair and recall campaigns"); *Modelski v. Navistar Int'l. Transp. Corp.*, 707 N.E.2d 239, 247 (Ill. App.

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[4] Rule 407 permits admission of subsequent remedial measures for "impeachment or to prove other controverted matters, such as ownership, control, or feasibility of precautionary measures," but that does not avoid the problem. Even if admissible, the evidence of subsequent remedial measures cannot be used to justify liability or punitive damages. That is how the court used them here. *See* Trial Ct. Op. at 11, 13, 21-22, R. _____.

Ct. 1999) (no duty to retrofit tractor with safer seat design; imposing such a duty would discourage improvements to product safety by making them more costly); *Dion v. Ford Motor Co.*, 804 S.W.2d 302, 310 (Tex. Ct. App. 1991) ("Ford did not assume a duty to improve upon the safety of its tractor by replacing an existing rollover protection system with an improved rollover protection system."); *see also Burke v. Deere & Co.*, 6 F.3d 497, 510-13 (8th Cir. 1993) (manufacturer cannot be punished via punitive damages for not retrofitting products with latter-developed safety features).

> Duties to recall products impose significant burdens on manufacturers. Many product lines are periodically redesigned so that they become safer over time. If every improvement in product safety were to trigger a common-law duty to recall, manufacturers would face incalculable costs every time they sought to make their product lines better and safer.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11 cmt. a (1997).

Here, Chrysler did the responsible thing. Upon learning of just a few undocumented injuries, it analyzed and documented the performance of its product. Based on that analysis, it decided to improve the safety of that product by addressing the risk, however unlikely it was to occur. Thus Chrysler made its airbags better and safer. That is exactly what the law is supposed to encourage.

But instead, Chrysler was punished. Its own internal study was turned against it, and became the lynchpin of the judgment below. It was transformed from a responsible inquiry for progress into evidence that Chrysler "knew or could possibly have known" its airbag design was causing injuries. Trial Ct. Op. at 21, R. ___; *see also id.* at 11, 13, R. ____. Based on its own effort to improve, Chrysler has been ordered – more than ten

years after the fact – to pay the cost of retrofitting class members' vehicles with the improved air bag it installed on later vehicles,[5] and pay $3.75 million in punitive damages on top of that.

Chrysler is far worse for having improved its products and warnings than if it had done nothing. Indeed, it is absurd to impose punitive damages on someone who tried to warn; warning, even if imperfect, negates the evil mind required for punitive damages. *See Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392, 398 (Mo. 1987); *Juarez v. United Farm Tools, Inc.*, 798 F.2d 1341, 1344 (10th Cir. 1986); *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089, 1097 (5th Cir. 1973); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994); *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993).

Imposing liability, much less punitive damages, on Chrysler for studying its product and improving its design sends the wrong message: don't study or fix things because you'll be liable, indeed, punished, if you do – and because you do. That is not the law, and should not be here. *See Duchess*, 769 A.2d at 1143; *Lynch*, 548 A.2d at 1281.

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[5] The judgment below is clearly a duty to retrofit previously sold vehicles, for it expressly orders Chrysler to pay $730 per class member's vehicle – "the cost to install a properly designed [airbag] deployment system" – to "cure" the supposed "defect" in vehicles sold more than ten years ago. Trial Ct. Op. at 1, 8, R. ____.

CONCLUSION

The judgment below should be reversed.

DATED: June 22, 2001

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