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Seat Belts and the Law: Mandatory Use Laws and the Legal Consequences of Non-Use

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16. Abstract

This report analyzes the current legal status of the seat belt defense in civil actions. Particular emphasis is given to factors which have altered the evolution of the seat belt defense since 1982, the most significant being the passage of laws mandating belt use in a majority of the states.

The report is organized into three sections. The first section provides the background necessary to an understanding of the nature and applications of the seat belt defense, and the benefits and detriments of the seat belt defense and mandatory use laws (MULs). The second section includes a State-by-State analysis of the current status of the seat belt defense. The final section examines the seat belt defense and MULs in the context of broader public policy considerations regarding injury prevention.

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The purpose of this paper is to analyze the current condition of the seat belt defense, which is defined in Section I of the paper, in civil actions.[1] Particular emphasis will be placed on factors which have altered the evolution of the seat belt defense since 1982,[2] the most significant being the passage, in a majority of jurisdictions in the United States, of mandatory seat belt use laws (MULs).

The reader should understand that each state[3] in the United States is an independent legislative and judicial entity, and the seat belt defense has been addressed in different, sometimes contradictory, ways in these different jurisdictions.[4] Nevertheless, one conclusion of this paper is that a general trend towards judicial recognition of the seat belt defense has been largely stifled by provisions in many MULs which prohibit evidence of seat belt nonuse to be introduced in civil actions. A second conclusion is that such "gag" provisions were adopted by state legislatures because of decisions made by the United States

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[1] A version of the seat belt defense has been raised in criminal cases on a number of occasions. The defense is typically raised by a person charged with criminally negligent homicide. The defendant alleges that the victim would not have died if he or she had been using a seat belt, and that the defendant's actions were not the proximate cause of the victim's death. The defense was successfully employed in an unreported Michigan case, People v. Smith, described in Fisher and Fisher, Use of the Safety Belt Defense in Michigan Negligent Homicide Cases, Michigan Bar Journal 144 (February 1989). Three subsequent Michigan cases, however, have rejected the defense. See People v. Richardson, 170 Mich. App. 470, 428 N.W. 2d 698 (1988); People v. Clark, 171 Mich. App. 656, 431 N.W. 2d 88 (1988); and People v. Burt, 173 Mich. App. 332, 433 N.W. 2d 366 (1989). The court in Clark stated that "a defendant takes his victim as he finds him and cannot be exonerated from criminal liability merely by arguing that the decedent's negligence was a intervening cause" (of his own death). 431 N.W. 2d 88, 89. The Richardson court held that the decedent's "failure to wear a safety belt does not bear on the criminal conduct of the defendant." 428 N.W. 2d 698, 699. See also Wren v. State, 577 P. 2d 235 (Alaska 1978); Pantuer v. State, 1989 Alaska App. Lexis 78 (September 22, 1989); Frazier v. State, 530 So. 2d 986 (Fla. App. 1st Dist. 1988); Roberts v. State, 173 Ga. App. 701, 327 S.E. 2d 819 (1985); State v. Douguerty, 1989 Tenn. Crim. App. Lexis 9 (Tenn. Crim. App. 1989); State v. Nester, 336 S.E. 2d 187 (W. Va. 1985); and K.G. v State No 89-0303 LV (Wis. App. 1989) (unpublished limited precedent opinion) which rejected the seat belt defense in criminal cases. All appellate precedent is against the use of the seat belt defense in criminal cases.

[2] For a discussion of the seat belt defense prior to 1983, see Westenberg, Non-Use of Motor Vehicle Safety Belts as an Issue in Civil Litigation, August 1983 Final Report, U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT HS-806-443. See also Westenberg, The Safety Belt Defense at Trial and in Out-of-Court Settlement, 37 University of Florida Law Review 785-840 (1985), reprinted in 36 Defense Law Journal 1-64 (1987) and Westenberg, Buckle Up or Pay; the Emerging Seat Belt Defense, 20 Suffolk University Law Review 867-948 (1986).

[3] This paper will discuss the seat belt defense in all 50 states, the District of Columbia and the Commonwealth of Puerto Rico. For convenience, the latter two jurisdictions will be referred to as "states."

[4] Compare the responses of the highest courts in Alaska and South Carolina when confronted with the refusal of their respective state legislatures to pass MULs. The Supreme Court of Alaska, in Hutchins v. Schwartz, 724 P. 2d 1194 (Alaska 1986), adopted the seat belt defense notwithstanding a previous refusal of the Alaska House to pass a MUL. See Note: The Seat Belt Issue: Judicial Disregard for Legislative Action, 4 Alaska Law Review 387 (1987). The Supreme Court of South Carolina, in Keaton v. Pearson, 358 S.E. 2d 141 (S.C. 1987), reversed its previous position in favor of the seat belt defense as articulated in Sams v. Sams, 247 S.C. 467, 148 S.E. 2d 154 (1966) and Jones v. Dague, 252 S.C. 261, 166 S.E. 2d 99 (1969), citing "the continuing legislative debate over a mandatory automobile seat belt law." 358 S.E. 2d 141, 142.

Department of Transportation. Although mistaken, DOT's insistence that the seat belt defense should be considered as a substantive part of MULs may have served a useful purpose, since the defense may have become a "bargaining chip" and its rejection may have made MULs more palatable to some state legislators and thus facilitated passage of some MULs. MULs have resulted in higher seat belt use rates and lower automobile death and injury rates.[5] This tangible social good [6] greatly outweighs the seat belt defense as a factor which may motivate people to use their seat belts, a rather speculative proposition at best.[7]

This paper is organized into three parts. The first section will provide the background necessary to an understanding of the nature and applications of the seat belt defense, and the benefits and detriments of the seat belt defense and MULs. The second section will provide a state-by-state analysis of the current status of the seat belt defense. The third section will examine the seat belt defense and MULs in the context of broader public policy considerations regarding injury prevention.

I. Background

A. An Overview of the Seat Belt Defense and Relevant Tort Law Theories

The "seat belt defense" is in reality a variety of legal theories which have been conceived to lessen or eliminate the liability of persons[8] who have been named as defendants in personal injury actions. It is an evidentiary rule which seeks to permit

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[5] Seat belt use rates typically rise from 15% to approximately 45% after the passage of a MUL. Such an increase translates to a 15% reduction in front seat fatalities. See Williams and Lund, Seat Belt Use Laws and Occupant Crash Protection in the United States, American Journal of Public Health 1986; 76(12):1438-41 at 1439. See also Chorba et. al., Efficacy of Mandatory Seat Belt Use Legislation, JAMA 1988; 260(24):3593-7, which describes significant decreases in severe and fatal injuries among front seat occupants following passage of the North Carolina MUL.

[6] See Orsay et. al., Prospective Study of the Effect of Safety Belts on Morbidity and Health Care Costs in Motor-Vehicle Accidents, JAMA 1988; 260(24):3598-3603, which concludes that universal seat belt use would save $10.1 billion in the United States each year.

[7] For example, even though New York has recognized the seat belt defense since Spier v. Barker, 35 N.Y. 2d 444 (1974), seat belt use has risen significantly only since the passage of the New York MUL in 1984. Pace, Thailer and Kwiatkowski, New York Mandatory Seatbelt Use Law: Patterns of Seatbelt Use Before and After Legislation, Journal of Trauma 1986; 26(11):1031-3. See also Schwartz, The New York Seat Belt Defense, 59 New York State Bar Association Journal 30, 35 (1987): " The deterrent effect [of the MUL] is far superior to that of the Spier decision."

[8] "Person" includes individuals, partnerships, corporations, units of government and any other legal entity which may be sued.

information concerning a plaintiff's[9] failure to use seat belts to be introduced in the trial for consideration by the jury.[10] Typically, the attorney for the defendant will allege in the answer to the plaintiff's complaint[11] or in a pretrial motion[12] that the plaintiff failed to use an available seat belt.[13] Through discovery procedures,[14] the defendant's attorney will seek to establish that a seat belt was available to the plaintiff, that the plaintiff failed to use the seat belt, and that the plaintiff was injured thereby or that the plaintiff's injuries were increased due to seat belt nonuse. Before the trial commences, the plaintiff's attorney often will move in limine[15] to bar the introduction of such evidence. The trial judge must then rule on the motion in limine. The losing party may appeal the judge's ruling after the trial has been completed. Appellate court rulings on this issue constitute the backbone of the body of law which exists concerning the seat belt defense. In a number of states, however, the legislature has assumed the responsibility for determining the validity of the defense, either by allowing it in some form or by forbidding its use.[16]

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[9] But see Rollins v. Department of Transportation, 238 Kan. 453, 711 P. 2d 1330 (1985), in which the Kansas Supreme Court refused to apply the seat belt defense to a non-party (the driver of the automobile in which plaintiff was injured.)

[10] Kohlman, The Seatbelt Defense. 35 Am Jur Trials 349, 408. See also Weymss v. Coleman, 729 S.W. 2d 174, 179 (Ky. 1987).

[11] In New York, the seat belt defense must by law be pleaded as an affirmative defense. McKinney's Vehicle and Traffic Law sec. 1229-c(8).

[12] See Volkswagen of America, Inc. v. Long, 476 So. 2d 1267 (Fla. 1985).

[13] For the purposes of this paper, "seat belt" includes shoulder harnesses and similar motor vehicle occupant restraint systems.

[14] "Discovery procedures" are a variety of devices authorized by federal and state rules of civil procedure to enable litigants to secure potential evidence. In a case involving the seat belt defense, the defendant's attorney might employ such discovery techniques as photographing the plaintiff's automobile, asking the plaintiff during a pre-trial deposition about his or her use of seat belts and requesting a physical examination of the plaintiff by a physician. For a thorough discussion of discovery in seat belt cases, see Kohlman, The Seatbelt Defense, 35 Am Jur Trials 349, sec. 60-62, pp. 455-461.

[15] A motion in limine is made before a trial begins in order to obtain a ruling on evidence which may be prejudicial or otherwise inadmissible. See McCormick, Evidence (Third Edition, 1984) 128 and Rothblatt and Leroy, Motion in Limine Practice, 20 Am Jur Trials 441-512.

[16] As discussed in Part III below, the seat belt defense, in large measure a product of state common law, was considered by state legislatures at the behest of the United States Department of Transportation, which, as part of Standard 208 (49 C.F.R. sec. 571.208 S4.1.5.2[c]), characterized the mitigation of damages approach as an "enforcement procedure" which was to be made part of MULs.

In order for the seat belt defense to be successful, it must work on two levels.[17] First, it must be recognized as a valid defense in the state in which the action is being brought.[18] Second, a causal connection must be established between the plaintiff's failure to use an available seat belt and his or her injuries.[19] Such connection is ordinarily proven through the use of expert witnesses.[20]

The legal theories upon which courts may base versions of the seat belt defense vary according to prevailing statutory and case law in a particular jurisdiction as well as the particular circumstances of the case being litigated. What follows is a synopsis of the major tort law theories under which the defense has been examined by the courts.[21]

1. Contributory negligence is a vestige of an earlier legal era in which a plaintiff won his or her case only if he or she was totally free of any negligence that contributed to the injury. The doctrine of contributory negligence bars recovery to a plaintiff who is in any degree, no matter how small, responsible for his or her injuries.[22] Courts have consistently refused to apply the doctrine of contributory negligence to seat belt cases,[23] in large measure because of judicial concern over the perceived unfair result of an injured plaintiff being completely precluded from recovering damages from negligent defendant merely because the plaintiff failed to buckle up.[24] Over the years, the number of contributory negligence jurisdictions has dwindled to seven: Alabama, Delaware, District of Columbia, Maryland, North Carolina,

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[17] Kohlman, note 10, p. 408-9.

[18] If the action is being brought in a federal court, the federal judge must still apply state law, whether common law Caizzo v. Volkswagenwerk, A.G., 468 F. Supp. 593 E.D.N.Y. 1979 or statutory law, Pasternack v. Achorn, 680 F. Supp. 447 D. Me. 1988.

[19] See Kohlman, The Seatbelt Defense, 3 Am Jur Proof of Facts 3d 71; Codots v. State, 125 A.D. 2d 746, 509 N.Y.S. 2d (3rd Dept. 1986).

[20] See Mo. State Ann. Sec. 307.178(3)(1); Spier v. Barker, 35 N.Y. 2d 444, 449, 363 N.Y.S. 2d 916, 920, 323 N.E. 2d 164 (1974). For an exception to the general rule requiring expert testimony, see Sandoz v. Caisse, 514 A. 2d 863, 864 (N.J. Super. 1986).

[21] For a more complete discussion of the legal theories underlying the seat belt defense see Note, Legal Issues Presented by Motor Vehicle Restraint Systems, 17 Akron Law Review 781-794, 783-787 (1984) and Note, The Seat Belt Defense: A Comprehensive Guide for the Lawyer and Suggested Approach for the Courts, 56 The Notre Dame Lawyer 272-292, 275-280 (1980).

[22] See Annotation: The Seatbelt Defense and Contributory Negligence, 92 ALR 3d 9.

[23] See, for example, McCord v. Green, 362 A. 2d 720 (D.C. 1976); Cierpisz v. Singleton, 247 Md. 215, 230 A. 2d 629 (1967); and Miller v. Miler, 273 N.C. 228, 160 S.E. 2d 65 (1968).

[24] See Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P. 2d 1035, 1035 (1972).

South Carolina and Virginia.[25] None of these jurisdictions recognizes the seat belt defense.[26]

2. Comparative negligence has supplanted contributory negligence in most jurisdictions.[27] In general, under comparative negligence law, the fault of both the plaintiff and the defendant is weighed by the jury in order to determine each party's responsibility for the plaintiff's damages.[28] Although some state courts have held that adoption of comparative negligence does not change their negative view of the seatbelt defense,[29] several jurisdictions have carved out a place for the seat belt defense within the framework of comparative negligence. In Insurance Co. of North America v. Pasakarnis,[30] the Supreme Court of Florida first noted that it had adopted comparative negligence because "it was inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of another to produce the loss."[31] The court went on to adopt the seat belt defense, stating that the defense was consistent with this principle of comparative negligence.[32] At present, courts in ten states - Alaska, Arizona, California, Florida, Kentucky, Michigan, New Jersey, New York, Oregon, and Wisconsin - have adopted the seat belt defense under their comparative negligence

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[25] Woods, Comparative Fault (Second Ed., 1987) Rochester, N.Y.: Lawyers Cooperative Publishing Company, 30.

[26] See Rogers, Annual Survey of South Carolina Law, 40 South Carolina Law Review 237, 240 (1988), speculating that the Supreme Court of South Carolina's rejection of the seat belt defense in Keaton v. Pearson, 358 S.E. 2d 141 (S.C. 1987) may have been influenced by the fact that South Carolina is a contributory negligence jurisdiction.

[27] Woods, note 25 above.

[28] See Annotation: Nonuse of Automobile Seatbelts as Evidence of Comparative Negligence, 95 ALR 3d 239.

[29] Because plaintiff still has no duty to anticipate defendant's negligence [see Churning v. Staples, 628 P. 2d 180 (Colo. App. 1981) and Amend v. Bell, 89 Wash. 2d 124, 570 P. 2d 138, 143 (1977)] and because there still is no connection between plaintiff's failure to use a seat belt and the occurrence of the crash [see Quick v. Crane, 111 Idaho 759, 727 P. 2d 1187, 1208 (1986)].

[30] 451 So. 2d 447 (Fla. 1984).

[31] 451 So. 2d 447, 452.

[32] 451 So. 2d 447, 453. To the same effect is Foley v. City of West Allis, 113 Wis. 2d 475, 335 N.W. 2d 824, 830 (1983).

plans,[33] although some have opted for variations such as mitigation of damages and double comparative negligence.[34]

3. Mitigation of damages avoids the problems inherent in apportioning fault under the doctrines of contributory negligence and pure comparative negligence.[35] The mitigation of damages approach first assesses responsibility for the crash itself. After the respective liability of each party has been determined, the issue of plaintiff's nonuse of seat belts is examined. The defendant has the burden of proving which of plaintiff's injuries would have been avoided through use of a seat belt.[36] The plaintiff's damages are reduced accordingly. The mitigation of damages approach, in effect, divides an automobile crash into two separate collisions, the first between two vehicles (or a vehicle and a stationary object), and the second between an occupant and the interior of the vehicle, an approach first used in the landmark products liability case, Larsen v. General Motors Corporation.[37] New York is a "pure" mitigation of damages state, treating mitigation separately from comparative negligence.[38]

4. "Double comparative negligence" was recently articulated in Waterson v. General Motors Corp.[39] Under this theory, the comparative fault of the respective parties in causing the crash is first determined. Then the comparative fault in causing the plaintiff's injuries is determined, including plaintiff's failure

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[33] Hutchins v. Schwartz, 724 P. 2d 1194 (Alaska 1986); Law v. Superior Court of the State of Arizona, 157 Ariz. 147, 755 P. 2d 1135 (1988); Franklin v. Gibson, 138 Cal. App. 3d340, 188 Cal. Rptr. 23 (1982) and Cal. Veh. Code sec. 27314 (j) (West Supp. 1989); Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984) and Fla. Stat. Ann. sec. 316.614 (West Supp. 1988); Weymss v. Coleman, 729 S.W. 2d 174 (Ky. 1987); Lowe v. Estate Motors Limited, 428 Mich. 439, 410 N.W. 2d 706 (1987) and M.C.L.A. sec. 257.710e (West Supp. 1988); Waterson v. General Motors Corp., 111 N.J. 238; 544 A. 2d 357 (1988); Dahl v. BMW, 304 Or. 558, 748 P. 2d 77 (1987); Foley v. City of West Allis, 113 Wis. 2d 475, 335 N.W. 2d 824 (1983).

[34] Acceptance of the seat belt defense under comparative negligence in Georgia was derailed by a gag provision in the MUL. See Cannon v. Lardner, 185 Ga. App. 194, 363 S.E. 2d 574 (Ga. App. 1987), writ vacated in part, judgment affirmed in part, 258 Ga. 332, 368 S.E. 730 (1988) and Ga. Stat. Ann. sec. 40-8-76.1.

[35] See Annotation: Nonuse of Seat Belt as Failure to Mitigate Damages, 80 ALR 3d 1033.

[36] See Spier v. Barker,35 N.Y. 2d 444, 450, 363 N.Y.S. 2d 916, 920, 323 N.E. 2d 164, 167 (1974).

[37] 391 F. 2d 495 (8th Cir. 1968). See also Weymss v. Coleman, 729 S.W. 2d 174, 178-9 (Ky., 1987).

[38] Spier v. Barker, 35 N.Y. 2d 444, 363 N.Y.S. 2d 916, 323 N.E. 2d 164 (1974) and New York Vehicle and Traffic Law sec. 1229-c (McKinney 1986). The pure mitigation of damages approach was also used in Clarkson v. Wright, 121 Ill. App. 3d 230, 76 Ill. Dec. 668, 459 N.E. 2d 305 (1984), reversed 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268 (1985).

[39] 111 N.J. 238, 544 A. 2d 357 (1988).

to use an available seat belt.[40] A formula is then applied to arrive at the plaintiff's damages.[41]

5. Crashworthiness cases are a form of product liability action in which a person who has been injured in an automobile crash sues the motor vehicle manufacturer, alleging that his or her injuries were caused or aggravated by a defect in the design or manufacture of the vehicle.[42] Since the design of the vehicle is a major issue in crashworthiness cases, the provision of safety devices by the automobile manufacturer, and the nonuse of such devices by the vehicle occupant, may be a significant factor in the jury's assessment of the manufacturer's liability.[43] Accordingly, theories such as comparative negligence may be inapplicable in crashworthiness cases.[44] A court in Louisiana, a state which refused to recognize the seat belt defense under its former contributory negligence law,[45] nevertheless allowed evidence of the existence of seat belts to be presented to the jury in a crashworthiness case.[46] It should be noted that even though crashworthiness cases and other types of personal injury cases involve different standards of liability, most state courts and federal courts applying state law will ordinarily accept, or not accept, the seat belt defense consistently between the two kinds of

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[40] 544 A. 2d at 575-6. A similar approach may be found in Gallub, A Compromise between Mitigation and Comparative Fault: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform, 14 Hofstra Law Review 319-355 (1986).

[41] The formula has been criticized as being too complicated. See 122 New Jersey Law Journal (August 4, 1988), 1. For a more thorough discussion of Waterson, see Polito, Waterson v. General Motors Corp., 102 Harvard Law Review 925 (1989).

[42] For a discussion of crashworthiness cases in general, see Hoenig, Resolution of "Crashworthiness Design Claims, 55 St. Johns Law Review 633-727 (1981). See also Wilton and Campbell, Recognizing the Value of Seat Belts in Motor Vehicle Products Liability Cases, 11 Journal of Products Liability 1-16 (1988) and Casbeer, The Use of the Seat Belt Defense in Crashworthiness Cases, 40 Baylor Law Review 551-571 (1988).

[43] See Lowe v. Estate Motors Ltd., 428 Mich. 439, 410 N.W. 2d 706, 720 (1987) and Siren v. Behan, 224 N.J. Super. 130, 539 A. 2d 1244, 1248 (1988), remanded for reconsideration 113 N.J. 323, 550 A. 2d 442 (1988).

[44] LaHue v. General Motors Corp. No. 88-5063-CV-SW-1. U.S.D.C., W.D.Mo., July 5, 1989). See also Wilkins, The Indiana Mandatory Seatbelt Use Law and Its Effect upon Automobile Tort Litigation, 19 Indiana Law Review 435-455 (1986), noting that the Indiana Comparative Fault Act, Ind. Code Sec. 34-4-33-13, does not apply to strict products liability actions.

[45] See Williams v. Harvey, 328 So. 2d 901, 903 (La. App. 4th Cir. 1976). "An injured guest passenger does not forfeit his right to recover because of his failure to use a seatbelt."

[46] McElroy v. Allstate Insurance Company, 420 So. 2d 214 (La. App. 4th Cir. 1982), cert. den. 422 So. 2d 165 (La. 1982). See also Hermann v. General Motors Corp. 720 F.2d 415 (5th Cir. 1983 and Jordan v. General Motors Corp., 624 F. Supp. 72 (E.D. La.1985).

actions.[47] However, some recent cases have allowed seat belt evidence to be introduced in crashworthiness cases on the issue of the safety of the design of the vehicle, notwithstanding gag provisions in the applicable MULs.[48]

6. Wrongful death actions are cases in which a defendant is being sued for causing another's death. The seat belt defense has not been recognized in many such cases because the courts ruled it was designed for situations in which persons are injured rather than killed[49] and because of difficulty in proving that a person would not have been killed if he or she had been using a seat belt.[50] A recent Florida case[51] did allow use of the seat belt defense in a wrongful death action, holding that to do otherwise "would create an anomalous situation by imposing liability for injuries which would not have been compensable had the decedent survived.[52]

7. Negligence per se is negligence as a matter of law.[53] Conduct which is negligent per se is not determined as such by a jury, but is established on the basis of legal doctrine.[54] Courts have consistently held that failure to wear a seat belt, in the absence of a MUL, does not constitute negligence per se.[55]

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[47] As an example, see the companion cases of Dahl v. BMW, 304 Or. 558, 748 P. 2d 77 (1987) and Morast v. James, 304 Or. 571, 748 P. 2d 84 (1987).

[48] Cunningham v. Suburu of America, Inc. Civil Action No. 85-2621-S (D.C. Kau 1987). 1987 U.S. Dist. Lexis 9314; LaHue v. General Motors Corporation, Case No. 88-5063-CV-SW-1 (D.C. W.Mo. 1989). 1989 U.S. Dist. Lexis 7523; Whitehead v. American Motors Sales Corporation, No. 19695 (Utah 1989). 1989 Utah Lexis 5. See also O'Grady, Minnesota's Seat Belt Evidence Gag Rule: Antiquated and Unfair in Crashworthiness Cases, 15 William Mitchell Law Review 353, 359 (1989).

[49] See England v. United States, 632 F. Supp. 1340, 1342-43 (M.D. Fla. 1986). See also Polyard v. Terry, 148 N.J. Super 202, 372 A. 2d 378 (Law Div. 1977); Sleeman v. Reifenstein, 90 A.D. 2d 966, 456 N.Y.S. 2d 597 (4th Dept., 1982).

[50] See Baginski v. New York Telephone Company, 130 A.D. 2d 362, 515 N.Y.S. 2d 23, 26 (1st Dept. 1987).

[51] McCoy v. Hollywood Quarries, 544 So. 2d 274 (Fla. App. 4th Dist. 1989).

[52] Id. The court specifically rejected the opposite holding in England v. United States, 632 F. Supp. 1340 (M.D. Fla. 1986).

[53] Speiser, Krause and Gans, The American Law of Torts. Rochester, N.Y.: The Lawyers Cooperative Publishing Company, 1985, vol. 2, p. 1026 and Hershberger v. Brooker, 421 N.E. 672, 677 (Ind. App. 1981).

[54] Once established, negligence per se has no greater significance than ordinary negligence. See Prosser, Contributory Negligence as Defense to Violation of Statute, 32 Minn. L. Rev. 105, 111 (1948): "Negligence per se is not liability per se."

[55] See Pritts v. Walter Lowery Trucking Company, 400 F. Supp. 867,869 (W.D. Pa. 1975); Coryell v. Conn, 88 Wis. 2d 310, 276 N.W. 2d 723,728(1979); Insurance Company of North America v. Pasakarnis, 451 So. 2d 447,453 (Fla. 1984). Each of these cases goes on to hold that failure to wear seat belts may be evidence of

Accordingly, many observers eagerly awaited the adoption of MULs, assuming that such legislation would give defense attorneys the clout of negligence per se. This has not come to pass, however. In order to ascertain whether violation of a MUL would be negligence per se, one must first look to the law itself. As will be discussed in detail below, many MULs contain gag provisions which do not allow any evidence of violations to be introduced in any civil action.
Even in those states which allow evidence of nonuse to be introduced, the MUL may provide that such nonuse is not negligence per se.[56] If the MUL is silent on the subject, the courts must determine whether a violation is negligence per se.[57] In the one case which has squarely addressed the issue, Waterson v. General Motors Corporation,[58] the court stated: "Even after the enactment of the mandatory seat belt law....failure to use a seat belt is not negligence per se."[59]

8. Ordinary negligence is a violation of a standard of conduct which a reasonable person would follow under like circumstances.[60] It is determined by the jury as the trier of fact. In the absence of a MUL, or when a MUL is silent, failure to use an available seat belt may still be considered by courts to be possible negligence for juries to consider.[61]

9. Assumption of Risk may be raised by a defendant based on a plaintiff's failure to use an available seat belt.[62] In general, in order to successfully raise the defense of assumption of risk, a defendant must prove first, that the plaintiff had knowledge and

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ordinary negligence.

[56] See Cal. Veh. Code sec. 27316(j) (West Supp. 1989) (violation shall not establish negligence as a matter of law or negligence per se) and Fla. Stat. Ann. sec.316.614(10) (West Supp. 1989) (violation of statute does not constitute negligence per se).

[57] Restatement (Second) Torts (1965) sec. 288B: "Effect of Violation.
(1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man is negligence in itself.
(2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct."

[58] 111 N.J. 238, 544 A. 2d 357 (1988).

[59] Id. at 370.

[60] Restatement (Second) of Torts (1965) sec. 283.

[61] See Hutchins v. Schwartz, 724 P. 2d 1194,1198 (Alaska, 1986); Law v. Superior Court, 157 Ariz. 147, 755 P. 2d 1135, 1143-4 (1988); Dahl v. BMW, 304 Or. 558, 748 P. 2d 77,82 (1987).

[62] For a more detailed discussion of this subject see Werber, A Multi-Disciplinary Approach To Seat Belt Issues, 29 Cleveland State Law Review 217, 255-60 (1980).

understanding of a condition which created a risk[63] and second, that the plaintiff freely incurred the risk.[64] Although often rejected by courts,[65] the defense of assumption of risk based on failure to wear a seat belt has been held to be a matter for consideration by the jury in at least two cases.[66] The acceptability of the defense of assumption of risk hinges upon judicial attitudes towards the risk of injury in motor vehicle crashes. As summarized by Judge Murray of the Supreme Court of Rhode Island: "Very few courts have found assumption of risk persuasive in considering the admissibility of safety-belt evidence. It is the opinion of this court that the failure to buckle up does not constitute a self-willed and knowing exposure to the specific risk of sustaining enhanced injuries originally set in motion by another person's negligence or undetectable product defect."[67]

B. Opposition to Seat Belt Defense

A number of arguments have been advanced opposing the seat belt defense.[68] Those which carry the most weight are described below, along with counter arguments.

1. Unanticipated Negligence of Defendant. Since the defendant is to blame for causing the crash, the plaintiff's recovery of damages should not be lessened merely because the plaintiff failed to anticipate the defendant's negligence.[69] Several courts have held, however, that crashes are common occurrences and that a reasonable person has the duty to lessen the

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[63] Swajian v. General Motors Corporation, 559 A. 2d 1041 (R.I. 1989).

[64] Horn v. General Motors Corporation, 17 Cal. 3d 359, 369-70 131 Cal. Reptr. 78, 551 P. 2d 398 (1976).

[65] Breault v. Ford Motor Company, 305 N.E. 2d 824, 826 (1973); Miller v. Haynes, 454 S.W. 2d 293, 300 (Mo. App. 1970); LaHue v. General Motors Corporation, Case No. 88-5063-CV-SW-1 (D.C.W. Mo. 1989); Kopischkie v. First Continental Corp., 610 P. 2d 668, 683 (Mont. 1980); Swajian v. General Motors Corporation, 559 A 2d 1041 (R.I. 1989); Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P. 2d 1030, 1035 (1972).

[66] Melia v. Ford Motor Co., 534 F. 2d 795, 801 (8th Cir. 1976); Cullen v. Timm, 180 Ga. App. 80, 360 S.E. 2d 745, 848-49 (1987).

[67] Swajian v. General Motors Corporation, 559 A. 2d 1041 (R.I. 1989).

[68] Westenberg, note 2 above, listed nine such reasons: doctrine, no duty, matter for the legislature, efficacy of safety belts, common practice, majority rule, practicality and trial administration, fairness, and invidious distinction. See Non-Use of Motor Vehicle Safety Belts as an Issue in Civil Litigation (August 1983 Final Report) DOT-HS-806-443, p. 20-23.

[69] Quick v. Crane, 111 Idaho 759, 727 P. 2d 1187, 1208-9 (Idaho 1986); Clarkson v. Wright, 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268, 270 (1985).

effects of crashes by using seat belts.[70] As the Supreme Court of Arizona stated: "Rejection of the seat belt defense can no longer be based on the antediluvian doctrine that one not need anticipate the negligence of others. There is nothing to anticipate; the negligence of motorists is omnipresent."[71]

2. Temporal Relationship. Under the doctrine of mitigation of damages, the plaintiff's responsibility to minimize damages caused by the crash does not attach until after the crash. Since deployment of a seat belt must be done before the crash, courts have held that plaintiffs have not breached their responsibility by failing to buckle up.[72] In recent cases, courts in Nebraska, North Carolina, and Rhode Island have rejected the selt belt defense on this basis.[73] The Supreme Court of Wisconsin, in addressing this issue, stated that such reasoning placed "an artificial emphasis on the moment of impact" and that the better view is to hold the plaintiff responsible for prior conduct which aggravates his or her damages.[74]

3. Following the Majority. Some courts have simply gone along with the majority of jurisdictions in denying the seat belt defense.[75] As more courts have adopted variations of the seat belt defense, this argument becomes less viable.[76]

4. Need for Experts. Since the seat belt defense ordinarily requires expert testimony in order to prove the causal link between the nonuse of seat belts by the plaintiff and the extent of his or her injuries,[77] some courts have been concerned that allowing the

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[70] Hutchins v. Schwartz, 724 P. 2d 1194, 1198 (Alaska, 1986); Insurance Co. of North America v. Pasakarnis, 541 So. 2d 447, 453 (Fla. 1984); Dahl v. BMW, 304 Or. 558, 748 P. 2d 77, 81 (1987); Foley v. City of West Allis, 113 Wis. 2d 475, 335 N.W. 2d 824, 828 (1983).

[71] Law v. Superior Court, 157 Ariz. 147, 755 P. 2d 135, 1140 (1988).

[72] State v. Ingram, 427 N.E. 2d 444, 448 (Ind. 1981); Welsh v. Anderson, 421 N.W. 2d 426, 429 (Neb. 1988); Hagwood v. Odom, 364 S.E. 2d 190, 192 (N.C. App. 1988).

[73] Welch v. Anderson, 228 Neb. 79, 421 N.W. 2d 426, 429 (1988); Hagwood v. Odom, 364 S.E. 2d 190, 192 (N.C. App. 1988); Swajian v. General Motors Corp. 559 A. 2d 104, (R.I. 1989).

[74] Foley v. City of West Allis, 113 Wis. 2d 475, 335 N.W. 2d 824, 830 (1983), quoting Prosser, Law of Torts, sec. 65, pp. 422-24 (4th ed. 1971).

[75] Quick v. Crane, 11 Idaho 759, 727 P. 2d 1187, 1209 (1986); Hillier v. Lamborn, 740 P. 2d 300, 304 (Utah App. 1987).

[76] Even McCord v. Green, 362 A. 2d 720,722 (D.C. 1976), a case which rejected the seat belt defense for a variety of reasons, found no merit in the bare argument that most jurisdictions did not allow the seat belt defense.

[77] See Truman v. Vargas, 275 Cal. App. 2d 976, 982, 80 Cal. Reptr. 373 (1969) and Franklin v. Gibson, 138 Cal. App. 3d 340, 188 Cal. Reptr 23, 25 (1982). See also Dowling v. Dowling, 138 A.D. 345, 525 N.Y.S. 2d 637, 638 (Second Dept. 1988).

seat belt defense would unduly complicate and lengthen trials.[78] However, as one court pointed out: "As to a 'battle of experts', juries are constantly evaluating expert testimony. This is not unique to the seat belt issue."[79]

5. Fairness. The issue of fairness has been raised in a number of ways. As discussed above, in contributory negligence jurisdictions the defendant would be absolved from all liability for the plaintiff's injuries, no matter how egregious his or her negligence was in causing the crash.[80] Before virtually all automobiles were equipped with seat belts, an argument was made that the seat belt defense unfairly penalized plaintiffs riding in seat belt equipped cars.[81] Finally, in states in which reductions to plaintiffs' damage awards have been limited by MULs,[82] persons to whom the MUL does not apply, such as rear seat passengers, may have their damages reduced by as much as 100 per cent while person covered by the MUL, such as front seat passengers, may have their damages reduced by as little as 1 per cent.[83] This anomaly can be corrected only through legislative action.[84]

6. The Slippery Slope Argument. On occasion, opponents of the seat belt defense have expressed the concern that acceptance of seat belt usage as a standard of reasonable conduct would lead to courts requiring ever more burdensome and costly self-protection measures of automobile passengers.[85] Nightmare visions of helmeted drivers being strapped into armored vehicles[86] do not take into

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[78] See Jeep Corp. v. Murray, 101 Nev. 640, 708 P. 2d 297 (1985); Derheim v. N. Fiorito Co., 80 Wash 2d 161, 492 P. 2d 1030, 1035 (1972); Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 456 (Fla. 1984)(Shaw, J., dissenting).

[79] Hutchins v. Schwartz, 724 P. 2d 1194, 1198 (Alaska 1986). See also Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1565 (D.C. Vt. 1985); Law v. Superior Court of the State of Arizona, 157 Ariz. 147, 755 P. 2d 1135, 1145 (1988).

[80] See notes 22-26 above and accompanying text.

[81] Britton v. Doehring, 242 So. 2d 666, 675 (Ala. 1970).

[82] See Iowa Code Ann. sec. 321.445(4)(b)(2) (West Supp. 1988) - 5% reduction in damages; Mich Comp. Laws Ann. Sec. 257.710e(5) (West Supp. 1988) - 5%; Mo. Stat. Ann. sec. 307.178(3) (Vernon Supp. 1989) - 1%; Wis. Stat. Ann. sec. 347.48(2m)(g) (1988) - 15%.

[83] Lowe v. Estate Motors Ltd., 428 Mich. 439,455, 410 N.W. 2d 706, 725 (1987) (Archer, J., dissenting).

[84] See Fahrner, The Michigan Supreme Court Says Yes to the Seat Belt Defense, 5 Cooley Law Review 159, 176 (1988).

[85] Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P. 2d 1030, 1035 (1972).

[86] Kleist, The Seat Belt Defense - An Exercise in Sophistry, 18 Hastings Law Journal 613, 621-22 (1967).

account the basic reasonableness of both judges and juries, however.[87]

7. Seat Belts as a Cause of Injuries. Four states still have, as precedent, cases which question the effectiveness of seat belts in preventing injuries.[88] There is ample evidence of the value of seat belts in saving lives and reducing injuries associated with automobile crashes.[89] However, because seat belt usage rates have risen, largely due to the effect of MULs,[90] the specter of seat belt caused injuries is again present.[91] In addition to reported cases in which passengers' injuries have been caused or increased by seat belts,[92] a recent Wyoming case describes precisely the situation most defenders of seat belts have discounted: a person trapped in a flaming vehicle and unable to release her seat belt.[93] It is crucial to keep the increase in seat belt caused injuries in perspective: many of the injured persons would have died had they not been wearing seat belts, and the injuries are far outweighed by lives saved and injuries prevented by the use of seat belts.

8. Speculation Regarding Causation. Courts in several jurisdictions have not permitted the seat belt defense because they felt that it was inappropriate to allow juries to speculate on the relationship between seat belt nonuse and the extent of plaintiff's

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[87] See Law v. Superior Court of the State of Arizona, 157 Ariz. 147, 755 P. 2d 1135, 1145 (1988): "The exact bounds of fault in another fact situation is a matter for the common law to address in its customary evolutionary fashion."

[88] McCord v. Green, 362 A. 2d 720, 723-24 (D.C. 1976); Cierpisz v. Singleton, 247 Md. 215, 230, 230 A. 2d 629, 635 (1967); D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11 (Miss. 1971); Miller v. Miller, 273 N.C. 228, 160 S.E. 65 (1968), cited as precedent in Hagwood v. Odom, 364 S.E. 2d 190, 191 (N.C. App. 1988).

[89] See, for example, Twohig v. Briner, 168 Cal. App. 3d 1102, 214 Cal. Reptr. 729, 730-34; Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 453 (Fla. 1984); Waterson v. General Motors Corp., 111 N.J. 238, 544 A. 2d 357, 373 (1988); Woods v. City of Columbus, 23 Ohio App. 163, 492 N.E. 2d 466, 470 (1985); McKee v. Southeast Delco School District, 354 Pa. Super 433, 512 A. 2d 28, 29 (1986).

[90] U.S. Department of Transportation, National Highway Traffic Safety Administration, Fatal Accident Reporting System 1987, p. 2-18.

[91] See Greenberg, Seat Belts and Human Rights: An Appraisal, Journal of Forensic Sciences 1987;32(1):158-166. For a detailed discussion of seat belt caused injuries, see Dardik and Ibraham, The Spectrum of Seat Belt Injuries, 6 Lawyer's Medical Journal 2d 59-75 (1978).

[92] See Garrett v. Ford Motor Company, 684 F. Supp. 407 (D.Md. 1987) (plaintiff's injuries were caused by defective rear seat lap belts); McLeod v. American Motors Corp., 723 F. 2d 830 (11th Cir. 1984) (according to expert testimony, the plaintiff's injuries would have been more severe had she been using a seat belt).

[93] Sims v. General Motors Corp., 751 P. 2d 357 (1988).

injuries.[94] It is difficult to understand this objection, since the seat belt defense presents juries with testimony by expert witnesses and because juries in negligence trials routinely approximate damages using information provided by experts and common sense.

9. Lack of Relationship of Seat Belt Use to First Collision. Some courts have rejected the seat belt defense because of a lack of connection between the plaintiff's failure to use his or her seat belt and the crash.[95] This would not be a problem in jurisdictions which apply the "second collision" theory, which distinguishes between the initial crash and the plaintiff's injuries.

10. Low Seat Belt Use Rates. Some courts have based their rejection of the seat belt defense on the fact that most persons do not use seat belts.[96] This theory may be dated due to increased seat belt use.[97] In addition, ingrained negligence in the population does not automatically make failure to fasten one's seat belt the act of a reasonable person and therefore not negligent.[98] As the New Jersey Supreme Court has indicated,[99] juries should be allowed to determine whether custom is a factor in determining whether a reasonably prudent person should buckle up, rather than courts taking the issue out of juries' hands.

11. Adherence to Precedent. The judiciary in certain states has placed a premium on judicial precedent in continuing to reject the seat belt defense.[100] Similarly, appellate courts in other states have consistently found reasons for rejecting the seat belt defense based on flaws in presentation of seat belt evidence at the

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[94] Britton v. Doehring, 268 Ala. 498, 242 So. 2d 666, 675 (1970); Lipscomb v. Diamiani, 226 A. 2d 914, 917-9 (Del. Super. 1967); Barry v. The Coca Cola Co., 99 N.J. Super. 270, 275, 239 A. 2d 273 (Law Div. 1967); Miller v. Miller, 273 N.C. 228, 160 S.E. 2d 65, 73 (1968).

[95] Melesko v. Riley, 32 Conn. Sup. 89, 339 A. 2d 479 (1975); Quick v. Crane, 11 Idaho 759, 727 P. 2d 1187, 1208 (1986).

[96] See Hampton v. State Highway Commission, 290 Kan. 565, 498 P. 2d 236 (1972); Amend v. Bell, 89 Wash. 2d124, 133, 570 P. 2d 138, 143 (1977).

[97] see note 90 above.

[98] See Prosser and Keeton, The Law of Torts, (5th ed. 1984) sec. 33 at 194-95.

[99] Waterson v. General Motors Corp., 111 N.J. 238, 544 A. 2d 357, 371 (1988).

[100] See, for example, Churning v. Staples, 628 P. 2d 180, 181 (Colo. App. 1981), which extended the "logic" in Fischer v. Moore, 183 Colo. 392, 517 P. 2d 458 (1973), decided under contributory negligence, to comparative negligence and Quick v. Crane, 111 Idaho 759, 727 P. 2d 1187, 1208 (1986), which quickly disposed of a seat belt defense argument by citing Hansen v. Howard O. Miller, Inc., 93 Idaho 314, 460 P. 2d 739 (1969).

trial level[101] or have simply consistently refused to address the merits of the seat belt defense.[102]

12. Absence of MULS. Courts have refused to recognize the seat belt defense because no MUL existed in their state[103] or because their state legislature voted down a MUL.[104] However, numerous courts have adopted some form of the seat belt defense in the absence of a MUL.[105] A major criticism of courts which defer to their legislatures in the matter of the seat belt defense is that such courts are confusing negligence per se with ordinary negligence.[106] As discussed above, there is no legal impediment to the adoption by a court of a standard of duty (ordinary negligence) even if the same conduct violates no law and is therefore not negligence per se.

13. Legislative Gag Provisions Lastly, and most significantly, courts have been constrained to turn down the seat belt defense because of legislative gag provisions,[107] both in seat belt installation statutes[108] and in MULs.[109] Three courts which disallowed the seat belt defense referred to gag provisions found in MULs enacted after the crashes in question took place.[110] Even though the MULs did not apply to the cases, the fact that the

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[101] Compare Harlan v. Curbo, 250 Ark. 610, 466 S.W. 2d 459 (1971) (merits of seat belt defense not reached because of lack of evidence) and Shelter Mutual Insurance Co. v. Tucker, 295 Ark. 260, 748 S.W. 2d 136 (1988). (evidence was "speculative").

[102] See Delott v. Roraback, 179 Conn. 406, 426 A. 2d 791 (1980); Wassell v. Hamblin, 196 Conn. 463, 493 A. 2d 870 (1985); Futterlieb v. Mr. Happy's, Inc., 16 Conn. App. 497, 548 A. 2d 728 (1988).

[103] For a recent case, see Thomas v. Henson, 102 N.M. 326, 695 P. 2d 476, 477 (1985).

[104] Keaton v. Pearson, 292 S.C. 579, 358 S.E. 2d 141 (1987).

[105] Recent cases include: Hutchins v. Schwartz, 724 P. 2d 1194, 1198 (Alaska 1986); Law v. Superior Court, 157 Ariz. 147, 755 P. 2d 1135, 1143-44 (1988); Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 451 (Fla. 1984); Weymss v. Coleman, 729 S.W. 174, 179 (Ky. 1987); Dahl v. BMW, 304 Or. 558, 748 P. 2d 77, 82 (1988); Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1563 (D. Vt.1985).

[106] Schwartz, The Seat Belt Defense and Mandatory Seat Belt Usage: Law, Ethics and Economics, 24 Idaho Law Review 275, 281 (1987-8).

[107] See notes 148-188 and accompanying text for a detailed discussion of gag provisions.

[108] Cheatham v. Thurston Motor Lines, 654 F. Supp. 216, 217 (S.D. Ohio 1986) (applying Tennessee law); Pasternack v. Achorn, 680 F. Supp. 447, 449 (D. Me. 1988) (applying Maine law).

[109] Ramrattan v. Burger King Corp., 656 F. Supp. 522, 527 (D. Md. 1987) (applying Maryland law).

[110] Clarkson v. Wright, 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268.270 (1985); Hagwood v. Odom, 364 S.E. 2d 190, 191 (N.C. App. 1988); Hillier v. Lamborn, 740 P. 2d 300, 304 (Utah, 1987).

courts mentioned the gag provisions may indicate their deference to the legislature on the seat belt defense.[111]

C. Support of Seat Belt Defense

Several reasons have been advanced which support the seat belt defense:

1. Consistency with Other Tort Law. The seat belt defense is consistent with the theory which underlies comparative negligence, namely that each party is responsible for his or her share of the damages caused.[112] Similarly, the seat belt defense fits into the doctrine of mitigation of damages, which allows a plaintiff's recoverable damages to be reduced by the incremental injury caused by his or her own negligence.[113]

2. Fairness. A related reason is "simple fairness".[114] Juries should be able to consider all relevant evidence in assessing responsibility for the plaintiff's injuries.[115]

3. Legislative Intent as Expressed in MULS. Although no case has yet been decided directly on point, a court may place a great deal of importance on the intent of the legislature in enacting a MUL, particularly one which is silent on the seat belt defense.[116]

4. Incentive for Injury Prevention. Some commentators have speculated that adoption of the seat belt defense will induce automobile occupants to buckle up, thereby saving lives and

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[111] See also Futterleib v. Mr. Happy's, Inc., 16 Conn. App. 497, 548 A. 2d 728, 731 (1988) (court referred to gag provision but did not reach the merits of the seat belt defense).

[112] See Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 452-53 (Fla. 1984); Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1564 (D. Vt. 1985).

[113] See Spier v. Barker, 35 N.Y. 2d 444, 363 N.Y.S. 2d 916, 323 N.E. 2d 164 (1974).

[114] Waterson v. General Motors Corporation, 111 N.J. 238, 544 A. 2d 357, 373 (1988). See also Foley v. City of West Allis, 113 Wis. 2d 475, 335 N.W. 2d 824, 831 (1983).

[115] Beerley v. Hamilton, 17 D.&.C. 332, 340 (C.P. of Philadelphia Co., Pa. 1980); Weymss v. Coleman, 729 S.W. 2d 174, 181 (Ky. 1987).

[116] The New Jersey Supreme Court in Waterson v. General Motors Corporation, 111 N.J. 238, 544 A. 2d 357, 369 (1988), discussed the consequences of the pending New Jersey MUL, particularly the legislature's rejection of a proposed gag rule. But see Lowe v. Estate Motors Ltd., 428 Mich. 439, 410 N.W. 2d 706, 716-17 (the Supreme Court of Michigan refused to apply the 5% damage reduction limitation found in the pending Michigan MUL to rear seat passengers) and Dahl v. BMW, 304 Or. 558, 748 P. 2d 77, 82 (1987) (in accepting the seat belt defense, the Supreme Court of Oregon ignored a proposed MUL - later repealed by referendum - which contained a gag provision).

preventing injuries.[117] Other commentators have concluded that the seat belt defense would "have virtually no effect on the actual seat belt wearing habits of automobile occupants."[118] Considering the crucial importance of this dispute to the acceptability of the seat belt defense by courts and legislatures, it is indeed remarkable that little hard data exists on the subject. This paper will discuss the seat belt defense as an inducement to individuals to use seat belts in Part III.[119]

D. Mandatory Use Laws

Although the value of seat belts as injury prevention devices has been recognized for decades[120], and seat belts have been installed as standard equipment in automobiles manufactured in the United States since the late 1960s,[121] mandatory use laws (MULs) have made an agonizingly slow entrance onto the American scene. Dozens of foreign nations enacted mandatory seat belt legislation in the 1970s, which resulted in increased usage rates and lower traffic fatality rates.[122] A MUL was passed in Puerto Rico in 1974.[123] Unfortunately, nine years after passage of the MUL, seat belt use rates there were a dismal 3 per cent.[124] No state passed a MUL thereafter until New York in 1984.[125] At the present time,

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[117] For example, see Transportation Research Board, National Academy of Sciences, Study of Methods for Increasing Safety Belt Use, Washington, D.C. 1981, p. 6: "A judicial doctrine permitting mitigation of damages in a civil action if the plaintiff's safety belt was not in use at the time of a crash might help motivate drivers to use their belts." See also The Seat Belt Defense as a Valid Instrument of Public Policy, 44 Tennessee Law Review 119 (1976).

[118] See Lavelle, Failure to Wear Seat Belts, 39 Colorado Law Review 605, 608 (1967): "(I)mposing an affirmative legal duty of wearing belts will have virtually no effect on the actual seat-belt wearing habits of automobile occupants." See also Miller v. Miller, 273 N.C. 228, 160 S.E. 2d 65, 73 (1968).

[119] See notes 646-671 below and accompanying text.

[120] For an interesting historical survey of seat belts, see Woodward, Oklahoma and the Seat Belt Defense, 10 Oklahoma City University Law Review 153, 155-161 (1985). Studies attesting to the efficacy of seat belts abound; for an excellent review, see Robertson, Estimates of Motor Vehicle Seat Belt Effectiveness and Use: Implications for Occupant Crash Protection, 66 American Journal of Public Health 859-864 (1976).

[121] Warner, Bags, Buckles and Belts: The Debate over Mandatory Passive Restraints in Automobiles, 8 Journal of Health Politics, Policy and Law 44, 48-9 (1983).

[122] See Effectiveness of Safety Belt Use Laws: A Multinational Examination. Washington, D.C. U.S. Department of Transportation, National Highway Traffic Safety Administration Report HS 807-018 (October 1986).

[123] P.R. Laws Ann. tit. 9, sec. 1212, effective October 22, 1974.

[124] Williams and Lund, Seat Belt Use Laws and Occupant Crash Protection in the United States, 76 American Journal of Public Health 1438 (1986).

[125] New York Vehicle and Traffic Law sec. 1229-c (McKinney 1986), effective December 1, 1984.

36 jurisdictions have MULs on their books[126]; 3 more state legislatures adopted MULS which were subsequently rescinded by referendum.[127]

The history of MULs is intertwined with the history of Federal Motor Vehicle Standard 208.[128] The history of Standard 208 is, as the United States Supreme Court put it, "complex and convoluted."[129] Promulgated under the mandate of the National Traffic and Motor Vehicle Safety Act of 1966,[130] Standard 208 is truly a child of the 1960s: idealistic, striving to accomplish great things, but somehow having struggled greatly along its way.[131] It is beyond the scope of this report to document the massive amount of rulemaking and litigation engendered by Standard 208[132] or to fully critique its odyssey.[133] Instead, this report will concentrate on S4.1.5 of Standard 208, which attempts to induce the states to enact MULs through the indirect method of requiring automobiles manufactured on or after September 1, 1989 to be equipped with automatic passive restraint systems[134] unless

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[126] CA, CO, CT, DC, FL, GA, HI, ID, IL, IN, IA, KS, LA, MD, MI, MN, MO, MT, NV, NJ, NM, NY, NC, ND, OH, OK, PA, PR, SC, TN, TX, UT, VA, WA, WI, WY. For a state-by-state discussion, see Part II below.

[127] MA, NE, OR. For specifics, see Part II below.

[128] 49 C.F.R. sec. 571.208.

[129] Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 34, 103 S.Ct. 2856, 77 L. Ed. 2d 443 (1983).

[130] 15 U.S.C. sec. 1381 et. seq. (1982 and Supp. III 1985). The purpose of the Act is to "reduce traffic accidents and deaths and injuries resulting from traffic accidents." 15 U.S.C. sec. 1381. The section authorizing NHTSA to promulgate standards is 15 U.S.C. sec. 1392(a).

[131] For an excellent discussion of the cultural underpinnings of the Act, see Mashaw and Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale Journal on Regulation 257 (1987). See also Note, Federal Motor Vehicle Safety Legislation, 29 Ohio State Law Journal 177 (1968) for a discussion of the background of the Act.

[132] See Wood v. General Motors Corp., 865 F. 2d 395, 398-99 (1st Cir. 1988) for a brief description of the history of Standard 208.

[133] Among the more interesting articles on Standard 208 are Graham and Gorham, NHTSA and Passive Restraints: A Case of Arbitrary and Capricious Deregulation, 35 Administrative Law Review 193 (1983); Milstone, Automatic Occupant Restraints and Judicial Review: How a Federal Agency Can Violate Congressional Will and Get Away With It, 19 Valparaiso University Law Review 695 (1985); Tolchin, Air Bags and Regulatory Delay, 1 Issues in Science and Technology 66 (1984).

[134] Automatic safety belt systems or air bag systems. 49 C.F.R. sec. 571.208 S4.1.2 (10-1-86 ed.).

two-thirds of the total population of the 50 states and the District of Columbia are covered by MULs.[135]

On July 17, 1984, revised Standard 208, containing S4.1.5, was promulgated.[136] Five days previously, New York's MUL had been enacted.[137] Since then, a majority of states have enacted MULs.[138] Virtually all of these MULs, however, do not meet the minimum criteria for state MULs found in Standard 208, in many cases because the state MUL contains a gag provision, which is a specific violation of S4.1.5.2.[139] Many states' MULs also violated Standard 208 because prescribed fines are less than the federal standard of $25.00 minimum. Other state MULs are riddled with exceptions for everyone from occupants of vehicles in parades[140] to persons delivering newspapers.[141] As a result, all vehicles manufactured after 1989 must conform to Standard 208.[142] There is evidence that state legislatures deliberately drafted their MULs so as to not fall under the two-thirds provision of

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[135] S4.1.5.1 reads as follows: "If the Secretary of Transportation determines, by not later than April 1, 1989, that state mandatory safety belt usage laws have been enacted that meet the criteria specified in S4.1.5.2 and that are applicable to not less than two-thirds of the total population of the 50 states and the District of Columbia (based on the most recent Estimates of the Resident Population of States, by Age, Current Population Reports, Series P-25, Bureau of the Census), each passenger car manufactured under S4.1.3 or S4.1.4 on or after the date of that determination shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3.

[136] 49 Fed. Reg. 28,962 to 29,010 (July 17, 1984).

[137] McKinney's Session Laws of New York, 1984, Chapters 365 and 366.

[138] See notes 130 and 131 above.

[139] S4.1.5.2 reads as follows: "The minimum criteria for state mandatory safety belt laws are:

(a) Require that each front seat occupant of a passenger equipped with safety belts under Standard No. 208 has a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion.

(b) If waivers from the safety belt usage requirement are to be provided, permit them for medical reasons only.

(c) Provide for the following enforcement measures:

1. A penalty of not less than $25.00 (which may include court costs) for each occupant of a car who violates the seat belt usage requirement.

2. A provision specifying that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.

3. A program to encourage compliance with the belt usage requirement.

(d) An effective date of not later than September 1, 1989."

[140] Code of Laws of S.C. sec. 56-5-6530(5).

[141] Ga. Code Ann. sec. 40-8-76.1(c)(8).

[142] Advisory opinion of Erica Z. Jones, Chief Counsel to NHTSA, December 19, 1988.

Standard 208.[143] From an injury prevention standpoint, both air bags and seat belts should be available to the motoring public; Standard 208's either/or approach was therefore less than the ideal solution and was recognized as such.[144]

Gag provisions

The greatest impact which MULs have had on the seat belt defense stems from gag provisions contained in many MULs which wholly or partially emasculate the seat belt defense. Such provisions are not unique to MULs, however. Starting in 1964, state laws required that all motor vehicles sold in that state be equipped with seat belts; all states adopted such laws.[145] None of these laws, however, required that motor vehicle passengers actually use the belts. The very first seat belt case ever decided premised a duty to use seat belts on the Wisconsin seat belt installation law.[146] This negligence per se approach was rejected in subsequent Wisconsin cases,[147] which nevertheless accepted the seat belt defense on other grounds. Other states[148] were uniform in their rejection of any variation of the seat belt defense which was based on installation statutes.[149]

Five of the installation statutes contained gag provisions which did not allow evidence of seat belt nonuse to be introduced in litigation involving personal injuries or property damage resulting from the use or operation of motor vehicles[150]; three

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[143] See Kropoth, Mandatory Seat Belt Usage in New Jersey, 9 Seton Hall Legislative Journal 549, 565-66 (1986).

[144] Teret, Air Bags and Seat Belts - Untangling Standard 208, 6 Journal of Public Health Policy 5 (1985).

[145] For a complete list of seat belt installation laws, see McAlpine, A Realistic Look at the Seat Belt Defense, 1983 Detroit College of Law Review 827, 830, note 17 (1983).

[146] Stockinger v. Dunisch, Civil No. 981 (Cir. Ct., Sheboygan County, Wisconsin, 1964).

[147] Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W. 2d 626 (1967); Corvell v. Conn, 88 Wis. 2d 310, 276 N.W. 2d 723 (1979).

[148] But see an English case, Froom v. Butcher, 3 All. Eng. Rep. 520, 525 (1975), which found a duty to use seat belts based upon an installation statute.

[149] Among many such cases are Miller v. Haynes, 454 S.W. 2d 923 (Mo. App. 1970); Kopische v. First Continental Corp., 187 Mont. 471, 610 P. 2d 668 (1980); Barry v. Stang, 191 N.W. 2d 526 (N.D. 1971); Robinson v. Lewis, 754 Or. 52, 457 P. 2d 483 (1969).

[150] Typical of these provisions is Me. Rev. Stat. Ann. tit 29, sec. 1368-A (1978): "In any accident involving an automobile, the nonuse of seat belts by the driver of or of passengers in the automobile shall not be admissible in evidence in any trial, civil or criminal, arising out of such accident."

still remain valid.[151] Each of the five has been addressed by the courts; the gag provisions were given full weight in four of the five states.[152] In the fifth state, a federal court interpreting the Virginia seat belt installation law gag provision,[153] although agreeing that nonuse of an available seat belt did not constitute negligence, held that the law did not expressly prohibit introduction of seat belt evidence for the purpose of mitigation of damages.[154] The law was quickly amended by the Virginia legislature by adding the words "nor shall evidence of such nonuse of such devices be considered in mitigation of damages of whatever nature."[155]

Several points must be made concerning installation statute gag provisions. The first is that such provisions all predated the seat belt defense.[156] The second is that, in at least one state, the seat belt defense would been have accepted by the courts had

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[151] Me. Rev. Stat. Ann. tit. 29, sec. 1368-A (1978); Minn. Stat. Ann. sec. 169.685(4) (West Supp. 1989); Va. Code sec. 46.1-309.1(b) (Supp. 1988). Virginia also has a gag provision in its MUL: Va. Code sec. 46.1-309.2(E) (Supp. 1988). The Iowa gag provision, former Iowa Code Ann. sec. 321.445, was replaced by a subsection in the Iowa MUL which allows evidence of a plaintiff's failure to use a seat belt to be introduced at a trial, but the plaintiff's damages may be reduced only by a maximum of 5%. Iowa Code Ann. 321.445(4)(b)(2) (1988 Supp.). The former Tennessee seat belt installation gag provision, Tenn. Code Ann. sec. 55-9-214(a), was removed when the Tennessee MUL, which includes a gag provision, was adopted in 1986. See Acts 1986, chapter 866 and Tenn. Code Ann. sec. 55-9-604 (1989).

[152] Minck v. Goodyear Tire & Rubber Co., No. C82-0201 (N.D. Iowa 1986) (applying Iowa law); Pasternack v. Achorn, 680 F. Supp. 447 (D. Me. 1988) (applying Maine law); Gray v. General Motors Corporation, 434 F. 2d 110, 113 (8th Cir. 1970) (applying Minnesota law); Mann v. United States, 294 F. Supp. 691 (E.D. Tenn. 1968) (applying Tennessee law); Stallcup v. Taylor, 62 Tenn. App. 407, 463 S.W. 2d 416 (1970); Ellithorpe v. Ford Motor Co., 503 S.W. 2d 516 (Tenn. 1973); Cheatham v. Thurson Motor Lines, 654 F. Supp. 216, 217 (S.D. Ohio 1986) (applying Tennessee law).

[153] "Failure to use such safety lap belts and shoulder straps or harnesses after installation shall not be deemed to be negligence." Va. Ann. Code sec. 46.1-309.1(b) (1974 Repl. Vol.).

[154] Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368, 1374 (E.D. Va. 1978).

[155] Va. Code sec.46.1-309.1(b)(1980). For a thorough discussion of this case, see Robinson and Cullen, Federal Court Rules Virginia Law Allows Evidence of Non-Use of Seat Belt, 13 University of Richmond Law Review 123 (1978).

[156] See Pollock, The Seat Belt Defense - A Valid Instrument of Public Policy, 44 Tennessee Law Review 119, 127 (1976).

not the gag provision existed.[157] Finally, such provisions served as models for other jurisdictions to copy in their MULs.

Another cluster of laws which contain gag provisions are motorcycle helmet laws, which were enacted in most states in the late 1960s and early 1970s in response to a federal highway safety standard that provided for the withholding of highway funds from states without a mandatory helmet use law.[158] When Congress prohibited such withholding of funds in 1976, twenty-eight states repealed or severely limited the applicability of their helmet laws.[159] Five of the remaining helmet laws contain provisions which effect the introduction of evidence of motorcycle helmet nonuse.[160] One of these laws contains a true gag provision.[161] The other four laws encompass lesser degrees of limitation.[162] All of these states also have laws which look less than favorably

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[157] In Minnesota, several cases have applied the mitigation of damages approach in situations in which the plaintiff failed to make use of a safety device. See Ottem by Ottem v. United States, 594 F. Supp. 283 (D. Minn. 1984) (applying Minnesota law, the court reduced its award for future pain and suffering by 25% due to plaintiff's failure to wear a motorcycle helmet); Northway v. Madsen, 390 N.W. 2d 435 (Minn. App. 1986) (plaintiff's failure to wear a motorcycle helmet was held to be a factor which may be considered by the jury in mitigating damages); Johnson v. Farmer's Union Central Exchange, 414 N.W. 2d 425 (Minn. App. 1987) (plaintiff's failure to wear goggles while working on an anhydrous ammonia line was held admissible; the court distinguished cases in other jurisdictions which had rejected the seat belt defense on a "no duty" basis, such as Clarkson v. Wright, 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268 (1985).

[158] See 33 Fed. Reg. 16337 (Nov. 7, 1968) and 23 C.F.R. Sec. 1204.4 (1979).

[159] The history of motorcycle helmet legislation, as well as comparisons between the motorcycle helmet defense and seat belt defense is described in Graham, Helmetless Motorcyclists--Easy Riders Facing Hard Facts: The Rise of The Motorcycle Defense. Ohio State Law Journal 233 (1980). For discussions of the relationship between the seat belt defense and the motorcycle helmet defense, see Halvorson v. Voeller, 336 N.W. 2d 118 (N.D. 1983) and Warfel v. Cheney, 157 Ariz. 424,758 P. 2d 1326 (1988).

[160] Minn. Stat. Ann. Sec. 169.974 Subd. 6; N.M. Stat. Ann. Sec. 66-7-356; N.C. Gen. Stat. Sec. 20-140.4(6); Ohio Code Ann. Sec. 4511.53; Va. Code Sec. 46.1-172.A.

[161] Ohio Rev. Code Ann. Sec. 4511.53 (last sentence) reads: "The provisions of this paragraph or a violation thereof shall not be used in the trial of any civil action."

[162] N.C. Gen. Stat. Sec. 20-140.4 (6) (Anderson Supp. 1988) reads: "Violation of any provision of this section shall not considered negligence per se or contributory negligence in any civil action." N.M. Stat. Ann. Sec. 66-7-356B reads: "Failure to wear a safety helmet as required in this section shall not constitute contributory negligence." Va. Code Sec. 46.1-172A reads in part: "Failure to wear a face shield, safety glasses or goggles or protective helmets shall not constitute negligence per se in any civil proceeding." Minn. Stat. Ann. Sec. 169.974 Subd. 6 reads in part: "In an action to recover damages for negligence resulting in any head injury to an operator or passenger of a motorcycle, evidence of whether or not the injured person was wearing protective headgear that complied with standards established by the commissioner of public safety shall be admissible only with respect to the question of damages for head injuries. Damages or head injuries of any person who was not wearing protective headgear shall be reduced to the extent that those injuries could have been avoided by wearing protective headgear that complied with standards established by the commissioner of public safety."

upon the seat belt defense. Four states ban the defense,[163] while the fifth state allows its use only in crashworthiness cases.[164]

The third wave[165] of gag provisions came in connection with child passenger safety restraint laws.[166] The first such law was enacted in Tennessee in 1977;[167] all states now have such legislation on their books.[168] All but a handful of states have some form of gag provision in their child restraint laws.[169] Those state laws which do not have gag provisions are silent on the subject of admissibility of nonuse of child restraints[170]; no state makes such nonuse negligence per se.[171]

Although few cases discuss the impact that the existence of gag provisions in child restraint laws may have on the seat belt defense, the highest courts in two states have come to opposite conclusions. The Rhode Island Supreme Court, in rejecting the seat belt defense, noted the existence of a gag provision in the Rhode

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[163] Minn. Stat. Ann. Sec. 169.685(4) (West. 1986) (seat belt installation statute) N.M.S.A. Sec. 66-7-373B; N.C. Gen. Stat. Sec. 20-135.2A(d) (Supp. 1985)(MUL); Va. Code Secs. 46.1-309.1(b) (Supp. 1988) (seat belt installation statute) and 46.1-309.2 E (Supp 1988) (MUL).

[164] Ohio Rev. Code Ann. Sec. 4513.263(G) (Anderson Supp. 1988).

[165] There is another set of state laws which contain provisions limiting the admissibility of evidence in civil actions involving automobiles. Some state anti-theft laws which prohibit motorists from leaving ignition keys in unattended vehicles provide that evidence of violations are not admissible in civil actions arising out of the theft of motor vehicles. See Mo. Stat. Ann. Sec. 304.150; N.M. Stat. Ann. Sec. 66-7-353; and Drahozal, Liability for Nonuse of Child Restraints, 70 Iowa Law Review 945, 959 (1985). Such provisions, unlike gag provisions found in seat belt installation laws and child restraint laws, have not been applied to cases involving the seat belt defense.

[166] Typically, such laws require that very young children be placed in child passenger restraint systems such as car seats, and older children be restrained using standard lap belts and shoulder harnesses.

[167] Ch. 114, 1977 Tenn. Pub. Acts 233, Tenn. Code Ann. sec. 55-9-214(b).

[168] For more thorough discussions of child restraint laws, see Wanebo, Child Safety in Automobiles: Mandatory Restraint - Use Laws, 52 Colorado Law Review 125 (1980); Logsdon, Toward a Uniform Child Restraint Law, 21 Journal of Family Law 301 (1982-83); Drahozal, Liability for Nonuse of Child Restraints, 70 Iowa Law Review 945 (1985).

[169] Typical of these gag provisions is Maryland's: "A violation of this section is not contributory negligence and may not be admitted as evidence in any civil action." Md. Trans. Code Ann. sec. 22-412.2(i). For a complete discussion of provisions in child restraint laws which limit liability, see Drahozal, id., 956-59.

[170] Alaska Stat. Ann. sec. 28.05.095; Cal. Veh. Code sec. 27360; Mich. Comp. Laws Ann. sec. 257.710d; Vermont Stat. Ann. tit. 23, sec. 1258.

[171] For recent cases involving gag provisions in child passenger restraint laws, see Barnes v. Robison, 712 F. Supp. 873 (D.C. Kan. 1989); State Farm Mutual Automobile Insurance Company v. Holland, 380 S.E. 2d 100 (N.C. 1989) and Grim v. Betz, 372 Pa. Super. 614,539 A. 2d 1365 (1988).

Island child restraint law[172] as an indication of legislative intent on the seat belt defense.[173] In contrast, the Supreme Court of Arizona acknowledged the existence of a gag provision in the Arizona child restraint law[174] but went on to say "we do not infer from this specific prohibition dealing with infants a general legislative intent to forbid the introduction of evidence that an adult motorist unreasonably failed to use a seat belt and enhanced his own injuries."[175] Using another approach,the Supreme Court of Florida merely ignored the fact that the Florida child restraint law contained a gag provision[176] when it allowed the seat belt defense.[177] Finally, the Supreme Court of Connecticut and the Court of Appeals of Oregon noted but did not discuss gag provisions in their respective child restraint laws[178] in cases which rejected the seat belt defense.[179]

There can be little doubt that gag provisions in child restraint laws served as models for similar provisions in MULs. The only state in which the child restraint law contains a gag and the MUL does not is Florida.[180] Conversely, the few states which do not prohibit the admissibility of nonuse of child restraints[181] all recognize some form of the seat belt defense. Accordingly, it

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[172] R.I. Gen. Laws Ann. sec. 31-22-22.

[173] Swajian v. General Motors Corp., 559 A. 2d 1041 (R.I. 1989). Rhode Island does not have a MUL.

[174] Ariz. Rev. Stat. sec. 28-907(H) (1989).

[175] Law v. Superior Court, 157 Ariz. 147, 755 P. 2d 1135, 1143 (1988). See also Turner v. Scaife, 17 Lycoming 60 (Pa. Ct. Common Pleas, 1987). For the reverse situation see Barnes v. Robison, 712 F. Supp. 873 (D.C. Kan. 1989), in which the court allowed evidence of nonuse of a child restraint was allowed to be introduced into evidence under K.S.A. sec. 8-1346, which states "[f]ailure to employ a child passenger restraint system shall not constitute negligence per se," notwithstanding plaintiff's argument that the Kansas MUL contains a complete gag. See also State Farm Mutual Automobile Insurance Company v. Holland, 380 S.E. 2d 100, 106 (N.C. 1989) (Martin, J., dissenting).

[176] Fla. Stat. Ann. sec. 316.613(3)(West Supp. 1989): "The failure to provide and use a child passenger restraint system shall not be considered comparative negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence."

[177] Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 455 (Fla. 1984) (Shaw, J. dissenting).

[178] Conn. Gen Stat. Ann. sec. 14-100a(5)(d) (1989); O.R.S. sec. 811.210 (1987).

[179] Wassell v. Hamblin, 196 Conn. 463, 493 A. 2d 870, 873 (1985); Madaris v. State of Oregon Highway Division, 80 Or. App. 662, 723 P. 2d 1054, 1056 (1986).

[180] The Florida MUL, Fla. Stat. Ann. sec. 316.614, enacted after both the child restraint law and Pasakarnis, followed Pasakarnis in not prohibiting evidence of nonuse of seatbelts to be introduced in civil actions.

[181] See note 170 above.

should be recognized that gag provisions in MULs are by no means unique, isolated phenomena.[182] Rather, gag provisions must be viewed as a symptom of the uneasiness with which many state lawmakers view any penalties assessed for failure to use safety devices.[183]

Several reasons can be advanced concerning why so many MULs contain gag provisions. As indicated above, the precedent established by other laws may have been a significant factor. Another important reason for gag provisions may have been to insure that a state's MUL did not count toward the two-third population coverage required by Standard 208 in order to rescind the passive restraint installation provision.[184] It may also be speculated that powerful political forces, particularly the plaintiff's bar, may have induced state legislators to include gag provisions in MULs. Finally, gag provisions may have been included as part of MULs in order to "water them down" sufficiently to make them acceptable to a majority of legislators.[185]

Regardless of the presence of gag provisions, several arguments can be advanced in favor of MULs. There is no question that MULs lead to higher seat belt use rates,[186] and that higher seat belt use rates save lives,[187] prevent or reduce the severity of injuries in motor vehicle crashes, and save many billions of dollars.[188] The cost of such legislation, in terms of enforcement, is minuscule in comparison. Buckling a seat belt is a

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[182] Gag provisions have now appeared in legislation requiring drivers of all-terrain vehicles to wear protective helmets. See VA Code Sec. 46.1-172.04C.

[183] The Uniform Vehicle Code and Model Traffic Ordinance (1987 Revision) contains what amounts to a gag provision, sec. 12-412(e): "Failure to use any safety belt or child restraint system in violation of this Act shall not diminish recovery for damages arising out of the ownership, maintenance or use of a motor vehicle." National Committee on Uniform Traffic Laws and Ordinances, Evanson, Illinois: Uniform Vehicle Code and Model Traffic Ordinance (1987 Revision).

[184] 49 C.F.R. sec. 571.208 S4.1.5. See Graham, Auto Safety: Assessing America's Performance (Dover, Mass.: Auburn House Publishing Co., 1989) 185-86.

[185] See Carlson, Fairness in Litigation or "Equality for All", 36 Drake Law Review 713, 716 (1986-87).

[186] National Highway Traffic Safety Administration statistics for 1987 show that seat belt use increased from 39% to 42% nationally during the year. Virtually all of this increase was attributed to MULs taking effect in seven states in 1987. United States Department of Transportation, National Highway Traffic Safety Administration, Fatal Accident Reporting System 1987, 2-18. See also O'Neill, Seat Belt Use Laws in the United States: Trends and Prospects. 64 Bulletin of the New York Academy of Medicine 729 (1988).

[187] Steed D. Editorial. 260 JAMA 365 (1988): "Increased Safety Belt Use Has Saved An Estimated 11,000 Lives Since 1984."

[188] "Seat belts reduce (1) the chance of injury 66%; (2) the extent of injury 74% and (3) medical costs 72%." Grosso, Moore and Marine, Mandatory Seatbelts: Medical, Epidemiological and Financial Rationale, 26 Journal of Trauma 675 (1986).

relatively simple and painless procedure for most people. Ample evidence exists concerning the efficacy of seat belts, based on data from other nations,[189] studies done in states which have adopted MULs,[190] and individual case reports.[191] It should be noted that at least one study failed to find any significant difference in injury rates after passage of a MUL, which the authors attributed to "poor acceptance of seat belts by the public."[192]

The lowest seat belt use rates, even after passage of a MUL, are among those segments of the population who are arguably most in need of protection, such as younger drivers and drinking drivers, leading to less reduction in fatalities than might be expected based on increased use rates.[193] Compared with passive restraint legislation, MULs are less expensive, since they rely on existing technology and do not require expensive retooling by auto manufacturers. With respect to the seat belt defense, MULs clarify once and for all the law of a state. This may be a significant public service in states in which the courts have deferred to the legislatures for guidance,[194] have refused to address the issue,[195] or are split[196].

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[189] United States Department of Transportation, National Highway Traffic Safety Administration, Effectiveness of Safety Belt Usage Laws, NTIS No. PB 80-209901, National Technical Information Service, Springfield, VA, 1980; United States Department of Transportation, National Highway Traffic safety Administration, Effectiveness of Safety Belt Use Laws: A Multinational Examination, DOT HS No. 807018 (October 1986). Newman, A Prospective Evaluation of The Protective Effect of Car Seat Belts, 26 Journal of Trauma 561 (1986); Allen, Barnes and Bodiwala, The Effect of Seat Belt Legislation on Injuries Sustained By Car Occupants, 16 Injury: The British Journal of Accident Surgery 471 (1985).

[190] See, for example, Wagenaar and Wiviott, Effects of Mandating Seatbelt Use: A Series of Surveys on Compliance in Michigan, 101 Public Health Reports 505-513 (1986); Pace, Thailer and Kwiatkowski, New York Mandatory Seatbelt Use Law: Patterns of Seatbelt Use Before and After Legislation, 26 Journal of Trauma 1031-33 (1986); Chorba, Reinfurt and Hulka, Efficacy of Mandatory Seat- Belt Use Legislation: The North Carolina Experience from 1983 through 1987, 260 JAMA 3593-97 (1988); Bernstein, Patuaf, Rutledge, Demarest, New Mexico Safety Restraint Law: Changing Patterns of Motor Vehicle Injury, Severity and Cost, 7 American Journal of Emergency Medicine 271 (1989).

[191] See Huelke and Sherman, Seat Belt Effectiveness: Case Examples from Real-world Crash Investigations, 27 Journal of Trauma 750-53 (1987).

[192] Dodson and Kaban, California Mandatory Seat Belt Law: The Effect of Recent Legislation on Motor Vehicle Accident Related Maxillofacial Injuries, 48 Journal of Oral and Maxillofacial Surgery 875, 879 (1988).

[193] Preusser et. al. Belt Use by High-Risk Drivers before and after New York's Seat Belt Use Law, 20 Accident Analysis and Prevention 245-250 (1988).

[194] See notes 103-104 above and accompanying text.

[195] See the discussion of Connecticut law below.

[196] See the discussion of Pennsylvania law below.

Arguments against MULs can be reduced to one major fact: many ordinary people don't like to be told to wear seat belts.[197] Accordingly, it may be seen as politically inexpedient for state lawmakers to pass MULs.[198] Even when MULs are enacted, the fact is that typically over half the population still does not buckle up.[199] MULs need police enforcement to work.[200] Some critics have charged that MULs are virtually unenforceable.[201] If rigorous enforcement of MULs is attempted, it may not be the most effective use of scarce police resources and may antagonize many motorists. Other arguments discussed elsewhere in this report include doubts about the efficacy of seat belts,[202] the "slippery slope" argument that MULs will inevitably lead to more draconian measures,[203] and now the obsolete concern about MULs leading to an abandonment of passive restraints under the "either/or" scheme in Standard 208.[204] Finally, two serious criticisms of MULs will be dealt with in the context of constitutional challenges to such laws, but can also stand alone. First, many MULs contain numerous exceptions which exempt from coverage as much as 40% of the occupant population in some states.[205] Second, many persons view

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[197] See Fredenburg, Legal Issues Presented by Motor Vehicle Restraint Systems, 17 Akron Law Review 781, 790 (1984): "The primary arguments against mandatory seat belt use legislation are public resistance and the political ramifications of such resistance." See Warner, note 121 above, at 48 for a list of reasons why individuals do not use seat belts.

[198] For an example, see Leichter, Saving Lives and Protecting Liberty: A Comparative Study of the Seat Belt Debate, 11 Journal of Health Politics, Policy and Law 323, 331 (1986), noting that 8 of the 25 sponsors of a proposed MUL in the Oregon House in 1985 subsequently abandoned the bill: "Legislators began hearing from large numbers of constituents, and most constituents stated that they did not like to be told by government that they had to use seat belts." A MUL was finally passed in Oregon in 1987 but was repealed by referendum in November, 1988.

[199] Williams and Lund, Seat Belt Use Laws and Occupant Crash Protection in the United States, 76 American Journal of Public Helath 1438, 1439 (1986).

[200] Watson, The Effectiveness of Increased Police Enforcement as a General Deterrent, 20 Law & Society Review 293 (1986).

[201] Leichter, Saving Lives and Protecting Liberty: A Comparative Study of the Seat Belt Defense, 11 Journal of Public Health Politics,Policy and Law 323, 333 (1986).

[202] See note 86 above and accompanying text.

[203] See note 83-85 above and accompanying text.

[204] See note 147 above and accompanying text.

[205] Wells, Williams and Fields, Coverage Gaps in Seat Belt Use Laws, 79 American Journal of Public Health 332, 333 (1989). The authors go on to state: "The gaps in coverage may have arisen because of political exigencies in passing the laws, but they have no logical basis."

MULs as unwarranted intrusions into their personal freedom to choose what is best for themselves.[206]

Constitutional Challenges to MULs

Legal challenges to MULs have been mounted in several states.[207] Reasons advanced to support these constitutional challenges include the arguments that MULs interfere with individual freedom of choice[208] and the constitutional right to privacy;[209] they constitute an unlawful exercise of the state's police power;[210] seat belts are ineffective and may even cause injuries;[211] MULs which contain exceptions for certain classes of motor vehicle occupants violate equal protection guarantees;[212] and MULs represent involuntary servitude and slavery in violation of the Thirteenth Amendment of the United States Constitution.[213] In every case, the MUL was held to be constitutional.

It is beyond the scope of this report to give a detailed analysis of the constitutional issues underlying MULs.[214] In general, the courts have held that an individual's decision not to

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[206] See Richards v. State, 757 S.W. 2d 723 (Tx. Ct. Crim. App. 1988) (Teague, J. dissenting).

[207] People v. Coyle, 251 Cal. Reptr. 80 (Cal. Super. 1988); People v. Kohrig, 113 Ill. 2d 384, 101 Ill. Dec. 650, 498 N.E. 2d 1158 (1986), appeal dismissed, 479 U.S. 1073, 107 S.CT. 1264, 94 L.Ed. 2d 126 (1987); State v. Hartog, 440 N.W. 2d 852 (Iowa 1989); Casholi v. State, No. 398-225 (Dist. Ct. Lancaster County, Nebraska 1985); People v. Weber, 129 Misc. 2d 993, 494 N.Y.S. 2d 960 (Town Ct., Town of Amherst 1985); Wells v. State, 130 Misc. 2d 113, 495 N.Y.S. 2d 591 (Sup. Ct., Steuben County 1985); State v. Swain, 92 N.C. App. 240, 374 S.E. 2d 173 (1988); Bendner v. Carr, 40 Ohio App. 3d 149, 582 N.E. 2d 178 (1987); State v. Batsch, 44 Ohio App. 3d 81, 541 N.E. 2d 475 (1988); City of Tulsa v. Martin, 775 P. 2d 824 (Okla. Crim. App. 1989). Richards v. State, 743 S.W. 2d 747 (Tex. App. - Houston [1st Dist.] 1987), petition for discretionary review refused, 757 S.W. 2d 723 (Tex. Crim. App. 1988) appeal dismissed, U.S. 109 S.Ct. 1105, 103 L.Ed. 2d 170 (1989).

[208] People v. Coyle, 251 Cal. Reptr. 80, 81-82 (Cal. Super. 1988).

[209] People v. Coyle, 251 Cal. Reptr. 80, 81 (Cal. Super 1988); People v. Kohrig, 113 Ill. 2d 384, 101 Ill. Dec. 650, 498 N.E. 2d 1158, 1160-62 (1986); State v. Hartog, 440 N.W. 2d 852 (Iowa 1989).

[210] People v. Kohrig, 498 N.E. 2d 1158, 1163 (Ill. 1986); State v. Swain, 92 N.C. App. 240, 374 S.E. 2d 173, 174 (1988); State v. Hartog, 440 N.W. 2d 852 (Iowa 1989).

[211] People v. Kohrig, 498 N.E. 2d 1158, 1166 (Ill. 1986); State v. Batsch, 44 Ohio App. 3d 81, 541 N.E. 2d 475 (1988).

[212] Bendner v. Carr, 40 Ohio App. 3d 149, 582 N.E. 2d 178, 182 (1987); City of Tulsa v. Martin, 775 P. 2d 824 (Okla. Crim App. 1989).

[213] State v. Swain, 92 N.C. App. 240, 374 S.E. 2d 173 (1988).

[214] See Compton, The Illinois Seat Belt Law: Should Those Who Ride Decide? 19 John Marshall Law Review 193 (1985); Thomas, Freedom to be Foolish? 19 Creighton Law Review 743, 748-57 (1986); Polito, Seat Belt Laws and the Right to Privacy, 10 Harvard Journal of Law and Public Policy 752 (1987).

use seat belts carries with it serious health and economic consequences to society as a whole.[215] Accordingly, it is within the limits of the state's police power to legislate against such a decision[216] since the state has a compelling interest in saving lives and promoting the welfare of its citizens.[217]

One constitutional issue which is crucial to the seat belt defense is whether gag provisions violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. The issue was first raised in the dissent in Clarkson v. Wright,[218] a case which rejected the seat belt defense. Although the decision in the case was based on pre-MUL law, the majority noted that the Illinois General Assembly had passed a MUL containing a gag provision.[219] The dissenting judge noted that the law imposed a duty to buckle up only on "specified passengers" and questioned the constitutionality of the applicability of the gag provision only to those passengers.[220] When the Supreme Court of Illinois did consider the constitutionality of the Illinois MUL, this issue was not raised.[221]

The only reported case which addresses the issue of gag provision constitutionality is Bendner v. Carr.[222] The defendant, in counsel's trial brief, alleged that the Ohio gag rule[223] "deprives defendant Lisa Carr of due process of law, and violates her right of equal protection of the laws."[224] Although no constitutional argument appears in the trial record, the trial court declared the gag provision unconstitutional.[225] On appeal,

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[215] See People v. Swain, 92 N.C. App. 240, 374 S.E. 2d 173, 174 (1988); State v. Hartog, 440 N.W. 2d 852 (Iowa 1989).

[216] People v. Kohrig, 498 N.E. 2d 1158, 1166 (1986).

[217] People v. Coyle, 251 Cal. Reptr. 80, 82 (Sal. Super. 1988); Wells v. State, 130 Misc. 2d 113, 495 N.Y.S. 2d 591, 596 (Sup. Ct. Steuben County, 1985).

[218] 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268, 273 (1985) (Ryan, J. dissenting).

[219] Ill. Rev. Stat. ch. 95 1/2, sec. 12-603.1 (1985 Supp.).

[220] 483 N.E. 2d 268, 273.

[221] People v. Kohrig, 113 Ill. 2d 384, 101 Ill. Dec. 650, 498 N.E. 2d 1158 (1986), appeal dismissed, 479 U.S. 1073, 107 S.Ct. 1264, 94 L.Ed. 2d 126 (1987).

[222] 40 Ohio App. 3d 149, 532 N.E. 2d 178 (1987).

[223] Ohio Rev. Code sec. 4513.263(G)(1) (Anderson Supp. 1988).

[224] 532 N.E. 2d at 181.

[225] Id. at 180.

Carr argued for the first time that the gag rule is irrational, and therefore unconstitutional,[226] because it is inconsistent with the remainder of the MUL, which is designed to encourage motorists to use their seat belts.[227] The Court of Appeals of Ohio, in rejecting this argument, concluded that the Ohio MUL was "rationally related to a valid legislative purpose; encouragement of seat-belt use through a fine system, while preserving the right to compensation for injuries caused by negligent drivers."[228] The unstated reasoning behind this is that a small fine[229] will motivate individuals to buckle up, while preserving their ability to recover full damages from negligent defendants will not cause a pull in the opposite direction.

Although Bendner v. Carr declares the gag provision in the Ohio MUL to be constitutional, it is submitted that of all the legal theories advanced to undermine the effects of the gag provision,[230] constitutional arguments may be the most effective. Such arguments may vary from state to state. The Texas Constitution, for example, contains an "Open Courts" provision which provides that "All courts shall be open, and every person ....shall have remedy by due course of law."[231] It has been suggested[232] that this provision might be applied to reject the gag provision in the Texas MUL.[233] Another interesting theory may be found in those cases which have held that damage caps in tort cases are unconstitutional. If one views gag provisions as part of the overall legislative effort to place limits on damages awarded to plaintiffs, commonly known as "tort reform",[234] one can muster

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[226] Under the "rational basis" test, a law which is discriminatory will nevertheless be held to be constitutional "if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 6 L. Ed. 2d 393 (1961).

[227] 532 N.E. 2d at 181.

[228] Id. at 182.

[229] $20 for drivers, $10 for passengers. Ohio Rev. Code sec. 4513.99 (F)-(I) (1988 Supp.).

[230] See Wilkins, The Indiana Mandatory Seatbelt Use Law and Its Effect Upon Automobile Tort Litigation, 19 Indiana Law Review 439 (1986). This article does not discuss constitutional objections to MUL gag provisions.

[231] Texas Const. art. 1, sec. 13.

[232] Casbeer, The Use of the Seat Belt Defense in Crashworthiness Cases, 40 Baylor Law Review 551, 569 (1988).

[233] Tex. Rev. Civ. Stat. Ann. art. 6701d, sec. 107C(j) (Vernon Supp. 1898): "Use or nonuse of a safety belt is not admissible evidence in a civil trial."

[234] Casbeer, note 234 above, at 571. See also Carlson, Fairness in Litigation or "Equality for All", 36 Drake Law Review 713, 716 (1986-87) and Hunt, S.54: Ohio's Seat Belt Law, 12 University of Dayton Law Review 473, 485-86 (1986). For an overview of "tort reform", see Rudolph, The Tort Crisis: Causes, Solutions and the Constitution, 11 University of Puget Sound Law Review 659 (1988).

constitutional arguments against gag provisions. Courts have split dramatically on the issue of the constitutionality of damage caps.[235] The leading case appears to be Fein v. Permanente Medical Group,[236] in which the Supreme Court of California held that a California law which limited non-economic damages in malpractice cases[237] did not violate either the due process or equal protection clauses of the Fourteenth Amendment of the United States Constitution.[238] Defendants' attorneys in states with MULs containing gag provisions might utilize a constitutional attack analogizing to the liablity cap cases.[239]

Part II. State-by-State Analysis of the Seat Belt Defense

What follows is a description of the current status of the seat belt defense in all states. Both statutory and common law sources are covered. However, laws and decisions which have no present validity are not discussed, except cases decided in 1982 or later and older cases which still underlie the present state of the law. No attempt has been made to render a complete analysis of every state's MUL. Instead, emphasis has been placed on facets of state MULs which relate to the seat belt defense, most notably the MULs' gag provisions. In states in which the status of the seat belt defense remains unsettled, few attempts have been made to speculate on how the issue will be decided by the courts, except in jurisdictions in which the courts have given strong signals that they favor (North Dakota) or oppose (Arkansas) the defense.

Alabama

Statutory law: There is no MUL in Alabama.

Case law: Britton v. Doehring[240] remains not only the law in Alabama but is also cited by courts in other jurisdictions as

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[235] For a list of cases on this issue, see 8 Lawyers Alert 127 (1988). See also Jones, Fein V. Permanente Medical Group: The Supreme Court Uncaps the Constitutionality of Statutory Limitations on Medical Malpractice Recoveries, 40 University of Miami Law Review 1075, 1079-87 (1986).

[236] 38 Cal. 3d 137, 211 Cal. Reptr. 368, 695 P. 2d 665 (1985), appeal denied, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed. 2d 215 (1985).

[237] Cal. Civ. Code sec. 3333.2 (West Supp. 1989).

[238] "No State shall make or enforce any law which shall....deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, amend. XIV, sec. 1.

[239] See O'Grady, Minnesota's Seat Belt Evidence Gag Rule: Antiquated and Unfair in Crashworthiness Cases, 15 William Mitchell Law Review 353, 369-71 (1989).

[240] 242 So. 2d 666 (Ala. 1970).

important authority for rejecting the seat belt defense.[241] The Supreme Court of Alabama listed seven reasons for its rejection of the seat belt defense: there was no statutory requirement to install or use seat belts; the court had doubts as to the efficacy of seat belts; adoption of the seat belt defense would be a de facto adoption of comparative negligence; plaintiffs in vehicles equipped with seat belts would be penalized while plaintiffs in unequipped vehicles would not: there is no duty to anticipate the negligence of another; juries would have to speculate as to which of plaintiffs' injuries were attributable to his or her failure to use seat belts; and the seat belt defense conflicts with traditional tort doctrines such as contributory negligence, avoidable consequences and last clear chance. In addition, the court stated that adoption of the seat belt defense was properly a matter for the legislature.[242]

In a recent crashworthiness case decided under Alabama law,[243] the United States Court of Appeals upheld the trial court's rejection of the following proposed jury instruction: "The Court charges you that failure to wear a seat belt in the state of Arizona is not contributory negligence as a matter of law. Britton v. Doehring, 242 So. 2d 666, 286 Ala. 498 (1970)."

Comments: Alabama still is one of the few remaining contributory negligence jurisdictions.[244] The Alabama child restraint law contains a gag provision.[245]

Conclusion: The seat belt defense is unavailable in Alabama.

Alaska

Statutory Law: There is no MUL in Alaska.

Case law: In Hutchins v. Schwartz,[246] the Supreme Court of Alaska adopted the seat belt defense in civil actions.[247] The court, as a preliminary matter, noted that Alaska does not have a

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[241] See Keaton v. Pearson, 358 S.E. 2d 141 (S.C. 1987); Hillier v. Lamborn, 740 P. 2d 300, 303 (Utah, 1987) for recent examples.

[242] 242 So. 2d 675.

[243] Ferguson v. BMW, 880 F. 2d 360 (11th Cir. 1989).

[244] See note above.

[245] Ala. Code sec. 32-5-222 (1983): "Provided that in no event shall failure to wear a child passenger restraint system be considered as contributory negligence."

[246] 724 P. 2d 1194 (Alaska 1986).

[247] The seat belt defense is not available in criminal cations in Alaska. See Wren v. State, 577 P. 2d 235 (Alaska 1978); Panther v. State, 1989 Alaska App. Lexis 7, 8 (September 22, 1989); and note 1 above.

MUL and agreed with courts in other states that the seat belt installation provision in the Alaska Administrative Code[248] does not mandate the use of seat belts.[249] After reviewing case law in other jurisdictions, the court rejected all arguments against the seat belt defense and concluded that "the failure to wear a seat belt is relevant evidence for the purpose of damage reduction" under comparative negligence.[250] The court added that "We find it unnecessary to wait for legislative action on this subject."[251]

Comments: The court states that it does not characterize the subject matter of this case as the "seat belt defense"[252] but this appears to be an exercise in semantics. A law review commentary[253] has been especially critical of the case, pointing out that most Alaskans do not use seat belts, that the court failed to articulate any legal grounds for its adoption of the seat belt defense, and that the court ignored the rejection of a proposed seat belt law by the Alaska legislature. The Alaska child restraint law[254] is one of the very few which does not contain a gag provision.

Conclusion: The seat belt defense is available in Alaska.

Arizona

Statutory law: There is no MUL in Arizona.

Case law: For a number of years, Arizona was securely in the "inadmissible" camp. In Nash v. Kamrath,[255] the Arizona Court of Appeals rejected the defense, based on the theory that a person has no duty to assume that another driver will be negligent, and on doubts about the benefits of seat belts. The issue surfaced again in Law v. Superior Court.[256] This time, the Arizona Court of

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[248] 12 AAC 0.4.270.

[249] 724 P. 2d 1197, citing Kopischke v. First Continental Corp., 187 Mont. 471, 610 P. 2d 668, 679 (1980) and Amend v. Bell, 89 Wash. 2d 124, 570 P. 2d 138, 143 (1977).

[250] 724 P. 2d 1199.

[251] Id.

[252] Id.

[253] Stein, The Seat Belt Defense: Judicial Disregard for Legislative Action, 4 Alaska Law Review 387 (1987). See Keaton v. Pearson, 358 S.E. 2d 141, 142 (S.C. 1987), which reached the opposite conclusion.

[254] Alaska Stat. 28.05.095.

[255] 21 Ariz. App. 530, 521 P. 2d 161 (1974).

[256] 157 Ariz. 142, 755 P. 2d 1130 (Ariz. App. 1986).

Appeals allowed the defense under the mitigation of damages approach, citing with approval Spier v. Barker,[257] Foley v. City of West Allis,[258] and Insurance Co. of North America v. Pasakarnis,[259] and rejecting Clarkson v. Wright[260]. The court noted that in the twelve years since Nash was decided, new evidence has documented the benefits of seat belt use. Significantly, the court stated: "the absence of a mandatory seat belt law in Arizona is not controlling,"[261] rejecting the reasoning in Thomas v. Henson.[262]

The case was appealed to the Supreme Court of Arizona.[263] In a well-written opinion, Vice Chief Justice Feldman refuted the most prominent arguments against the seat belt defense in detail.[264] Significantly, Justice Feldman rejected the "no duty" approach found in Clarkson v. Wright,[265] writing "each person is under an obligation to act reasonably to minimize foreseeable injuries and damages. Thus, if a person chooses not to use an available, simple safety device, that person may be at 'fault'."[266] Justice Feldman also stated that the judiciary did not have to defer to the legislature in the matter of the seat belt defense: "To hold that we cannot let a jury consider such conduct on the issue of damages is to judicially transmogrify legislative non-action on a common law damage issue into legislative intent to approve nonuse of seat belts."[267] The court specifically rejected contrary holdings in neighboring states.[268]

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[257] 35 N.Y. 444, 363 N.Y.S. 2d 916, 323 N.E. 2d 164 (1974).

[258] 113 Wis. 2d 475, 335 N.W. 2d 824 (1983).

[259] 451 So. 2d 447 (1984).

[260] 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268 (1985).

[261] 755 P. 2d at 1132.

[262] 102 N.M. 326, 695 P. 2d 476 (1985).

[263] Law v. Superior Court of the State of Arizona, 157 Ariz. 147, 755 P. 2d 1135 (1988).

[264] Id. at 1140-45.

[265] 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268 (1985).

[266] 755 P. 2d at 1143.

[267] Id. at 1144.

[268] Thomas v. Henson, 102 N.M. 326, 695 P. 2d 476 (1985); Fields v. Volkswagen of America, Inc., 555 P. 2d 48 (Okla. 1976).

Comments: The Arizona child restraint law [269] contains a gag provision; the majority in Law felt that it was inapplicable as precedent.[270] The Supreme Court of Arizona did throw down the gauntlet to the legislature on the matter of gag rule in any subsequent MUL.[271]

Conclusion: The seat belt defense is available under the Arizona comparative negligence law.[272]

Arkansas

Statutory law: There is no MUL in Arkansas.

Case law: The Supreme Court of Arkansas has been reluctant to grapple with the seat belt defense. In Harlan v. Curbo,[273] the court held as error a trial court's jury instruction that a seat belt was available to but not used by the plaintiff, stating that stronger evidence than a mere statement that seat belts were available to the plaintiffs was required in order to present the seat belt defense to the jury. In Shelter Mutual Insurance Company v. Tucker,[274] the court, relying on Harlan v. Curbo, also did not reach the legal merits of the defense, holding that the defendant did not present sufficient relevant testimony to support the defense.

The United States Court of Appeals for the Eighth Circuit has recently stated: "We believe it likely that the Arkansas Supreme Court would hold that a jury may assess a percentage of fault against (the plaintiff) if defendants can demonstrate the degree to which her injuries would have been reduced by use of a seat belt."[275] However, the court went on to hold that the defendant did not present sufficient evidence to back its seat belt defense.

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[269] Ariz. Rev. Stat. sec. 28-907 H (1989): "The requirements of this section or evidence of a violation of this section are not admissible as evidence in a judicial proceeding except in a judicial proceeding for a violation of this section."

[270] 755 P.2d 1135, 1143: "We do not infer from this specific prohibition dealing with infants a general legislative intent to forbid the introduction or evidence that an *adult* motorist unreasonably failed to use a seat belt and enhances his own injuries." (Italics are the court's.)

[271] 755 P. 2d at 1144: "Of course, if we are wrong, and if the legislature intends that in this state one may unreasonably refuse to use a seat belt and nevertheless hold another responsible for the resulting damages, it can easily enact such a policy."

[272] Ariz. Rev. Stat. sec. 12-2505(A) (1989).

[273] 250 Ark. 610, 466 S.W. 2d 459 (1971).

[274] 295 Ark. 260, 748 S.W. 2d 136 (1988).

[275] Potts v. Benjamin, 1989 U.S. App. Lexis 12315 (8th Cir., August 21, 1989).

Comments: The Arkansas child restraint law has a comprehensive gag provision; noncompliance with the statute is inadmissible at trial in any civil action with regard to negligence.[276]

Conclusion: Unsettled. Neither the legislature nor the courts in Arkansas have been quick to embrace seat belts.

California

Statutory law: California has a MUL.[277] The MUL provides that in any civil action, a violation "shall not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation."[278]

Case law: California has a long history of acceptance of the seat belt defense, starting with Truman v. Vargas[279] (decided under a contributory negligence standard) and continuing through McNeil v. Yellow Cab Co.[280] and Franklin v. Gibson[281] to recent reaffirmations in Twohig v. Briner[282] and Von Beltz v. Stuntman, Inc.[283] The court in Franklin v. Gibson set out how the seat belt defense may be used to prove the plaintiff's comparative negligence: "The burden is on the defendant to prove whether in the circumstances of the case the plaintiffs in the exercise of ordinary care should have used the seat belts available to them, and what injuries plaintiffs would have sustained, according to expert testimony, if the seat belts had been used."[284] The seat belt defense was recognized by the California Supreme Court as applying to products liability actions in Daly v. General Motors

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[276] Ark. Stat. Ann. sec. 27-34-106(a): "The failure to provide or use a child passenger safety seat shall not be considered, under any circumstances, as evidence of comparative or contributory negligence, nor shall failure be admissible as evidence in the trial of any civil action with regard to negligence." See also Potts v. Benjamin, note 275 above.

[277] Cal. Veh. Code sec. 27315 (West Supp. 1989).

[278] Cal. Veh. Code sec. 27315(j) (West Supp. 1989).

[279] 275 Cal. App. 2d 976, 80 Cal. Reptr. 373 (1969).

[280] 85 Cal. App. 3d 116, 147 Cal. Reptr. 733 (1978).

[281] 138 Cal. App. 3d 340, 188 Cal. Reptr. 23 (1982).

[282] 168 Cal. App. 3d 1102, 214 Cal. Reptr. 729 (1985).

[283] 207 Cal. App. 3d 1467, 255 Cal. Reptr. 755 (1989).

[284] 138 Cal. App. 3d 340, 188 Cal Reptr. 23, 25 (1982).

Corp.,[285] although the precise boundaries of the defense were not made clear.[286]

Comments: The effects of the California MUL on the seat belt defense have been the subject of some debate. One commentator has stated that Cal. Veh. Code sec. 27315(j) "calls into question the continuing validity of Truman and Franklin."[287] Another has indicated that this section in effect makes failure to wear a seat belt negligence per se and eliminates the first prong of the Franklin test.[288] Since the seat belt defense has never been fully considered by the California Supreme Court, a resolution of this issue must wait for an appropriate case.

The MUL has been found to be constitutional in People v. Coyle.[289]

Conclusion: The seat belt defense was and is available in California. The exact shape of the defense still must be clarified by the California Supreme Court.

Colorado

Statutory Law: Colorado has a MUL; its evidentiary section reads as follows: "(7) Evidence of failure to comply with the requirement of subsection (2) of this section shall be admissible to mitigate damages with respect to any person who was involved in a motor vehicle accident and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. Such mitigation shall be limited to awards for pain and suffering and shall not be used for limiting recovery of economic loss and medical payments."[290]

Case law: Colorado courts have never recognized the seat belt defense in personal injury cases. Fischer v. Moore[291] held that the seat belt defense was not an affirmative defense under comparative negligence. After Colorado adopted a comparative

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[285] 20 Cal. 3d 725, 144 Cal. Reptr. 380, 575 P. 2d 1162 (1978).

[286] Goe, Buckling Up: How the Mandatory Seatbelt Law Affects the Seatbelt Defense, 17 Southwestern Law Review 597, 613 (1988).

[287] Merema, The Seat Belt Defense - An Update, 28 For the Defense 19, 21 (May, 1986).

[288] Goe, note 289 above, 619-20.

[289] 251 Cal. Reptr. 80 (Cal. Super. 1988).

[290] Colo. Rev. Stat. sec. 42-4-236.

[291] 183 Colo. 392, 517 P. 2d 458 (1973).

negligence statute,[292] the defense continued to be rejected.[293] In one crashworthiness case, the question of plaintiff's failure to wear a shoulder harness was allowed to be decided by the jury.[294]

Comments: The MUL reverses Colorado common law, which had rejected the seat belt defense.[295] The defense is limited to mitigation of damages awarded for pain and suffering only and does not limit damages in connection with economic loss and medical payments.

Conclusion: The MUL allows the seat belt defense in Colorado.

Connecticut

Statutory law: Connecticut has a MUL which contains a gag provision.[296]

Case law: Connecticut appellate courts have been reluctant to tackle the issue of the seat belt defense. In Wassell v. Hamblin, the Supreme Court of Connecticut invited the legislature to resolve the issue.[297] In refusing to reach the merits of the seat belt defense in a case which predated the MUL, the Court of Appeals of Connecticut noted the existence of the gag provision in the newly-enacted MUL.[298] The implication was that in the future Connecticut courts would no longer have to struggle with the seat belt defense because the legislature had solved the problem.

Comments: Before the MUL, trial courts had split on the seat belt defense in the vacuum created by the lack of appellate decisions.[299]

Conclusion: The seat belt defense, never very strong, is no longer available in Connecticut.

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[292] Colo. Rev. Stat. sec. 13-21-111.

[293] See Churning v. Staples, 628 P. 2d 180, 181 (Colo. App. 1981); Dare v. Souble, 674 P. 2d 960 (Colo. 1984)(a motorcycle helmet case which relied heavily on Fischer v. Moore).

[294] Roberts v. May, 583 P. 2d 305 (Colo. App. 1978).

[295] See Thompson, Colorado Mandatory Seatbelt Act Revives the Seatbelt Defense, 16 The Colorado Lawyer 1210 (1987).

[296] Conn. Gen Stat. Ann. sec. 14-100a (1989). Subsection (c)(4) reads: "Failure to wear a seat safety belt shall not be considered as contributory negligence nor shall failure be admissible evidence in any civil action."

[297] 196 Conn. 463, 493 A. 2d 870, 873 (1985).

[298] Futterleib v. Mr. Happy's, Inc., 16 Conn. App. 497, 548 A. 2d 728, 732 (1988).

[299] Id. at 732. See also Zakarian and Guliano, Survey of Connecticut Tort Law: 1985, 60 Connecticut Bar Journal 126, 137 for a listing of trial court cases.

Delaware

Statutory law: Delaware has not enacted a MUL.

Case law: In Lipscomb v. Damiani,[300] the Supreme Court of Delaware rejected the seat belt defense for a number of reasons, including deference to the legislature on a standard of care,[301] the problem of conjecture by the jury,[302] and incompatibility with traditional tort theories.[303]

Comment: Delaware remains a contributory negligence state. The Delaware child restraint law contains a gag provision.[304]

Conclusion: The seat belt defense is unavailable in Delaware.

District of Columbia

Statutory law: The District of Columbia has enacted a MUL[305] which contains a gag provision.[306]

Case law: The District of Columbia Court of Appeals rejected the seat belt defense in McCord v. Green.[307] The court expressed serious doubts about the safety value of seat belts[308] and noted that most persons do not use seat belts.[309] Thus, according to the court, failing to use a seat belt was not negligence. The

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[300] 226 A. 2d 914 (Del. 1967).

[301] Id. at 916.

[302] Id. at 917-18.

[303] Id. at 918.

[304] Del. Code Ann. tit. 21, sec. 4199C (1988 Cum. Supp.): "(d) Failure to wear a child passenger restraint system shall not be considered as evidence of either comparative or contributory negligence in any civil suit arising out of any motor vehicle accident in which a child under 4 is injured, nor shall failure to wear a child passenger restraint system be admissible as evidence in the trial of any civil action."

[305] D.C. Code Ann. sec. 40-1601 et. seq. (1986).

[306] D.C. Code sec. 40-1607 (1986): "Neither a violation of this chapter nor compliance with its terms shall constitute evidence of negligence, evidence of contributory negligence, or a basis for civil action for damages. Also, a violation or compliance with this chapter shall not be used as a basis for mitigating damages arising from a civil liability."

[307] 362 A. 2d 720 (D.C. 1976).

[308] Id. at 723-24.

[309] Id. at 724-25.

court went on to reject the decision in Spier v. Barker[310], stating that the mitigation of damages approach does not fit into either the theory of contributory negligence or the doctrine of avoidable consequences[311]

Comment: The District remains a contributory negligence jurisdiction.

Conclusion: The seat belt defense is unavailable in the District of Columbia.

Florida

Statutory law: Florida's MUL is known as the "Florida Safety Belt Law."[312] Subsection (10) reads as follows: "A violation of the provisions of this section shall not constitute negligence per se, nor shall such violation be used as prima facie evidence of negligence in any civil action."

Case law: Until 1984, Florida had refused to recognize the seat belt defense, first under contributory negligence and then under comparative negligence.[313] The Supreme Court of Florida departed from this precedent and adopted the seat belt defense in Insurance Company of North America v. Pasakarnis.[314]

The fact pattern of this case clearly posed the issue: the plaintiff's vehicle was struck broadside by a vehicle driven by the defendant, who had run a stop sign. The plaintiff was ejected and suffered his injuries upon impact with the pavement.[315] The court summarized its position at the beginning of its decision: "we hold that evidence of failure to wear an available and fully operational seat belt may be considered by the jury in assessing a plaintiff's damages where the 'seat belt defense' is pled and it is shown by competent evidence that failure to use the seat belt produced or contributed substantially to producing at least a portion of the

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[310] 35 N.Y. 2d 444, 363 N.Y.S. 2d 916, 323 N.E. 2d 164 (1974).

[311] 362 A. 2d at 725. The doctrine of avoidable consequences holds that an injured plaintiff must avoid additional damages after having been injured by a defendant (e.g., by promptly seeking medical treatment). Thus, the plaintiff's responsibility begins only after the damage has been caused by the defendant. Buckling a seat belt occurs before the crash. See State v. Ingram, 427 N.E. 2d 444, 447-48 (Ind. 1981); Miller v. Miller, 273 N.C. 228, 160 S.E. 2d 65 (1968).

[312] Fla. Stat. Ann. sec. 316.614 (West Supp. 1989).

[313] See Brown v. Kendrick, 192 So. 2d 49 (Fla. 1st Dist. 1966) and Lafferty v. Allstate Insurance Co., 425 So. 2d 1147 (Fla. 4th Dist. 1982).

[314] 451 So. 2d 447 (Fla. 1984).

[315] Id. at 447.

damages."[316] The court first disposed of the argument that the seat belt defense was a matter for the legislature, stating that the issue was "particularly appropriate for judicial decision."[317] The court then took note of the effectiveness of seat belts in reducing deaths and injury severity.[318] After rejecting the negligence per se and contributory negligence approaches, the court adopted the mitigation of damages approach taken by Spier v. Barker.[319] The case was remanded for a new trial solely on the issue of whether and to what extent Pasakarnis' $100,000 damage award should be reduced due to his failure to wear an available seat belt.[320]

Pasakarnis was applied in a products liability case in Baker v. Firestone Tire & Rubber Co.[321] Baker was injured when a tire failed and caused him to lose control of his car.[322] A United States District Court jury determined that Firestone was 40% negligent for the crash (presumably due to manufacturing defects in the tire) and that Baker was 60% negligent for the crash (presumably due to poor maintenance of the tire). The jury assessed Baker's damages at $300,000; under Florida's contributory negligence plan, this was reduced by 60% to $120,000. Then under the Pasakarnis mitigation of damages approach, the jury further reduced Baker's damages by 90% due to his failure to wear an available seat belt, entering a final judgment in the amount of $12,000.[323] The United States Court of Appeals affirmed.

A recent Florida case[324] succinctly reiterates the Pasakarnis rule: "it is up to the defendant to prove that :

> One) There was a seat belt available to plaintiff
> Two) It was fully operational
> Three) Plaintiff failed to use it."

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[316] Id.

[317] Id. at 451.

[318] Id. at 453.

[319] 35 N.Y. 2d 444, 363 N.Y.S. 2d 916 (1974), 323 N.E. 2d 164 (1974).

[320] 451 So. 2d at 455.

[321] 793 F. 2d 1196 (11th Cir. 1986).

[322] Id at 1197.

[323] Id. at 1198.

[324] Booth v. Abbey Road Beef and Booze, Inc. 352 So. 2d 1288, 1290 (Fla. App. 4th Dist. 1988).

Of late, some Florida courts have become rigorous in holding defendants to their burden of proving that plaintiff's belt was fully operational.[325]

Comments: Florida is one of the few states where judicial doctrine and legislation have clearly intersected concerning the seat belt defense. Pasakarnis was very much on Florida legislators' minds as they considered a MUL.[326] After much debate, the law was drafted so that the Pasakarnis rule remained unchanged.[327] The 1986 Journal of the Florida house of Representatives contains an entry which specifically states that the intent of the legislature was not to alter Pasakarnis.[328]

It should be noted that the Florida child restraint law[329] contains a gag provision. Although this was raised by the dissenting justice in Pasakarnis,[330] it was ignored by the majority. Thus, different results obtain depending upon the age of the unbelted plaintiff: under identical circumstances, damages could be reduced in the case of an adult but not a child.[326]

Florida has institutionalized the Pasakaruis decision in its Florida Standard Jury Instructions (Civil) 6.14[327].

Conclusion: The seat belt defense is available in Florida under the mitigation of damages approach.

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[325] See Youngentob v. Allstate Insurance Co., 519 So. 2d 636 (Fla. App. 4th Dist. 1987) (mere fact that automobile is in good condition is not sufficient to warrant a jury instruction on the seat belt defense); Devolder v. Sandage, 544 So. 2d 1046 (Fla. App. 2nd Dist. 1989) (Defendant was required to prove that plaintiff's seat belt was anchored to the body of the vehicle and included buckles which closed securely when utilized); DeLong v. Wiches Co., 545 So. 2d 362 (Fla. App. 2nd Dist. 1989) (Defendant did not meet its burden of establishing that plaintiff's seat belts were operational merely by introducing photographs and testimony that the vehicle was purchased new by plaintiff a few months before the crash.)

[326] Van Laningham, The Making of the 1986 Florida Safety Belt Law: Issues and Insight, 14 Florida State University Law Review 685, 688 (1986).

[327] Id. at 696-702.

[328] American Automobile Association v. Tehrani, 508 So. 2d 365 (Fla. 1st Dist. App. 1987).

[329] Fla. Stat. Ann. sec. 316.613.

[330] 451 So. 2d at 455 (Shaw, J. dissenting).

[326] See Parker v. Montgomery, 529 So. 2d 1145, 1150 (Fla. App. 1st Dist. 1988). See also Barnes v. Robison, 712 F. Supp. 873 (D.C. Kan. 1989).

[327] The Florida Bar Standard Jury Instructions, 475 So. 2d 682 (Fla. 1985).

Georgia

Statutory law: Georgia has enacted a MUL which contains a noticeably detailed and wide ranging gag provision.[328]

Case law: The recent history of seat belt decisions in Georgia appellate courts shows a number of cases which are progressively more favorably disposed to the seat belt defense, followed by the enactment of the MUL and its gag. In Wendlandt v. Shepherd Construction Company, Inc., the Court of Appeals of Georgia stated: "Much can be said for a legal proposition that the failure to use an available seatbelt, in view of its potential to reduce serious injuries, could be considered by a jury as a matter of negligence by the injured party and as affecting the amount of damages to be recovered."[329] The court did not reach the merits of the seat belt defense, however, because the defendant had won the trial.[330] In three cases decided in 1987 the court, citing Wendlandt, remarked that the seat belt defense was appropriate under the Georgia comparative negligence plan, but did not have to decide on its merits.[331] Finally, the Court of Appeals received a case that squarely posed the issue in Cannon v. Lardner.[332] Again citing Wendlandt, the court concluded that evidence of plaintiffs' failure to use seat belts was relevant in determining damages.[333] As in Pasakarnis, the court discounted the child restraint gag provision in arriving at its conclusion.[334] The dissent relied on "majority rule," "matter for the legislature," and "no duty" arguments.[335] As for the latter, the dissenting judge stated: "Drivers are not clairvoyant. They are entitled to rely on the presumption that other drivers will not act negligently."[336]

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[328] Ga. Code Ann. sec. 40-8-76.1. Subdivision (d) provides: "Failure to wear a seat safety belt in violation of this Code section shall not be considered evidence of negligence, shall not be considered by the court on any question of liability of any person, corporation or insurer,shall not be the basis for cancellation of coverage or increase in insurance rates, and shall not diminish any recovery for damages arising out of the ownership, maintenance or operation of a passenger vehicle."

[329] 178 Ga. App. 153, 342 S.E. 2d 352, 354 (1986).

[330] Id.

[331] Cullen v. Timm, 184 GA App. 80, 360 S.E. 2d 745 (1987); Sapp. v. Johnson, 184 GA. App. 603, 362 S.E. 2d 82, 85 (1987); Martini v. Nixon, 185 Ga. App. 328, 364 S.E. 2d 49, 51 (1987).

[332] 185 Ga. App. 194, 363 S.E. 2d 574 (1987).

[333] 363 S.E. at 576.

[334] Id. See Ga. Code Ann. sec. 40-8-76.

[335] Id at 579. (McMurray, P.J. dissenting).

[336] Id. Compare.Law v. Superior Court, 157 Arz. 147, 755 P. 2d 1135, 1140 (1988): "Rejection of the seat belt defense can no longer be based on the antediluvian doctrine that one need not anticipate the negligence of others. There is nothing to anticipate; the negligence of motorists is omnipresent."

The debate ended abruptly with the passage of the MUL. The Supreme Court of Georgia vacated the writ of certiorari in the appeal of Cannon v. Lardner, due to the passage of the MUL.[337]

Comments: As one commentator has said about Georgia's flirtation with the seat belt defense, "the 1988 Georgia General Assembly brought this trend in the case law to a screeching halt" with its gag provision[338]

Conclusion: The seat belt defense is now unavailable in Georgia.

Hawaii

Statutory law: Hawaii has enacted a MUL.[339] It provides: "This section shall not be deemed to change existing laws, rules or procedures pertaining to a trial of a civil action for damages for personal injuries or death sustained in a motor vehicle accident."[340]

Case law: There are no cases involving the seat belt defense decided under Hawaiian law.

Comments: The Hawaii child restraint law contains a gag provision.[341] The New Jersey MUL[342] contains a provision virtually identical to that in the Hawaii MUL, and the New Jersey child restraint law[343] contains a gag provision. The Supreme Court of New Jersey nevertheless approved the seat belt defense.[344] Hawaiian courts might do the same. It should be noted that the "no change in existing laws" provision is virtually useless in states with no hard case law on the seat belt defense.

Conclusion: Unsettled.

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[337] 258 Ga. 332, 368 S.E. 2d 730 (1988).

[338] Adams and Adams, Annual Survey of Georgia Law: Torts, 40 Mercer Law Review 377, 398 (1988).

[339] Haw. Rev. Stat. sec. 291-11.6 (Supp. 1988).

[340] Haw. Rev. Stat. sec. 291-11.6(d) (Supp. 1988).

[341] Haw. Rev. Stat. sec. 291-11.5(d) (Supp. 1988): "In no event shall failure of a child under the age of four years to be restrained or failure to restrain such child in a child passenger restraint system be considered as contributory negligence, comparative negligence, or negligence per se."

[342] N.J. Sta. Ann. sec. 39:3-76.2h (West 1988). North Carolina also enacted a similar provision, but it was amended by chapter 623 of the laws of 1987 into a gag provision.

[343] N.J. Stat. Ann. sec. 39:3-76.2a (West 1988).

[344] Waterson v. General Motors Corporation, 111 N.J. 238, 544 A. 2d 357 (1988).

Idaho

Statutory law: Idaho has enacted a MUL which is silent on seat belt evidence.[345]

Case law: The most recent Idaho case, Quick v. Crane,[346] reaffirmed the ruling of inadmissibility in Hansen v. Howard O. Miller, Inc.,[347] even though the former was decided under comparative negligence and the latter under contributory negligence. The reason given in both cases was the lack of any connection between plaintiff's failure to use seat belt and the cause of the crash.[348]

Comments: Although it is possible to argue that legislative silence amounts to an acceptance of the seat belt defense, realistically the legislature has deferred to the Supreme Court of Idaho in this matter.

Conclusion: The seat belt defense is unavailable in Idaho.

Illinois

Statutory law: Illinois has enacted a MUL which contains a gag provision.[349]

Case law: For many years, mid-level Illinois courts had allowed the seat belt defense.[350] The Supreme Court of Illinois, however, overturned this long standing precedent in Clarkson v. Wright.[351] The court's analysis was rather sketchy; it relied on the "no duty" position, referring to both a lack of statutory duty to wear a seat belt and no common law duty to anticipate the

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[345] Idaho Code sec. 49-673 (1988).

[346] 111 Idaho 759, 727 P. 2d 1187 (1986).

[347] 93 Idaho 314, 460, p. 2d 739 (1969).

[348] 727 P. 2d at 1208.

[349] Ill. Stat. Ann. ch 95 1/2, sec. 12-603.1 (Smith-Hurd Supp. 1988). Subsection (c) reads: "Failure to wear a seat safety belt in violation of this section shall not be considered evidence of negligence, shall not limit the liability of an insurer, and shall not diminish any recovery for damages arising out of the ownership, maintenance or operation of a motor vehicle."

[350] Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E. 2d 329 (1968); Eichorn v. Olson, 32 Ill. App. 3d 587, 335 N.E. 2d 774 (1975); Dudanas v. Plate, 44 Ill. App. 3d 901, 3 Ill Dec. 486, 358 N.E. 2d 1171 (1976); Seward v. Griffin, 116 Ill. App. 3d 749, 72 Ill. Dec. 305, 452 N.E. 2d 558 (1983). Clarkson v. Wright, 121 Ill. App 3d 230, 76 Ill. Dec. 668, 459 N.E. 2d 305 (1984); Sewell v. Wofford, 131 Ill. App. 3d 62, 86 Ill. Dec. 361, 475 N.E. 2d 575 (1985).

[351] 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268 (9185)

negligence of another.[352] Even though the case was not decided under the Illinois MUL, the court emphasized the gag provision contained therein,[353] leading one to speculate that the court was anticipating the future of the seat belt defense in Illinois in arriving at its decision.

Comments: The Supreme Court of Illinois has upheld the constitutionality of the MUL.[354] It should be noted that the dissent in Clarkson v. Wright raised the issue of the constitutionality of the gag provision[355] but the issue was not raised or discussed in People v. Kohrig.

Conclusion: The seat belt defense is unavailable in Illinois.

Indiana

Statutory law: Indiana has enacted a MUL[356] which contains a gag provision.[357]

Case law: The Supreme court of Indiana rejected the seat belt defense in State v. Ingram.[358] The court rejected the argument that the seat belt defense should be recognized under the doctrine of mitigation of damages because the act of buckling a seat belt of necessity must occur before the crash, and the classic doctrine of mitigation of damages looks to acts of the injured party after the injury has occurred.[359] In addition, the court deferred to the legislature on the issue of a motor vehicle occupant's duty to use a seat belt.[360]

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[352] 483 N.E. at 270.

[353] Id.

[354] People v. Kohrig, 113 Ill. 2d 384, 101 Ill. Dec. 650, 498 N.E. 2d 1158 (1986). For more detailed discussions of this case, see Polito, Seat Belt Laws and the Right to Privacy, 10 Harvard Journal of Law and Public Policy 752 (1987); McCarthy and Jarzyna, 1986-1987 Illinois Law Survey - Criminal Law 19 Loyola University of Chicago Law Journal 373, 400-402. (1988).

[355] 483 N.E. 2d at 273.

[356] Ind. Code Ann. sec. 9-8-14-5 et. seq (Burns 1987).

[357] Ind. Code Ann. sec. 9-8-14-5 (Burns 1987): "Failure to comply with this chapter does not constitute fault under IC 34-4-33 and does not limit the liability of an insurer. Evidence of the failure to comply with this chapter may not be admitted in any civil action to mitigate damages."

[358] 427 N.E. 2d 444 (1981).

[359] Id. at 448.

[360] Id.

Comments: Even after the decision in State v. Ingram, defense attorneys continued, without success, to raise the seat belt defense in Indiana.[361] Even this option has been foreclosed to them under the MUL.

Conclusion: The seat belt defense is unavailable in Indiana.

Iowa

Statutory law: For a number of years, the Iowa seat belt installation statute contained a gag provision.[362] The Iowa MUL[363] repealed the gag provision in causes of action arising on or after July 1, 1986.[364] The current provision does not allow nonuse of a seat belt to be used as evidence of comparative negligence. However, such nonuse may be admitted to mitigate damages if the defendant introduces "substantial evidence" that the failure to wear a seat belt contributed to plaintiff's injuries. If the trier of fact finds that the plaintiff's failure to wear a seat belt contributed to his or her injuries, the plaintiff's recovery may be reduced by a amount not to exceed 5%.[365]

Case law: There has been little case law on the issue of seat belt nonuse in Iowa because of the former gag provision.[366]

Comments: The Iowa MUL has been held to be constitutional by the Supreme Court of Iowa.[367] The court held that the law does not violate an individual's right of privacy and is a reasonable exercise of the State's police power.[368] It may be anticipated that Iowa courts will have to grapple with the details of the 5%

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[361] Wilkins, The Indiana Seatbelt Use Law and Its Effect Upon Automobile Tort Litigation, 19 Indiana Law Review 439 (1986).

[362] Former Iowa Code Ann. sec. 321.445. See notes to above and accompanying text.

[363] Iowa Code Ann. sec. 321.445 (West Supp. 1988), effective June 8, 1986.

[364] Iowa Code Ann. sec. 321.445(4a) (West Supp. 1988).

[365] Iowa Code Ann. sec. 321.445(4b) (West Supp. 1988).

[366] In a case involving a taxicab company's alleged negligence due to its failure to furnish seat belts to its passengers, the Supreme Court of Iowa, noting the controversy over the value of seat belts as protective devices, upheld the dismissal of the case. Tiemeyer v. McIntosh, 176 N.W. 2d 819 (Iowa 1970). The seat belt defense was rejected in a products liability action decided under the former Iowa gag provision. Minck v. Goodyear Tire and Rubber Co., No. C82-0201 (N.D. Iowa 1986)(applying Iowa law).

[367] State v Hartog, 440 N.W.2d 852 (Iowa 1989).

[368] Id.

damage limitation provision[369] or, as in Louisiana,[370] the legislature may repeal it.

Conclusion: The seat belt defense is available to mitigate damages, but only to the extent of a 5% reduction.

Kansas

Statutory law: Kansas has enacted a MUL[371] which contains a gag provision.[372]

Case law: Courts in Kansas have a long history of rejecting the seat belt defense.[373] The rule is well-settled: "A passenger in an automobile has no legal duty to use an available seat belt in anticipation of the driver's negligence, and evidence of nonuse is unavailable under the comparative negligence doctrine either on the issue of contributory negligence or in mitigation of damages."[374] "Just as a passenger has no duty to anticipate the negligence of a driver of a vehicle, a driver need not anticipate the negligence of drivers of other vehicles and has no duty to use an available seat belt."[375] However, a recent federal court decision leaves open the possibility of allowing the introduction of seat belt evidence on the issue of defective design in a crashworthiness case.[376]

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[369] No courts have done so as yet. But see Lowe v. Estate Motors Limited, 428 Mich. 439, 410 N.W. 2d 706, 716, 718, 724 (1987), in which both the majority opinion and the dissent noted the existence of a similar provision in Michigan's MUL even though the MUL was not an issue in the case.

[370] Acts 1988, No. 759, sec. 1 repealed a similar provision in the Louisiana MUL, LA. Sta. Ann. sec. 32:295(E), and replaced it with a gag provision.

[371] Kan. Stat. Ann. sec. 8-2501 et. seq (Supp. 1988).

[372] Kan. Stat. Ann. sec. 8-2504(c) (Supp. 1988): "Evidence of failure of any person to use a safety belt shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages."

[373] Hampton v. State Highway Commission, 209 Kan. 565, 498 P. 2d 236 (1972); Taplin v. Clark, 6 Kan. App. 2d 66, 626 P. 2d 1198 (1981); Ratterree v. Bartlett, 238 Kan. 11, 707 P. 2d 1063 (1985); Rollins v. Department of Transportation, 238 Ka, 453, 711 P. 2d 1330 (1985); Fudge v. City of Kansas City, 239 Kan. 369, 720 P. 2d 1093 (1986).

[374] Taplin v. Clark, 6 Kan. App. 2d 66, 626 P. 2d 1198, Syl. 1 (1981), adopted in Ratterree v. Bartlett, 238 Kan. 11, 18, 707 P. 2d 1063, 1069 (1985).

[375] Fudge v. City of Kansas City, 239 Kan. 369, 720 P. 2d 1093, 1101 (1986). Among decisions holding to the contrary are Insurance Company of North America v. Pasakarnis, 451 So. 2d 447, 453 (Fla. 1984); Lowe v. Estate Motors Incorporated, 428 Mich. 439, 410 N.W. 2d 706, 712 (1987).

[376] Cunningham v. Suburu of America, Inc., Civil Action No. 85-2621-S (D.C. Kan 1987).

Comments: The Kansas legislature has ratified longstanding common law concerning the seat belt defense.[377]

Conclusion: The seat belt defense is unavailable in Kansas.

Kentucky

Statutory: There is no MUL in Kentucky.

Case law: The Supreme Court of Kentucky adopted the seat belt defense in 1987.[378] The trial court had excluded evidence of plaintiff's nonuse of seat belts and the Kentucky Court of Appeals affirmed that decision, reasoning that the seat belt defense was a matter for the legislature.[379] The Supreme Court, in addressing the issue of the seat belt defense, first noted the existence of a gag provision in the Kentucky child restraint law.[380] The court stated: "We need not get involved in trying to interpret the meaning of this statute, because whatever it means, except as to a small child as defined by the words of the statute, it is silent on the duty to utilize a seat belt restraint." We cannot construe this silence as a legislative expression of public policy for or against the use of a seat belt restraint.[381] The court refused to be drawn into an extended discussion of a motor vehicle occupant's duty to anticipate another's negligence and to wear a seat belt, but instead handled the issue as an evidentiary problem: "In short, we recognize the potential use of the seat belt defense as an evidentiary matter for the jury's consideration depending upon the evidence in the particular case, and we express no opinion as to whether the occupant of an automobile should or should not be required to wear a seat belt as a matter of law."[382] Accordingly, the jury was allowed to decide whether there should have been an apportionment based on Kentucky's comparative fault scheme.[383]

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[377] See Eli v. The Board of Commissioners of Sedgwick County Kansas, (1989 Kan. App. Lexis 338) (Not designated for publication) and Barnes v. Robison, 712 F. Supp. 873 (D.C. Kan. 1989).

[378] Weymss v. Coleman, 729 S.W. 2d 174 (KY. 1987).

[379] Weymss v. Coleman, No. 85-CA-1645-MR and No. 85-CA-1794-MR.

[380] Ky. Rev. Stat. sec. 189.125. Subsection (5) reads as follows: "Failure to wear a child passenger restraint shall not be considered as contributory negligence, nor shall such failure to wear said passenger restraint system be admissible as evidence in the trial of any civil action." For a detailed discussion of this issue, see Lewis, The Seat Belt Defense in Kentucky, 15 Northern Kentucky Law Review 657, 670-71 (1988).

[381] 729 S.W. 2d at 178. See also Conley v. American Motors Corporation, 769 S.W. 2d 75 (Ky. App. 1989).

[382] Id. at 181.

[383] Id. at 182. See Hilen v. Hays, 673 S.W. 2d 713 (Ky. 1984).

Conclusion: The seat belt defense may be used in Kentucky to introduce evidence of plaintiffs' negligence in failing to utilize an available safety belt.

Louisiana

Statutory law: Louisiana has a MUL which contains a gag provision.[384] The gag provision was added in 1988 to replace an earlier provision which allowed evidence of seat belt nonuse to be considered evidence of comparative negligence, with reduction in plaintiffs' damages limited to a maximum of 2%.[385]

Case law: Prior to the enactment of Louisiana's MUL, courts had handled the seat belt defense differently depending upon whether or not the case was a crashworthiness case. In ordinary negligence cases, the seat belt defense was disallowed;[386] however, in crashworthiness cases, the defense was allowed.[387] As the court stated in McElroy v. Allstate Insurance Company, "Ford's defense to the allegations of design defect was that the vehicle was designed as safely as possible. Ford maintains that the design of the vehicle as a whole, including all of the restraint devices, was such that no defect existed. In this light, evidence of the existence of seat belts was properly before the jury."[388]

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[384] La. Rev. Stat. sec. 32:295.1 (West Supp. 1989). Subsection E reads: "In any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt in violation of this section shall not be considered evidence of comparative negligence. Failure to wear a safety belt in violation of this section shall not be admitted to mitigate damages."

[385] Before being amended by Acts 1988, No. 759, sec. 1, effective August 1, 1988, subsection E read: "In any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt in violation of the Section shall not be considered evidence of comparative negligence. Failure to wear a safety belt in violation of this section may be admitted to mitigate damages, but only when the party offering such evidence proves that:

(1) There was a functioning safety belt available to the injured party;

(2) The injured party failed to use a safety belt;

(3) The party's failure to use a safety belt contributed to the party's injuries;

(4) The use of a safety belt would have reduced the injured party's damages in an amount equal to or in excess of the mitigation sought. In no event shall the award of damages be reduced by more than two percent for the nonuse of a safety belt."

[386] Benson v. Seagraves, 445 So. 2d 187 (La. App. 3 Cir. 1984); Williams v. Harvey, 328 So. 2d 901 (La. App. 1st Cir. 1976); Williams v. Chrysler Motor Company, 271 So. 2d 551 (La. App. 1st Cir. 1972); Fontenot v. Fidelity Guaranty and Casualty Co. of New York, 217 So. 2d 702 (La. App. 3d Cir. 1969); Lawrence v. Westchester Fire Insurance Co., 213 So. 2d 784 (La. App. 2nd Cir. 1968) App. Den. 252 La. 96, 215 So. 2d 131 (1968); Myles v. Lee, 209 So. 2d 533 (La. App. 2d Cir. 1968).

[387] See McElroy v. Allstate Insurance Company, 420 So. 2d 214 (La. App. 4th Cir. 1982), cert. den. 422 So. 2d 165 (La. 1982); Hermann v. General Motors Corporation, 720 F. 2d 414 (5th Cir. 1983); Jordan v. General Motors Corporation, 624 F. Supp. 72 (E.D. La. 1985).

[388] See McElroy v. Allstate Insurance Company, 420 So. 2d 214 (La. App. 4th Cir. 1982), cert. den. 422 So. 2d 165 (La. 1982).

Comments: An interesting recent Louisiana case involved the issue of the liability of a mother for failing to restrain her five year old child in a seat belt or a child restraint device.[389] Although the case arose before the effective date of the Louisiana MUL, the court noted the 2% damage reduction cap in a way which indicated that the court felt that the legislature did not consider failure to use seat belts to be a significant matter.[390] The court held that the mother was not negligent in failing to restrain her child.

Conclusion: The seat belt defense is unavailable in Louisiana.

Maine

Statutory law: Maine has not enacted a MUL.[391] The Maine seat belt installation law contains a gag provision.[392]

Case law: The one case which discussed the seat belt defense in Maine is Pasternack v. Achorn.[393] The main issue was whether federal courts were bound by state laws which excluded evidence which ordinarily would be acceptable under the Federal Rules of Evidence.[394] The court found in the affirmative, noting that other federal courts had recognized seat belt gag provisions in the past.[395] Noting that "Maine neither mandates the use of seat belts nor has it repealed its statute expressly precluding evidence of seat belt nonuse," the court concluded that "a federal court should be reluctant to disregard a state statute so closely related to a substantive state legislative policy"[396] and excluded evidence of plaintiff's nonuse of a seat belt.

Conclusion: The Seat belt defense is unavailable in Maine.

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[389] Hammer v. City of Lafayette, 502 So. 2d 301 (La. App. 3rd Cir. 1987). For a similar case, see Costello v. Marchese, 137 A.D. 2d 482, 524 N.Y.S. 2d 232 (2nd Dept. 1988).

[390] 502 So. 2d at 304.

[391] Me. Rev. Stat. Ann. tit. 32, sec. 9602(4) (1988) requires instructors and students of commercial driver education schools to use seat belts during behind-the-wheel instruction.

[392] Me. Rev. Stat. Ann. tit. 29, sec. 1368-A (1978). The second paragraph reads: "In any accident involving an automobile, the nonuse of seat belts by the driver of or passengers in the automobile shall not be admissible in evidence in any trial, civil or criminal, arising out of such accident."

[393] 680 F. Supp. 447 (D.Me. 1988).

[394] 28 U.S.C.A., Fed. R. Evid., Rules 401-403.

[395] The court cited Ramrattan v. Burger King Corp., 656 F. Supp. 522 (D. Md. 1987; Cheatham v. Thurston Motor Lines, 654 F. Supp. 216 (S.D. Ohio 1986); Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368 (E.D. VA. 1978); Sours v. General Motors Corp., 717 F. 2d 1511 (6th Cir. 1983).

[396] 680 F. Supp. at 449.

Maryland

Statutory law: Maryland has enacted a MUL which contains a gag provision.[397] The gag provision does not apply in lawsuits against manufacturers for injuries allegedly caused by defectively installed or defectively operating seat belts.[398]

Case law: The Maryland Court of Appeals refused to accept the seat belt defense in Cierpisz v. Singleton,[399] although it did hold open the possibility that under certain circumstances the defense would be allowed.[400] In Ramrattan v. Burger King Corp.,[401] the court relied on the gag provision to dispose of the seat belt defense in short order.

Comment: Maryland remains a contributory negligence jurisdiction.

Conclusion: The seat belt defense is unavailable in Maryland.

Massachusetts

Statutory law: Massachusetts enacted a MUL[402] which was repealed by the voters on November 4, 1986 by a vote of 53% to 47% in a binding referendum.[403] Massachusetts retains laws which

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[397] Md. Trans. Code sec. 22-412.3 (Supp. 1986). Subdivision (h) reads in part as follows: "Failure to use seat belt.

(1) Failure of an individual to use a seat belt in violation of this section may not:

(i) Be considered evidence of negligence;

(ii) Be considered evidence of contributory negligence;

(iii) Limit liability of a party or an insurer; or

(iv) Diminish recovery for damages arising out of the ownership, maintenance or operation of a motor vehicle.

(2) Subject to the provisions of paragraph (3) of this subsection, a party, witness or counsel may not make reference to a seat belt during a trial of a civil action that involves property damage, personal injury or death if the damage, injury or death is not related to the design, manufacture installation, supplying or repair of a seat belt."

[398] Md. Trans. Code sec. 22-412.3(h)(3) (Supp. 1986).

[399] 247 Md. 215, 230 A. 2d 629 (1967).

[400] Id. at 635.

[401] 656 F. Supp. 522 (D. Md. 1987).

[402] Mass. Gen. Laws Ann. ch 90, sec. 7BB.

[403] See Hingson et al., Repeal of the Massachusetts Seat Belt Law, 78 American Journal of Public Health 548 (1988).

require students in commercial driver training schools[404] and school bus operators[405] to wear seat belts.

Case law: Two Massachusetts products liability cases discuss, but do not reach the merits of, the seat belt defense. In Breault v. Ford Motor Co.,[406] the court ruled that the seat belt defense was not "clearly presented" by the defendant.[407] In MacCuish v. Volkswagenwerk A.G.,[408] the court held that the seat belt defense is inapplicable in a breach of warranty claim.[409]

Comments: The Massachusetts child restraint law contains a gag which covers only contributory negligence.[410]

Conclusion: Unsettled.

Michigan

Statutory law: Michigan has enacted a MUL.[411] Like Iowa, Missouri and Wisconsin, the law does allow evidence of seat belt nonuse to be considered by juries, but places a limit on the amount of reduction in damages.[412]

Case law: In Michigan, a long line of intermediate appellate court decisions[413] which refused to accept the seat belt defense

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[404] Mass. Gen. Laws Ann. ch. 90, sec. 32G.

[405] Mass. Gen. Laws Ann. ch. 90, sec. 7B(8).

[406] 364 Mass. 352, 305 N.E. 2d 824 (1973).

[407] 305 N.E. 2d at 828.

[408] 22 Mass. App. Ct. 380, 494 N.E. 2d 390 (1986).

[409] 494 N.E. 2d at 395.

[410] Mass. Gen. Laws Ann. ch. 90, sec. 7AA includes the following language: "A violation of this section shall not be used as evidence of contributory negligence in any civil action."

[411] Mich. Comp. Laws Ann. sec. 257.710e (West Supp. 1988).

[412] Mich. Comp. Laws Ann. sec. 257.710e(5) (West Supp. 1988) reads: "Failure to wear a safety belt in violation of this section may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance or operation of a motor vehicle. However, such negligence shall not reduce the recovery for damages by more than 5%."

[413] Romanewiz v. Black, 16 Mich. App. 119, 167 N.W. 2d 606 (1969); Selimo v. Baratono, 28 Mich. App. 217, 184 N.W. 2d 367 (1970); DeGraff v. General Motors Corporation, 135 Mich. App. 141, 352 N.W. 2d 511 (1984); Schmitzer v. Misener-Bennett Ford, 135 Mich. App. 350, 354 N.W. 2d 336 (1984); Hierta v. General Motors Corporation, 147 Mich. App. 274, 382 N.W. 2d 765 (1985); Kirk v. Ford Motor Company, 147 Mich. App. 337, 383 N.W. 2d 193 (1985); Lowe v. Estate Motors Limited, 147 Mich. App. 523, 382 N.W. 2d 811 (1985). See also Wojan v. General Motors Corp., 851 F. 2d 969 (7th Cir. 1988).

was overturned by the Supreme Court of Michigan.[414] Lowe v. Estate Motors Limited[415] was a pre-MUL case;[416] nevertheless, the court did discuss the MUL, and it is possible that the existence of the MUL influenced its decision.[417] Applying principles of comparative negligence, the court disagreed with the "no duty" basis for rejecting the seat belt defense found in previous Michigan decisions, stating that the proposition that one need not anticipate the negligence of others "is flawed and inconsistent with modern and traditional principles of negligence law."[418] Furthermore, since this was a crashworthiness case, the court noted that "in crashworthiness cases, the vehicle is to be considered as an integrated whole. Accordingly, seat belt evidence is admissible for that purpose."[419]

Two justices dissented. Each of the dissenters raised the issue of problems created by the newly-enacted MUL applying only to front seat passengers.[420] In addition, Justice Levin discussed the intent of the Michigan legislature in enacting the MUL, stating that there was no intent shown to overturn the long line of cases which rejected the seat belt defense.[421] Chief Justice Riley, writing on behalf of the majority, drew the opposite conclusion, focusing on the fact that the MUL provided that a violation "shall be admissible as evidence of negligence."[422] As for the dissenters' concerns about the 5% limitation applying only to front seat passengers, Chief Justice Riley recognized that while the "limitation could lead, potentially and perhaps anomalously, to the irrational result of protecting the recoveries of individuals whose

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[414] For a more complete discussion of this history, see Fahrner, The Michigan Supreme Court Says Yes to the Seat Belt Defense, 5 Cooley Law Review 159, 167-69 (1988).

[415] 428 Mich. 439, 410 N.W. 2d 706 (1987)

[416] The crash occurred on April 18, 1979; the Michigan MUL became effective on July 1, 1985. 410 N.W. 2d at 728.

[417] Id. at 716-19, 724-30. It may be useful to compare the histories of the seat belt defense in Illinois and Michigan. In both states, the highest court overturned longstanding precedent after the enactment of the states's MUL. Both cases, Clarkson v. Wright and Lowe v. Estate Motors Limited, were decided applying pre-MUL law. Nevertheless, each court took pains to note the existence of evidentiary provisions in the newly-enacted MULs. Most interestingly, the courts went in directly opposite directions, Illinois rejecting the seat belt defense and Michigan accepting it.

[418] Id. at 715.

[419] Id. at 720.

[420] Id. at 724 (Archer, J. dissenting), 726-27 (Levin, J. dissenting).

[421] Id. at 729-30.

[422] Id. at 718. The court misquoted the statute; the correct language is "shall be considered evidence of negligence."

failure to use seat belts was in violation of the statute, while not protecting the recoveries of those whose failure to use seat belts was not in violation of it, we are compelled to conclude that that effect is essentially a legislative concern."[423]

Comments: Although Lowe v. Estate Motors Limited was a crashworthiness case, it seems fair to say that it may be applied to all Michigan cases involving seat belt nonuse.[424]

Conclusion: The seat belt defense is available in Michigan. However, the 5% damage reduction applies to front seat passengers.

Minnesota

Statutory law: Minnesota has enacted a MUL which does not contain a gag provision.[425] However, the Minnesota seat belt installation statute, which became effective on January 1, 1964[426] contains a gag.[427]

Case law: Due to the quarter-century old gag, there are no Minnesota state court cases involving the seat belt defense. A United States Court of Appeals case, Gray v. General Motors Corporation,[428] referred to the gag in upholding a District Court judge's refusal to allow a jury to consider evidence of a plaintiff's nonuse of seat belts.

Comments: Absent the gag, courts in Minnesota appear to be ready to recognize the seat belt defense. In two cases involving the nonuse of motorcycle helmets, courts allowed evidence of nonuse to be considered as a factor in mitigation of damages.[429] In another case,[430] the Minnesota Court of Appeals held that evidence of a plaintiff's failure to wear safety goggles while working on an anhydrous ammonia line was admissible in assessing damages. The

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[423] Id. at 718-19.

[424] Fahrner, note 420 above, at 176.

[425] Minn. Stat. Ann. sec. 169.686 (West Supp. 1989).

[426] Minn. Stat. Ann. sec. 169.685(1) (West Supp. 1989).

[427] Minn. Stat. Ann. sec. 169.685(4) (West Supp. 1989): "Proof of the use or failure to use seat belts....shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle." See also O'Grady, note 239 above.

[428] 434 F. 2d 110 (8th Cir. 1970).

[429] Ottem by Ottem v. United States, 594 F. Supp. 283 (D.Minn 1984)(applying Minnesota law); Northway v. Madison, 390 N.W. 2d 435 (Minn. App. 1986).

[430] Johnson v. Farmers Union Central Exchange, 414 N.W. 2d 425 (Minn. App. 1987).

court rejected anti-seat belt defense cases such as Clarkson v. Wright[431] and Amend v. Bell.[432]

Conclusion: The seat belt defense is unavailable in Minnesota.

Mississippi

Statutory law: Mississippi does not have a MUL. Its child restraint law contains a gag provision.[433]

Case law: The leading case in Mississippi[434] is D.W. Boutwell Butane Company v. Smith.[435] In refusing to hold that failure to use an available seat belt constituted comparative negligence, the Supreme Court of Mississippi held that the Mississippi seat belt installation statute did not require automobile occupants to use seat belts and also questioned the efficacy of seat belts.[436]

Conclusion: Although the admissibility of evidence on seat belt use in Mississippi courts is doubtful, the status of the seat belt defense is best described as unsettled.

Missouri

Statutory law: Missouri has enacted a MUL which allows evidence on nonuse of seat belts to be admitted to mitigate damages, but plaintiff's recovery can be reduced a maximum of 1%.[437]

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[431] 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268 (1985).

[432] 89 Wash. 2d 124, 570 P. 2d 138 (1977).

[433] Miss. Code. Ann. sec. 63-7-301 et. seq. The gag provision is found in sec. 63-7-301, which reads in part as follows: "Failure to provide and use a child passenger restraint device or system shall not be considered contributory or comparative negligence."

[434] For a complete history of the seat belt defense in Mississippi, see Tate, The Seat Belt Defense - Should Mississippi Courts Consider Seat Belt Nonuse as Evidence of a Failure to Mitigate Damages?, 5 Mississippi College Law Review 63, 64-66 (1984).

[435] 244 So. 2d 11 (Miss. 1971).

[436] Id. at 12.

[437] Mo. Stat. Ann. sec. 307.178 (Vernon Supp. 1989). Subdivision 3 reads: "In any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt in violation of this section shall not be considered evidence of comparative negligence. Failure to wear a safety belt in violation of this section may be admitted to mitigate damages, but only under the following circumstances:

(1) Parties seeking to introduce evidence of the failure to wear a safety belt in violation of this section must first introduce expert evidence proving that a failure to wear a safety belt contributed to the injuries claimed by plaintiff;

(2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt in violation of this section contributed to the plaintiff's claimed injuries, and may reduce the amount

Case law: Missouri courts have refused to allow the seat belt defense since Miller v. Haynes.[438] In that case, the Missouri Court of Appeals rejected the seat belt defense, relying on the arguments that there was no statutory duty to use an available seat belt; the negligence of others is not foreseeable; the doctrine of mitigation of damages is inapplicable because the duty to mitigate damages begins only with the injury; and that apportionment of damages would lead to speculation by juries.[439] In a 1988 case,[440] the Missouri Court of Appeals summarily rejected the seat belt defense, relying on Miller v. Haynes. However, in a 1989 case[441] the United States District Court for the Western District of Missouri allowed evidence of plaintiff's nonuse of a seat belt to be introduced in a crashworthiness case. In so doing, the court held that the plain meaning of the MUL was to allow such evidence to be introduced in product liability cases.[442]

Conclusion: The seat belt defense is available in Missouri only on the issue of mitigation of damages. Reductions in plaintiffs' recoveries are limited to 1%; rear seat passengers' recoveries cannot be reduced. Evidence of nonuse of available seat belts by plaintiffs is admissible in crashworthiness cases in Federal Court for the Western District of Missouri.

Montana

Statutory law: Montana has enacted a MUL[443] which contains a gag provision.[444]

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of the plaintiff's claimed recovery by an amount not to exceed one percent of the damages awarded after any reductions for comparative negligence."

[438] 454 S.W. 2d 293 (Mo. App. 1970).

[439] Id. at 299-301.

[440] Glasscock v. Miller, 720 S.W. 2d 771, 776 (Mo. App. 1986).

[441] LaHue v. General Motors Corp., No. 88-5063-CV-SW-1 (D.C. W. Mo. July 5, 1989).

[442] Mo. Stat. Ann. sec. 307.178(3). The court held that the statute which refers to actions arising out of "the ownership, common maintenance or operation of a motor vehicle," does not apply to the design or construction of a motor vehicle.

[443] Mont. Code Ann. sec. 61-13-101 et. seq (1987).

[444] Mont. Code Ann. sec. 61-13-106 (1987): "Evidence of compliance or failure to comply with 61-13-103 is not admissible in any civil action for personal injury or property damage resulting from the use or operation of a motor vehicle, and failure to comply with 61-13-103 does not constitute negligence."

Case law: The Supreme Court of Montana disposed of the seat belt defense in Kopischke v. First Continental Corp.[445] After reviewing decisions in other jurisdictions, the Montana court relied heavily on Amend v. Bell[446] and held that the seat belt defense was a matter for the legislature.[447]

Conclusion: The seat belt defense is unavailable in Montana.

Nebraska

Statutory law: The Nebraska MUL[448] was rejected by the voters in November of 1986. Not repealed was the section of law relating to evidence of seat belt nonuse.[449]

Case law: Prior to 1988, Nebraska common law had been unclear about the seat belt defense.[450] In 1988, the Supreme Court of Nebraska refused to recognize the seat belt defense in Welsh v. Anderson,[451] a case not decided under the MUL. The court followed the majority rule[452] and especially relied on cases which held that a plaintiff is under no duty to mitigate damages through fastening a seat belt because such duty arises only after the injury has occurred.[453]

Comments: Although it is now of questionable validity, in a crashworthiness case decided under Nebraska law, a federal court allowed a jury to consider whether the plaintiff's failure to use

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[445] 610 P. 2d 668 (Mont. 1980).

[446] 89 Wash. 2d 124, 570 P. 2d 138 (1977).

[447] 610 P. 2d at 683.

[448] Former Neb. Rev. Stat. sec. 39-6,103.04.

[449] Neb. Rev. Stat. sec. 39-6, 103.08 reads as follows: "Safety belt violation; evidence; when admissible. Evidence that a person was not wearing a seat belt at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause, but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five per cent." Note that the title refers to a "violation" (of the repealed law) while the text of the section is merely in terms of nonuse of a seat belt at the time of injury. It is therefore questionable whether this section still has any validity.

[450] Maricle v. Spiegel, 329 N.W. 2d 80, 86 (Neb. 1983) considered the the seat belt defense, citing cases which held that failure to use a seat belt was relevant to the issue of contributory negligence, but did not come to grips with its merits.

[451] 228 Neb. 79, 421 N.W. 2d 426 (1988).

[452] Id. at 428.

[453] The court cited McCord v. Green, 362 A. 2d 720 (D.C. 1976); State v. Ingram, 427 N.E. 2d 444 (Ind. 1981); and Hagwood v. Odom, 88 N.C. App. 513, 364 S.E. 2d 190 (1988). 421 N.W. 2d at 429.

an available seat belt amounted to misuse of the product and assumption of risk.[454]

Conclusion: The seat belt defense is unavailable in Nebraska.[455]

Nevada

Statutory law: Nevada has enacted a MUL which is silent on the seat belt defense.[456]

Case law: The Supreme Court of Nevada has refused to allow the seat belt defense in a products liability action.[457] The court based its decision on doubts as to the relevance of the evidence and the question as to whether the plaintiff would have avoided injury even if he had been belted.[458] In addition, the court reasoned that the injection of these issues would substantially lengthen the trial and possibly mislead the jury.[459]

Comment: It is interesting that the court in Jeep Corp. v. Murray characterized the nonuse of a seat belt as "a single, relatively insignificant aspect of the accident."[460]

Conclusion: The seat belt defense is unavailable in Nevada.

New Hampshire

Statutory law: New Hampshire has not enacted a MUL.

Case law: There are no seat belt cases decided under New Hampshire law.[461]

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[454] Melia v. Ford Motor Company, 534 F. 2d 795 (8th Cir. 1976).

[455] An argument can be made that Neb. Rev. Stat. sec. 39-6, 103.08 is still available to allow mitigation of damages with a maximum reduction in damages of 5%. See note 455 above.

[456] Nev. Rev. Stat. sec. 484.641 (Michie Supp. 1988).

[457] Jeep Corp. v Murray, 708 P. 2d 297 (Nev. 1985).

[458] Id. at 301.

[459] Id.

[460] Id.

[461] For a general discussion of New Hampshire comparative negligence law, see Rooney, Rooney and Eatman, Comparative Negligence in New Hampshire: Its Effect on Contributory Negligence and Tort Law, 22 Suffolk University Law Review 1 (1988) and Kathios v. General Motors Corp., 862 F. 2d 944 (1st Cir. 1988).

Comments: The New Hampshire child restraint law contains a gag[462] which applies only to evidence of contributory negligence and is silent as to mitigation of damages.[463]

Conclusion: Unsettled.

New Jersey

Statutory law: New Jersey has enacted a MUL.[464] It contains a provision concerning the continuation of existing laws, rules and procedures,[465] which is puzzling considering the unsettled status of the seat belt defense at the time of its enactment.[466]

Case law: Two New Jersey cases have addressed the seat belt defense in recent years. The first, Dunn v. Durso,[467] was decided by a lower court; the second, Waterson v. General Motors Corp.,[468] was decided by the Supreme Court of New Jersey. In Dunn v. Durso the court, after having reviewed the unsettled state of the seat belt defense in New Jersey, held that while failure to use a seat belt was not negligence per se,[469] in view of the efficacy of seat belts it was ordinary negligence.[470] The court went on to use the

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[462] N.H. Rev. Stat. Ann. sec. 265:107-a(IV) reads; "A violation of this section shall not be used as evidence of contributory negligence in any civil action."

[463] Westenberg, Buckle Up or Pay: The Emerging Safety Belt Defense, 20 Suffolk University Law Review 867, 893 (1986).

[464] N.J. Stat. Ann. sec. 39:3-76.2e et. seq (West 1988).

[465] N.J. Stat. Ann. sec. 39:3-76.2h (West 1988): "This act shall not be deemed to change existing laws rules or procedures pertaining to a trial of a civil action for damages for personal injuries or death sustained in a motor vehicle accident."

[466] The MUL became effective on March 1, 1985. The issue of the meaning of sec. 39:3-76.2h was first raised in Dunn v. Durso, 219 N.J. Super. 383, 530 A. 2d 387, 389 (1986), which was decided under pre-MUL law. Nonetheless, in a footnote the court stated: "The court believes that its recognition of the seat belt defense and its chosen method of damage apportionment are well supported by the law as it existed prior to March 1, 1985. The court's holding, then, is consistent with and not barred by the above statute." In a second pre-MUL case, the Supreme Court of New Jersey, in Waterson v. General Motors Corp., 111 N.J. 238, 544 A. 2d 357, 369 (1988) referred to 39:3-76.2h and asked "Here, the question is what was the law in 1980?" (the date of the crash). The court then went on to read the section as a mandate from the New Jersey legislature to make law for those seat belt cases arising after March 1, 1985.

[467] 219 N.J. Super. 383, 530 A. 2d 387 (1986).

[468] 111 N.J. 238, 544 A. 2d 357 (1988).

[469] 530 A. 2d at 391, fn 7.

[470] Id. at 396: "Seat belts are effective and desirable accoutrements of safe vehicular travel and accordingly, a duty may be judicially imposed regarding their use."

method adopted in Foley v. City of West Allis[471] in apportioning damages.[472]

The Supreme Court of New Jersey took a different approach in Waterson v. General Motors Corp. It rejected the "duty to wear a seat belt" reasoning in Dunn v. Durso,[473] leaving it to the jury to determine whether the plaintiff's nonuse of a seat belt should reduce his or her damages. As for allocation of damages, the court set out the following procedure:. first, the jury determines the total amount of damages incurred as a result of the crash, without regard to the plaintiff's nonuse of seat belts; second, the jury determines each party's comparative negligence in causing the crash; third, the jury determines whether the plaintiff was negligent in failing to wear a seat belt, using the standard of a "reasonably prudent person"; fourth, if negligence is found, the jury determines whether the plaintiff's injuries were increased by this negligence; fifth, the jury determines the percentage of the plaintiff's comparative fault for these particular injuries; and sixth, the court then determines the amount of plaintiff's recovery.[474]

Comments: The Waterson decision has been criticized on two counts. First, its failure to adopt a standard of negligence has been viewed as too weak and as failing to provide incentives to the motoring public to buckle up.[475] Second, the formula for apportionment of damages is extremely complicated[476] and may lead to precisely the sort of speculation and conjecture by juries that have been the cause of concern for other courts.[477] In addition, although the Waterson decision is lengthy and thorough, it fails to discuss the gag provision found in the New Jersey child restraint law,[478] a glaring omission in light of the MUL's mandate that existing laws pertaining to motor vehicle actions are not deemed to be changed.[479]

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[471] 113 Wis. 2d 474, 335 N.W. 2d 284 (1983).

[472] See notes 625 to 629 below and accompanying text.

[473] 544 A. 2d at 371, citing Lowe v. Estate Motors Limited, 428 Mich. 439, 410 N.W. 2d 706 (1987).

[474] Id. at 374-76.

[475] Polito, Casenote, 102 Harvard Law Review 925 (1989).

[476] See note 41 above.

[477] See note 94 above.

[478] N.J. Stat. Ann. sec. 39:3-76.2a (West Supp. 1988) reads in part as follows: "In no way shall failure to wear a child passenger restraint system be considered as contributory negligence, nor shall the failure to wear the child passenger restraint system be admissible as evidence in the trial of any civil action."

[479] N.J. Stat. Ann. sec. 39:3-76.2h (West Supp. 1988).

Conclusion: The seat belt defense is available to defendants in New Jersey.

New Mexico

Statutory law: New Mexico has enacted a MUL[480] which includes a gag provision.[481]

Case law: New Mexico furnishes an example of the larger national trend concerning the seat belt defense: the pattern is one of initial rejection, then acceptance, then rejection again.[482] The Court of Appeals of New Mexico initially rejected the seat belt defense citing as reasons the timing problem inherent in the mitigation of damages approach and the absence of duty, statutory or otherwise, to use seat belts.[483] The same court took a second look at the seat belt defense nine years later.[484] Citing recent developments in tort law and new studies as to the effectiveness of seat belts,[485] the court held that an individual's duty to exercise care for his or her own safety[486] extended to pre-crash conduct.[487] The court then adopted the mitigation of damages approach in apportioning damages.[488]

On appeal, the Supreme Court of New Mexico disposed of the case, and the seat belt defense, with remarkable brevity: "We believe that the creation of the seat belt defense is a matter for the Legislature, not the judiciary."[489]

Comment: The Supreme Court of New Mexico summarily rejected the seat belt defense in 1985, the same year that the MUL,

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[480] N.M. Stat. Ann. secs. 66-7-370 et. seq (1987).

[481] N.M. Stat. Ann. sec. 66-7-373B (1987) reads: "Failure to be secured by a child passenger restraint device or by a safety belt as required by the Safety Belt Use Act [66-7-370 to 66-7-373 NMSA 1978] shall not in any instance constitute fault or negligence and shall not limit or apportion damages."

[482] See Ackerman, The Seat Belt Defense Reconsidered: A Return to Accountability in Tort Law?, 16 New Mexico Law Review 221, 222-31 (1986).

[483] Selgado v. Commercial Warehouse Co., 88 N.M. 579, 544 P. 2d 719 (Ct. App. 1975).

[484] Thomas v. Henson, 102 N.M. 417, 696 P. 2d 1010 (Ct. App. 1984).

[485] 696 P. 2d at 1014.

[486] Id. at 1017, citing Prosser, The Law of Torts, 418 (4th ed. 1971).

[487] 696 P. 2d at 1017.

[488] The court cited Insurance Company of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984) and Spier v. Barker, 35 N.Y. 2d 444, 363 N.Y.S. 916, 323 N.E. 2d 164 (1974).

[489] Thomas v. Henson, 102 N.M. 326, 695 P. 2d 476, 477 (1985).

including its gag provision, was passed by the New Mexico Legislature. There is nothing in the court's decision to indicate any connection between these two events.

Conclusion: The seat belt defense is unavailable in New Mexico.

New York

Statutory law: New York was a pioneer in MULs.[490] Its MUL contains a gag as to liability but allows evidence of nonuse of seat belts to be introduced on the issue of mitigation of damages.[491]

Case law: New York was one of the first states to judicially recognize the seat belt defense. The holding in Spier v. Barker remains a classic.[492] In addition to being followed in New York,[493] it has been the foundation for decisions in other jurisdictions.[494] Also, the "mitigation rule" of Spier v. Barker fits well into products liability cases under the "second collision" theory.[495] However, application of the mitigation of damages theory to seat belt cases has been criticized locally because according to legal theory, mitigation of damages should apply only to the plaintiff's post-accident conduct.[496] New York courts have, in fact, carved out exceptions to the doctrine contained in Spier v. Barker in cases in which the failure to use

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[490] McKinney's Vehicle and Traffic Law sec. 1229-c, effective January 1, 1985.

[491] Section 1229-c(8) reads: "Non-compliance with the provisions of this section shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense."

[492] 35 N.Y. 2d 444,449-50, 363 N.Y.S. 2d 916, 920, 323 N.E. 2d 164 (1974): "We today hold that nonuse of an available seat belt, and expert testimony in regard thereto, is a factor which the jury may consider, in light of all the other facts received in evidence, in arriving at its determination as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain."

[493] See Schwartz, The New York Seat Belt Defense, 59 New York State Bar Journal 30 (1987) and Smith, The Failure to Buckle up: Limiting Damages by Proof of a Plaintiff's Nonuse of an Available Seat Belt, 53 New York State Bar Journal 418 (1981) for discussions of New York cases spawned by Spier v. Barker.

[494] See, for example, Insurance Company of North America v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984) and Halvorson v. Voeller, 336 N.W. 2d 118, 121 (N.D. 1983).

[495] See Caiazzo v. Volkswagenwerk A.G., 647 F. 2d 241, 251 (2nd Cir. 1981) and Uribe v. Armstrong Tire & Rubber Co., 55 A.D. 869, 390 N.Y.S. 2d 419 (1st Dept. 1977).

[496] See Gallub, A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform, 14 Hofstra Law Review 319, 324 (1986). See also notes 72-74 above and accompanying text.

a seat belt was alleged to be the cause of the incident itself[497] and in wrongful death actions.[498]

Comments: New York's MUL appears to continue the mitigation rule; however, one court in New York has indicated in dicta that the MUL may cause courts to reevaluate the Spier rule.[499] Two lower courts have held that the New York MUL is constitutional.[500]

Conclusion: The seat belt defense is available in New York with respect to mitigation of damages.

North Carolina

Statutory law: North Carolina has enacted a MUL.[501] The MUL originally contained a provision similar to those in the Hawaii[502] and New Jersey[503] MULs which continued North Carolina common law concerning use of seat belt evidence at trials; in 1987, that subsection was rewritten strictly as a gag provision.[504] The practical effect of the 1987 amendment was to preclude the courts from even considering the seat belt defense under the mitigation of damages theory.

Case law: As in several other jurisdictions,[505] a recent appellate decision in North Carolina has reaffirmed a venerable

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[497] Curry v. Moser, 89 A.D. 2d 1, 454 N.Y.S. 2d 311 (2nd Dept. 1982) (plaintiff fell out of car); Costello v. Marchese, 137 A.D. 2d 482, 524 N.Y.S. 2d 232 (2nd Dept. 1988) (defendant grandfather failed to buckle up plaintiff grandchild).

[498] Baginski v. New York Telephone Co., 130 A.D. 2d 362, 515 N.Y.S. 2d 23 (1st Dept. 1987).

[499] DiMauro v. Metropolitan Suburban Bus Authority, 105 A.D. 2d 236, 483 N.Y.S. 2d 383 (2d Dept. 1984).

[500] People v. Weber, 129 Misc. 2d 993, 494 N.Y.S. 2d 960 (1985); Wells v. State, 130 Misc. 2d 113, 495 N.Y.S. 2d 591 (1985).

[501] N.C. Gen. Stat. sec. 20-135.2A (Supp. 1988).

[502] Haw. Rev. Stat. sec. 291-11.6(d) (Supp. 1988).

[503] N.J. Stat. Ann. sec 39:3-76.2h (West 1988).

[504] N.C. Gen. Stat. sec. 20-135.2A(d) formerly read: "Failure to wear a safety belt in violation of this section shall not constitute negligence or contributory negligence in any action for the recovery of damages arising out of the operation, ownership or maintenance of a motor vehicle, nor shall anything in this act change any existing law, rule or procedure pertaining to any such civil action." As amended by chapter 623 of the laws of 1987, it now reads: "Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or procedure except in an action based on a violation of this section."

[505] Arkansas, Idaho and Missouri and Texas. See text sections concerning these states.

anti-seat belt defense case. Hagwood v. Odom[506] states that "the law enunciated in Miller v. Miller, 273 N.C. 228, 160 S.E. 2d 65 (1968) is dispositive" on seat belt issues. Miller v. Miller is a litany of arguments against the seat belt defense, including harsh consequences to plaintiffs under North Carolina's contributory negligence rule, no duty to anticipate the negligence of others, no statutory duty to use seat belts, most motor vehicle occupants customarily do not use seat belts, seat belts as a cause of injury, the problem of conjecture by juries and the seat belt situation not fitting into the doctrine of avoidable consequences.[507] As a federal court stated in a crashworthiness case, Miller v. Miller "leaves no room for a contributory negligence defense based on the plaintiffs' failure to wear seat belts."[508]

Comments: As stated above, North Carolina is a contributory negligence jurisdiction.

The North Carolina MUL has been held to be constitutional. In State v. Swain, the Court of Appeals of North Carolina held that the MUL was a reasonable regulation and a proper exercise of the police power of the state.[509]

There is evidence that the gag provision in the North Carolina MUL was the result of political bargaining. One commentator has written: "Faced with such strong opposing views, those legislators supporting the [mandatory use] law believed that inclusion of a provision requiring mitigation of damages in the courts would seriously jeopardize passage of the bill....Proponents of the law succeeded in getting the law passed only by agreeing to exclude the seat belt defense."[510]

Conclusion: The seat belt defense is not available in North Carolina.

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[506] 88 N.C. App. 513, 364 S.E. 2d 190, 191 (1988).

[507] 273 N.C. 228, 160 S.E. 2d 65 (1968).

[508] Seese v. Volkswagenwerk A.G., 648 F. 2d 833, 841 (3rd Cir. 1981).

[509] State v. Swain, 92 N.C. App. 240, 374 S.E. 2d 173 (1988). It is interesting to note that in this case the Court of Appeals of North Carolina referred to the serious problems caused by "the carnage on our public highways" while a few months previously it had rejected the seat belt defense in Hagwood v. Odom, 88 N.C. App. 513, 364 S.E. 2d 190 (1988). One explanation for this is that only one judge sat on both panels. Another explanation is that the court did not view the seat belt defense as an inducement to the citizenry to buckle up, following Miller v. Miller, 273 N.C. 228, 160 S.E. 2d 65, 73 (1968): "It is doubtful that such a rule would increase the use of seat belts."

[510] Daniels, The Seat Belt Defense and North Carolina's New Mandatory Usage Law, 64 North Carolina Law Review 1127, 1141 (1986). Compare with Carlson, Fairness in Litigation or "Equality for All", 36 Drake Law Review 713, 716 (1986-87), in which the author states that the 5% limitation in reduction of plaintiff's damages in Iowa's MUL "represented a compromise with those against mandatory seat belt legislation."

North Dakota

Statutory law: North Dakota has enacted a MUL which is silent on use of seat belt evidence.

Case law: The only North Dakota case directly involving the seat belt defense is dated. Kunze v. Stang,[511] which was decided under the old contributory negligence standard, held against the seat belt defense but left open the issue of mitigation of damages. However, in Halvorson v. Voeller,[512] a case involving failure to wear a motorcycle helmet, the Supreme Court of North Dakota relied heavily on Spier v. Barker[513] in adopting the mitigation of damages approach. Moreover, in Day v. General Motors Corp.,[514] the court held that North Dakota comparative negligence law allowed reduction in damages in proportion to the plaintiff's fault.[515]

Comments: One commentator has suggested that the Supreme Court of North Dakota will recognize the seat belt defense when a proper case presents itself.[516]

Conclusion: The status of the seat belt defense is unsettled in North Dakota, but its future acceptance by the courts seems likely.

Ohio

Statutory law: Ohio has enacted a MUL[517] which contains a gag provision. The gag provision allows evidence of seat belt nonuse to be introduced into evidence in crashworthiness cases only.[518]

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[511] 191 N.W. 2d 526 (N.D. 1971).

[512] 336 N.W. 2d 118 (N.D. 1983).

[513] 35 N.Y. 2d 444, 363 N.Y.S. 2d 916, 323 N.E. 2d 164 (1974).

[514] 345 N.W. 2d 349 (N.D. 1984).

[515] The alleged negligence was the plaintiff's failure to use a seat belt. However, since this crashworthiness case was a certification from federal court on North Dakota comparative negligence law, the Supreme Court of North Dakota was not called upon to rule on the seat belt defense.

[516] Goulet, casenote, Halvorson v. Voeller, 60 North Dakota Law Review 751, 765 (1984).

[517] Ohio Rev. Code Ann. sec. 4513.263 (Anderson Supp. 1988).

[518] Ohio Rev. Code Ann. sec. 4513.263(G) (Anderson Supp. 1988) reads in part: "(1) Subject to division (G)(2) of this section, the failure of a person to wear all of the available elements of a properly adjusted occupant restraining device or to ensure that each passenger of an automobile being operated by the person is wearing all of the available elements of such a device, in violation of division (B) of this section, shall not be considered or used as evidence of negligence or contributory negligence, shall not diminish recovery for damages in any civil action involving the person arising from the ownership, maintenance, or operation of an automobile, shall not be used as a basis for the criminal prosecution of the person other than a prosecution for a violation of this section and shall not be admissible as evidence in any civil or criminal action involving the person other

Case law: Ohio case law, starting with Bertsch v. Spears[519] and Roberts v. Bohn[520] has generally favored exclusion of seat belt evidence.[521] However, the Supreme Court of Ohio never addressed the seat belt issue. In the mid-1980s, in keeping with a national trend,[522] a few Ohio courts showed some receptiveness to the seat belt defense,[523] but the passage of the MUL in 1986 sealed the fate of the seat belt defense in ordinary personal injury actions.

In crashworthiness cases, there was a different result. The United States Court of Appeals for the Sixth Circuit, after analyzing Ohio case law, reasoned that introduction of evidence of plaintiff's nonuse of an available seat belt may be better suited

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than a prosecution for a violation of division (B) of this section.

(2) If, at the time of an accident involving a passenger car equipped with occupant restraining devices, any occupant of the passenger car who sustained injury or death was not wearing an available occupant restraining device, was not wearing all of the elements of such a device, or was not wearing such a device as properly adjusted, then, consistent with the Rules of Evidence, the fact that such occupant was not wearing the available occupant restraining device, was not wearing all of the elements of such a device, or was not wearing such a device as properly adjusted is admissible in evidence in relation to any claim for relief in a tort action to the extent that the claim for relief satisfies all of the following:

(a) It seeks to recover damages for injury or death to such occupant;

(b) The defendant in question is the manufacturer, designer, distributor, or seller of the passenger car;

(c) The claim for relief against the defendant in question is that the injury or death sustained by such occupant was enhanced or aggravated by some design defect in the passenger car or that the passenger car was not crashworthy."

[519] 20 Ohio App. 2d 137, 252 N.E. 2d 194 (1969).

[520] 26 Ohio App. 2d 50, 269 N.E. 2d 53 (1971), reversed on other grounds Sub. nom. Suchy v. Moore, 29 Ohio St. 2d 99 (1972).

[521] See also Cheatham v. Thurston Motor Lines, 654 F. Supp. 216 (S.D. Ohio 1986); Schaeffer v. Burdette, 33 Ohio Misc. 2d 12, 514 N.E. 952 (1986); Bantel V. Herbert, 31 Ohio App. 3d 167, 509 N.E. 2d 981 (1987); Bendner v. Carr, 40 Ohio App. 3d 149, 532 N.E. 2d 178 (1987); and Vogel v. Wells, 1989 Ohio App. Lexis 2938 (July 26, 1989).

[522] See note 488 above.

[523] See Moore v. Arrow Truck Lines, Inc., 16 Ohio Bar Rep. 306 No. C2-82-1131 (S.D. Ohio 1984)(allowing admissibility of seat belt evidence because of changes in the public's perception of seat belts and because Ohio had recently adopted a comparative negligence statute); McCartney v. Ake, 22 Ohio Misc. 2d 32, 489 N.E. 2d 1079 (1984)(holding that nonuse of an available seat belt is disregard for common-law duty to exercise reasonable care and allowing evidence of seat belt nonuse to go to the jury); Woods v. City of Columbus, 23 Ohio App. 3d 163, 492 N.E. 2d 466 (1985)(leaving open the possibility that seat belt evidence might be admissible in order to mitigate damages).

to crashworthiness cases.[524] This precedent was continued in the MUL.

Comments: There is ample reason to believe that the Ohio legislature deliberately followed what it felt to be Ohio common law in drafting the gag provision of the MUL.[525]

The Ohio MUL, including specifically its gag provision, has been held to be constitutional.[526]

In a recent case, Thompson v. Markham,[527] the Court of Appeals in Ohio held that all evidence involving seat belts is not necessarily inadmissible. The case involved an allegation that a driver was inattentive because she was engaged in unbuckling her daughter's seat belt. The court held that this kind of evidence can be properly admitted in a civil trial, notwithstanding Ohio's gag rule.

Conclusion: The Ohio MUL allows the seat belt defense in crashworthiness cases only.

Oklahoma

Statutory law: Oklahoma has enacted a MUL[528] which includes a gag provision.[529]

Case law: The Oklahoma Supreme Court refused to allow the seat belt defense in Fields v. Volkswagen of America, Inc.[530] The court based its decision on "no duty" to wear seat belts, either under the Oklahoma seat belt installation law or under the common

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[524] Sours v. General Motors Corp., 717 F. 2d 1511, 1519-20 (6th Cir. 1983): "GM did not cause the accident; it is accused of failing to protect plaintiff adequately from injury caused by a foreseeable accident. In such a case, it may be appropriate to inquire into what steps, if any, plaintiff took to protect himself from an accident, such as using a seat belt."

[525] See Schaeffer v. Burdette, 33 Ohio Misc. 2d 12, 514 N.E. 2d 952, 955 (1986); Bendner v. Carr, 40 Ohio App. 3d 149, 532 N.E. 2d 178, 181 (1987); Note, S. 54: Ohio's Seat Belt Law, 12 University of Dayton Law Review 473, 482 (1986).

[526] Bendner v. Carr, 40 Ohio App. 3d 149, 532 N.E. 2d 178 (1987). State v. Batsch, 44 Ohio App. 3d 81, 541 N.E. 2d 475 (1988).

[527] 1989 Ohio App. Lexis 2927 (July 26, 1989)

[528] Okla. Stat. Ann. tit. 47, secs. 12-416 to 12-420 (West Supp. 1989).

[529] Okla. Stat. Ann. tit. 47, sec. 12-420 (West Supp. 1989) reads: "Nothing in this act shall be used in any civil proceeding in this state and the use or nonuse of seat belts shall not be submitted into evidence in any civil suit in Oklahoma."

[530] 555 P. 2d 48 (Okla. 1976).

law reasonable person standard.[531] To support the latter argument, the court referred to its doubts concerning the efficacy of seat belts and the fact that most motorists did not use seat belts.[532] The court also invoked as reasons for its decision timing problems inherent in the mitigation of damages approach and the fact that the majority of decisions have rejected the seat belt defense and then stated that this was a matter for the legislature.[533]

Comment: The Oklahoma MUL has been held to be constitutional in City of Tulsa v. Martin.[534] The court rejected the respondent's allegation that the MUL's exclusion of trucks, pick-up trucks, vans and other types of vehicles constitutes a violation of the Equal Protection Clause of the United States Constitution[535], concluding that the legislature could reasonably have found that the excluded vehicles were larger than other vehicles and could therefore afford more protection from injury.[536]

Conclusion: The seat belt defense is unavailable under both statutory and case law in Oklahoma.

Oregon

Statutory law: Although the Oregon legislature enacted a MUL,[537] it was never in force. The proposed law was rejected by the voters in November of 1988. The proposed law contained a gag provision.[538]

Case law: Until recently, Oregon courts had rejected the seat belt defense, first under the rule of contributory negligence[539] and then under the rule of comparative negligence.[540] A pair of cases has changed that situation.

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[531] Id. at 61-62.

[532] Id.

[533] Id.

[534] 775 P. 2d 824 (Okla. Cr. App. 1989).

[535] United States Constitution, Amendment XIV, Sec. 1.

[536] Citing 17 Op. Atty. Gen. 143 (1985).

[537] Chapter 385, Oregon Laws 1987 (House Bill 2399).

[538] Chapter 385, Oregon Laws 1987, sec. 1(3): "A violation of this section shall not be considered under any circumstances to be negligence nor shall evidence of such a violation be admissible in any civil action."

[539] Robinson v. Lewis, 254 Or. 52, 457 P. 2d 483 (1969).

[540] Madaris v. State of Oregon Highway Division, 80 Or. App. 662, 723 P. 2d 1054 (1986).

The Court of Appeals of Oregon, following established precedent, rejected seat belt evidence in Morast v. James[541] and Dahl v. BMW[542]. The court in Morast relied on majority rule, no duty to use a seat belt, and fairness.[543] Both of these decisions, however, were overturned by the Supreme Court of Oregon in the companion cases of Dahl v. BMW and Morast v. James.[544] In Dahl, the court noted the passage of the Oregon MUL and the then pending referendum, but concluded that this should have "no effect" on its decision.[545] As in other cases,[546] the court wrestled with the notion of "duty"; it concluded that "the question is not whether the plaintiff owed the defendant or any other party a duty to buckle up."[547] Rather, the question was whether a reasonable prudent person should have foreseen the risks of injury inherent in highway travel and taken the precaution of fastening his or her seat belt.[548] Such a determination of reasonableness, according to the court, is properly left to the jury.[549] Finally, the court chose comparative fault, rather than mitigation of damages, as the proper method of apportioning damages.[550]

Comments: It is ironic that the rejection of the Oregon MUL allowed the seat belt defense to be accepted in that state. The voters, who of necessity also rejected the gag rule, now may be affected if they fail to use seat belts, are injured and file lawsuits.

Conclusion: The seat belt defense is available under the Oregon comparative negligence law.[551]

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[541] 87 Or. App. 368, 742 P. 2d 665 (1987).

[542] 84 Or. App. 483, 734 P. 2d 387 (1987). Although Morast v. James was an ordinary personal injury action and this case was a products liability action, the court's reasoning applied equally to both cases. 734 P. 2d at 389. Courts in Louisiana and Ohio have treated crashworthiness cases differently from other seat belt cases.

[543] 742 P. 2d at 666: " One glaring example would be that a drunk driver could be free from any civil liability for injuries sustained in an automobile accident caused by the driver's disregard for the safety of others, if he was able to show that the use of a seat belt would have prevented the injuries sustained by the victim."

[544] Dahl v. BMW, 304 Or. 558, 748 P. 2d 77 (1987); Morast v. James, 304 Or. 571, 748 P. 2d 84 (1987).

[545] 748 P. 2d at 82.

[546] See, for example, Lowe v. Estate Motors Limited, 482 Mich. 429, 410 N.W. 2d 706, 716 (1987).

[547] 748 P. 2d at 81.

[548] Id.

[549] Id. at 81-82.

[550] Id. at 83; Morast v. James, 748 P. 2d at 85.

[551] O.R.S. sec. 18-470.

Pennsylvania

Statutory law: Pennsylvania has enacted a MUL which contains a gag provision.[552]

Case law: Court decisions in Pennsylvania were unsatisfactory guides to attorneys planning to use or oppose the seat belt defense, since the courts appeared less than eager to grapple with some of the thorny issues surrounding the defense. In fact, federal courts, which look to state common law for guidance, were so confused that within two years one court wrote: "We believe that the Courts of Pennsylvania would allow competent evidence of [seat belt nonuse]"[553] while another wrote: "We believe the Pennsylvania courts would reject evidence concerning non-usage of seat belts by plaintiff."[554] One lower court judge addressed the seat belt issue in a resolute manner, stating "In spite of the lack of appellate authority in Pennsylvania in this area, we feel that the facts in the case at bar mandate the placing before the jury of all the facts that may have caused this accident....To keep this important fact from the jury would have been an impediment to justice."[555] Two recent pre-MUL cases reached exactly opposite conclusions on the defense: Stouffer v. Commonwealth of Pennsylvania[556] allowed it, while Grim v. Betz[557] rejected it. The court in Grim noted that "on November 23, 1987, the availability of a 'seat belt defense' in Pennsylvania ceases to be an open question."[558]

Conclusion: The MUL gag rule forecloses the use of the seat belt defense in Pennsylvania.

Puerto Rico

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[552] Pa. Cons. Stat. Ann. sec. 4581 (Purdon Supp. 1988). Subdivision (e) reads in part: "In no event shall a violation or alleged violation of this subchapter be used as evidence in a trial of any civil action; nor shall any jury in a civil action be instructed that any conduct did constitute or be interpreted by them to constitute a violation of this subchapter; nor shall failure to use a child passenger restraint system or safety seat belt system be considered as contributory negligence nor shall failure to use such a system be admissible as evidence in the trial of any civil action."

[553] Pritts v. Walter Lowery Trucking Company, 400 F. Supp. 867 (W.D. Pa. 1975).

[554] Vizzini v. Ford Motor Company, 569 F. 2d 754, 767-68 (3rd Cir. 1977).

[555] Beerly v. Hamilton, 17 Pa. D. & C. 3d 332 (1980).

[556] 1989 Pa. Comm. Lexis 522 (July 26, 1989).

[557] 372 Pa. Super 614, 539 A. 2d 1365 (1988).

[558] Id.

Statutory law: Puerto Rico has enacted a MUL which does not contain a gag provision.[559]

Case law: Common law in Puerto Rico allows evidence of seat belt nonuse to be submitted to the trier of fact.[560]

Conclusion: The seat belt defense is available in Puerto Rico.

Rhode Island

Statutory law: Rhode Island has not enacted a MUL.[561]

Case law: In June 1989, the Rhode Island Supreme Court rejected the seat belt defense in Swajian v. General Motors Corp.[562] The court held that a motor vehicle occupant had no duty to buckle up.[563] The court also noted that Rhode Island's child restraint law contained a gag provision which prohibited evidence of nonuse of seat belt use by children to be introduced into evidence: "Arguably in light of the child-passenger restraint law--which precludes all safety-belt evidence in civil trials--the General Assembly has already indicated its unwillingness to allow juries to consider this evidence."[564] Other points used by the court included the timing problems inherent in the doctrine of mitigation of damages, the fact that most Rhode Islanders do not buckle up, and preference for legislative action.

Conclusion: The seat belt defense is unavailable in Rhode Island.

South Carolina

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[559] P.R. Laws Ann. tit. 9, sec. 1212.

[560] Canales Velazquez v. Rosario Quiles, 107 P.R. Dec. 757 (1978).

[561] R.I. Gen. Laws sec. 31-23-41 (1988 Supp.) requires drivers of public service vehicles to use seat belts: "Every jitney, bus, private bus, school bus and trackless trolley coach, when operated upon a highway, shall be equipped with a driver's seat safety belt device....Every person when driving any such vehicle shall use and have his body anchored by such seat safety belt."

[562] 559 A. 2d 1041 (R.I. 1989).

[563] Citing Miller v. Miller, 273 N.C. 228, 160 S.E. 2d 65 (1968).

[564] 559 A. 2d at 1047. R.I. Gen. Laws sec. 31-22-22(B) (1988 Supp.) reads in part: "Provided that in no event shall failure to wear a child passenger restraint system or regular seat belt be considered as contributory or comparative negligence, nor such failure to wear said child passenger restraint system, regular seat belt or shoulder harness be admissible as evidence in the trial of any civil action."

Statutory law: South Carolina has a MUL[565] which contains a gag provision.[566]

Case law: Until recently, South Carolina was one of a relatively few jurisdictions which recognized the seat belt defense. Both Sams v. Sams[567] and Jones v. Dague[568] stood for the proposition that evidence of seat belt nonuse could be presented to the trier of fact at a trial. The Supreme Court of South Carolina did an about face in 1987.[569] In a brief decision, the court acknowledged its previous recognition of the seat belt defense but went on to hold evidence of nonuse unavailable. It based its decision on the absence of a statutory duty[570] and deferred the matter to the legislature for resolution.[571]

Comments: South Carolina is a contributory negligence jurisdiction. One commentator has speculated that the harshness of the contributory negligence rule may have influenced the court's decision in Keaton v. Pearson.[572] Another possible explanation is that the court anticipated the passage of a MUL with a gag rule, although no mention of a MUL is made in the decision in Keaton v. Pearson.[573] Finally, it appears that the seat belt defense was not employed to any great extent in South Carolina in any event.[574]

It should be noted that in South Carolina the prohibition against use of seat belt evidence does not extend to cases in which the defendant is accused of negligence because of failure to furnish seat belts to passengers, because, according to the Supreme

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[565] S.C. Code sec. 56-5-6510 to 56-5-6550.

[566] S.C. Code sec. 56-5-6540(C) reads; "A violation of this article does not constitute negligence per se or contributory negligence and is not admissible as evidence in a civil action."

[567] 247 S.C. 467, 148 S.E. 2d 154 (1966).

[568] 252 S.C. 261, 166 S.E. 2d 99 (1969).

[569] Keaton v. Pearson, 358 S.E. 2d 141 (S.C. 1987).

[570] Id.

[571] The court cited as precedent Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970); Fischer v. Moore, 183 Colo. 392, 517 P. 2d 458 (1973); and Miller v. Miller, 273 N.C. 228, 160 S.E. 2d 65 (1968).

[572] Rogers, Annual Survey of South Carolina Law, 40 South Carolina Law Review 237, 240 (1988).

[573] See Clarkson v. Wright, 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E. 2d 268, 270 (1985); Hillier v. Lamborn, 740 P. 2d 300, 304 (Utah 1987).

[574] See Westenberg, Non-Use of Motor Vehicle Safety Belts as an Issue in Civil Litigation, United States Department of Transportation, National Highway traffic Safety Administration, August 1983 Final Report, DOT HS-806-443, at 45.

Court of South Carolina, "this issue is totally different from the one addressed in Keaton."[575]

Conclusion: The seat belt defense is no longer available in South Carolina.

South Dakota

Statutory law: There is no MUL in South Dakota.

Case law: No case law in South Dakota addresses seat belt issues.

Comments: The South Dakota child restraint law contains a gag provision.[576]

Conclusion: Unsettled.

Tennessee

Statutory law: For many years, the Tennessee seat belt installation statute contained a prohibition against use of seat belt evidence in civil trials.[577] The Tennessee MUL[578] contains a similar provision.[579]

Case law: Tennessee courts and federal courts interpreting Tennessee law have been unanimous in refusing to consider the seat belt defense because of the installation law gag rule.[580] In a recent case, Cheatham v. Thurston Motor Lines,[581] a federal court

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[575] Poston v. Barnes, 363 S.E. 2d 888 (S.C. 1987). For similar cases, see McKee v. Southwest Delco School District, 512 A. 2d 28 (Pa. Super. 1986) and Kaplan v. Upland Hills Farm Schools, 423 N.W. 2d 576 (Mich. 1988).

[576] S.D. Cod. Laws sec. 32-37-4: "Failure to comply with the provisions of this chapter is not considered as contributory negligence, comparative negligence or assumption of risk and is not admissible as evidence in the trial of any civil action."

[577] Tenn. Code Ann. sec. 55-9-214(a) read in part as follows: "In no event shall failure to wear seat belts be considered as contributory negligence, nor shall such failure to wear said belts be considered in mitigation of damages on the trial of any civil action." It has since been renumbered as Tenn. Code Ann. sec. 55-9-601 and the gag provision removed.

[578] Tenn. Code Ann. sec. 55-9-601 et. seq (1989).

[579] Tenn. Code Ann. sec. 55-9-604 (1989) reads: "In no event shall failure to wear a safety belt be considered as contributory negligence, nor shall such failure to wear a safety belt be admissible as evidence in a trial of any civil action."

[580] Mann v. United States, 294 F.Supp. 691 (E.D. Tenn. 1968); Stallcup v. Taylor, 62 Tenn. App. 407, 463 S.W. 2d 416 (1970); Ellithorpe v. Ford Motor Co., 503 S.W. 2d 576 (Tenn. 1973).

[581] 654 F. Supp. 216 (S.D. Ohio 1986).

said flatly: "Tennessee law plainly precludes the use of [seat belt] evidence."[582]

Comments: In 1987, a Tennessee state senator brought an action to have the MUL declared unconstitutional. The Court of Appeals of Tennessee, Middle Section, held that since the senator had only received a warning citation, no justicible issue existed and the court therefore could not render a declaratory judgment.[583]

Conclusion: Seat belt defense is unavailable in Tennessee.

Texas

Statutory law: Texas has enacted a MUL which includes a gag provision.[584]

Case law: The Supreme Court of Texas rejected the seat belt defense in Carnation Company v. Wong,[585] stating that "persons whose negligence did not contribute to an automobile accident should not have the damages awarded to them reduced or mitigated because of their failure to wear available seat belts."[586] This rule was reaffirmed in Pool v. Ford Motor Company,[587] which also noted the existence of the gag rule in the MUL.[588]

Comments: The court in Pool stated that the Texas legislature "has ratified Carnation's policy".[589]

The Texas MUL has been held to be constitutional. In Richards v. State,[590] the court concluded that "the Texas legislature had

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[582] Id. at 217.

[583] Henry v. Alexander, No. 87-27-II (Slip opinion) (Tenn App. 1987).

[584] Tex. Rev. Civ. Stat. Ann. art. 6701d, sec. 107C (Vernon Supp. 1989). Subdivision (j) reads as follows: "Use or nonuse of a safety belt is not admissible evidence in a civil trial."

[585] 516 S.W. 2d 116 (Tex. 1974).

[586] Id. at 117.

[587] 715 S.W. 2d 629 (Tex. 1986).

[588] Id. at 633.

[589] Id. See also American Automobile Association v. Tehrani, 508 So. 2d 365, 370 (Fla. 1st Dist. 1987), which refers to "legislative intent not to alter the Pasakarnis rule" in enacting Florida's MUL.

[590] 742 S.W. 2d 747 (Tex. App. - Houston [1st Dist.] 1987), petition for discretionary review denied, 757 S.W. 2d 723 (Tex. Crim. App. 1988); Appeal dismissed, 109 S. Ct. 1105, 103 L. Ed. 2d 170 (1989).

a legitimate interest in limiting appellant's constitutional right to liberty when it enacted the Texas seat belt law."[591]

Conclusion: The seat belt defense is unavailable in Texas.

Utah

Statutory law: Utah's MUL[592] contains a gag provision.[593]

Case law: The Court of Appeals of Utah considered the seat belt defense in Hillier v. Lamborn.[594] Relying on the majority rule, and without any analysis of the merits of the defense, it quickly dispatched the defense.[595] Interestingly, although the case was pre-MUL the court referred to the gag provision in the Utah MUL but did not discuss it.[596] However, in Whitehead v. American Motors Sales Corporation,[597] another pre-MUL case, the court held that evidence of seat belt nonuse was properly excluded as to the plaintiff's contributory negligence or failure to mitigate damages, stating: "We....decline to place ourselves in the awkward position of adopting a stance that is in direct contravention of express legislation."[598] Since this was a crashworthiness case, the court allowed the introduction of evidence concerning the effect of the presence of seat belts in the design safety of the vehicle.[599]

Conclusion: The seat belt evidence is unavailable in Utah, except in crashworthiness cases.

Vermont

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[591] Id. at 749.

[592] Utah Code Ann. sec. 41-6-181 to 41-6-186 (1988).

[593] Utah Code Ann. sec. 41-6-186 (1988): "The failure to wear a seat belt does not constitute contributory or comparative negligence, and may not be introduced as evidence in any civil litigation on the issue of injuries or on the issue of mitigation of damages."

[594] 740 P. 2d 300 (Utah App. 1987), pet. for cert. den. 765 P. 2d 1277 (Utah 1987).

[595] Id. at 304.

[596] Id., note 1. The rule in Hillier v. Lamborn was followed in Gleave v. Denver & Rio Grande Western Railroad Company, 749 P. 2d 660 (Utah App. 1988).

[597] 1989 Utah Lexis 5, (Supreme Court of Utah, February 2, 1989).

[598] Id. For a pre-MUL case which reaches the opposite conclusion, see Stouffer v. Commonwealth of Pennsylvania, 1989 Pa. Comm. Lexis 522 (1989).

[599] Id.

Statutory law: There is no MUL in Vermont.

Case law: The only case which has addressed the seat belt defense in Vermont is Smith v. Goodyear Tire and Rubber Co.,[600] a products liability action tried in federal court. Chief Judge Coffrin refutes, point by point, numerous arguments which were raised by the plaintiff in opposition to the seat belt defense, including no duty, custom, judicial economy, and the timing problem inherent in the mitigation of damages approach. His decision is summarized as follows: "Believing that parties should pay for injuries in proportion to the degree to which they cause them, we hold that evidence concerning the nonuse of a seat belt may be considered by the jury."[601] The court went on to apply comparative fault principles to this case.[602]

Comments: Although the Supreme Court of Vermont has not been called upon to decide a seat belt case, it has cited Smith v. Goodyear Tire and Rubber Co. as precedent in a non seat belt case.[603]

Conclusion: The seat belt defense is available in Vermont.

Virginia

Statutory law: Virginia's seat belt installation statute contains a gag provision.[604] The Virginia MUL[605] contains a differently worded gag, as well as a clause stating that the MUL does not change existing rules pertaining to civil actions.[606] Since both gag provisions are highly exclusionary, the two provisions do not appear to be in conflict.

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[600] 600 F. Supp. 1561 (D.Vt. 1985).

[601] Id. at 1564.

[602] Id. at 1568.

[603] Grazulis v. Curtis, 543 A. 2d 1326 (Vt. 1988).

[604] Va. Code sec. 46.1-309.1(b) (Supp. 1988): "Failure to use such safety lap belts or a combination of lap belts and shoulder straps or harnesses after installation shall not be deemed to be negligence nor shall evidence of such nonuse of such devices be considered in mitigation of damages of whatever nature."

[605] Va. Code sec. 46.1-309.2 (Supp. 1988).

[606] Va. Code sec. 46.1-309.2E (Supp. 1988): "A violation of this section shall not constitute negligence, be considered in mitigation of damages of whatever nature, be admissible in evidence or be the subject of comment by counsel in any action for the recovery of damages arising out of the operation, ownership or maintenance of a motor vehicle, nor shall anything in this section change any existing law, rule or procedure pertaining to any such civil action."

Case law: In 1978, a federal district court read the original installation statute gag provision,[607] which only referred to negligence, in such a way as to allow evidence of seat belt nonuse to be introduced on the issue of mitigation of damages.[608] The Virginia legislature quickly amended the gag provision to also encompass mitigation of damages.[609]

Conclusion: The seat belt defense is unavailable in Virginia.

Washington

Statutory law: Washington's MUL includes a gag provision.[610]

Case law: The Supreme Court of Washington has considered and rejected the seat belt defense under both contributory negligence and comparative negligence theories. In Derheim v. N. Fiorito Co, Inc., decided under contributory negligence, the court wrote: "It seems extremely unfair to mitigate the damages of one who sustains those damages in an accident for which he was in no way responsible...."[611] In Amend v. Bell, decided under comparative negligence the court refused to consider the defense for a variety of reasons, including no duty to anticipate the negligence of another, fairness, custom, and that adoption of the defense would lead to speculation by the jury.[612]

Conclusion: The seat belt defense is unavailable in Washington.

West Virginia

Statutory law: No MUL exists in West Virginia.

Case law: No West Virginia cases have considered the seat belt defense.

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[607] At that time, Va. Code sec. 46.1-309.1(b) read: "Failure to use such safety lap belts or a combination of lap belts and shoulder straps or harnesses after installation shall not be deemed to be negligence."

[608] Wilson v. Volkswagen of America, 445 F. Supp. 1368, 1374 (1978). See Robinson and Cullen, Federal Court Rules Virginia Law Allows Evidence of Non-Use of Seat Belt, 13 University of Richmond Law Review 123 (1978).

[609] The installation law was amended by the Virginia legislature in 1980. See note (612) above for the current text of Va. Code sec. 46.1-309.1(b).

[610] Wash. Rev. Code Ann. sec. 46.61.688 (1987). Subdivision (6) states: "Failure to comply with the requirements of this section does not constitute negligence, nor may failure to wear a safety belt assembly be admissible as evidence of negligence in any civil action."

[611] 80 Wash. 2d 161, 492 P. 2d 1030, 1036 (1972).

[612] 89 Wash. 2d 124, 570 P. 2d 138 (1977).

Comments: The child restraint law in West Virginia contains a gag provision.[613] Although one local commentator has downplayed the potential effect of this provision,[614] a similar provision was a factor in Rhode Island, another state with no previous experience with the seat belt defense.[615]

Conclusion: Unsettled.

Wisconsin

Statutory law: Wisconsin's MUL[616] allows evidence of seat belt nonuse to be introduced into evidence in civil actions; reduction in plaintiffs' damages is limited to 15 per cent.[617]

Case law: Wisconsin has long recognized the seat belt defense.[618] In Foley v. City of West Allis,[619] Judge Abramson of the Supreme Court of Wisconsin summarized Wisconsin's position concerning the seat belt defense: "The seat belt defense is this court's recognition that in light of the realities of the frequency of automobile accidents and the extensive injuries they cause, the general availability of seat belts, and the public knowledge that riders and drivers should 'buckle up for safety,' those who fail to use available seat belts should be held responsible for the incremental harm caused by their failure to wear available seat belts."[620] She went on to apply the "second collision" approach to what she characterized as "seat belt negligence."[621] The

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[613] W.Va. Code sec. 17C-15-46 (Supp. 1988) reads in part as follows: "A violation of this section shall not be deemed by virtue of such violation to constitute evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages."

[614] Lafond, A Proposal for West Virginia: Admissibility of Seat Belt Evidence on the Issue of Mitigation Damages,(sic) 90 West Virginia Law Review 525, 529 (1987).

[615] See Swajian v. General Motors Corp., 559 A. 2d 1041 (RI 1989).

[616] Wis. Stat. Ann. sec. 347.48 (1988).

[617] Wis. Stat. Ann. sec. 347.48(g) (1988): "Evidence of compliance or failure to comply with par. (b), (c) or (d) is admissible in any civil action for personal injuries or property damage resulting from the use or operation of a motor vehicle. Notwithstanding s. 895.045, with respect to injuries or damages determined to have been caused by a failure to comply with par. (b), (c) or (d), such a failure shall not reduce the recovery for those injuries or damages by more than 15%. This paragraph does not affect the determination of causal negligence in the action."

[618] See Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W. 2d 626 (1967); Coryell v. Conn, 88 Wis. 2d 311, 276 N.W. 2d 723 (1979).

[619] 113 Wis. 2d 475, 335 N.W. 2d 824 (1983).

[620] 335 N.W. 2d at 828 (footnotes omitted).

[621] Id. at 829.

method used in allocating damages was to calculate the plaintiff's damages by the rules of comparative negligence[622] and then to reduce plaintiff's recoverable damages by the percentage of the plaintiff's causal seat belt negligence.[623] One year after Foley, the Supreme Court of Wisconsin was confronted with seat belt nonuse in the context of a crashworthiness case.[624] The court again applied the second collision analysis, but came to a different conclusion concerning the plaintiff's damages. According to the court's reasoning, since the issue in a crashworthiness case is the unified design of the automobile, the plaintiff's damages must also be considered to be indivisible.[625] The plaintiff's failure to use an available seat belt directly reduced his damages, in contrast to the two step procedure used in Foley.[626]

Comments: Although the Wisconsin legislature continued to allow the seat belt defense in its MUL, reductions in plaintiffs' damages were scaled down to 15%. One reason for this cutback may have been that the legislature might have felt that the defense was worthless as an incentive. After almost twenty years of the seat belt defense, seat belt use in Wisconsin was 14%, approximately the national average.[627]

Conclusion: The seat belt defense is available in Wisconsin to the extent allowed by the MUL.

Wyoming

Statutory law: Wyoming enacted a MUL in 1989[628] which contains a gag provision[629].

Case law: In the only Wyoming case which involves the seat belt defense, the Supreme Court of Wyoming followed what it perceived to be the majority rule and held that seat belt evidence

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[622] Wis. Stat. Ann. sec. 895.045 (1988).

[623] 335 N.W. 2d at 829. For a more thorough discussion of Foley v. City of West Allis, see McChrystal, Seat Belt Negligence: The Ambivalent Wisconsin Rules, 68 Marq. L. Rev. 539 (1985).

[624] Sumnicht v. Toyota Motor Sales U.S.A., Inc., 121 Wis. 2d 338, 360 N.W. 2d 2 (1984).

[625] 360 N.W. 2d at 10-12.

[626] Id.

[627] Towers, Plaintiff's Failure to Wear a Safety Belt, 58 Wisconsin Bar Bulletin 13, 14 (1985).

[628] Wyoming Statutes sec. 31-5-1401 and 31-5-1402, effective June 8, 1989.

[629] Wyoming Statutes sec. 31- 5-1402(f): "Evidence of a person's failure to wear a seat belt as required by this act shall not be admissible in any civil action."

was not admissible "with the possible exception of mitigation of damages."[630]

Conclusion: The seat belt defense is unavailable in Wyoming.

DISCUSSION

A. Present Status of the Seat Belt Defense

The following table summarizes the present posture of each state toward the seat belt defense:

Seat Belt Defense Allowed (15 states)		
Case Law	Statutory Law	Both
Alaska	Colorado*	California*
Arizona	Iowa*	Florida*
Kentucky	Missouri*	Michigan*
New Jersey*		New York*
Oregon		Puerto Rico*
Vermont		Wisconsin*

Seat Belt Defense Rejected (29 states)		
Alabama	Connecticut*	District of Columbia*
Delaware	Georgia*	Illinois*
Idaho*	Pennsylvania*	Indiana*
Nebraska	Virginia*	Kansas*
Nevada*	Wyoming*	Louisiana*
Oklahoma*		Maine
Rhode Island		Maryland*
		Ninnesota*
		Montana*
		New Mexico*
		North Carolina*
		Ohio*
		South Carolina*
		Tennessee*
		Texas*
		Utah*
		Washington*

[630] Chrysler Corp. v. Todorovich, 580 P. 2d 1123 (Wyo. 1978).

Seat Belt Defense Unsettled (8 states)

Akansas
Hawaii*
Massachusetts
Mississippi
New Hampshire
North Dakota*
South Dakota
West Virginia

(* = indicates state with a MUL)

Several of the nominally "unsettled" states, specifically Arkansas, Massachusetts and Mississippi, seem to lean toward rejection; only North Dakota has shown an inclination to accept the defense. Many of the states which accept the defense do so only to a very limited extent. For example, the Missouri MUL requires testimony by an expert witness in order to show that plaintiff's failure to use a seat belt contributed to his or her injuries.[631] The law goes on to limit any reduction in plaintiff's damages to no more than 1%.[632] As a practical matter, the additional 1% would probably not cover the fees of needed expert witnesses.

MULs have interred and resurrected the seat belt defense in approximately the same numbers of states. Gag provisions found in MULs laid the defense to rest in Connecticut, Georgia, Louisiana, and Pennsylvania, and may have inspired courts to finish off the defense in Illinois, South Carolina and Utah. MULs revived the seat belt defense in Colorado, Iowa, and Missouri and may have played a role in judicial acceptance in Michigan. As noted above, and as described in the sections of this report pertaining to the particular states, acceptance of the seat belt defense via MULs is extremely circumscribed in some states.

The next table presents changes in the seat belt defense between 1982 and 1989.

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[631] Mo. Stat. Ann. sec. 307.178(3)(1) (Vernon Supp. 1989).

[632] Mo. Stat. Ann. sec. 307.178(3)(2) (Vernon Supp. 1989).

From Acceptance to Rejection

Georgia*
Illinois*
South Carolina*

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From Unsettled to Rejection

Connecticut*
Louisiana*
Maryland*
Nebraska
Nevada*
Pennsylvania*
Rhode Island
Utah*
Wyoming*

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From Rejection to Acceptance

Arizona
Colorado*
Florida*
Iowa*
Michigan*
Missouri*
Oregon

==========

From Unsettled to Acceptance

Alaska
Kentucky
New Jersey*
Vermont

(* = indicates state with a MUL)

As a result of these changes, twelve states finally rejected the seat belt defense while eleven states finally accepted the seat belt defense. Eleven out of the twelve states which rejected the defense have enacted MULs, while only six out of eleven states which accepted the defense have enacted MULs. The strongest trend is not pro or con the defense, but rather that many states have

come to grips with the legal issues surrounding nonuse of seat belts, either through judicial decisions or via MULs.

The next table lists states in which the MUL essentially continued unchanged the state's common law on the subject of the seat belt defense.

Acceptance
California
Florida
New York
Rejection
District of Columbia
Indiana
Kansas
Montana
North Carolina
Ohio
Texas
Washington

In addition, MULs in Hawaii, New Jersey, North Carolina[633] and Virginia purported to continue existing law, although the main consequence of these sections was to create confusion about their intent. Courts in four states have concluded that their state's MUL was specifically intended by the state legislature to be an extension of previous case law.[634]

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[633] The North Carolina provision, N.C. Gen. Stat. sec. 20-135.2A(d), was later repealed and replaced with a gag provision. In either incarnation its effect was to continue the rule of Miller v. Miller, 273 N.C. 228, 160 S.E. 2d 65 (1968). See Daniels, The Seat Belt Defense and North Carolina's New Mandatory Usage Law, 64 North Carolina Law Review 1127, 1143 (1986).

[634] See American Automobile Association v. Tehrani, 508 So. 2d 365, 370 (Fla. App. 1st Dist. 1987); Barnes v. Robison, 712 F. Supp. 873 (D.C. Kan. 1989) (applying Kansas Law); Eli v. The Board of Commissioners of Sedgwick County, Kansas, 1989 Kan. App. Lexis 338 (not designated for publication). Schaeffer v. Burdette, 33 Ohio Misc. 2d 12, 514 N.E. 2d 952, 955 (1986); Pool v. Ford Motor Co.,715 S.W. 629, 633 (Texas 1986).

As discussed earlier,[635] state courts have been unanimous in upholding the constitutionality of MULs. In addition, a federal court has accepted without question the gag provision in a MUL.[636]

Part III. The Seat Belt Defense, MULs, Deterrence and Public Policy

It is evident that MULs are intended to save lives and prevent or reduce injuries by inducing motor vehicle occupants to fasten their seat belts.[637] It has been demonstrated that MULs do just that,[638] particularly when they are vigorously enforced.[639]

Some observers feel that the seat belt defense performs a similar deterrent function.[640] If such is the case, why do so many MULs contain gag provisions which severely limit or flatly abolish the seat belt defense? More tellingly, why did so many state legislatures ignore the criteria in FMVSS 208 which requires MULs to include a provision allowing mitigation of damages?[641] In

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[635] See notes 207-217 above and accompanying text.

[636] Ramrattan v. Burger King Corp., 656 F. Supp. 522, 527 (D. Md. 1987).

[637] See, for example, Cal. Veh. Code sec. 27315 (West Supp. 1989): "The Legislature finds that a mandatory seatbelt law will contribute to reducing highway deaths and injuries by encouraging greater use of existing manual seatbelts...." It should be noted here that some doubters have argued that MULs are not, in fact, intended to be safety measures. See Richards v. State, 757 S.W. 2d 723, 725 (Tex. Crim. App. 1988)(Teague, J. dissenting): "Simply put, `seat belt' legislation was enacted not to save lives or prevent injury but instead was enacted only to save automobile manufacturers money by letting them install seat belts rather than air bags in newly manufactured automobiles." See also Wilkins, The Indiana Seatbelt Use Law and Its Effect upon Automobile Tort Litigation, 19 Indiana Law Review 439 (1986), note 25 at 446-48.

[638] See Campbell, North Carolina's Seat Belt Law: Public Safety and Public Policy, 53 Popular Government 27 (1988).

[639] See Campbell, The Relationship of Seat Belt Law Enforcement to Level of Belt Use. Chapel Hill, N.C.: University of North Carolina Highway Safety Research Center (1987); Watson, The Effectiveness of Increased Police Enforcement as a General Deterrent, 20 Law and Society Review 293 (1986).

[640] As an example, see Hoglund and Parsons, Caveat Viator: The Duty to Wear Seat Belts under Comparative Negligence Law, 50 Washington Law Review 1, 15 (1974): "Adoption of the seat belt rule could have a dramatic effect upon the level of usage in Washington by informing the motoring public that they can only look to themselves for compensation for self-aggravated injuries."

[641] 49 C.F.R. sec. 571.208 S4.1.5.2(c). This subsection represents a decision on the part of the National Highway Traffic Safety Administration that the seat belt defense may have an effect on motor vehicle occupant behavior. See Transportation Research Board, National Academy of Sciences, Study of Methods for Increasing Seat Belt Use, United States Department of Transportation, National Highway Traffic Safety Administration (1981) at 30: "NHTSA agrees that a judicial doctrine such as recommended here might have a positive effect on drivers." (NHTSA comment on the mitigation of damages doctrine.)

order to understand this phenomenon, and its implications for public policy, one must consider the objectives of tort litigation; the effect that the threat of tort liability may have on individual behavior; the practical politics of MULs; and the consequences of the "either/or" approach to seat belts and air bags adopted by Standard 208.

Traditionally, the function of tort litigation has been seen as settling private disputes among individuals.[642] However, another role of tort litigation, which encompasses a larger social purpose, is the prevention of injuries.[643] The underlying concept is that the threat of large damage verdicts will force entities to alter their behavior in such a way that the risk of injury to the population is reduced.[644] This concept is controversial; sceptics have advanced a number of reasons why tort law is ineffective as a deterrent.[645]

It is debatable whether the theory of tort liability as a behavior modification technique can be applied to individuals and their use of the seat belts.[646] There are several schools of thought concerning the existence and purpose of the defense. One viewpoint is that the seat belt defense is merely an evidentiary rule which is intended to make trials more equitable by allowing evidence of plaintiffs' nonuse of seat belts, like all relevant evidence, to be presented for consideration by juries.[647] Another viewpoint is that the defense has a higher purpose as a tool of public policy which can reduce traffic deaths and injuries and

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[642] Moore, Self-Protective Safety Devices: An Economic Analysis, 40 University of Chicago Law Review 421 (1973).

[643] Teret and Jacobs, Prevention and Torts: The Role of Litigation in Injury Control, 17 Law, Medicine and Health Care 17 (1989).

[644] Id. at 20.

[645] See Sugarman, Doing Away with Tort Law. 73 California Law Review 558 (1985).

[646] Compare Fuchs, Reallocating the Rise of Loss in Automobile Accidents by Means of Mandatory Seat Belt Use Legislation, 52 So. Cal. Law Review 91, 117 (1978): "It may be unduly optimistic to believe that a change in the common law liability rules, such as holding plaintiffs liable for the damages caused by nonuse, will have a substantial effect on the conduct of the populace as a whole," with Daniels, The Seat Belt Defense and North Carolina's New Mandatory Usage Law. 64 North Carolina Law Review 1127, 1143 (1986): "By precluding the defense the General Assembly has failed to provide a strong incentive to wear seat belts."

[647] Weymss v. Coleman, 729 S.W. 2d 174, 181 (Ky. 1987).

their consequential social and economic costs.[648] A third view, perhaps the most prevalent of them all, refuses to recognize the seat belt defense because, among other reasons, they discern no deterrent effect inherent in the defense.[649]

In contrast to tort litigation, regulatory laws such as MULs have as their primary purpose the modification of actions deemed to be unacceptable. Regulatory laws, unlike tort liability, are enforced even if no actual damage has been done.[650] A small penalty [651] is assessed for violation of MULs, but this is done, at least theoretically, in a routine and predictable manner.[652] In contrast, the consequences of tort liability are less predictable, relatively rare, but potentially severe.

In discussing the relative deterrent effect of tort litigation and regulatory laws, then, it is crucial to draw distinctions between the kinds of entities being regulated. A large corporation may indeed reevaluate its products and manufacturing processes based upon the specter of civil litigation, with its attendant adverse publicity and negative financial consequences. To an individual, the threat of a lawsuit may be far too remote to take seriously.[653] Conversely, the possibility of being assessed a relatively small fine may cause an individual to change his or her

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[648] See Pollock, The Seat Belt Defense - A Valid Instrument of Public Policy, 44 Tennessee Law Review 119, 135: "The seat belt defense should be viewed as an incentive to encourage public use of a proven safety device, rather than as a limitation imposed on a deserving plaintiff which inures to the benefit of a tortfeasor," and Sayler, Caveat Viator: Safety is No Longer The Only Good Reason for Oregonians to "Buckle Up", 67 Oregon Law Review 901, 931 (1988): "Tort Law Should Encourage The Wearing of Seat Belts."

[649] Miller v. Miller, 273 N.C. 228, 160 S.E. 2d 65, 73 (1968): "(I)t is doubtful that such a rule would increase the use of seat belts."

[650] See Schwartz, The Seat Belt Defense and Mandatory Seat Belt Usage: Law, Ethics and Economics, 24 Idaho Law Review 275, 281 (1987-88).

[651] MUL fines range from $5 to $50. Wyoming's law provides for no fine for its violation; instead, drivers who are using seat belts when stopped for other traffic violations have their fines for those violations reduced by $5. Wyoming Statutes sec. 31-5-1402(e).

[652] Whether this is, in fact, the case is open to question. Campbell, note 645 above, notes at page 2 that the level of seat belt citations ranged from 10 per 100,000 population in Idaho to 878 per 100,000 population in Hawaii.

[653] See Miller, The Seat Belt Defense under Comparative Negligence, 12 Idaho Law Review 5973 (1975): "If the possibility of personal injury is not sufficient to make the plaintiff take adequate precautions, little additional incentive is added by the distant possibility of a law suit." See also Blum and Kalves, The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence, 34 University of Chicago Law Review 239, 254 (1967).

behavior, as has been the result with MULs. Such a penalty would be meaningless to a large corporation.

The mistake which some persons have made is to believe that all entities behave in a similar manner when confronted by the same stimulus. In fact, large entities such as corporations may be much more receptive to legal and economic motivations than are individuals.[654] The following may be a fair statement: "The history of automobile products liability law has been one which has taken into account the urgent need to provide incentives to manufacturers to take those steps necessary to minimize potential harm-causing defects."[655] It is much less of a certainty that the use of the seat belt defense against plaintiffs in the same automobile products liability actions would result in most motorists habitually fastening their seat belts.[656]

As discussed elsewhere in this report, MULs motivate many individuals to use seat belts.[657] The same cannot be said about the seat belt defense, however. Although many commentators, including the National Highway Traffic Safety Administration,[658] have speculated on the deterrent effect of the seat belt defense, none has produced any proof that such is the case. In New York and Wisconsin, two states in which the seat belt defense has been established for many years, no detectable decreases in automobile fatalities occurred until MULs were enacted. Wisconsin has a higher fatality rate than neighboring Minnesota, which has never recognized the seat belt defense.[659] In a study conducted for the

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[654] See Calabresi, The Costs of Accidents (New Haven, CT: Yale University Press, 1970) at 245, noting that under workers compensation law employers, using economic analysis, instituted safety measures at worksites while their employees remained indifferent to injury risks.

[655] Seese v. Volksawgenwerk A.G., 648 F. 2d 833, 840 (3d Cir. 1981). See also Staggs v. Chrysler Corp., 678 F. Supp. 270, 272 (N.D. Ga. 1987).

[656] See Sorenson v. Allred, 112 Cal. App. 717, 169 Cal. Reptr. 441 (1981): "We think it altogether apparent that people in general, and motorists in particular, do not act with any deliberative thought as to consequences which are not immediately apparent. Witness the disdain with which motorists in vast numbers disregard the use of seat belts intended for their protection." In this connection, insurance incentives have been found to have no effect on seat belt usage rates. See Robertson, Insurance Incentives and Seat Belt Use, 74 American Journal of Public Health 1157 (1984).

[657] See note 190 above.

[658] See note 647 above.

[659] United States Department of Transportation, National Highway Traffic Safety Administration, Fatal Accident Reporting System 1987, 4-10. The statistics are:

fatalities:	per 100,000 drivers	per 1,000 sq. mi.	per 100 mil. VMT
Wisconsin	24.5	14.2	2.0
Minnesota	21.4	6.3	1.5

United States Department of Transportation, the Institute of Social Research of the University of Michigan asked 2,534 persons whether they believed that being liable for damages resulting from an automobile crash influenced a person's driving behavior. Only 38% answered in the affirmative.[660]

A study was done in Florida which was intended to measure the effectiveness of various intervention techniques on seat belt usage rates of state employees.[661] Quite by chance, Insurance Company of North America vs. Pasakarnis,[662] a seminal case which changed Florida law by allowing seat belt evidence to be introduced on mitigation of damages, was decided during the course of the study. No noticeable changes in seat belt use were detected.[663]

MULs appear to be successful in motivating individuals to fasten their seat belts because they are well-publicized and involve an economic threat which is modest (and therefore comprehensible to the average person), likely to occur, and cannot be compensated through insurance or other means.[664] Tort liability is less successful, in large measure because it has the opposite characteristics.[665]

In theory, a regulation which requires automobile manufacturers to install automatic restraint systems in their vehicles accomplishes the goal of injury prevention while avoiding the problems associated with either the seat belt defense or MULs. Standard 208 did not accomplish this. It encouraged states to adopt a version of the seat belt defense in their MULs, and offered this as a substitute for automatic restraints. To be sure, there

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[660] Survey Research Center, Institute for Social Research, University of Michigan, Public Attitudes Toward Auto Insurance, United States Department of Transportation Auto Insurance and Compensation Study, March, 1970, 65.

[661] Rogers, Rogers and Bailey, Promoting Safety Belt Use Among State Employees: The Effects of Promoting and a Stimulus-Control Intervention, 21 Journal of Applied Behavior Analysis 263 (1988).

[662] 451 So. 2d 447 (Fla. 1984).

[663] Rogers et al., note 667 above, at 267-68.

[664] Cramton, Driver Behavior and Legal Danctions: A Study of Deterrence, 67 Michigan Law Review 421, 429-30 (1969) notes the same phenomenon with respect to parking violations.

[665] One characteristic which MULS and tort liability share is that they are least likely to deter the kinds of individuals who most need deterring. See Klein and Waller, Causation, Culpability and Deterrents in Highway Crashes. U.S. Department of Transportation, Automobile Insurance and Compensation Study, July 1970, 133-34 and Preusser et. al., Belt Use By High-Risk Drivers Before and After New York's Seat Belt Use Law, 20 Accident Analysis and Prevention 245 (1988).

were benefits from this arrangement: it placed MULs on state agendas and also brought the seat belt defense up for consideration by legislatures, which alleviated uncertainty about the defense in many jurisdictions. However, in taking this approach two problems were created. First, the adoption of an "either/or" position toward seat belt use and passive restraints when a superior approach would have been to encourage both.[666] Second, the distinctions between tort liability and regulatory law were blurred. The seat belt defense, which is a concept independent of MULs, became entangled in the politics surrounding the passage of MULs. In some states, the seat belt defense became little more than a bargaining chip, given away by supporters to induce opponents to change their votes.[667]

Of particular interest is the presence of gag provisions in so many MULs, a result which is directly opposite to the criteria found in Standard 208. This may be a recognition on the part of some state legislatures that abolishing the seat belt defense did not weaken the effectiveness of the MUL. Moreover, given the different roles played by the seat belt defense and MULs, a gag provision does not have to be viewed as an inconsistency within a MUL: the law, with its fine and enforcement provisions, motivates people to use seat belts and the gag rule allocates loss among parties to a civil action according to the legislature's view of what should be a fair result.[668]

Also playing a role was resistance to NHTSA's "either/or" position on seat belts and passive restraints and possible resentment against federal interference in state affairs.[669]

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[666] See Benguerel, Mandatory Seat Belt Legislation: Panacea for Highway Traffic Fatalities, 36 Syracuse Law Review 1341 (1986); Robertson, Estimates of Motor Vehicle Seat Belt Effectiveness and Use: Implications for Occupant Crash Protection, 66 American Journal of Public Health 859, 863 (1976).

[667] See Carlson, Fairness in Litigation or "Equity for All", 36 Drake Law Review 713, 716 (1987-88); Hunt, S.54: Ohio's Seat Belt Law, 12 University of Dayton Law Review 473, 481-82 (1986).

[668] Bendner v. Carr, 40 Ohio App. 3d 149, 532 N.E. 2d 178, 181-82 (1987).

[669] The United States Department of Transportation was aware of these concerns when it promulgated Standard 208. See 49 C.F.R. 28977 (July 14, 1984): "Several commenters including the National Association of Governors' Highway Safety Representatives (NAGHSR) stated that the DOT approach was fundamentally wrong in that it sets automatic restraints and belt usage laws as an either/or proposition. These commenters argued that both of these requirements are needed to ensure maximum use of restraints by front seat passengers. Further, these commenters asked why the federal government was intruding on the states' prerogative to shape the usage laws by specifying minimum criteria."

DOT's response was as follows: "Although the Department understands this concern, it believes that under the National Traffic and Motor Vehicle Safety Act, in order for it to accept MULs as an alternative to requiring automatic crash protection, MULs must provide a level of safety equivalent to that which would be expected to be provided under existing technology by the automatic systems. The Department, therefore, believes that it is imperative that it establish minimum criteria that will ensure that the MULs will achieve a usage level

Concern over the "either/or" problem undoubtedly led to the enactment of MULs in some states with watered down provisions to prevent the states from being counted as part of the two thirds population needed for recision of Standard 208.[670]

It is possible for the seat belt defense to live in harmony with a MUL.[671] Unfortunately, the two have become so identified with each other that in some states they have become mutually exclusive: the seat belt defense was ushered out of many a state by the MUL. Since MULs have been successful in reducing highway deaths and lessening injuries, abolishing the seat belt defense may have been a small price to pay. This tradeoff, however, need not have been made if Standard 208 had been silent on the subject of the seat belt defense. The point is that policy makers should be extremely cautious about linking issues unnecessarily.

The seat belt defense has enjoyed a renaissance of sorts in states without MULs and states in which the MUL is silent on the issue.[672] It has been established to a very limited extent by MULs in some states.[673] But MULs have destroyed the seat belt defense in a number of jurisdictions.[674] One could argue that this is not significant from a highway safety perspective, whether or not the defense is effective as an injury reduction tool, because in those states the defense was replaced by a MUL. However, the unsubstantiated position taken by legal scholars and government officials that tort liability considerations will change an individual's behavior is a matter for concern. National policies should not be based on wishful thinking. It is hardly surprising that millions of motorists ignored, or more likely never heard of, the seat belt defense. What is disturbing is that many influential people continue to believe that individual behavior can be modified, and injuries prevented, through such a mechanism. To divert energy from the push for passive restraint systems in order to consider the seat belt defense was a misguided effort. It is suggested that in the future more research should be done

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high enough to provide at least an equivalent level of safety." 49 C.F.R. 28,999 (July 14, 1984).

[670] See note 143 above, and accompanying text.

[671] Waterson v. General Motors Corp., 111 N.J. 238, 544 A. 2d 357, 358 (1988); "Considerations of fairness and public policy, as expressed in this state's mandatory seat belt law, lead us to the principle we announce today."

[672] Alaska, Arizona, Kentucky, New Jersey and Oregon.

[673] Colorado, Iowa, Michigan, Missouri and Ohio.

[674] Connecticut, Georgia, Louisiana, Illinois, Maryland, New Mexico, Pennsylvania, South Carolina and Utah.

concerning the effects of tort liability on individual behavior. In addition, it is recommended that attempts by the federal government to modify state tort law be done carefully and sparingly.