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## Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society

Andrew L. Merrit

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## Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society

*Andrew L. Merritt\**

I. INTRODUCTION .....	2
II. THE CONFLICT IN COMMON-LAW PRECEDENT: A "BLACK- LETTER" RULE IN INVISIBLE INK .....	3
A. <i>Two Conflicting Rules</i> .....	3
B. <i>Four Qualified Approaches</i> .....	7
1. Magnitude of Emotional Distress .....	7
2. Severity of Financial Injury .....	9
3. Distinction Between Business Fraud and Non- business Fraud .....	10
4. Emotional Distress as a Component of Punitive Damage Awards .....	12
III. ASSESSING THE SIGNIFICANCE OF A SPECIAL RULE FOR FRAUD: THE RELATION OF FRAUD TO INDEPENDENT TORT ACTIONS FOR INFLICTION OF EMOTIONAL DISTRESS .....	15
A. <i>Intentional Infliction of Emotional Distress</i> .....	15
B. <i>Negligent Infliction of Emotional Distress</i> .....	21
IV. SUPPLYING THE MISSING POLICY ANALYSIS: TOWARD A CON- CEPTION OF FRAUD AS A DIGNITARY TORT .....	23
A. <i>Compensation for Emotional Distress in Fraud Cases</i> .....	23

\* Assistant Professor of Law, University of Illinois College of Law. B.A., Hampshire College, 1977; J.D., Columbia University, 1980. I am grateful to my colleagues Deborah Jones Merritt and Elaine W. Shoben for their comments. I also thank my research assistants, Leonard Rumery and Lynn Coyle.

B. <i>Treating Fraud as a Dignitary Tort</i> .....	30
C. <i>Evaluating the Qualified Approaches</i> .....	32
1. Requiring Severe Distress .....	32
2. Requiring Substantial Pecuniary Harm .....	34
3. Distinguishing Personal Frauds from Business Frauds .....	35
4. Awarding Emotional Distress Damages as a Part of Punitive Damages .....	37
V. CONCLUSION .....	38

## I. INTRODUCTION

One of the most dynamic developments in modern tort law has been the increased focus on damages for emotional distress. During the past few decades courts have fashioned several new tort theories to allow recovery of emotional distress damages as independent causes of action.<sup>1</sup> At the same time, lobbyists and legislators have attacked these damages for contributing to "runaway" jury verdicts. As a result of these attacks, a growing number of states are enacting statutes that limit recovery of emotional distress damages in traditional tort areas such as medical malpractice.<sup>2</sup> Thus, damages for emotional distress are at a crossroads between broad trends of expansion and contraction.

One largely unexplored battleground for these conflicting trends is the awarding of emotional distress damages in commercial tort cases, particularly in cases of fraud and deceit. No judicial consensus exists on the propriety of awarding damages for emotional distress in fraud cases. Many jurisdictions limit damages for fraud to pecuniary injuries; this view has had the most influence on legal commentators and treatise writers.<sup>3</sup> Nevertheless, a substantial group of jurisdictions has awarded emotional distress damages in fraud cases.<sup>4</sup> Few of the decisions on either side of this issue have examined closely other jurisdictions' treatment of the issue, and most of these decisions have not analyzed the policies favoring or opposing the award of emotional distress damages in fraud cases. Perhaps this lack of detailed consideration in the case law has been the greatest hindrance to the development of a judicial consensus.

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1. See *infra* notes 76-78, 106-10, 146 and accompanying text.

2. See, e.g., CAL. CIV. CODE § 3333.2 (West Supp. 1988) (placing a \$250,000 ceiling on awards for noneconomic losses, including pain and suffering, in medical negligence cases); MINN. STAT. ANN. § 549.23 (West 1988) (placing \$200,000 cap on damages for intangible loss in any civil action); cf. S.D. CODIFIED LAWS ANN. § 21-3-11 (1987) (limiting total damages in medical malpractice cases to one million dollars). For further discussion, see also statutes cited *infra* note 147.

3. See *infra* notes 6, 7 and accompanying text.

4. See cases cited *infra* note 11.

This Article has two purposes. First, it seeks to direct attention to an important but rarely noted conflict among the jurisdictions in defining damages for fraud. Second, the Article attempts to supply the perspective of precedent and policy that is lacking in the opinions that address this issue. Part II of this Article discusses the varying approaches that courts have taken in deciding whether to award emotional distress damages in fraud litigation. Part III of the Article highlights the practical difference between allowing recovery for emotional distress as an element of damages for fraud and relegating plaintiffs to other tort theories of recovery for emotional distress. Part IV first examines, as a general matter, whether courts should allow the awarding of emotional distress damages in fraud cases. After concluding that policy concerns generally favor granting such damages, Part IV then considers whether courts should adopt any of the qualified approaches to the availability of such damages. This Article concludes that inflexible distinctions between "personal" torts and "commercial" torts are unrealistic in a modern consumer society. Thus, the Article urges courts to recognize fraud as a dignitary tort that justifies the awarding of emotional distress damages.

## II. THE CONFLICT IN COMMON-LAW PRECEDENT: A "BLACKLETTER" RULE IN INVISIBLE INK

The proper measure of fraud damages always has been a matter of controversy. Most of the argument has centered on the proper way to recompense a plaintiff's pecuniary losses. Courts have long split over whether the plaintiffs should recover the benefit of their bargain or whether recovery should be limited to out-of-pocket loss.<sup>5</sup> Relatively few cases have considered the propriety of awarding damages for non-pecuniary loss. Increasingly, however, defrauded plaintiffs are seeking to supplement their recovery for monetary losses with recovery for emotional distress. Though a substantial body of precedent now addresses this issue, no judicial consensus has emerged.

### A. *Two Conflicting Rules*

Commentators believe that emotional distress damages generally should not be recovered in fraud cases. The *Restatement (Second) of Torts (Restatement)* defines the appropriate recovery for plaintiffs in fraud cases solely in terms of "pecuniary" losses.<sup>6</sup> Similarly, a leading

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5. Compare *Smith v. Bolles*, 132 U.S. 125 (1889) (adopting an out-of-pocket measure) and *Beardmore v. T.D. Burgess Co.*, 245 Md. 387, 226 A.2d 329 (1967) with *Kinsey v. Scott*, 124 Ill. App. 3d 329, 341, 463 N.E.2d 1359, 1367 (1984) (using a benefit of the bargain standard).

6. RESTATEMENT (SECOND) OF TORTS § 525 (1977) [hereinafter RESTATEMENT].

treatise on remedies concludes that "separate recovery for mental anguish is usually denied in deceit cases."<sup>7</sup> Thus, the "blackletter" law appears to deny fraud plaintiffs recovery for emotional distress.

The history of emotional distress damages in fraud litigation, however, is marked by disagreement rather than accord. Since at least the turn of the century, courts have taken radically different approaches to the awarding of damages for fraud. *Cable v. Bowlus*<sup>8</sup> is perhaps the earliest American case specifically addressing the issue. In *Cable* an Ohio court declared that a plaintiff who was defrauded into purchasing stock in a gold mining company could not recover for his "feelings, disappointment, or disgrace."<sup>9</sup> In 1912 a Pennsylvania court reached a contrary result in a real estate fraud case, allowing the jury to award "an amount sufficient to compensate the plaintiff, in a reasonable measure, for his trouble, vexation and annoyance."<sup>10</sup> Subsequent decisions have added to both lines of precedent.<sup>11</sup>

To label either of these lines of precedent as a firm majority rule would be inaccurate. Certainly most reported decisions measure fraud damages by economic loss rather than emotional harm. In most of these cases, however, no indication exists that any party requested emotional distress damages or that the court consciously considered the issue.<sup>12</sup>

7. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 9.2, at 602 (1973). For a contrasting view, see R. DUNN, RECOVERY OF DAMAGES FOR FRAUD 147-52 (1988) (recognizing the conflict in the case law and urging that recovery for emotional distress is appropriate).

8. 21 Ohio C.C. 53 (1900).

9. *Id.* at 54 (syllabus by the court).

10. *Schusler v. Clark*, 50 Pa. Super. 459, 466 (1912).

11. Jurisdictions that specifically have addressed the award of emotional distress damages are divided almost evenly between those denying recovery and those supporting recovery. For precedent denying recovery, see *Moore v. Slonim*, 426 F. Supp. 524, 527 (D. Conn.) (applying Connecticut law), *aff'd mem.*, 562 F.2d 38 (2d Cir. 1977); *Kantor v. Comet Press Books Corp.*, 187 F. Supp. 321, 323 (S.D.N.Y. 1960) (applying New York law); *Umpfrey v. Sprinkel*, 106 Idaho 700, 711-12, 682 P.2d 1247, 1258-59 (1983); *Cornell v. Wimschel*, 408 N.W.2d 369, 382 (Iowa 1987); *Harsche v. Cysz*, 157 Neb. 699, 710-11, 61 N.W.2d 265, 272 (1953); *Carrigg v. Blue*, 283 S.C. 494, 497 n.1, 323 S.E.2d 787, 789 n.1 (Ct. App. 1984). For precedent permitting recovery, see *Holcombe v. Whitaker*, 294 Ala. 430, 434, 318 So. 2d 289, 293 (1975); *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 755, 168 Cal. Rptr. 237, 246 (1980), *appeal dismissed*, 450 U.S. 1051 (1981); *Trimble v. City of Denver*, 697 P.2d 716, 730 (Colo. 1985); *Food Fair, Inc. v. Anderson*, 382 So. 2d 150, 154-55 (Fla. Dist. Ct. App. 1980); *Captain & Co. v. Stenberg*, 505 N.E.2d 88, 100 (Ind. Ct. App. 1987); *Crowley v. Global Realty, Inc.*, 124 N.H. 814, 818-19, 474 A.2d 1056, 1058 (1984); *McRae v. Bolstad*, 32 Wash. App. 173, 178-79, 646 P.2d 771, 775-76 (1982), *aff'd*, 101 Wash. 2d 161, 676 P.2d 496 (1984); *cf. Emmons v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 532 F. Supp. 480, 485 (S.D. Ohio 1982) (allowing damages for emotional distress under Ohio law, at least for "malicious" fraud). Two jurisdictions contain conflicting precedents. *See cases cited infra* note 15. The status of the law in some jurisdictions is difficult to classify. One court, for example, has stated that Missouri law would deny emotional distress damages in fraud cases, but has qualified that opinion as being inapplicable to tortfeasors who acted "willfully"—an exception that would seem to include most cases of fraud. *Walsh v. Ingersoll-Rand Co.*, 656 F.2d 367, 371 (8th Cir. 1981).

12. *See, e.g., Posner v. Davis*, 76 Ill. App. 3d 638, 395 N.E.2d 133 (1979) (assuming that

These decisions, therefore, do not represent holdings in opposition to recovery for emotional distress in fraud cases. Among the cases that specifically have addressed the issue, neither a clear majority rule<sup>13</sup> nor a decided trend in either direction has emerged.<sup>14</sup> Indeed, in some jurisdictions a litigant could point to precedent supporting either conclusion.<sup>15</sup> Thus, the "blackletter" law discerned by the *Restatement* and some commentators fades upon close examination of the case law.

The courts themselves have paid little attention to either the conflicting precedents that support and reject fraud damages for emotional distress or the policies underlying those results. Most cases simply assert a rule. Thus, typical decisions denying recovery state only that "courts in other jurisdictions have consistently held that damages for mental anguish, humiliation, pain and suffering are not recoverable in an action for fraud";<sup>16</sup> or that "[i]nconvenience is no more proper as an element of damage in such [a] case than it would be in an action for breach of warranty."<sup>17</sup> Cases awarding emotional distress damages can be equally cryptic; many of these cases also fail to acknowledge the conflict among jurisdictions or to engage in any policy analysis.<sup>18</sup>

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plaintiffs in a fraudulent property sale case should have introduced evidence of the monetary value of their efforts to clean up a water-logged basement); *Lobe Enters. v. Dotsen*, 360 N.W.2d 371, 373 (Minn. Ct. App. 1985); *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980) (stating that a defrauded party may recover the benefit of his bargain plus any additional damages that are a natural and proximate consequence of the defendant's misrepresentations).

13. See *supra* note 11.

14. An "old" rule and a "new" rule on this issue apparently do not exist. Courts addressing the issue within the past several years have added support to both lines of precedent. See *supra* note 11.

15. Compare *Ellis v. Crockett*, 51 Haw. 45, 52, 451 P.2d 814, 820 (1969) (denying recovery) and *Hudson & Hudson Realtors v. Savage*, 545 S.W.2d 863, 868 (Tex. Ct. App. 1977) (denying recovery), *overruled by United Plastics, Co. v. Dyes*, 588 S.W.2d 857 (Tex. Civ. App. 1979) with *Knox v. Anderson*, 159 F. Supp. 795, 806 (D. Haw.) (allowing recovery), *aff'd*, 297 F.2d 702, 729-31 (9th Cir. 1961), *cert. denied*, 370 U.S. 915 (1962) and *Kneip v. Unitedbank-Victoria*, 734 S.W.2d 130, 136 (Tex. Ct. App. 1987) (allowing recovery). California courts generally award emotional distress damages in fraud actions, see, e.g., *Jahn v. Brickey*, 168 Cal. App. 3d 399, 214 Cal. Rptr. 119 (1985); and *Rosener*, 110 Cal. App. 3d at 758, 168 Cal. Rptr. at 246, but deny these damages to plaintiffs suing for fraud under a particular statutory section governing fraud in the purchase, sale, or exchange of property, see *Channell v. Anthony*, 58 Cal. App. 3d 290, 315, 129 Cal. Rptr. 704, 720 (1976) (interpreting CAL. CIV. CODE § 3343 (1971)); and *Sierra National Bank v. Brown*, 18 Cal. App. 3d 98, 103, 95 Cal. Rptr. 742, 745 (1971).

16. *Savage*, 545 S.W.2d at 868 (citing decisions denying recovery without acknowledging the existence of any precedent supporting recovery).

17. *Aaron v. Hampton Motors, Inc.*, 240 S.C. 26, 39, 124 S.E.2d 585, 591 (1962). It appears that on some occasions courts' denial of recovery is shaped in part by counsel's failure to cite the case law that has allowed recovery. See *In re Romero*, 535 F.2d 618, 623 (10th Cir. 1976) (rejecting the litigant's contention that a bankruptcy court properly allowed consequential damages for inconvenience and mental suffering; noting only that "[t]his claim is presented without cogent authority").

18. *E.g., Knox*, 159 F. Supp. at 806 (stating that "[t]he Court further awards \$2,500 for mental suffering").

A few decisions, however, do offer a glimmer of policy analysis and thus provide an initial benchmark for evaluating the two approaches. The courts' articulated rationale for denying recovery of emotional distress damages rests on a conception of fraud as a purely commercial tort. Sometimes this view is embraced simply in conclusory language: that damages for fraud are "*pecuniary* damage[s]" because "[t]he aim of compensation in deceit cases is to put the plaintiff in the position he would have been had he not been defrauded."<sup>19</sup> The Iowa Supreme Court recently denied emotional distress damages in a fraud case because those damages "are not ordinarily contemplated in a business transaction."<sup>20</sup> The case noted that, according to a leading commentator, "deceit is an economic, not a dignitary tort." For these reasons the court found that "though strong men may cry at the loss of money, separate recovery for mental anguish is usually denied in deceit cases."<sup>21</sup> In short, the court concluded that an action for fraud protects exclusively monetary interests—not feelings.

Courts that have endorsed recovery for emotional distress, on the other hand, have emphasized that fraud is a tort cause of action, even though the case may have arisen out of a contractual dispute.<sup>22</sup> One of these courts stated that an injured party "is entitled to recover in a tort action those damages which result directly, naturally and proximately from fraud."<sup>23</sup> In addition, these courts have stressed that the culpability of a fraud defendant, who has intentionally or recklessly deceived another, justifies an expansive measure of damages.<sup>24</sup> This emphasis on moral culpability is more characteristic of tort than contract law. Thus, courts awarding emotional distress damages for fraud view fraud in a broader framework of intentional tort theory in which emotional distress damages typically are awarded.<sup>25</sup> Under this view, the action for fraud protects both pecuniary and dignitary interests.

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19. *Crockett*, 51 Haw. at 52, 451 P.2d at 820 (emphasis in original).

20. *Cornell*, 408 N.W.2d at 382.

21. *Id.* (quoting D. DOBBS, *supra* note 7, § 9.2, at 602).

22. *See, e.g., Jahn*, 168 Cal. App. 3d at 406-07, 214 Cal. Rptr. at 124 (stressing the tort theory of fraud in addition to a request for rescission of contract).

23. *Kneip*, 734 S.W.2d at 136.

24. *See, e.g., Rosener*, 110 Cal. App. 3d at 755, 168 Cal. Rptr. at 246 (emotional distress damages held appropriate because the defendant's conduct "clearly contained elements of intentional malfeasance and bad faith"); *Baker v. American States Ins. Co.*, 428 N.E.2d 1342, 1349 (Ind. Ct. App. 1981). Thus, courts that would award emotional distress damages if the plaintiff proved fraud would deny them if the plaintiff proved only negligent misrepresentation. *See, e.g., Crowley v. Global Realty, Inc.*, 124 N.H. 814, 818-19, 474 A.2d 1056, 1058 (1984); *Charlie Stuart Oldsmobile, Inc. v. Smith*, 171 Ind. App. 315, 325-30, 357 N.E.2d 247, 255 (1976).

25. *See, e.g., American States Ins. Co.*, 428 N.E.2d at 1349 (quoting *Charlie Stuart Oldsmobile, Inc.*, 171 Ind. App. 315, 357 N.E.2d 247); *Kneip*, 734 S.W.2d at 136.

### B. Four Qualified Approaches

Most courts that directly have addressed the issue of emotional distress damages in fraud actions have taken a firm position awarding or denying such damages. A few opinions, however, have eschewed an absolute statement permitting or rejecting emotional distress damages in all fraud cases and have adopted a qualified position that allows such damages in some cases. These opinions have suggested four possible positions limiting the award of damages for emotional distress: (1) a requirement that the emotional distress be particularly severe; (2) a demand that the plaintiff's pecuniary loss be substantial; (3) a distinction between business frauds and other frauds; and (4) an inclusion of emotional distress damages as part of a punitive damage award. Examination of these four approaches will lay a framework for appropriately resolving the issue as a matter of tort policy.

#### 1. Magnitude of Emotional Distress

The emotional distress suffered by fraud victims ranges from petty annoyance or frustration to severely debilitating humiliation or depression.<sup>26</sup> All courts probably would agree that plaintiffs seeking recovery for these feelings must prove their distress, rather than leaving the issue to the mere conjecture of the jury.<sup>27</sup> Most decisions awarding emotional distress damages for fraud, however, have not required plaintiffs to prove any particular quantum of distress. In practice, the distress suffered by plaintiffs in most of these cases has been substantial enough to support a significant recovery.<sup>28</sup> The absence of any formal requirement that the plaintiff suffer severe emotional distress suggests that plaintiffs suffering even lesser varieties of distress could recover some damages for their suffering.

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26. The general concept of mental distress is very broad. It can encompass "nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 433, 426 P.2d 173, 178, 58 Cal. Rptr. 13, 18 (1967).

27. *Haggerty v. March*, 480 So. 2d 1064, 1068 (La. Ct. App. 1985) (stating that "[d]amages like any other fact should be proven by a preponderance of the evidence and to constitute a preponderance, such evidence must show the loss is more probable than not"). This court noted that "[t]he plaintiff made no effort to prove mental anguish or any other specific loss." *Id.* at 1067; see also *Rosener*, 110 Cal. App. 3d at 755, 168 Cal. Rptr. at 246 (noting that the plaintiff's evidence of mental suffering was "considerable, and convincing").

28. See, e.g., *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1157 & n.1 (10th Cir. 1981) (upholding one million dollar verdict apparently attributable to emotional distress), *cert. denied*, 464 U.S. 824 (1983); *Lewis v. Upton*, 151 Cal. App. 3d 232, 237, 198 Cal. Rptr. 494, 497 (1984) (holding that a jury could award a total of \$13,000 in compensatory damages to a plaintiff who proved only \$11,119.20 in pecuniary losses because the plaintiff suffered great emotional distress); *Trimble v. City of Denver*, 697 P.2d 716, 730 (Colo. 1985) (upholding \$35,000 verdict); *Kneip*, 734 S.W.2d at 134 (valuing emotional distress at \$40,000 for each of two plaintiffs and \$30,000 for a third plaintiff).



At least two jurisdictions, on the other hand, explicitly have limited recovery in fraud cases to serious emotional distress.<sup>29</sup> These courts defined compensable mental anguish as a relatively high degree of mental pain that "is more than mere disappointment, anger, restraint or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotion as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation."<sup>30</sup> One trial court applying this rule instructed jurors that their consideration of "mental anguish" should not "include any amount for mere worry, anxiety, vexation or anger."<sup>31</sup>

When the record in these cases has reflected "no serious emotional distress or anxiety," the courts have overturned verdicts awarding emotional distress damages to defrauded plaintiffs.<sup>32</sup> Under this standard, a plaintiff's testimony "that he was 'embarrassed,' 'mad,' and that he 'felt like scum'" was insufficient to support recovery.<sup>33</sup> The court opined that this testimony did "not depict the equivalent of a mental sensation of pain or distress."<sup>34</sup> Thus, a requirement of severe mental anguish sig-

29. *McGregor v. Mommer*, 714 P.2d 536, 545 (Mont. 1986); *Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 136 (Tex. Ct. App. 1985).

30. *Roberts*, 694 S.W.2d at 136 (quoting *Trevino v. Southwestern Bell Tel. Co.*, 582 S.W.2d 582, 584 (Tex. Ct. App. 1979) (finding emotional distress compensable in an action for invasion of privacy)). In *Trevino*, the court denied emotional distress damages to a plaintiff who introduced a third person's testimony that the plaintiff was "very upset" when the telephone company entered his store and took his telephones. The *Trevino* court contrasted the plaintiff's evidence with the evidence in another invasion of privacy case that properly awarded emotional distress damages. In the comparison case the plaintiffs had "testified at length as to their feelings of humiliation, stomach aches, loss of sleep, nervousness and embarrassment," all of which made one plaintiff feel "like the size of a red ant," and troubled the plaintiff's wife to the point that she "could not sleep at night." *Trevino*, 582 S.W.2d at 584. Presumably the *Roberts* case would have allowed emotional distress damages in fraud cases with this type of evidence.

31. *Roberts*, 694 S.W.2d at 133 (recounting the trial court's instruction to the jury).

32. *McGregor*, 714 P.2d at 545. This court overturned emotional distress damages in a case raising both fraud and contract claims by invoking standards from a false imprisonment case that limited such damages to tortious conduct which "results in a substantial invasion of a legally protected interest and causes a significant impact upon the person of plaintiff." *Id.* (quoting *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 473, 686 P.2d 209, 213 (1984) (emphasis in original)). In *McGregor* the court deemed the plaintiff's testimony that his financial problems caused by the fraud "bothered him a lot" and "at times it would show up at home" insufficient to support recovery. *Id.*

In part, the *McGregor* court was worried that the trial court's instruction would have permitted the plaintiff to recover emotional distress damages "even if [he] recovered only on [his] contract claim." *Id.* at 544. The *McGregor* court's limit appears equally applicable, however, to the plaintiff's claims of fraud, because the court drew these standards from the tort context of false imprisonment. For a later case applying the *McGregor* court's "significant impact" requirement to a tort claim of bad faith, see *Noonan v. First Bank Butte*, 740 P.2d 631, 635 (Mont. 1987) (requirement applied over the objections of a dissenting judge).

33. *Roberts*, 694 S.W.2d at 136.

34. *Id.* Any such standard is inherently imprecise in its application. Thus, a plaintiff apparently cannot recover if he "feels like scum," *id.*, but can recover if he feels "like the size of a red

nificantly limits a fraud plaintiff's opportunity to recover for emotional distress.

## 2. Severity of Financial Injury

Some California precedent has developed a second theory to limit emotional distress damages in fraud cases. Rather than requiring a threshold degree of emotional distress, this approach focuses on the extent of the pecuniary damage that the plaintiff has suffered.<sup>35</sup> Under this rule a plaintiff can recover emotional distress damages in fraud cases only if the pecuniary harm suffered is substantial.<sup>36</sup>

This standard originated in tort cases that involved bad faith conduct other than fraud.<sup>37</sup> Courts in those cases envisioned the standard as a protection against false or trivial claims. Thus, one court explained that when the plaintiff's claim "is actionable and has resulted in substantial damages apart from those due to mental distress, the danger of fictitious claims is reduced."<sup>38</sup> This court was not "concerned with mere

ant," at least if he testifies to symptoms such as loss of sleep and stomach aches, *see supra* note 30. The difficulty of applying this approach is indicated by the jury's reaction to the plaintiff's testimony in *Roberts*. In that fraud case the jury agreed to assign a value of \$10,000 to mental distress, but the court regarded the mental distress as too insubstantial to support any recovery. *Roberts*, 694 S.W.2d at 136. Similarly, in *McGregor* a jury awarded \$5,000 for mental anguish, but the court regarded the mental anguish as too insubstantial to support any recovery under a requirement of "significant" impact on the plaintiff. *McGregor*, 714 P.2d at 544-55.

35. *See Walker v. KFC Corp.*, 515 F. Supp. 612, 619 (S.D. Cal. 1981) (trial court instructed jury using *Book of Approved Jury Instructions*, No. 12.85, quoted *infra* note 36), *aff'd in part, rev'd in part on other grounds*, 728 F.2d 1215 (9th Cir. 1984). Dictum in Montana precedent might support a similar approach. *See McGregor*, 714 P.2d at 545; *see also supra* note 32. Although the *McGregor* court's opinion focused on the plaintiff's failure to establish a "significant" impact, it is possible that in other cases the court might invoke the second branch of this requirement and require a "substantial" invasion.

36. A standard California jury instruction generalizes this rule in a manner that includes fraud cases and extends to other cases of financial injury as well:

### *Emotional Distress Resulting From Financial Injury*

A plaintiff who has suffered a substantial financial injury which was [proximately] [legally] caused by a defendant's intentional or reckless wrongful conduct, is entitled to recover damages from that defendant for any mental or emotional distress [proximately] [legally] resulting from such financial injury.

2 COMMITTEE ON STANDARD JURY INSTRUCTIONS OF THE SUPER. CT. OF LOS ANGELES COUNTY, CALIFORNIA, JURY INSTRUCTIONS: CIVIL, BOOK OF APPROVED JURY INSTRUCTIONS, No. 12.85 (C. Loring 7th ed. 1986) [hereinafter BAJI].

37. *See Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 434, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967) (en banc) (suit against insurer for bad faith refusal to settle suit within policy limits); *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 937, 122 Cal. Rptr. 470, 483-84 (1975) (suit by buyers of real estate against title insurance company for failing to discover, disclose, or eliminate easement). The *Jarchow* court purported to apply this standard to cases of mere negligence, although *Jarchow* also involved claims of bad faith. *Jarchow* has been criticized for purporting to expand the standard's coverage to merely negligent infliction of emotional distress without regard to bad faith. *See Quezada v. Hart*, 67 Cal. App. 3d 754, 762, 136 Cal. Rptr. 815, 820 (1977).

38. *Crisci*, 66 Cal. 2d at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19.

bad manners or trivialities but tortious conduct resulting in substantial invasions of clearly protected interests."<sup>39</sup> California subsequently embodied this standard in jury instructions for all types of tortious infliction of pecuniary injury<sup>40</sup> and applied these instructions to fraud cases.<sup>41</sup> In fraud, as in other contexts, the requirement of substantial pecuniary injury permits plaintiffs to recover emotional distress damages in many cases, but restricts recovery when the facts of a case suggest any danger of abusive litigation.

### 3. Distinction Between Business Fraud and Nonbusiness Fraud

In *Moore v. Slonim*<sup>42</sup> a federal district court dismissed a claim of emotional distress for fraud with language that appears to distinguish between business frauds and other frauds. The court asserted that "it is black letter law that damages for mental distress are not ordinarily available in a cause of action for business fraud."<sup>43</sup> Two other opinions have quoted *Slonim's* language with approval.<sup>44</sup> These cases suggest that some courts assume that emotional distress damages are appropriate in cases of personal or nonbusiness fraud, but inappropriate in cases of business fraud.

Many courts have allowed emotional distress damages in personal rather than purely commercial contexts. Thus courts have granted emotional distress damages against a funeral director who defrauded bereaved relatives into foregoing the opportunity to see the body,<sup>45</sup> against an adoption agency that lied to an adopting couple about a troubled child's background,<sup>46</sup> against an insurance salesman who deceived his customers,<sup>47</sup> and against a man who fraudulently induced a

39. *Id.* (footnote omitted).

40. BAJI, *supra* note 36, No. 12.85.

41. *Walker*, 515 F. Supp. at 619 (trial court instructed jury in fraud case using BAJI, *supra* note 36, No. 12.85).

42. 426 F. Supp. 524 (D. Conn.), *aff'd*, 562 F.2d 38 (2d Cir. 1977).

43. *Id.* at 527 (citing 37 C.J.S. *Fraud* § 141f, at 469 (1943)).

44. *Cable v. Hechler*, 421 F. Supp. 129, 134 (E.D.N.Y. 1981), *aff'd mem.*, 685 F.2d 423 (2d Cir. 1982); *Cornell v. Wunschel*, 408 N.W.2d 369, 382 (Iowa 1987).

45. *Ridout's-Brown Serv., Inc. v. Holloway*, 397 So. 2d 125 (Ala. 1981).

46. *Burr v. Board of County Comm'rs*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986). The agency told the couple that the infant was "a nice big, healthy, baby boy" to whom an eighteen year old unwed mother had given birth at the local hospital. *Id.* at 70, 491 N.E.2d at 1103. The agency further explained that the young unwed mother was trying to work and that her parents were cruel to the child. In fact, the infant's mother was a thirty-one year old mental patient at Massillon State Hospital with physical as well as psychological problems and mental deficiencies. The child inherited from his mother a debilitating disease that destroyed his central nervous system.

47. *Knox v. Anderson*, 159 F. Supp. 795 (D. Haw.), *aff'd*, 297 F.2d 702 (9th Cir. 1961), *cert. denied*, 370 U.S. 915 (1962).

woman to enter into a void marriage.<sup>48</sup> Courts also have awarded emotional distress damages to home buyers suing deceptive real estate sellers<sup>49</sup> and home owners suing deceptive contractors;<sup>50</sup> perhaps these suits also contain a special personal element, even though they certainly are economic transactions. Correspondingly, some courts have denied emotional distress damages in contexts that seem more clearly business related. For example, courts have denied recovery for emotional distress to a service station lessee who sued the lessor for misrepresentations that induced the lessee to enter a franchise agreement<sup>51</sup> and to an author who was defrauded into entering a publishing contract.<sup>52</sup>

Although these cases could support a generalized distinction between business frauds and personal frauds, this distinction does not serve as a very reliable guide to all judicial opinions. Other courts have denied recovery in contexts that seem distinctly personal. For example, one court refused to recompense the emotional suffering of a man who claimed that his paramour defrauded him in order to obtain money "by promising to marry him when in fact she had no intention of doing so."<sup>53</sup> Many years ago a California court refused to grant emotional distress damages to a woman who had sold her property to a conniving developer only because the developer falsely claimed to share her distinctive religious beliefs about communicating with the spirits of the dead and promised to devote the property to the establishment of a home for welcoming people of this faith.<sup>54</sup> Other courts have granted recovery for emotional distress damages in cases that seem distinctly commercial. These cases include a fast food restaurant franchisee's re-

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48. *Holcombe v. Whitaker*, 294 Ala. 430, 318 So. 2d 289 (1975).

49. *E.g.*, *Godfrey v. Steinpress*, 128 Cal. App. 3d 154, 180 Cal. Rptr. 95 (1982).

50. *E.g.*, *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980), *appeal dismissed*, 450 U.S. 1051 (1981).

51. *Carrigg v. Blue*, 283 S.C. 494, 323 S.E.2d 787 (Ct. App. 1984). Similarly, *Cornell* denied mental distress damages to a couple allegedly defrauded into purchasing a motel based on misleading concealment of facts regarding the profitability of the motel complex. The court commented that "[d]amages for mental distress are not ordinarily contemplated in a business transaction." *Cornell*, 408 N.W.2d at 382.

52. *Kantor v. Comet Press Books Corp.*, 187 F. Supp. 321 (S.D.N.Y. 1960). The court stated that "damages are not recoverable in this type of action for loss of profits, physical pain and mental anguish or punitive damages." *Id.* at 323 (citing *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418 (2d Cir. 1959)).

53. *Harsche v. Cxyz*, 157 Neb. 699, 700, 61 N.W.2d 265, 267 (1953). In *Harsche* the court intimated that it would have allowed recovery if the plaintiff had claimed breach of a promise to marry. The court, however, would not permit recovery on a fraud claim. *Id.* at 710-11, 61 N.W.2d at 272. The case thus reaches an opposite conclusion on facts notably similar to *Holcombe*. See *supra* note 48 and accompanying text.

54. *Newman v. Smith*, 77 Cal. 22, 18 P. 791 (1888). The court permitted rescission of the contract based on fraud, but refused to grant damages for "anxiety, worry, and harassment." *Id.* at 27, 18 P. at 793.

covery of emotional distress damages from a franchisor who had misrepresented material facts concerning the desirability of the franchise arrangement,<sup>55</sup> a client's recovery from his real estate agent for fraud in the purchase of commercial properties,<sup>56</sup> and a travel agency's recovery from an employee who had embezzled funds.<sup>57</sup> Thus, the distinction between business fraud and nonbusiness fraud is not a reliable basis for reconciling the conflicting case law in this area.<sup>58</sup>

#### 4. Emotional Distress as a Component of Punitive Damage Awards

Many states permit jurors to award punitive or exemplary damages in fraud cases.<sup>59</sup> Jurors sometimes may include compensation for emotional distress as part of these punitive damage awards. In some jurisdictions, jurors in any fraud case may award emotional distress damages under the guise of punitive damages.<sup>60</sup> In other jurisdictions, jurors may do so only if the fraud meets the additional, vague criteria necessary to support an award of punitive damages, such as oppression or aggravation.<sup>61</sup>

In a few states courts explicitly allow damages for emotional distress as part of exemplary or punitive damages. Michigan courts, for example, have explained that their exemplary damages are intended as a form of extra compensation in cases marked by recklessness, bad

55. *Walker v. KFC Corp.*, 515 F. Supp. 612 (S.D. Cal. 1981), *aff'd in part, rev'd in part on other grounds*, 728 F.2d 1215 (9th Cir. 1984).

56. *Jahn v. Brickey*, 168 Cal. App. 3d 399, 214 Cal. Rptr. 119 (1985).

57. *Clare v. State*, 456 So. 2d 355 (Ala. Crim. App. 1983) (criminal case upholding an order of restitution by relying on the damage measure that would be applied in a civil action), *aff'd*, 456 So. 2d 357 (Ala. 1984).

58. This Article later considers whether the distinction between business and nonbusiness fraud offers a sensible approach that, as a matter of policy, ought to guide the courts in deciding damage issues in fraud cases. *See infra* notes 167-74 and accompanying text.

59. *See, e.g.*, *Moore Ford Co. v. Smith*, 270 Ark. 340, 604 S.W.2d 943 (1980); *Kleinfelter v. Northwest Builders & Developers, Inc.*, 44 N.C. App. 561, 261 S.E.2d 498 (1980); *Barnes v. McKinney*, 589 P.2d 698 (Okla. Ct. App. 1978); *Green v. Uncle Don's Mobile City*, 279 Or. 425, 568 P.2d 1375 (1977); *Jeffers v. Nysse*, 98 Wis. 2d 543, 297 N.W.2d 495 (1980). Massachusetts, Nebraska, and Washington courts do not award punitive damages. *See* 1 J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES LAW AND PRACTICE* §§ 4.07-12 (1985).

60. *See, e.g.*, *Harris v. Wagshal*, 343 A.2d 283, 288 n.13 (D.C. 1975); *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976) (explaining that "fraud is, itself, one of the elements of aggravation which will permit punitive damages to be awarded").

61. *See, e.g.*, *Randell v. Banzhoff*, 375 So. 2d 445, 448 (Ala. 1979) (holding that fraud must be "gross"), *cert. denied*, 444 U.S. 1081 (1980); *Holcomb v. Hoffschneider*, 297 N.W.2d 210, 215 (Iowa 1980) (denying recovery for "ordinary" fraud); *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961). The practical effect of such vague limits is unclear; most cases of intentional fraud arguably establish the reckless indifference to the rights of others or implied malice to which some of the restrictive cases refer. *Cf. Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 1042, 479 S.W.2d 518, 522 (1972) (finding that "malice" to support punitive damages does not require personal hatred; it includes intentional wrongdoing without just cause or excuse).

faith, or other oppressive conduct.<sup>62</sup> Thus, these damages are not merely punitive in nature. Rather, they provide "compensatory damages for embarrassment and injured feelings" in cases of egregious misconduct.<sup>63</sup> These damages are available in commercial fraud cases when the plaintiff establishes fraudulent conduct independent from a breach of contract claim.<sup>64</sup> Similarly, before recent statutory reforms<sup>65</sup> a Georgia statute permitted jurors to assess an extra amount of damages in actions marked by aggravating circumstances in order "to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."<sup>66</sup> Several cases upheld the assessment of these damages in fraud cases.<sup>67</sup>

Even in the majority of jurisdictions which insist that punitive damages are not compensatory,<sup>68</sup> jurors may inflate punitive damage awards to compensate plaintiffs for frustration or emotional suffering. Courts routinely instruct jurors to take into account "all the circumstances"<sup>69</sup> in assessing punitive damages. Courts sometimes specifically direct the jury to consider "the extent of harm inflicted."<sup>70</sup> These in-

62. *Willett v. Ford Motor Co.*, 400 Mich. 65, 71, 253 N.W.2d 111, 113 (1977).

63. *Id.*; see also *Loeblich v. Garnier*, 113 So. 2d 95, 103 (La. Ct. App. 1959) (holding that "exemplary" damages which redress mental anguish are compensatory rather than punitive in nature); *Bixby v. Dunlap*, 56 N.H. 456, 464 (1876) (stating that damages for willful injury may include compensation for wounded feelings, though these damages are awarded under the name of punitive, vindictive, or exemplary damages); *Fay v. Parker*, 53 N.H. 342 (1873) (allowing exemplary damages to compensate wounded feelings). On the confused history and semantics of punitive or exemplary damages in Michigan, see *Wade, The Michigan Law of Punitive Damages*, in *MICHIGAN LAW OF DAMAGES* 27-1 to -27 (1978).

64. *Kewin v. Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401, 420-21, 295 N.W.2d 50, 55 (1980); *Gilroy v. Conway*, 151 Mich. App. 628, 636-37, 391 N.W.2d 419, 422 (1986); *Oppenhuizen v. Wennersten*, 2 Mich. App. 288, 299-300, 139 N.W.2d 765, 771 (1966) (finding fraud in selling a car with a forged title; exemplary damages awarded for plaintiff's embarrassment in being questioned over alleged purchase of stolen vehicle).

65. See GA. CODE ANN. § 51-12-5.1(c) (Supp. 1988) (allowing punitive damages not as compensation, but only to punish; effective for causes of action arising on or after July 1, 1987).

66. *Id.* § 51-12-5. The statute purports to codify the common law. See *id.* § 51-12-5 editorial note.

67. See *Kelly v. Georgia Casualty & Sur. Co.*, 105 Ga. App. 104, 107, 123 S.E.2d 711, 713 (1961); *King v. Towns*, 102 Ga. App. 895, 902-03, 118 S.E.2d 121, 127 (1960).

68. See, e.g., *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986) (holding that punitive damages are intended for punishment and deterrence, not as a means of recovering extra damages); *Moore v. State Bank*, 240 Kan. 382, 729 P.2d 1205 (1986) (holding that punitive damages are not designed for compensation), *cert. denied*, 107 S. Ct. 2484 (1987); *Feingold v. Southeastern Pa. Transp. Auth.*, 512 Pa. 567, 517 A.2d 1270 (1986) (holding that the purpose of punitive damages is punishment rather than compensation).

69. E.g., *Rinaldi v. Aaron*, 314 So. 2d 762, 763 (Fla. 1975); *Iola State Bank v. Bolan*, 235 Kan. 175, 192, 679 P.2d 720, 734 (1984); *Farrell v. Kramer*, 159 Me. 387, 391, 193 A.2d 560, 562 (1963).

70. *Leimgruber v. Claridge Assocs.*, 73 N.J. 450, 456, 375 A.2d 652, 655 (1977); see also *Fort Worth Cab & Baggage Co. v. Salinas*, 735 S.W.2d 303, 306 (Tex. Ct. App. 1987) (holding that in determining whether an award of exemplary damages is reasonable, a court examines many factors, including the "sensibilities" of the plaintiff); *RESTATEMENT, supra* note 6, § 908 comment e

structions invite jurors, if they are so inclined, to include an award for emotional distress. Moreover, appellate courts occasionally justify an award of punitive damages by referring to, among other factors, the plaintiff's emotional distress.<sup>71</sup> One court even suggested that a plaintiff added a punitive damage claim to a fraud case precisely because he recognized that the court was unlikely to include emotional distress as a regular element of compensatory damages.<sup>72</sup>

Common sense, finally, suggests that jurors sometimes consider a plaintiff's emotional anguish in calculating a punitive damage award. Some evidence shows that jurors in civil cases attempt to award an overall amount of damages that they perceive as fair; if the jurors are precluded from compensating an element of damages in one part of their verdict, they will increase another award.<sup>73</sup> Jurors in fraud cases, therefore, may assess generous punitive damages when they realize that the plaintiff otherwise will receive no compensation for frustration or mental distress. Indeed, one pair of commentators has noted that, in jurisdictions allowing only nominal damages for fraud, jurors may use

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(stating that the jury can consider the "extent of harm" to the plaintiff, including "the fact that the plaintiff has been put to trouble and expense in the protection of his interests").

71. See *Wilkes v. Moses*, 291 S.C. 504, 354 S.E.2d 403 (Ct. App. 1987) (affirming award of \$700,000 actual and \$300,000 punitive damages in accident case; the court focused on the extent of the plaintiff's injuries, including her severe pain and embarrassment); cf. *McNeill v. Allen*, 35 Colo. App. 317, 326, 534 P.2d 813, 819 (1975) (accepting for sake of argument counsel's position that evidence of emotional distress was relevant to the issue of exemplary damages). Conversely, courts have justified an award of emotional distress damages by observing that the standards for a punitive damage award had been met. See *Emmons v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 532 F. Supp. 480, 485 (S.D. Ohio 1982); *Food Fair, Inc. v. Anderson*, 382 So. 2d 150, 154-55 (Fla. Dist. Ct. App. 1980).

72. *Sierra Nat'l Bank v. Brown*, 18 Cal. App. 3d 98, 103, 95 Cal. Rptr. 742, 745-46 (1971) (attributing plaintiffs' interest in recovering punitive damages to their realization that they could not recover emotional distress damages as a regular component of compensatory damages).

73. One commentator has pointed to a case retried several times in which three separate juries returned verdicts for the same total amount, even though only two of the three juries were permitted to award punitive damages. See Comment, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 521 (1957). In that case, the jurors who were forbidden to award punitive damages may have recharacterized the amount of punishment they wished to award as compensation for emotional distress. Similarly, jurors who are not invited to compensate emotional distress as a part of the regular compensatory damage award may satisfy their desire to reach a fair result by calculating this distress in an award of punitive damages. Cf. *Durant v. Surety Homes Corp.*, 582 F.2d 1081, 1088 (7th Cir. 1978) (noting that a trial court's error in allowing the jury in a fraud case to award emotional distress damages as an aspect of compensatory damages reduced the risk that the jury had included compensation for emotional distress in its punitive damage verdict).

From this perspective, it is ironic that punitive damages may have originated as an attempt by the courts to compensate wounded feelings when such compensation was not directly available. See Comment, *supra*, at 519; see also *Hazelwood v. Illinois Cent. G.R.R.*, 114 Ill. App. 3d 703, 712, 450 N.E.2d 1199, 1206 (1983). Judicial focus on the punitive purpose of punitive damages may be counterbalanced by jurors who possibly still regard these damages as having, in part, a compensatory function.

punitive damages to serve a compensatory function.<sup>74</sup> Even in jurisdictions allowing more substantial financial recovery for fraud the jury may be tempted to redress the plaintiff's mental anguish by increasing the punitive damage award.

### III. ASSESSING THE SIGNIFICANCE OF A SPECIAL RULE FOR FRAUD: THE RELATION OF FRAUD TO INDEPENDENT TORT ACTIONS FOR INFLICTION OF EMOTIONAL DISTRESS

During the past two decades most courts have recognized independent tort actions for intentional or negligent infliction of emotional distress. Some courts have suggested that, although damages for emotional distress are not available in fraud suits, plaintiffs may recover those damages if they can establish separate claims for intentional or negligent infliction of emotional distress.<sup>75</sup> The issue, then, is whether these independent actions satisfy the claims of fraud victims for emotional distress damages.

#### A. *Intentional Infliction of Emotional Distress*

The law always has permitted plaintiffs who suffer some physical injury to recover for emotional distress in addition to recovering for the physical injuries.<sup>76</sup> The law also has permitted plaintiffs to recover emotional distress damages for certain intentional invasions of their dignity—notably assault, battery, or false imprisonment—even in the absence of any physical harm. Apart from physical injury or traditional dignitary torts, however, courts historically were reluctant to grant recovery for emotional distress damages.

Over the past two decades, however, courts have recognized that traditional tort actions would not reach some forms of contemptible behavior that caused significant emotional distress. To redress these injuries, courts created the tort of intentional infliction of emotional

74. See 2 J. GHIARDI & J. KIRCHER, *supra* note 59, § 19.17, at 54. The authors suggest that in these jurisdictions

one cannot help but suspect another ratio decidendi, albeit not articulated. The plaintiff who is thus allowed to recover punitive damages, as is the case with some dignitary torts, is effectively provided a form of rough compensation though in the guise of exemplary damages, for the harm he or she has suffered because of the tort but has been unable to quantify for the purposes of the customary compensatory damage award.

*Id.*

75. See *infra* notes 80-91 and accompanying text.

76. Recovery of emotional distress damages in this circumstance is not limited to suits against intentional tortfeasors. Many negligence cases dealing with physical harm include a component of emotional distress damages. See, e.g., *Grubbs v. United States*, 581 F. Supp. 536, 541, 542 (N.D. Ind. 1984); *Pretre v. United States*, 531 F. Supp. 931, 934 (E.D. Mo. 1981) (stating "mental anguish attendant upon bodily injuries is a compensable [sic] injury"); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 362-63 (5th ed. 1984).



distress. Although this tort has gained widespread acceptance, the courts, fearing an inundation of lawsuits challenging mere bad manners, have attempted to restrict recovery to the most extreme kinds of anti-social behavior. To this end, courts uniformly have insisted that plaintiffs seeking to recover for intentional infliction of emotional distress meet several restrictive criteria: (1) the defendant must have intended to upset the plaintiff or must have acted with reckless disregard of the consequences; (2) the conduct must have been "beyond all possible bounds of decency, and . . . regarded as atrocious, and utterly intolerable in a civilized community"; and (3) the plaintiff's emotional distress must have been severe.<sup>77</sup> To reflect the extreme nature of this action, some courts have termed it the tort of "outrage."<sup>78</sup>

Plaintiffs in fraud actions frequently invoke this new tort theory as an alternative means of recovering damages for emotional distress.<sup>79</sup> Even when plaintiffs do not specifically plead intentional infliction of emotional distress as a separate theory of liability, some judges use the standards developed for that tort to evaluate the availability of emotional distress damages based on the fraud claim. In most cases, fraud plaintiffs fail to meet one of the restrictive criteria for intentional infliction of emotional distress.

In *Ma v. Community Bank*,<sup>80</sup> for example, a bank assured a customer that if he lost his certificate of deposit the bank would issue a new one without charge. Later, when the certificate was stolen, the bank continually refused to reissue the certificate unless the plaintiff posted a substantial bond. The plaintiff sued for fraud, seeking both his pecuniary loss and damages for emotional distress. The trial court awarded pecuniary loss damages, but denied emotional distress damages. The Seventh Circuit, applying its view of Wisconsin law, affirmed the denial of these damages on the ground that the plaintiffs, seeking damages for emotional distress based on fraud, had failed to prove the following: (1) that the defendant acted for the purpose of causing emotional distress to the plaintiff; (2) that the conduct was extreme and

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77. See *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 801 (Iowa 1984) (stating the second criterion quoted in the text); see also *Othman v. Globe Indem. Co.*, 759 F.2d 1458 (9th Cir. 1985), *overruled on other grounds*, *Bryant v. Ford Motor Co.*, 844 F.2d 602 (9th Cir. 1987) (en banc); *LeCroy v. Dean Witter Reynolds, Inc.*, 585 F. Supp. 753 (E.D. Ark. 1984); *Plocar v. Dunkin' Donuts of Am., Inc.*, 103 Ill. App. 3d 740, 431 N.E.2d 1175 (1981); *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 374 N.W.2d 905 (1985). See generally RESTATEMENT, *supra* note 6, § 46.

78. See, e.g., *Spencer v. King County*, 39 Wash. App. 201, 692 P.2d 874 (1984), *overruled on other grounds*, *Frost v. City of Walla Walla*, 106 Wash. 2d 669, 724 P.2d 1017 (1986).

79. E.g., *Truesdell v. Proctor*, 443 So. 2d 107 (Fla. Dist. Ct. App. 1983) (alleging fraud and negligent infliction of emotional distress); *Stewart v. Isbell*, 155 Mich. App. 65, 399 N.W.2d 440 (1986) (alleging fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress).

80. 686 F.2d 459 (7th Cir. 1982).

outrageous; and (3) that the defendant's conduct caused an extreme and disabling emotional response by the plaintiff.<sup>81</sup> In short, the court borrowed the standards for the tort of intentional infliction of emotional distress and used them to deny emotional distress damages in a fraud action.<sup>82</sup>

The Seventh Circuit interpreted Illinois law in a similar fashion in *Durant v. Surety Homes Corp.*<sup>83</sup> In that case a contractor defrauded a buyer into purchasing a home with a cracked foundation. The buyer brought suit for fraud; the trial court granted compensation for pecuniary loss and awarded punitive damages, but denied damages for the plaintiff's emotional distress. In affirming the trial court's denial of the emotional distress damages, the Seventh Circuit invoked Illinois' leading case on the separate tort of intentional infliction of emotional distress and stated that the defendant could be liable only for actions "calculated to cause 'severe emotional distress' to a person of ordinary sensibilities."<sup>84</sup> Based on this standard the *Durant* court denied recovery because the plaintiff had failed to establish the defendant's wrongful intent.<sup>85</sup>

Curiously, the *Durant* court construed the already narrow requirements for recovery in a particularly restrictive manner. The court of appeals ruled against the plaintiff because it agreed with the trial court that "simply no evidence of intention to cause such distress" existed.<sup>86</sup> Thus, the court seemed to require a specific intent to create distress. Controlling precedent, however, had established that a plaintiff could win an intentional infliction claim by establishing merely reckless conduct.<sup>87</sup> That conduct was present in *Durant*; indeed, the court affirmed an award of punitive damages precisely because evidence existed to establish that the contractor "not only committed fraud, but did so designedly or wantonly, with reckless disregard for the Durants' rights."<sup>88</sup>

In another colorful case a court applied a similarly narrow reading

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81. *Id.* at 469.

82. Alternatively, the court said that the plaintiff could recover emotional distress damages on a theory of bad faith breach of contract, but only if the plaintiff could prove " 'substantial damages aside and apart from the emotional distress itself and . . . damages occasioned by the simple breach of contract.' " *Id.* (quoting *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 696, 271 N.W.2d 368, 378 (1978)). Because the plaintiff had not pleaded or proved these damages, this theory also was of no avail to the plaintiff.

83. 582 F.2d 1081 (7th Cir. 1978).

84. *Knierim v. Izzo*, 22 Ill. 2d 73, 86 174 N.E.2d 157, 164 (1961); see also *D.R.W. Corp. v. Cordes*, 65 Wis. 2d 303, 222 N.W.2d 671 (1974) (measuring the availability of emotional distress damages in a fraud case by the standards for intentional infliction of emotional distress).

85. *Durant*, 582 F.2d at 1085.

86. *Id.*

87. See *Public Fin. Corp. v. Davis*, 66 Ill. 2d 85, 360 N.E.2d 765 (1976).

88. *Durant*, 582 F.2d at 1087, 1088.

of the standards for intentional infliction of emotional distress in order to deny these damages to a disaffected disciple who sued the Maharishi Mahesh Yogi for fraud.<sup>89</sup> The court rejected the separate emotional distress claim because most claims for intentional infliction of emotional distress are based on a specific, discrete incident.<sup>90</sup> Although the plaintiff claimed that he had wasted eleven years of his life, including years of free labor, in the service of a phony, the court dismissed this loss as merely a "continuing injury." As in *Durant*, no prior case law compelled this restriction; indeed, another state had rejected proposals for a similar "sudden occurrence" requirement even in the context of negligent infliction of emotional distress.<sup>91</sup>

A few cases have permitted fraud plaintiffs to recover damages for mental anguish under the standards of intentional infliction of emotional distress. In a securities fraud case, *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,<sup>92</sup> the court based liability on both theories, fraud and intentional infliction of emotional distress, because the defendant brokerage company had actual knowledge that the plaintiff was an illiterate, insecure person with grave concern for protecting her financial security. Against this background the court affirmed the jury's finding that the defendant's plan—to pressure the plaintiff's gullible husband into investing the couple's hard-won earnings in a margin account, trading in his wife's account without her permission, and lying to his wife—was "outrageous."<sup>93</sup> In another case a court concluded that a

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89. *Doe v. Yogi*, 652 F. Supp. 203 (D.D.C. 1986). The yogi allegedly represented that science had proved that transcendental meditation could reverse aging, result in enlightenment, and promote world peace. The yogi also promised to teach the plaintiff to fly, to levitate (an exercise that consisted of hopping around the floor in a lotus position), and "to manipulate the physical world and the laws of nature." *Id.* at 205. The plaintiff sought to recover for the costs of taking courses from the yogi, for his emotional distress in realizing that he had wasted eleven years of his life in the movement, and for his physical injuries suffered while trying to learn to "fly." *Id.*

90. *Id.* at 209. The court did uphold a separate cause of action for fraud against a challenge that the yogi's promises were mere opinion. The court did not, however, indicate whether it would be willing to grant emotional distress damages under the fraud count. Thus, it is unclear whether the court anticipated allowing the plaintiff some emotional distress damages under the fraud count, or whether the court envisioned the fraud count as limited to a claim for: (1) the costs expended on the yogi's courses; and possibly (2) the physical injuries suffered while performing yoga exercises.

91. See *Ochoa v. Superior Court*, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985). The court in *Ochoa* permitted a mother to recover for the anguish she suffered while the penal facility holding her son continually declined to give him proper medical treatment. The court specifically rejected the defendant's argument that claims for negligent infliction of emotional distress should be limited to those family members who are contemporaneous witnesses to a "sudden occurrence."

92. 703 F.2d 1152 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983).

93. *Id.* at 1159. The wife was a Korean immigrant who could neither read nor write Korean or English. The husband had only a tenth grade education and worked as a manual laborer "almost every waking hour, including all major holidays." *Id.* at 1160. The couple had "adopted a spartan lifestyle, spending very little for anything other than basic necessities and doing nothing in

realty company's misrepresentations that a house was free of termites and dry rot were outrageous enough to support the purchasers' action for intentional infliction of emotional distress.<sup>94</sup>

These cases, however, remain the exception rather than the rule. Even strikingly antisocial conduct frequently fails to satisfy the "outrageousness" requirement of the intentional infliction of emotional distress tort. In a recent Florida case, for example, a supermarket repeatedly pressured an employee to sign confessions to theft, despite her tearful protests that she was innocent.<sup>95</sup> The supermarket finally induced her to cooperate by assuring her that it was standard practice to require all employees to sign these confessions as part of a lie detector test, and that the employer would not fire her if she signed one.<sup>96</sup> When the employee finally succumbed to the coercion, the employer fired her. The court, nonetheless, rejected a claim for intentional infliction of emotional distress on the basis that this case "[did] not meet the test of outrageousness."<sup>97</sup> Nevertheless, the court upheld a claim for emotional distress damages as an aspect of the employee's fraud claim.<sup>98</sup>

Claims for intentional infliction of emotional distress, therefore, do not obviate consideration of damages for emotional distress in fraud actions. In many fraud cases, plaintiffs will be unable to convince a court that their distress was severe, to convince a court that the defendant's actions were outrageous, or to convince some courts that a particularly narrow formulation of an intent requirement has been satisfied. Ironically, because fraud is common enough in today's society, courts may no longer consider it sufficiently extraordinary to satisfy the requirement

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the way of entertainment." *Id.* Both husband and wife recognized that the husband was extremely gullible and therefore took special steps to put the couple's assets into accounts in the wife's name alone.

94. *Godfrey v. Steinpress*, 128 Cal. App. 3d 154, 180 Cal. Rptr. 95 (1982). Similarly, one might expect that a fraud by a funeral parlor director against the deceased's relatives would satisfy any court's sense of outrageousness. Thus, emotional distress damages have been granted against a mortician who falsely represented that the deceased's face had been "eaten up with maggots" in order to avoid the trouble of preparing the body for viewing by the deceased's family. *Ridout's-Brown Serv., Inc. v. Holloway*, 397 So. 2d 125, 127 (Ala. 1981). In that case, the plaintiff had stated claims for both fraud and intentional infliction of emotional distress. The court endorsed a \$220,000 verdict (almost all of which must have represented compensation for emotional distress) without specifying whether it was awarded on one or both theories of recovery.

95. *Food Fair, Inc. v. Anderson*, 382 So. 2d 150 (Fla. Dist. Ct. App. 1980).

96. *Id.* at 151. Indeed, the employer interpreted the lie detector's finding that her confession was a lie as an indication that she must have stolen more money than originally stated on the confession. The employer thus coerced the employee to sign confessions for ever-increasing amounts. *Id.*

97. *Id.* at 153.

98. *Id.* at 154-55.

of outrageousness.<sup>99</sup> Thus, if courts wish to compensate defrauded plaintiffs for emotional distress, they should do so by reformulating their definition of compensatory damages for fraud, rather than by relegating those plaintiffs to the restrictive theory of intentional infliction of emotional distress.<sup>100</sup>

The standards developed for the new tort of intentional infliction of emotional distress, moreover, are inappropriate when applied to plaintiffs in fraud cases. Courts created the new tort theory to permit recovery in a narrow class of cases that failed to fit within any established tort action.<sup>101</sup> At the same time, the courts wanted to protect themselves from being overwhelmed with attempts to turn mere bad manners or petty incivilities into court cases.<sup>102</sup> Hence, the courts restrictively defined the tort of intentional infliction of emotional distress.

These concerns, however, do not apply to the fraud plaintiff. Fraud is a well-established tort, not a novel cause of action. The existence of this claim, moreover, demonstrates that society already considers fraud more than mere bad manners; it is seriously antisocial behavior that justifies the imposition of substantial compensatory damages, punitive damages, and even criminal penalties.<sup>103</sup> Finally, fraud cases are already in the courts, whether the plaintiff claims emotional distress damages or not. Indeed, the courts are open to fraud claims that assert any measure of pecuniary loss, however small.<sup>104</sup> A few courts permit plaintiffs to bring fraud actions for nominal damages even without proof of specific financial loss.<sup>105</sup> Thus, awarding emotional distress damages in

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99. Courts reserve the tort of intentional infliction of emotional distress for occasional cases that strike them as unusually egregious. *See, e.g.,* *Oswalt v. County of Ramsey*, 371 N.W.2d 241, 248 (Minn. Ct. App. 1985) (explaining that the tort is "sharply limited to cases involving particularly egregious facts").

100. *Food Fair*, 382 So. 2d at 150. *See supra* notes 95-98 and accompanying text.

101. For example, a leading decision recognized a separate theory of recovery for intentional infliction of emotional distress when gangsters threatened a businessman with future injury. The court did so because it felt the action failed to fit within traditional tort requirements of assault, battery, or false imprisonment. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952).

102. *See* RESTATEMENT, *supra* note 6, § 46 comment d.

103. *See* MODEL PENAL CODE § 223.3 (Proposed Official Draft 1962) (defining purposeful deception as theft). Federal statutes prohibiting mail and wire fraud authorize penalties of \$1,000 and prison terms of up to five years. 18 U.S.C. §§ 1341, 1343 (1982).

104. Most courts require the plaintiff to establish some pecuniary damage or detriment as an element of a basic cause of action for fraud. *See, e.g.,* *Day v. Avery*, 548 F.2d 1018, 1028-29 (D.C. Cir. 1976) (stating that "a *sine qua non* of any recovery for misrepresentation is a showing of pecuniary loss proximately caused by reliance on the misrepresentation;" nominal damages held not available), *cert. denied*, 431 U.S. 908 (1977). The cases do not require, however, that the plaintiff's damages be major; the cases only require that the damages be measurable. For a case awarding only \$5 in damages, see *D.R.W. Corp. v. Cordes*, 65 Wis. 2d 303, 222 N.W.2d 671 (1974).

105. *See* *Greater Coral Springs Realty, Inc. v. Century 21 Real Estate, Inc.*, 412 So. 2d 940 (Fla. Dist. Ct. App. 1982) (awarding "nominal" damages of \$1,000 in addition to punitive dam-

fraud cases will not swamp the courts with additional lawsuits.

In short, the policy concerns that justify restrictive requirements for the separate tort of intentional infliction of emotional distress are inapplicable to causes of action for fraud. Courts should not view this new tort theory as excusing a careful consideration of the need to make emotional distress damages generally more available in fraud claims.

### B. *Negligent Infliction of Emotional Distress*

Many courts are expanding plaintiffs' opportunities for recovery based only on negligent infliction of emotional distress. Plaintiffs who have suffered no physical injury, however, must hurdle a series of legal barriers. Most courts agree that the plaintiff's distress must be severe.<sup>106</sup> Many jurisdictions also require "physical consequences" or "objective symptomology" of the plaintiff's distress, such as weight loss or severe depression.<sup>107</sup> If the plaintiff has suffered mental anguish from witnessing physical injuries negligently inflicted upon another person, courts typically require proof that the plaintiff was close to the accident, saw the accident directly, and was a close relative of the victim.<sup>108</sup> Some courts apply an even more restrictive rule that limits recovery to bystanders who were physically endangered by the defendant's conduct.<sup>109</sup> By curtailing the number of plaintiffs who may recover for neg-

ages); *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 477 A.2d 1224 (1984). Several other jurisdictions award nominal damages when the plaintiff persuades the court that he has suffered some real damage, but fails to introduce sufficiently detailed evidence to allow the court to compute the value of the damages with a reasonable degree of accuracy. *See, e.g., Long-Lewis Hardware Co. v. Lightsey*, 392 So. 2d 545 (Ala. Civ. App. 1980); *In re Busse*, 124 Ill. App. 3d 433, 464 N.E.2d 651 (1984); *Beavers v. Lamplighters Realty, Inc.*, 556 P.2d 1328 (Okla. Ct. App. 1976). Although the awarding of nominal damages for fraud is still the minority rule, one commentator concludes from these cases that the law is in a state of development, "and the old rules can no longer be stated with assurance." R. DUNN, *supra* note 7, § 6.02, at 205.

106. *See, e.g., Ramirez v. Armstrong*, 100 N.M. 538, 541 n.1, 673 P.2d 822, 825 n.1 (1983) (stating that emotional distress must have a "severity which no reasonable person could be expected to endure"); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 72, 451 N.E.2d 759, 761 (1983) (stating that distress must be so "severe and debilitating" that a reasonable person would be "unable to cope adequately").

107. *See, e.g., Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163 (1978); *Goldberg v. Ruskin*, 128 Ill. App. 3d 1029, 1043, 471 N.E.2d 530, 539-40 (1984), *aff'd*, 113 Ill. 2d 482, 499 N.E.2d 406 (1986); *Dailey v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (1970). *But see St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 654 (Tex. 1987) (abandoning a requirement of physical injury or physical manifestation of emotional distress and noting "an established trend in American jurisprudence which recognizes the tort of negligent infliction of mental anguish without imposing arbitrary restrictions on recovery in such actions"); *cf. Alabama Power Co. v. Harmon*, 483 So. 2d 386 (Ala. 1986) (holding that emotional distress damages could be awarded in a breach of contract action without proof of physical symptoms).

108. *See Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). For examples of courts following *Dillon's* basic approach, see *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 526 (Fla. Dist. Ct. App. 1985); *Ramirez*, 100 N.M. 538, 673 P.2d 822.

109. *Farmer's Group, Inc. v. Trimble*, 658 P.2d 1370 (Colo. Ct. App. 1982), *aff'd*, 691 P.2d

ligent infliction of emotional distress, all these restrictions protect defendants from oppressive liability and shield the courts from burdensome litigation.<sup>110</sup>

As victims of intentional misconduct, fraud plaintiffs are more likely to add claims for intentional infliction of emotional distress than for negligent infliction of emotional distress. At least one court, however, has measured the availability of psychological damages in a fraud case by borrowing the standards for negligent infliction of emotional distress. In *Goldberg v. Mallinckrodt, Inc.*,<sup>111</sup> a physician claimed that a drug company defrauded him by intentionally misrepresenting that its product, a dye used to X-ray spinal cords, had no adverse side effects. The drug company allegedly knew that some patients had suffered severe adverse reactions to the dye. Doctor Goldberg sued the drug company for fraud after two of his patients, who had suffered severe physical injuries from the product, sued the doctor for malpractice. The doctor claimed that witnessing his patients' adverse reactions to the drug caused him such emotional distress that he discontinued administering myelograms to other patients and suffered economic loss by foregoing this aspect of his medical practice.<sup>112</sup> The court denied damages for this loss, stating that even if the doctor's debilitating emotional distress was the cause of his decision to stop administering myelograms, he was not a family member of the injured patients and was not physically endangered by the wrongdoing.<sup>113</sup>

In reaching this conclusion, the *Goldberg* court overlooked an essential distinction between the case before it and more typical claims of negligent infliction of emotional distress. Doctor Goldberg was not sim-

1138 (Colo. 1984) (en banc); *Green v. Leibowitz*, 118 A.D.2d 756, 757, 500 N.Y.S.2d 146, 148 (1986); *Vaillancourt v. Medical Center Hosp. of Vt., Inc.*, 139 Vt. 138, 143, 425 A.2d 92, 95 (1980). Although a few courts have been attracted to a more liberal rule of pure foreseeability, compare *Rodriguez v. State*, 52 Haw. 156, 174, 472 P.2d 509, 520-21 (1970) with *Ochoa v. Superior Court*, 39 Cal. 3d 159, 190, 703 P.2d 1, 23, 216 Cal. Rptr. 661, 683 (1985) (Bird, C.J., dissenting in part), most jurisdictions continue to restrain these negligence actions for emotional distress within the bounds of more restrictive criteria.

110. Courts have been concerned about unfairly imposing "disproportionate" recovery on defendants who were merely negligent. *E.g.*, *Smith v. Cote*, 128 N.H. 231, 247, 513 A.2d 341, 351 (1986).

111. 792 F.2d 305 (2d Cir. 1986).

112. *Id.* at 307-10. Although he originally claimed damages for the emotional distress, the doctor subsequently limited his request to compensation for the economic harm he suffered when his emotional distress caused him to forego treating other patients. *Id.* One can only speculate on the reasons for this retreat from the original claim. It seems unfairly cynical to posit that the doctor was admitting that he was not really upset by viewing his patients' suffering and was concerned only about the money he would lose in future operations. It seems more likely that the doctor believed the court would be more receptive to a damage theory that, while linked to emotional distress, stressed an actual pecuniary injury rather than emotional distress alone.

113. *Id.* at 310.

ply one of a potentially unlimited number of witnesses to another's suffering. Rather, he was the one person who had been defrauded into personally inflicting that injury on another. Thus, the doctor had the unusually close personal connection with the accident that courts ordinarily seek by requiring that the plaintiff be related to the victim or fear for his own physical safety.

As with intentional infliction of emotional distress, the standards developed to restrict the tort of negligent infliction of emotional distress should not be applied to fraud actions. Fraud is a recognized tort, not a novel, expansive theory of recovery. Society already has judged fraud to be significant rather than petty antisocial conduct. Because fraud actions are limited to persons actually defrauded, these actions will not burden the courts with suits by hundreds of bystanders who claim that they were upset by witnessing injuries inflicted upon others. Finally, allowing emotional distress damages in fraud cases will not impose an unfairly disproportionate burden on defendants. Justice favors a larger measure of recovery against intentional wrongdoers than against merely negligent ones.

In sum, the availability of separate claims for intentional or negligent infliction of emotional distress cannot adequately compensate fraud victims for their mental anguish. Too often, plaintiffs in fraud cases will be unable to satisfy the exacting requirements of these separate torts. The policy reasons supporting those restrictive standards, moreover, are inapplicable to fraud plaintiffs. Before deciding whether to award damages for emotional distress in fraud actions, the courts independently must examine the policies favoring and opposing those damages.

#### IV. SUPPLYING THE MISSING POLICY ANALYSIS: TOWARD A CONCEPTION OF FRAUD AS A DIGNITARY TORT

##### A. *Compensation for Emotional Distress in Fraud Cases*

Compensation for a wrongfully inflicted injury is a basic tort policy.<sup>114</sup> Courts should deny damages for emotional distress in fraud cases, therefore, only if a persuasive policy reason for denial exists. Three possible interests bear upon the availability of these damages: (1) the needs of potential plaintiffs; (2) the concerns of potential defendants; and (3) society's interest in an efficient court system. Balancing these interests suggests that, as a general rule, emotional distress damages should be awarded in fraud actions.

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114. See, e.g., RESTATEMENT, *supra* note 6, § 901 (stating the compensatory and deterrence goals of tort damages).



Fraud plaintiffs have a substantial interest in recovering damages for emotional distress. Defrauded plaintiffs are burdened by mental distress ranging from significant annoyance and frustration to severe depression. The cases include plaintiffs to whom fraud has meant deterioration of marital harmony,<sup>115</sup> or near paralysis in depression.<sup>116</sup> Indeed, in tort cases involving bad faith conduct "it is likely that the greatest portion of plaintiffs' injuries would take the form of emotional distress (e.g., vexation, tension, frustration, and worry)," rather than just financial harm.<sup>117</sup> Thus, if damages for emotional distress are not awarded, a defrauded plaintiff is denied full compensation.

Even commentators who oppose the awarding of emotional distress damages for fraud acknowledge that fraud victims may suffer serious emotional distress. Professor Dan Dobbs, for example, concedes that emotional distress "result[s] naturally enough from many frauds" and that "strong men may cry at the loss of money."<sup>118</sup> Another pair of authors agree that "one might suffer a great deal of anguish and humiliation as a result of being led down the primrose path through misrepresentation."<sup>119</sup>

A substantial body of sociological literature, moreover, confirms that victims of wrongdoing suffer severe mental anguish. In one survey, victims of property crimes rated their emotional suffering as worse than their financial loss.<sup>120</sup> These studies have focused on violent crimes, such as rape or assault, and on theft of tangible property. Their findings, however, may be relevant to the victims of white collar wrongs such as fraud.<sup>121</sup> Some research stresses "the extent and depth of feelings displayed [by victims] even after what appear objectively to be relatively minor crimes."<sup>122</sup> Other research suggests that the intentional nature of a crime contributes to the severe emotional distress suffered by victims; victims react to the intentional invasion of their dignity

115. *Godfrey v. Steinpress*, 128 Cal. App. 3d 154, 166-67, 180 Cal. Rptr. 95, 101 (1982) (telling the plaintiff's story of marital arguments, destruction of normal sex life, and husband's turn to alcohol).

116. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1164 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983).

117. *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 950, 122 Cal. Rptr. 470, 493 (1975).

118. D. DOBBS, *supra* note 7, at 602.

119. 2 J. GHIARDI & J. KIRCHER, *supra* note 59, § 19.17, at 48.

120. Maguire, *Victims' Needs and Victim Services: Indications from Research*, 10 VICTIMOLOGY 539, 549 (1985).

121. Some authors have encouraged victimology studies of white collar crime and illegal business practices. See Viano, *Theoretical Issues and Practical Concerns for Future Research in Victimology*, 10 VICTIMOLOGY 736, 740 (1985). To date, however, apparently no specific studies of the victims of such violations have been done.

122. Maguire, *supra* note 120, at 550.

with feelings of self-doubt, self-blame, humiliation, and distrust of others.<sup>123</sup> Intentional fraud may elicit similar feelings.

In certain respects the mental anguish experienced by fraud victims may be more intense than that suffered by some victims of other types of wrongdoing. Victims of armed robbery perhaps may fault themselves for their misfortune,<sup>124</sup> but defrauded investors or consumers may be even more likely to berate themselves for falling prey to a deceitful scam. Thus, because fraud results from a consensual transaction, the victim's feelings of self-blame and self-doubt may be heightened.

Finally, in creating the torts of intentional and negligent infliction of emotional distress, courts have recognized that "[e]motional injury . . . is deserving of redress" because it "can be as severe and debilitating as physical harm."<sup>125</sup> That observation applies equally to plaintiffs in fraud actions. Just as courts have weighted heavily the interests of distressed plaintiffs in developing new torts to compensate emotional harm, courts also should acknowledge the compelling interests of fraud plaintiffs in redressing their emotional injury.

The concerns of defendants in fraud cases do not override the plaintiffs' need for compensation. To win a fraud case, the plaintiff must establish that the defendant intentionally deceived the plaintiff.<sup>126</sup>

123. See Janoff-Bulman, *Criminal vs. Non-Criminal Victimization: Victims' Reactions*, 10 VICTIMOLOGY 498 (1985).

124. *Id.* at 505 (discussing self-blame of crime victims).

125. *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 135, 447 N.E.2d 109, 113 (1983); see also *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 653 (Tex. 1987) (stating that "[i]t is well recognized that certain psychological injuries can be just as severe and debilitating as physical injuries").

126. See, e.g., *KangaROOS U.S.A., Inc. v. Caldor, Inc.*, 778 F.2d 1571, 1573 (Fed. Cir. 1985); *Paskas v. Illini Fed. Sav. & Loan Ass'n*, 109 Ill. App. 3d 24, 32, 440 N.E.2d 194, 199 (1982); *Kawin v. Chrysler Corp.*, 636 S.W.2d 40, 43 (Mo. 1982); *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 178 (1986); *McGovern v. Crossley*, 477 A.2d 101, 103 (R.I. 1984); cf. *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986) (excusing the plaintiff from showing a specific intent to defraud, but requiring the plaintiff to establish that the defendant knew that the statements were false). Many courts permit reckless disregard for the truth to satisfy the scienter requirement of an action for deceit, but only because a knowingly ignorant individual who purports to speak from careful knowledge acts with the moral equivalent of intentional falsehood. See, e.g., *Martins Chevrolet, Inc. v. Seney*, 292 Md. 328, 333, 439 A.2d 534, 537 (1982); *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986); *Derry v. Peek*, 14 App. Cas. 337, 374 (H.L. 1889) (Herschell, L.J.).

A few courts speak loosely of negligent misrepresentation as fraud or "constructive" fraud. This Article, however, considers only the traditional action for deceit, which requires proof of intentional misrepresentation. All courts awarding damages for emotional distress in fraud cases have limited those damages to cases of intentional fraud. See, e.g., *Allen v. Jones*, 104 Cal. App. 3d 207, 215, 163 Cal. Rptr. 445, 450 (1980) (recognizing that "mental distress damages may be recovered in an action for deceit," but insisting that the "allegations of intentional wrongdoing must be specific and will be closely scrutinized"); *Charlie Stuart Oldsmobile, Inc. v. Smith*, 171 Ind. App. 315, 325, 357 N.E.2d 247, 252 (1976) (denying emotional distress damages when the defendant's

An intentional swindler is in a poor position to argue that it is unfair to compensate fully the plaintiff's loss;<sup>127</sup> thus, tort law's twin goals of deterrence and compensation combine to support the award of emotional distress damages against perpetrators of intentional fraud.<sup>128</sup> Moreover, defendants in fraud cases cannot claim that damages for emotional distress are either unforeseeable or unduly burdensome. In most cases the defrauded plaintiff's distress is easily foreseen. In those few cases in which the trivial nature of a fraud renders the plaintiff's emotional distress unexpected, the ordinary tort requirements of foreseeability and proximate cause will insulate the defendant from liability. Recovery for emotional distress in fraud actions, furthermore, will be limited to the plaintiffs who relied on the defendant's representations. Thus, a defendant need not worry about liability to an unknown and potentially limitless number of bystanders.<sup>129</sup> For all these reasons, the defendant's interests in a fraud case do not justify special theories of damages, du-

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conduct was merely negligent); *Crowley v. Global Realty, Inc.*, 124 N.H. 814, 818, 474 A.2d 1056, 1058 (1984) (distinguishing theories of intentional tort from theories of mere negligent misrepresentation).

127. For example, a substantial body of case law applies a broader view of proximate cause to cases involving intentional tortfeasors than to cases involving merely negligent tortfeasors. See Merritt, *A Consistent Model of Loss Causation in Securities Fraud Litigation: Suing the Remedy to the Wrong*, 66 Tex. L. Rev. 469, 501-06 (1988).

128. Several states draw a similar distinction in awarding emotional distress damages to plaintiffs who were upset by tortious interference with their personal property. Compensation is denied if the defendant has acted only with negligence, but can be granted if the defendant acted intentionally or with malice. See, e.g., *Walker v. Ingram*, 251 Ala. 395, 37 So. 2d 685 (1948) (awarding mental distress damages to tenant against landlord for landlord's intentional trespass to property under hostile circumstances); *Valley Dev. Co. v. Weeks*, 147 Colo. 591, 597-98, 364 P.2d 730, 733 (1961) (generalizing that plaintiffs can recover emotional distress damages for injury to property if "the act occasioning the injury to property was inspired by fraud, malice, or like motives" and stating that "proof of a willful or wanton tort as distinguished from a mere negligent injury, seems to be the most common distinction in the authorities"); *Thibodeaux v. Western World Ins. Co.*, 391 So. 2d 24 (La. Ct. App. 1980) (concerning intentional trespass and deliberate cutting of trees); *Fredeen v. Stride*, 269 Or. 369, 372-73, 525 P.2d 166, 168 (1974) (stating that emotional distress damages generally are denied in conversion cases, but are awarded if the defendant's conduct was "aggravated" and if "mental suffering is the direct and natural result of the conversion"). See generally Annotation, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R.2d 1070 (1953). In states following this approach, an award of emotional distress damages for fraud could be supported as an application of rules generally governing invasions of property interests. Occasional opinions have granted emotional distress damages for even negligent injury to property. See *Campbell v. Animal Quarantine Station*, 63 Haw. 557, 632 P.2d 1066 (1981).

129. Some fraudulent statements, such as fraudulent statements in a securities prospectus or an accounting statement, may create potential liability to numerous plaintiffs. The common-law courts already have determined, however, that in cases of deliberate fraud, as opposed to negligent misrepresentation, the defendant's interest in avoiding a large measure of liability does not outweigh the large plaintiff group's interest in receiving compensation. See *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931) (Cardozo, C.J.) (holding that a privity limit applies to an action for negligent misrepresentation, but not to an action for fraud).

ties, or causation to curtail liability for emotional distress.

Finally, society's interest in efficient judicial administration does not counsel denying damages for emotional distress.<sup>130</sup> Awarding these damages will not open the judicial floodgates to an entirely new class of claims; plaintiffs already bring fraud suits focusing on the pecuniary harm that they have suffered.<sup>131</sup> Nor would expanding the range of damages for fraud pose a serious risk of manufactured claims: in numerous other areas of tort law, courts already trust jurors to evaluate claims of emotional distress objectively.<sup>132</sup> Indeed, courts recognizing the new torts of intentional and negligent infliction of emotional distress have stressed their confidence in lay jurors' ability to evaluate the genuineness of such claims.<sup>133</sup> Finally, it is unlikely that allowing damages for emotional distress in fraud cases will burden the courts with trivial lawsuits. Claims of trivial distress will receive trivial damage awards. Few plaintiffs will wish to pay the legal bills for initiating such claims, and attorneys will not be willing to undertake these claims for a contingency fee.

In any event, if courts are concerned about the impact that claims for emotional distress in fraud cases might have on judicial administration, they should tailor the rules of proof to reduce that impact, rather than denying the damages altogether. A requirement of serious distress or substantial pecuniary injury, for example, might winnow out false

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130. This interest, in any event, should not be given undue weight in a policy calculus:

It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation"; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.

*Niederman v. Brodsky*, 436 Pa. 401, 412, 261 A.2d 84, 89 (1970) (quoting Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939)).

131. Only two potential ways exist through which the recognition of these damages might increase the amount of litigation. First, recognition theoretically might affect cases in which the amount of pecuniary damages did not justify the expenses of litigation (even when augmented by the possibility of a punitive damage award), but in which plaintiffs and their attorneys concluded that an extra measure of damages for emotional distress would make the lawsuit cost-effective. It seems unlikely, however, that many cases without a substantial financial injury or a prospect of substantial punitive damages would support a significant award for emotional distress. Second, recognition of emotional distress damages might have some effect if jurisdictions that do not currently permit fraud actions for purely nominal damages chose to permit these plaintiffs to sue solely for emotional distress, even absent any proof of other damage. Courts concerned about this second prospect, however, can retain their insistence that plaintiffs establish some real pecuniary loss as a predicate to claiming damages for emotional distress.

132. For example, jurors measure emotional distress in cases of assault, offensive battery, or false imprisonment, in which the emotional distress damages are for fright, embarrassment, or loss of dignity, rather than for physical pain and suffering. Many cases of physical injury also include an award for the plaintiff's pain and suffering.

133. See, e.g., *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); *Rodrigues v. State*, 52 Haw. 156, 172, 472 P.2d 509, 519-20 (1970); *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 134-35, 447 N.E.2d 109, 112 (1983).

claims and discourage plaintiffs from seeking recovery for trivial injuries. With alternatives such as these available, concerns about judicial administration cannot support a total ban on damages for emotional distress.

Thus, the legitimate interests of plaintiffs, defendants, and society combine to favor the awarding of emotional distress damages in fraud cases. Although some courts continue to deny these damages, the rationales for denial articulated by those courts do nothing to undermine this conclusion. Some courts deny damages for emotional distress because they believe that such damages are never awarded in fraud cases. These courts assert that because fraud is an "economic" tort, damages should redress only the plaintiff's "pecuniary" injuries.<sup>134</sup> These courts oversimplify the case law; a substantial body of precedent has permitted the awarding of emotional distress damages in fraud cases.<sup>135</sup> Moreover, the assertion that fraud damages protect only pecuniary interests is wholly conclusory; that some courts have limited fraud plaintiffs to economic damages does not explain why they have chosen to do so. Surely these courts cannot mean that fraud victims suffer only monetary injury. Case law shows the emotional distress suffered by fraud victims.<sup>136</sup>

Other courts have denied damages for emotional distress because these damages were not within the "contemplation of the parties."<sup>137</sup> These courts, however, have cited no empirical evidence for this proposition.<sup>138</sup> Especially in cases of consumer fraud, persons who have been defrauded may expect compensation for their frustration and mental anguish. Even in commercial cases these courts' argument rings hollow. Fraud is rarely within the contemplation of the innocent contracting party—otherwise the party would reject the bargain. To expect the de-

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134. See *supra* notes 19-21 and accompanying text.

135. On the difficulties of establishing the real "majority" rule, see *supra* notes 11-15 and accompanying text.

136. See *supra* notes 115-16 and accompanying text.

137. See, e.g., *Cornell v. Wunshel*, 408 N.W.2d 379 (Iowa 1987).

138. Some studies have suggested that the public underestimates the availability of compensation for pain and suffering in tort litigation. See O'Connell & Simon, *Payments for Pain and Suffering: Who Wants What, When, and Why?*, 1972 U. ILL. L.F. 1, 20 (reporting that most automobile accident victims surveyed did not expect to receive an award for pain and suffering). If this study remains an accurate gauge of public perceptions, it may bolster the assumption that other tort victims do not expect to receive such awards. On the other hand, these data indicated only the public's misperception of the legal definition of compensable damages; most respondents believed that in fairness they *should* receive compensation for pain and suffering. *Id.* at 30. If an inquiry into the expectations of the parties becomes simply an inquiry into what the parties think the law is, the inquiry is irrelevant in determining whether a rule denying recovery should be changed. A defrauded person might guess accurately that the law in his state would deny recovery of emotional distress damages. A person, however, might believe that the law is unfair in denying those damages.

frauded party to contemplate specifically not only the fraud, but also the emotional distress that will flow from the fraud, is unrealistic.

More importantly, a measure of damages based on the "contemplation of the parties" is an application of a contract principle rather than a tort standard.<sup>139</sup> Damages in tort suits should be measured by proximate cause, not the parties' expectations.<sup>140</sup> A different measure of consequential damages is appropriate in contract cases because the law does not wish to discourage "efficient" breaches of contracts.<sup>141</sup> Tort law, on the other hand, seeks to deter fraud, the antithesis of a bargained-for exchange. Fraud is an independent tort action that implicates tort policy.<sup>142</sup> Fraud is not merely a suit for breach of contract dressed in the guise of tort. Using a contract standard to determine damages based on the "contemplation of the parties," therefore, is inappropriate.

Finally, courts have justified denying emotional distress damages in fraud cases because, according to these courts, the purpose of fraud damages is only to return plaintiffs to the position they occupied before the fraud.<sup>143</sup> Again, this rationale is merely a conclusory assertion. Moreover, the argument actually seems to support compensation for emotional distress. Recompensing economic loss alone does not return defrauded plaintiffs to their original position because it fails to redress the plaintiff's mental anguish. If courts truly wish to "return plaintiffs

139. See, e.g., *Scott v. Hurd-Corrigan Moving & Storage Co.*, 103 Mich. App. 322, 349, 302 N.W.2d 867, 878 (1981) (stating that in a suit for breach of contract "the damages recoverable are those damages that arise naturally from the breach or which reasonably can be said to have been in contemplation of the parties at the time the contract was made"); *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). Even contract cases often broaden the "contemplation of the parties" limit to a test of foreseeability. See E. FARNSWORTH, *CONTRACTS* § 12.14, at 876-77 (1982). The concept of foreseeability in contract law, however, "is a more severe limitation than is the requirement of substantial or 'proximate' cause" in tort. *RESTATEMENT (SECOND) OF CONTRACTS* § 351 comment a (1979) [hereinafter *RESTATEMENT CONTRACTS*].

140. See, e.g., *Lowrey v. Dingmann*, 251 Minn. 124, 127, 86 N.W.2d 499, 502 (1957) (stating that "the party guilty of the fraud is liable for all out-of-pocket-loss damages proximately caused by the fraud, even though the damages were not within the contemplation of the wrongdoer or his adversary"); see also R. DUNN, *supra* note 7, § 1.3, at 11-15 (stating that courts generally do not limit consequential damages in fraud actions to those within the contemplation of the parties, or even to those that were foreseeable).

141. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 107 (3d ed. 1986). Posner explains that the usual measure of damages in contract law seeks to satisfy "the objective of giving the promisor an incentive to fulfill his promise unless the result would be an inefficient use of resources." *Id.* at 108. Posner also advises one to "[n]otice how careful the law must be not to exceed compensatory damages if it does not want to deter efficient breaches." *Id.* When damage measures are uncertain, it will be difficult for a party contemplating breach to determine the rationally preferable course of action.

142. Thus, for example, punitive damages are available under a tort theory of fraud, but not available for breach of contract.

143. *Ellis v. Crockett*, 51 Haw. 45, 52, 451 P.2d 814, 820 (1969).

to the position they occupied before the fraud," courts should award a full measure of damages, including damages for emotional distress.

### B. *Treating Fraud as a Dignitary Tort*

The change from denial to acceptance of emotional distress damages in fraud cases does not require radical overhaul of the law. Instead, it requires only that the courts perceive fraud not only as a pecuniary tort, but also as a dignitary tort. Courts should recognize that in a modern commercial society fraud is in part a dignitary tort. This shift in perception would bring fraud jurisprudence into line with other trends in modern tort law.

All courts award emotional distress damages for certain dignitary wrongs, even absent any physical injury to the plaintiff. Torts such as assault, battery, and false imprisonment can be termed "dignitary" because successful plaintiffs may recover damages for emotional distress without proving any physical injury. Indeed, the victims of assault, battery, and false imprisonment may recover nominal damages as a means of assuaging their dignity even if they have suffered no physical or emotional injury at all.<sup>144</sup>

These traditional dignitary torts redress wrongs that would have been most common and keenly felt in England during the early development of the common law. As our society has developed, however, citizens have identified a new range of activities as assaulting their dignity. Courts have responded to this development by recognizing new dignitary torts, including intentional infliction of emotional distress<sup>145</sup> and invasion of privacy.<sup>146</sup> All these torts, virtually unknown before the twentieth century, compensate emotional and dignitary harms, rather than economic or physical loss.

Just as courts have not hesitated to recognize entirely new dignitary torts, neither should they be reluctant to acknowledge that an older tort action, such as fraud, may have a dignitary aspect. Common-law courts are free to rework an old conception of fraud in light of fresh

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144. In a related sense, actions such as libel and slander per se are dignitary torts. Within first amendment limits, the common law permits jurors to award substantial presumed damages even without proof of actual injury to reputation.

145. See *supra* notes 76-78 and accompanying text.

146. See, e.g., *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970). Courts continue to recognize new tort actions in which recovery for emotional distress is an important element of damages. See, e.g., Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1446 (1982) (stating that mental distress is "the major injury in many breach of confidence cases"); Note, *Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra-Contract Damages*, 64 N.C.L. REV. 1421, 1422-23 (1986) (stating that an insurer's bad faith refusal to settle with its insured may permit the insured to recover damages for emotional distress).

policy views.<sup>147</sup> Citizens today are as likely to suffer distress from commercial deception as from bodily assault or false imprisonment.<sup>148</sup> Rather than ignoring the claims of fraud plaintiffs who have suffered substantial frustration or perhaps severe emotional distress, courts should recognize that fraud is at least in part a dignitary tort and should award damages for that distress.

Allowing recovery for emotional distress in fraud actions does not mean that all defrauded plaintiffs automatically will recover those damages. Plaintiffs bear the burden of proving that their distress is genuine, and jurors may reject as inherently improbable any claims for substantial emotional distress based upon trivial harms. In addition, just as battery requires contact, assault requires apprehension, and false imprisonment requires confinement, fraud requires proof of some underlying financial injury.<sup>149</sup> Courts may maintain the traditional elements of

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147. New Jersey's Supreme Court recently decided to award nominal damages in actions for fraud even without proof of a specific amount of loss, so long as the plaintiff established "some loss, detriment, or injury." *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 48, 477 A.2d 1224, 1229-30 (1984). In endorsing the availability of nominal damages in a fraud action, the court determined that the traditional insistence on proof of compensatory damages was based more on outmoded historical distinctions between the old English writs than on any considered policy judgment. *Id.* at 52, 477 A.2d at 1232. A similar fresh look valuing policy over history is appropriate in determining whether emotional distress damages are appropriate.

Refining fraud damages to include compensation for emotional distress is not inconsistent with recent legislative reforms of tort damages. See statutes cited *supra* note 2. Those reform statutes impose ceilings—typically very high ceilings—on emotional distress damages to prevent runaway jury verdicts; they do not deny these damages entirely. See, e.g., MINN. STAT. ANN. § 549.23 (West 1988) (limiting damages for intangible loss in civil actions to \$400,000); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1988) (capping damages for noneconomic loss in personal injury actions at \$875,000). Moreover, some of the statutes are explicitly limited to negligence claims and do not purport to cover intentional torts. See ALASKA STAT. § 09.17.010 (Supp. 1988) (placing \$500,000 cap on damages for noneconomic losses in personal injury claims based on negligence); HAWAII REV. STAT. §§ 663-8.5, -8.7 (Supp. 1987) (applying \$375,000 cap to actual physical pain and suffering, but not to other mental anguish and not to any intentional torts). Other statutes limit damages only in medical malpractice litigation, in which a particular insurance crisis has prompted passage of these measures. See, e.g., CAL. CIV. CODE § 3333.2 (West Supp. 1988) (limiting damages for noneconomic loss in medical negligence cases to \$250,000); IND. CODE ANN. § 16-9.5-2-2 (Burns 1983) (limiting patient's recovery for injury or death to \$500,000).

148. E. SUTHERLAND & D. CRESSEY, *CRIMINOLOGY* 42 (8th ed. 1970) (stating that "[i]t is probable . . . that fraud is the most prevalent crime in America"). Comparative statistics are not readily available because the Federal Bureau of Investigation (FBI) does not include fraud in its statistical index of crime. The FBI excludes the various forms of fraud "not because they are unimportant predations but because they are difficult for the police to know about very fully, and because they are often difficult to count even when much detail on them is known." *HANDBOOK OF CRIMINOLOGY* 62 (D. Glaser ed. 1974).

149. See, e.g., *Berkel & Co. Contractors v. Providence Hosp.*, 454 So. 2d 496 (Ala. 1984); *Downer v. Bramet*, 152 Cal. App. 3d 837, 199 Cal. Rptr. 830 (1984); *Courtney v. Feldstein*, 147 Mich. App. 70, 382 N.W.2d 734 (1985); *Jurcich v. General Motors Corp.*, 539 S.W.2d 595, 600-01 (Mo. Ct. App. 1976). Courts recognizing emotional distress damages for fraud have done so to grant full compensation for misconduct that the law has deemed independently tortious and actionable; the plaintiff must establish all elements of a cause of action for fraud, including some



a cause of action for fraud while redefining the scope of damages recoverable by plaintiffs who establish that cause of action. Proximate cause limits also will protect defendants against far-fetched claims of emotional distress that are tied to the fraud more by the ingenuity of the plaintiff's imagination than by a reasonable response.<sup>150</sup>

### C. *Evaluating the Qualified Approaches*

As previously discussed, some courts have suggested the imposition of further limits on a plaintiff's ability to recover for emotional distress in fraud cases.<sup>151</sup> A careful examination of four such limiting approaches reveals that none of them serves the policies identified above.<sup>152</sup>

#### 1. Requiring Severe Distress

Some courts have required fraud plaintiffs to establish that their distress was particularly severe in order to recover compensation for that distress.<sup>153</sup> At first glance this approach appears to represent a sensible compromise between absolute rules that either allow or deny damages for emotional distress. Further reflection, however, demonstrates the difficulties with this restriction. A requirement of substantial emotional distress requires the court or jury to mark an uncertain boundary between serious mental anguish and lesser emotional upset or disappointment. The cases themselves indicate that this line is difficult to draw; jurors and judges often disagree,<sup>154</sup> and a court may find similar testimony showing emotional distress adequate in one case and inadequate in the next case.<sup>155</sup> To demand proof of severe emotional distress,

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pecuniary harm. On the other hand, those few courts that have decided to allow an action for purely nominal fraud damages even without proof of specific, quantifiable damage, *see* cases cited *supra* note 105, appropriately might permit jurors to award compensation for emotional distress even absent specific proof of financial injury.

Cases of deception unaccompanied by financial injury may, of course, support claims of emotional distress if the deception or "fraud" is a means of accomplishing another recognized tort (for example, a battery committed through fraudulently obtained consent), or is conduct that satisfies the independent, stringent standards for intentional infliction of emotional distress.

150. *See* *Cable v. Hechler*, 532 F. Supp. 239, 245 (E.D.N.Y. 1981) (holding that the defendant's allegedly fraudulent stock market transactions were not the proximate cause of the injury to the plaintiff's reputation that occurred when the defendant's transactions triggered an inquiry by the American Stock Exchange; the plaintiff's misleading answers during this inquiry inspired an investigation of the plaintiff by the Securities and Exchange Commission).

151. *See supra* notes 26-74 and accompanying text.

152. *See supra* notes 114-50 and accompanying text.

153. *See supra* notes 26-34 and accompanying text.

154. *See supra* note 34.

155. *See supra* note 34. Perhaps some of the diverse results reached in similar cases may be reconciled by reference to the plaintiff's ability or inability to establish objective symptoms of emotional distress, such as headaches or loss of sleep. On the other hand, the jurisdiction that

therefore, burdens trial and appellate courts with a factual dispute to which no clear guidelines apply and opens the door to inconsistent resolutions of the issue.<sup>156</sup>

Moreover, a required quantum of emotional distress is not necessary to protect the interests of defendants. When emotional distress is minimal, the jury will award only modest damages.<sup>157</sup> Indeed, a prerequisite of serious emotional distress might work against defendants' interests by encouraging plaintiffs to overstate the degree of their emotional distress in order to satisfy the judicial standard.<sup>158</sup>

Finally, the traditional dignitary torts such as assault, battery, and false imprisonment do not require plaintiffs to prove that their distress meets a higher standard of severity.<sup>159</sup> These torts redress emotional injury and protect the plaintiff's dignity even when the emotional distress is slight. The extent of the mental distress dictates the extent of

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most clearly has required serious distress in fraud cases currently does not require proof of severe distress by objective symptomology from plaintiffs who bring suit under other tort theories such as negligent infliction of emotional distress. See *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649 (Tex. 1987).

156. A requirement of particularly substantial emotional distress, of course, might discourage some plaintiffs from introducing any evidence of emotional distress and enable courts to dismiss other claims for emotional distress based on the pleadings. This preservation of judicial time, however, is unlikely to outweigh the time spent litigating the severity of emotional distress issue in both trial and appellate courts. Once plaintiffs have expended the time and money necessary to come to court, they have an incentive to litigate any issue that might increase their monetary recovery.

157. When the jury grants an award greater than the amount that the judge believes reasonably can be awarded, the judge can order *remittitur* or a new trial. The judge need not deny all recovery. Moreover, judges should consider a substantial jury award as an indication that ordinary individuals do not regard the plaintiff's distress as an insubstantial frustration unworthy of recovery.

158. Cf. *Garrard*, 730 S.W.2d at 652 (stating that the requirement that plaintiffs establish physical symptoms of severe distress in a negligent infliction case is undesirable because it encourages victims to exaggerate symptoms).

159. See, e.g., *Clark v. I.H. Rubenstein, Inc.*, 335 So. 2d 545 (La. Ct. App. 1976) (awarding \$500 to compensate the plaintiff for embarrassment resulting from a mistaken accusation of shoplifting, even though the plaintiff was detained wrongfully for only five minutes and was treated courteously); *Smith v. Hubbard*, 253 Minn. 215, 91 N.W.2d 756 (1958) (awarding \$1,000 to compensate a police officer for "ribbing" and kidding from his friends after the officer had suffered only lost buttons in an assault). In general, cases that address these torts state no express requirement that distress be particularly serious or severe. In contrast, courts that have articulated special standards for serious distress in developing the torts of negligent and intentional infliction of emotional distress have been particularly careful to announce requirements of severe distress. See *supra* note 77 and accompanying text. These courts, presumably, have found it important to emphasize this quantum of distress requirement because the law generally has not required a particular level of emotional distress in order to extend compensation.

A rule that would eliminate recovery for modest amounts of distress resulting from torts such as assault, battery, and false imprisonment might be largely meaningless in any event, because jurors are permitted to award nominal damages for these torts even without a showing of injury. See, e.g., *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983) (allowing the plaintiff to recover nominal damages for battery even though the act was harmless).

recovery, but does not mark the difference between recovery and denial of all emotional distress damages. Similarly, courts should recompense a fraud plaintiff's mental distress without requiring a threshold of severity.

Most jurisdictions demand proof of severe emotional distress before allowing recovery for intentional or negligent infliction of emotional distress.<sup>160</sup> The special policy considerations that shaped the requirements for these torts, however, do not apply to fraud cases. Fraud is a traditional, well-established tort, not a novel theory of recovery. Recognizing recovery for modest emotional distress, therefore, will not create claims for plaintiffs who otherwise would not have had a cause of action. Moreover, the requirement of pecuniary harm already limits the number of plaintiffs who may sue successfully for fraud. In this context, an additional requirement of severe emotional harm serves no useful purpose.

On the other hand, courts in a few jurisdictions have hinted that they may require substantial distress even in traditional dignitary tort actions.<sup>161</sup> Texas cases that require a high degree of mental anguish in fraud cases may be justified as an application of a general rule that Texas courts have applied to other dignitary torts.<sup>162</sup> In jurisdictions such as Texas, however, the policy analysis suggested above<sup>163</sup> provides a basis for relaxing the requirement of severe emotional distress in all dignitary tort cases.

## 2. Requiring Substantial Pecuniary Harm

Some courts have limited recovery of emotional distress damages for fraud to plaintiffs who can establish that their pecuniary damages were substantial.<sup>164</sup> This requirement may mean only that the plaintiff must prove the minimal pecuniary harm necessary to state a claim for fraud.<sup>165</sup> If so, the requirement adds little of value to the legal analysis.

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160. See *supra* note 77 and accompanying text.

161. See *Campbell v. Jenkins*, 43 Colo. App. 458, 460, 608 P.2d 363, 364 (1979) (concerning assault; fright will not support a compensatory damage award unless the fright is serious enough to cause physical symptoms such as nausea, headaches, or mental distress; the court borrowed this requirement from a case that announced the requirements for negligent infliction of emotional distress); *Johnson v. Supersave Mkts., Inc.*, 686 P.2d 209, 213 (Mont. 1984) (concerning false imprisonment).

162. See, e.g., *Ryder Truck Rentals, Inc., v. Latham*, 593 S.W.2d 334 (Tex. Ct. App. 1980) (concerning slander); *Trevino v. Southwestern Bell Tel. Co.*, 582 S.W.2d 582, 584 (Tex. Ct. App. 1979) (concerning invasion of privacy).

163. See *supra* notes 114-50, 157-58 and accompanying text.

164. See *supra* notes 35-41 and accompanying text.

165. See *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975). This court suggested that "interference with one's legally protected interests is sufficient damage to satisfy the [substantial damage] test . . . and to guard against potentially fraudulent

If, on the other hand, these courts want the plaintiff to establish a high degree of pecuniary harm before recovering emotional distress damages, this approach poses several problems. First, attempting to distinguish substantial from insubstantial pecuniary loss creates the same difficulties as trying to distinguish serious from slight emotional distress. Parties will consume valuable court time debating the value of the plaintiff's financial loss, and both judges and juries will reach conflicting conclusions on whether a particular loss qualifies as substantial. Thus, society's interest in efficient judicial administration disfavors a requirement of substantial pecuniary loss.

Nor is this limitation necessary to protect a defendant's interest in avoiding vexatious litigation and burdensome liability. Absent serious financial damage, the plaintiff is unlikely to pursue an action for fraud or obtain a large damage award. Jurors will be skeptical of plaintiffs' claims that trivial financial losses triggered severe emotional distress. A requirement of substantial pecuniary injury, therefore, is largely unnecessary.

Traditional dignitary torts do not link recovery for emotional distress to a particular quantum of physical or economic harm. A plaintiff in a battery action, for example, can recover for humiliation and anger even if the defendant's offensive touching did not cause the slightest physical harm.<sup>166</sup> Courts in these cases have recognized that emotional distress is an independent harm that deserves compensation despite the absence of other injuries. Similarly, the plaintiff's key to recovery of emotional distress damages in fraud actions should be proof of the underlying elements of fraud. Once the plaintiff has established those elements, the availability of emotional distress damages should rest on the plaintiff's ability to prove the harm, not on the extent of the plaintiff's financial loss.

### 3. Distinguishing Personal Frauds from Business Frauds

Some courts have denied compensation in business fraud cases by suggesting a distinction that would deny emotional distress damages in

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emotional distress claims." *Id.* at 937, 122 Cal. Rptr. at 484. The court opined that any further requirement of damage would "add little to the guarantee of genuineness." *Id.* The court's discussion of this issue, however, is dictum, because the plaintiff established substantial financial injury of \$170 for loss of property use and \$7,100 for attorney's fees in an action to quiet title. *Id.* at 937 n.11, 938, 122 Cal. Rptr. at 484 n.11, 485.

166. See, e.g., *Whitley v. Andersen*, 37 Colo. App. 486, 488, 551 P.2d 1083, 1085 (1976); *Southern Fin. Co. v. Alexander*, 113 Ga. App. 740, 149 S.E.2d 526 (1966); *Green v. Washington Suburban Sanitary Comm'n*, 259 Md. 206, 269 A.2d 815 (1970); *Conway v. Kansas City Pub. Serv. Co.*, 234 Mo. App. 596, 125 S.W.2d 935 (1939); *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967); *S.H. Kress & Co. v. Musgrove*, 153 Va. 348, 149 S.E. 453 (1929) (concerning battery and false imprisonment).

business fraud cases, but allow them for other kinds of fraud.<sup>167</sup> A distinction between business frauds and personal frauds, however, is largely unworkable. Some frauds, such as those involving promises of marriage or the mishandling of funeral arrangements, are clearly personal.<sup>168</sup> Deception in the sale of personal insurance may also be personal, because "a primary consideration in purchasing insurance is the peace of mind and security it will provide when the contingency insured against arises."<sup>169</sup> On the other hand, how should one classify an employee's claim that he was defrauded into executing a contract under which he gave up five years' worth of back wages;<sup>170</sup> or a small investor's claim that a securities fraud destroyed her family's financial security;<sup>171</sup> or a real estate owner's claim that she was induced to sell a piece of commercial property by misrepresentations that catered to her distinctive religious beliefs?<sup>172</sup> If courts adhere to a distinction between business and personal frauds, adjudication of these claims will burden the courts with lengthy debates over whether the transaction was of a business or personal nature.

In most cases, moreover, the plaintiff's legitimate interests strongly favor recovery, regardless of the business nature of the fraud. Consumer purchases are business transactions, but are rife with the potential to inflict severe frustration on a defrauded consumer. It is certainly foreseeable that a person who is deceived into purchasing a termite-infested dwelling or paying thousands of dollars for a defective automobile will suffer substantial distress. To deny recovery in these cases would leave plaintiffs badly undercompensated.

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167. See *supra* notes 42-52 and accompanying text.

168. Recognition of the availability of emotional distress damages in fraud may be less important to these types of claims because a court will be more likely to find that these facts satisfy the "outrageousness" standard for a separate action for intentional or reckless infliction of emotional distress. Moreover, many courts have granted emotional distress recovery for these kinds of "noncommercial" contracts on the basis of breach of contract, even absent proof of fraud. See *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979); RESTATEMENT CONTRACTS, *supra* note 139, § 353.

169. *Jarchow*, 48 Cal. App. 3d at 940, 122 Cal. Rptr. at 486 (endorsing the award of emotional distress damages for the insurer's breach of an implied covenant of good faith).

170. In *Moore v. Slonim*, 426 F. Supp. 524 (D. Conn.), *aff'd*, 562 F.2d 38 (2d Cir. 1977), the court judged these facts to constitute "business" fraud.

171. In *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1167 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983), a brokerage firm argued that it should not be responsible for emotional distress suffered by a defrauded client because the underlying tort was only a "business fraud." The court evinced no interest in a distinction between business and other frauds, and therefore made no attempt to categorize the securities fraud claim as one or the other. One could argue that securities fraud claims by brokerage firm clients against stockbrokers should be treated as claims of consumer fraud.

172. Cf. *Newman v. Smith*, 77 Cal. 22, 18 P. 791 (1888) (not clear whether the real estate was commercial or residential).

Even victims of more purely commercial frauds may experience serious mental anguish. Individuals who imperil either a child's college education or a secure retirement by staking their savings in a fraudulent investment scheme surely suffer emotional distress. Proprietors of small businesses likewise experience mental despair when their businesses are threatened. The test for recovery of emotional distress should be the foreseeability of distress rather than an artificial distinction between business contexts and other contexts.<sup>173</sup>

Finally, this foreseeability test adequately protects the interests of defendants in fraud cases. If the defendant can foresee emotional distress to the plaintiff, the defendant should be accountable for that distress, no matter how sophisticated the plaintiff or how commercial the setting of the fraud. Entrance into the business world surely does not amount to an assumption of risk that requires one to suppress feelings against illegal and oppressive conduct; free enterprise should never be a license to cheat others. A case-by-case consideration of whether the defendant's misconduct was likely to cause emotional disturbance more fairly balances the interests of plaintiffs and defendants than does an approach that separates business and personal frauds.<sup>174</sup>

#### 4. Awarding Emotional Distress Damages as a Part of Punitive Damages

Some jurisdictions may deny emotional distress damages as a separate category of recovery in fraud cases, but permit jurors to award

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173. A more technical distinction might suggest that individuals could not recover for business frauds in which their corporate entities were swindled. Thus, one court denied the president (and apparent founder) of a corporation the right to seek recovery for the emotional distress he suffered when an insurance company allegedly defrauded him into signing a release. *Gibbs v. Jefferson-Pilot Fire & Casualty Ins. Co.*, 178 Ga. App. 544, 343 S.E.2d 758 (1986). The court reasoned that the president could not sue individually to recover damages for his mental anguish based on fraud because "he admits he procured the insurance for his corporations for the benefit of the corporations and signed the releases as president of the corporations." *Id.* at 545, 343 S.E.2d at 759. Presumably, the court's opinion foreclosed any recovery of emotional distress damages; although corporations are fictional legal "persons," they feel no pain. See *Ailetcher v. Beneficial Fin. Co.*, 2 Haw. App. 301, 632 P.2d 1071 (1981); *Hogan Exploration, Inc. v. Monroe Eng'g Assoc.*, 430 So. 2d 696 (La. Ct. App. 1983) (holding that corporate plaintiffs cannot experience mental distress); *In re James Noel Flying Serv.*, 61 Bankr. 335 (Bankr. W.D. La. 1986).

Perhaps one can justify this result as one burden accepted by an entrepreneur in exchange for the benefits of doing business in the corporate form. To deny the legitimacy of the anguish suffered by the founder and president of a corporation because he chose to file a corporate certificate with the secretary of state's office rather than to do business as an unincorporated proprietor, however, does seem to ignore the realities of reasonable human reactions.

174. For an example of a court that adopted this case-by-case approach, see *Baker v. American States Ins. Co.*, 428 N.E.2d 1342, 1349 (Ind. Ct. App. 1981) (holding that a worker's fraud claim against an insurance company stated a claim on which relief could be granted for emotional distress).

those damages surreptitiously as part of punitive damages.<sup>175</sup> This practice does not serve well the legitimate interests of either plaintiffs or defendants. Plaintiffs lose the opportunity to present concrete evidence of their emotional distress and to urge the jury to compensate that injury. Likewise, defendants have no chance to counter the plaintiff's proof of emotional distress or to exhort the jury to minimize those damages. When damages for emotional distress are awarded furtively as an unspecified part of the punitive damage award, jurors may vastly underestimate or overestimate the plaintiff's injury.

Nor does the practice of awarding emotional distress damages as part of punitive damages foster efficient, evenhanded judicial administration. Courts cannot review the suitability of emotional distress damages when those damages are hidden as unstated components of punitive damage awards. Moreover, to permit the inflation of punitive damage awards in this manner further undermines the credibility of the judicial system in the eyes of critics who continually attack large punitive damage awards. Recognizing emotional distress as a separate item of compensation in fraud cases not only would benefit plaintiffs, defendants, and courts, but also would end needless speculation over whether a generous measure of punitive damages included compensation for mental anguish.

#### V. CONCLUSION

Woody Guthrie observed in song that "[s]ome will rob you with a six gun, and some with a fountain pen."<sup>176</sup> The law always has compensated victims of armed robbery for their mental distress, but many courts have been unwilling to extend that relief to the targets of more genteel extortions. The modern focus on compensation for dignitary harms, combined with a recognition that fraud victims suffer distress ranging from anger to debilitating anguish, suggests that the distinction between fraud victims and victims of other wrongful acts is outdated. In a commercial society, wrongdoers may violate individual integrity by pen point as well as by gun point. By acknowledging the dignitary dimension of fraud and allowing recovery of emotional distress damages in fraud cases, courts will better serve both the compensatory and deterrent functions of tort law.

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175. See *supra* notes 59-74 and accompanying text.

176. Guthrie, *Pretty Boy Floyd*, in A. LOMAX, *FOLK SONGS OF NORTH AMERICA* 437 (1960).