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Jonathan G. Lester

Boston College Law School, jonathan.lester@bc.edu

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THE TRUE BENEFIT OF THE BARGAIN: HOW EMOTIONAL DISTRESS DAMAGES MAKE FRAUD VICTIMS WHOLE

Abstract: For over a century, American courts have recognized emotional distress damages in tort. Initially, these decisions limited recovery for emotional distress to cases where the victim experienced a physical impact. Throughout the twentieth century, that requirement largely fell out of favor as courts began to recognize emotional injury in the absence of physical harm, supported by new psychiatric research. Despite this, the availability of emotional distress damages in fraud cases continues to divide jurisdictions. Many jurisdictions refuse to recognize any more than pecuniary damages to plaintiffs in fraud, characterizing fraud as a purely economic tort. The experience of victims challenges this assumption, as individuals report significant psychiatric and physical maladies resulting from fraud. Jurisdictions that award emotional distress damages in fraud divide further still about the appropriate standard. Some courts focus on the plaintiff's severity of harm or physical manifestation of distress. Others look to the defendant's malice, intent, or ability to foresee emotional harm. This Note argues that current psychiatric research and self-reported emotional distress of fraud victims demonstrate the need to universally recognize emotional distress damages. This Note further argues the severity standard offers the best combination of flexibility for plaintiffs and protection for defendants against frivolous claims. Only with the recognition of emotional distress damages can fraud victims become genuinely whole.

INTRODUCTION

Charles and Wanda Phillips thought they had found a safe bet for their retirement money, better than a bank.¹ They invested their entire retirement savings of \$120,000 into the Baptist Foundation of Arizona.² The Foundation's promotional videos, screened in community churches, promised that the fund had never lost its investors' money.³ Charles felt that he could trust the fund because he and his wife "were dealing with Christians and a real Christian doesn't steal your money."⁴ That changed in 1999 when the investors' checks

¹ Emily Cartwright, *Taken on Faith: A Look into the Baptist Foundation's Fall*, CBS60 MINUTES (July 30, 2002), <https://www.cbsnews.com/news/taken-on-faith/> [https://perma.cc/V8RE-R29U].

² *Id.*

³ *Id.*; 60 Minutes, *Taken on Faith—How the Wicked Use Religion to Scam the Virtuous*, YOUTUBE (Nov. 23, 2018), <https://www.youtube.com/watch?v=krWT1SGrpHY&t=9s> [https://perma.cc/R99N-96M5].

⁴ Cartwright, *supra* note 1.

stopped coming, and Charles, Wanda, and 11,000 other investors became victims of the foundation's financial collapse due to fraud.⁵

Fraud is its own industry, with billions of dollars stolen every year from the world's biggest companies—and unwary, vulnerable individuals.⁶ Some fraudsters exploit social connections to attack retirement savings, insurance coverage, and personal assets.⁷ The financial ramifications are readily apparent: losses of homes, cars, and savings.⁸ In Arizona, the Baptist Foundation retirees, having lost most or all of their savings, had to return to work.⁹ The emotional consequences of such fraud, however, may be less obvious and thus forgotten in the effort to make victims whole.¹⁰ In fact, the availability of emotional distress damages divides U.S. courts between those that posit that fraud only allows for pecuniary damages, and those that believe emotional distress in

⁵ *Id.*; Veronica Graff, *20 Years Later, Victims of Baptist Foundation of Arizona Scheme Still Recovering*, PHX. BUS. J. (Dec. 16, 2018), <https://www.bizjournals.com/phoenix/news/2018/12/16/20-years-later-victims-of-baptist-foundation-of.html> [<https://perma.cc/9UZJ-5RB6>] (asserting that the Baptist Foundation of Arizona scandal “is considered one of the largest affinity frauds in U.S. history”); Todd Starnes, *A Look Back at the Arizona Baptist Foundation Struggle*, BAPTIST PRESS (Dec. 17, 1999), <http://m.bnnews.net/4394/a-look-back-at-the-arizona-baptist-foundation-struggle> [<https://perma.cc/SXJ3-UYU5>] (providing an overview of the collapse of the Arizona Baptist Foundation).

⁶ See ASS'N OF CERTIFIED FRAUD EXAM'RS, REPORT TO THE NATIONS: 2018 GLOBAL STUDY ON OCCUPATIONAL FRAUD AND ABUSE 4 (2018) (finding over \$7 billion of total fraud losses for businesses); Roger Aitken, *U.S. Card Losses Could Exceed \$12B by 2020*, FORBES (Oct. 26, 2016), <https://www.forbes.com/sites/rogeraitken/2016/10/26/us-card-fraud-losses-could-exceed-12bn-by-2020/#1121fed3d243> [<https://perma.cc/KE7S-79YT>] (detailing global and American credit card fraud loss statistics); Lyle Daly, *Identity Theft and Credit Card Fraud Statistics for 2019*, MOTLEY FOOL (Apr. 13, 2020), <https://www.fool.com/the-ascend/research/identity-theft-credit-card-fraud-statistics/> [<https://perma.cc/R9XH-R7FU>] (discussing statistics for individual identity theft). A 2019 study on 4,425 residents of Madrid, Spain found that 10.8% of respondents had experienced bank fraud. Encarnación Sarriá et al., *Financial Fraud, Mental Health, and Quality of Life: A Study on the Population of the City of Madrid, Spain*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Sept. 6, 2019, at 3.

⁷ See, e.g., *Nelson v. Progressive Corp.*, 976 P.2d 859, 862 (Alaska 1999) (insurance recovery); *Food Fair, Inc. v. Anderson*, 382 So. 2d 150, 151 (Fla. Dist. Ct. App. 1980) (employer/employee fraud case); *Sumler v. E. Ford, Inc.*, 2004-CA-01574-COA (¶ 10), 915 So. 2d 1081, 1086 (Miss. Ct. App. 2005) (automobile repossession); *Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 129 (Tex. App. 4th Dist. 1985) (real estate fraud); *Affinity Fraud: How to Avoid Investment Scams That Target Group*, U.S. SEC. & EXCH. COMM'N INV. PUBL'NS (Oct. 9, 2013), <https://www.sec.gov/investor/pubs/affinity.htm> [<https://perma.cc/T2KF-H599>] (defining affinity fraud). The U.S. Securities and Exchange Commission defines “[a]ffinity fraud” as “investment scams that prey upon members of identifiable groups, such as religious or ethnic communities, the elderly, or professional groups.” *Affinity Fraud*, *supra*. The perpetrator may pose as a fellow affinity member (or actually be a member of that community) and enlist group leaders to communicate the fraudulent information. *Id.*

⁸ See *Hoffman v. Stamper*, 867 A.2d 276, 297–98 (Md. 2005) (fraud victims lost homes); *Sumler*, 2004-CA-01574-COA (¶¶ 24–29), 915 So. 2d at 1088–89 (fraud victim lost car to repossession); *Cartwright*, *supra* note 1 (fraud victim lost retirement savings).

⁹ *Cartwright*, *supra* note 1.

¹⁰ See, e.g., *Hoffman*, 867 A.2d at 295 (stating that victims suffered anger, humiliation, headaches, vomiting); *Sumler*, 2004-CA-01574-COA (¶¶ 30–31), 915 So. 2d at 1089–90 (claims of embarrassment and stress); *Cartwright*, *supra* note 1 (noting victims' lack of ability to sleep).

fraud cases warrants compensation.¹¹ Those in the latter group diverge further still on the appropriate way to calculate emotional damages.¹² Thus, fraud victims seeking just compensation for their emotional suffering meet inconsistent outcomes.¹³

The requirements for recovery in states that do recognize emotional distress damages are equally varied.¹⁴ Some jurisdictions require some physical manifestation of trauma.¹⁵ These jurisdictions posit that such evidence is necessary to screen out false claims and provide the courts with an administrable standard to evaluate emotional distress.¹⁶ This requirement of post-incident physical manifestation replaced the former “physical impact” rule.¹⁷ The physical impact rule required that a physical injury must occur before a plaintiff could recover for emotional distress damages.¹⁸ This rule fell out of favor as psychiatric medicine developed standardized diagnostic criteria, and courts recognized that emotional injury could be recognized in the absence of physical injury without inviting a wave of frivolous claims.¹⁹ Other jurisdictions adopted standards requiring severe emotional distress, expert medical evidence, or foreseeability of harm by the defendant.²⁰

¹¹ See *Pecuniary Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining pecuniary damages as recovery of only economic damages); Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 2, 7–15 (1989) (discussing the varied treatment of emotional damages in fraud cases).

¹² See *Nelson*, 976 P.2d at 868 (discussing different standards for emotional distress damages in fraud cases); Merritt, *supra* note 11, at 7–15 (same).

¹³ Compare *Nelson*, 976 P.2d at 868 (permitting emotional distress damages for severe emotional distress in a fraud case with an insurance company), with *Bates v. Allied Mut. Ins. Co.*, 467 N.W.2d 255, 260 (Iowa 1991) (denying the availability of emotional damages in a fraud case with an insurance company).

¹⁴ See *Nelson*, 976 P.2d at 868 (listing the legal standards for emotional distress damages in fraud).

¹⁵ See *Hoffman*, 867 A.2d at 296–97 (discussing Maryland’s requirement of a physical manifestation of emotional injury before awarding damages). Physical manifestation is a broad definition that includes depression and nightmares “to represent that the injury for which recovery is sought is capable of objective determination.” *Vance v. Vance*, 408 A.2d 728, 733–34 (Md. 1979).

¹⁶ *Vance*, 408 A.2d at 733.

¹⁷ *Hoffman*, 867 A.2d at 295–96.

¹⁸ See, e.g., *Homans v. Bos. Elevated Ry. Co.*, 62 N.E. 737, 737 (Mass. 1902) (permitting emotional distress damages related to plaintiff’s physical injury on a train).

¹⁹ *Towns v. Anderson*, 579 P.2d 1163, 1164 (Colo. 1978) (abandoning a physical impact requirement based on advances in psychiatry and psychology that reduced the risk of frivolous emotional distress claims); *Bass v. Nooney Co.*, 646 S.W.2d 765, 769 (Mo. 1983) (same); BESSEL A. VANDER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 139 (2015) (discussing the pros and cons of diagnostic criteria in AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS III* (1980) [hereinafter *DSM III*]); see *DSM History*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/psychiatrists/practice/dsm/history-of-the-dsm> [https://perma.cc/9JNM-788G] (explaining that *DSM III* established diagnostic criteria).

²⁰ See, e.g., *Nelson v. Progressive Corp.*, 976 P.2d 859, 868 (Alaska 1999) (requiring severe emotional distress); *Kilduff v. Adams, Inc.*, 593 A.2d 478, 484–85 (Conn. 1991) (requiring plaintiff’s

Although little research exists on the unique trauma experienced by fraud victims, studies reflect that fraud impacts both mental and physical health.²¹ Psychiatric understanding of trauma and how it affects the mind and body has evolved significantly over the last thirty to forty years.²²

This Note examines the unique nature of fraud trauma, how fraud impacts victims, and compares the prevailing legal approaches to recognizing this trauma in fraud lawsuits.²³ Part I explores the history of requirements for emotional distress damages, tracing the law's development from the anachronistic physical impact rule to the modern rules of physical manifestation, severity, and foreseeability.²⁴ Part II begins by surveying state court approaches to emotional distress damages in fraud cases.²⁵ Part II also discusses the development of intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED) claims and examines the century of psychiatric research that uncovered how trauma affects victims' physical and emotional states.²⁶ Finally, Part III asserts that all American courts should recognize emotional distress damages in fraud cases and proposes a method that would allow juries to assess emotional distress damages based on the severity of the trauma.²⁷

I. LET'S GET PHYSICAL: FROM THE PHYSICAL IMPACT RULE TO THE PHYSICAL MANIFESTATION REQUIREMENT

Fraud, also known as fraudulent misrepresentation, allows a plaintiff to sue when a defendant intended to cause the plaintiff to act or not act based on

emotional distress to have been foreseeable); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (requiring the plaintiff to support claims with medical or expert opinion).

²¹ See Linda Ganzini et al., *Victims of Fraud: Comparing Victims of White Collar and Violent Crime*, 18 BULL. AM. ACAD. PSYCHIATRY L. 55, 56 (1990) (researching emotional distress in affinity fraud victims); Sarriá et al., *supra* note 6, at 10 (finding poorer health and higher levels of mental distress among fraud victims as compared to non-victim peers); Maria Victoria Zunzunegui et al., *Financial Fraud and Health: The Case of Spain*, 31 GACETA SANITARIA 313, 317–18 (2017) (Spain) (discussing fraud victims self-reporting substandard physical health).

²² VANDER KOLK, *supra* note 19, at 39–47 (discussing neuroscience advances confirming biologic change due to trauma). Research demonstrates that a traumatized individual's brain reacts in a similar way when recounting the traumatic incident as it did when the incident occurred. *Id.* at 42–43. For example, one patient, after reading a script detailing the car crash that killed her daughter thirteen years prior, felt a fight or flight response (confirmed via magnetic resonance imaging (MRI) scan) similar to what she experienced on the day of the accident. *Id.* at 45–46. These developments connect physical symptoms to underlying emotional distress. See, e.g., *id.* at 7–9 (discussing sleeplessness, nightmares, and emotional disturbance associated with trauma in a Vietnam veteran).

²³ See *infra* notes 28–280 and accompanying text.

²⁴ See *infra* notes 28–108 and accompanying text.

²⁵ See *infra* notes 109–204 and accompanying text.

²⁶ See *infra* notes 205–237 and accompanying text.

²⁷ See *infra* notes 238–280 and accompanying text.

the defendant's misrepresentation of a material fact or opinion.²⁸ Fraud affects all aspects of society, costing businesses an estimated seven billion dollars, draining over eight billion dollars from U.S. banks through credit card fraud, and affecting hundreds of thousands of Americans every year.²⁹ To individuals, the experience of fraud may feel like a personal attack on their economic and mental well-being.³⁰ Personal transactions commonly underlie cases where the plaintiff seeks emotional damages for fraud.³¹

Instructive in the study of emotional distress damages in fraud cases is a look at how IIED³² and NIED actions assess emotional distress damages be-

²⁸ RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977). Fraud, as a tort, generally defines a singular definition as fraud can take a number of forms. *Hodge v. Craig*, 382 S.W.3d 325, 342 (Tenn. 2012). In general, courts look for a defendant's deceit or misrepresentation to gain a financial advantage. *Id.* A Tennessee court stated that the cause of action of "deceit" as well as "'intentional misrepresentation,' 'fraudulent misrepresentation,' and 'fraud' are different names for the same cause of action." *Id.* Courts also recognize a separate tort of "negligent misrepresentation" for defendant negligence rather than intentional conduct. *Id.* at 344; RESTATEMENT (SECOND) OF TORTS § 552 (requiring an underlying business transaction before allowing an action for negligent misrepresentation). This Note uses the word "fraud" to encompass both the intentional and negligent causes of action, as a plaintiff that successfully proves either of these should have emotional distress damages available to them. *See Merritt*, *supra* note 11, at 25 (asserting that, just as courts recognize emotional distress in intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED) cases, fraud victims are just as deserving of compensation); Justin Sevier & Kelli Alces Williams, *Consumers, Seller-Advisors, and the Psychology of Trust*, 59 B.C.L.REV. 931, 940-42 (2018) (equivocating only intentional misrepresentation with fraud but noting that the narrow scope of the intentional misrepresentation cause of action led to the creation of a negligent misrepresentation cause of action).

²⁹ *See ASS'N OF CERTIFIED FRAUD EXAM'RS*, *supra* note 6, at 4 (finding over seven billion dollars of total fraud losses for businesses); Aitken, *supra* note 6 (detailing global and American credit card fraud loss statistics); Daly, *supra* note 6 (discussing statistics about individual identity theft, namely 444,602 fraud cases reported in 2018).

³⁰ *See Financial Fraud Crime Victims*, U.S. DEP'T OF JUST., DIST. OF ALASKA, <https://www.justice.gov/usao-ak/financial-fraud-crimes> [<https://perma.cc/UNM4-MQJH>] (discussing common types of fraud as well as common victim reactions).

³¹ *See, e.g., Nelson v. Progressive Corp.*, 976 P.2d 859, 862 (Alaska 1999) (insurance recovery); *Food Fair, Inc. v. Anderson*, 382 So. 2d 150, 151 (Fla. Dist. Ct. App. 1980) (employer/employee fraud case); *Sumler v. E. Ford, Inc.*, 2004-CA-01574-COA (¶ 10), 915 So. 2d 1081, 1086 (Miss. Ct. App. 2005) (automobile repossession); *Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 129 (Tex. App. 1985) (real estate fraud).

³² *See, e.g., Nelson*, 976 P.2d at 868 (requiring severe damage to the plaintiff's mental state in a fraud case before awarding emotional distress compensation in line with the state's IIED requirements). IIED requirements are adopted by judicial decision, but generally courts require (1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) causation, and (4) resulting severe emotional distress. *McGrath v. Fahey*, 533 N.E.2d 806, 809 (Ill. 1988) (stating elements of IIED); *Chanko v. Am. Broad. Cos., Inc.*, 49 N.E.3d 1171, 1178 (N.Y. 2016) (same). Defining extreme and outrageous conduct, the *Restatement (Second) of Torts* states "where the conduct . . . go[es] beyond all possible bounds of decency, and . . . [is] regarded as atrocious, and utterly intolerable in a civilized community . . . an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. Severity of emotional distress may require physical or psychological manifestations of that trauma

cause the applicable legal standards often overlap.³³ The development of this body of law has undergone significant change since the late nineteenth century.³⁴ Section A of this Part explores the rise of the physical impact rule as a prerequisite for emotional damages recovery and how developments in psychiatric medicine predicated the rule's downfall.³⁵ Section B discusses rationales for requiring some physical manifestation of emotional distress before awarding damages.³⁶ Finally, Section C reviews alternative legal standards in states where physical manifestation is not necessary to recover for emotional distress.³⁷

A. Physical Injury and Intent for Emotional Distress Damages

The physical impact rule dominated emotional distress in negligence cases as the majority view from the inception of such damages well into the twentieth century.³⁸ The prevailing view among state courts deemed emotional distress damages "parasitic," or dependent on a physical injury and thus requiring a "host" cause of action for an award.³⁹ The rationale for this rule seemed

along with proof of medical treatment. DANB. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 621 (8th ed. 2017).

³³ See *Dziadek v. Charter Oak Fire Ins. Co.*, 867 F.3d 1003, 1010 (8th Cir. 2017) ("[A] plaintiff must prove intentional or negligent infliction of emotional distress to recover for mental or emotional harm on a fraud claim." (interpreting *Stabler v. First State Bank of Roscoe*, 2015 SD 44, ¶ 24, 865 N.W.2d 466, 479 (S.D. 2015))); *Kilduff v. Adams, Inc.*, 593 A.2d 478, 484–85 (Conn. 1991) (citing damages standards from an unintentional infliction of emotional distress case and applying them to fraud cases); *Vance v. Vance*, 408 A.2d 728, 732–34 (Md. 1979) (applying an NIED standard requiring a physical manifestation of emotional injury to a fraud case); *Meritt*, *supra* note 11, at 18 (discussing the importation of IIED requirements to emotional distress recovery in fraud cases). The *Restatement (Third) of Torts'* NIED definition describes a cause of action when a defendant's negligent act causes serious emotional harm because the action caused a fear of physical injury or "occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 (AM. L. INST. 2012). Most jurisdictions now recognize NIED. See DOBBS ET AL., *supra* note 32, at 625 (noting that a small number of courts do not have a cause of action for NIED).

³⁴ See *infra* notes 51–61 and accompanying text.

³⁵ See *infra* notes 38–70 and accompanying text.

³⁶ See *infra* notes 71–81 and accompanying text.

³⁷ See *infra* notes 82–108 and accompanying text.

³⁸ See *Vance*, 408 A.2d at 731 (discussing the history of the physical impact rule).

³⁹ See, e.g., *Homans v. Bos. Elevated Ry. Co.*, 62 N.E. 737, 737 (Mass. 1902) (permitting recovery for "nervous shock" because the plaintiff experienced a physical injury in a sudden train stoppage); *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 418 (Mont. 1995) (defining "'parasitic' damages"); *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354, 354 (N.Y. 1896) (denying recovery for distress and resultant miscarriage caused by the defendant's negligence in absence of physical impact). The *Mitchell* court confirmed that the physical impact rule formed the "consensus . . . opinion" of the time. 45 N.E. at 354.

straightforward at the time: physical injury provided an objective element necessary to prevent frivolous claims from mere “psychic” injuries.⁴⁰

The burgeoning psychiatric science of the late nineteenth century had not yet developed a courtroom-applicable understanding of emotional distress.⁴¹ For example, in 1897, in *Spade v. Lynn & Boston Railroad Co.*, the Massachusetts Supreme Judicial Court addressed the question of whether a plaintiff could recover for only emotional distress without an associated physical injury.⁴² The plaintiff passenger claimed she suffered an emotional injury when a fellow passenger and the defendant’s employee fought in her proximity.⁴³ The court recognized that emotional distress might lead to physical impact, and thus, negligence may cause such ultimate injury.⁴⁴ The opinion noted that courts traditionally permit recovery for injuries that naturally flow from negligence, and the plaintiff’s physical injury arising from emotional distress did flow from the defendant’s negligence.⁴⁵ Despite this, the court held that a plaintiff could not recover for emotional distress damages for “mere fright” without an initial physical injury.⁴⁶ The reasoning came down to administrability and fairness concerns about any alternative rule other than one requiring physical impact.⁴⁷ In 1896, just before *Spade*, the New York Court of Appeals reached a similar conclusion in *Mitchell v. Rochester Railroad Co.*⁴⁸ The

⁴⁰ See *Spade v. Lynn & Bos. Ry. Co.*, 47 N.E. 88, 89 (Mass. 1897) (holding that damages for “mere fright” likely come from practical concerns with implementing a rule to the contrary), *abrogated by* *Dziokonski v. Babineau*, 380 N.E.2d 1295 (Mass. 1978); *Mitchell*, 45 N.E. at 354–55 (worrying about a “flood of litigation in cases where the injury complained of may be easily feigned without detection”).

⁴¹ Compare *Mitchell*, 45 N.E. at 354–55 (denying emotional distress damages absent physical injury based on fraud concerns), with *Towns v. Anderson*, 579 P.2d 1163, 1164 (Colo. 1978) (dispatching older rationales for the physical impact rule that relied on concerns about frivolous claims and unreliable proof in favor of removing the physical impact requirement based on advances in psychiatry and psychology), and *Bass v. Nooney Co.*, 646 S.W.2d 765, 769 (Mo. 1983) (same).

⁴² 47 N.E. at 88.

⁴³ *Spade v. Lynn & Bos. Ry. Co.*, 168 Mass. 285, 285 (Mass. 1897) (reporting the same Supreme Judicial Court opinion as *Spade*, 47 N.E. 88 (Mass. 1897), but also summarizing the procedural history and facts found at the trial court level). The plaintiff alleged the defendant train company allowed the problematic passenger on the train despite the passenger’s intoxication. *Id.* at 286. While standing next to the plaintiff, the intoxicated passenger and defendant’s employee got into a fight regarding fare payment. *Id.* The brawl did not injure the plaintiff physically; however, the experience “subjected her to a severe nervous shock . . . [causing] great mental and physical pain and anguish.” *Id.* at 285–86.

⁴⁴ *Spade*, 47 N.E. at 88–89. The court stated that a plaintiff’s emotional distress must connect to a physical injury before allowing recovery. *Id.* at 89.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* First, the court worried that recognizing emotional distress without physical injury would lead to frivolous claims, burdening the judicial system and requiring decisions based on potentially unfounded claims. *Id.* Second, the court worried about fairness, particularly to passenger rail defendants who could become liable for injuries to especially sensitive passengers. *Id.*

⁴⁸ See *id.* at 88–89 (requiring physical impact); *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354, 354–55 (N.Y. 1896) (same), *overruled by* *Battalla v. State*, 176 N.E.2d 729 (N.Y. 1961). The plaintiff in

Mitchell court ruled against the passenger plaintiff because a physical injury did not immediately precede her emotional distress.⁴⁹ The court went further to state that plaintiffs needed some injury, no matter how slight, to recover for emotional distress because otherwise plaintiffs can simply manufacture emotional injuries.⁵⁰

Such results are not surprising given the understanding of trauma in the late nineteenth century.⁵¹ In the courtroom, judges demanded that plaintiffs connect a physical injury to their resulting emotional distress damages.⁵² Meanwhile, in the doctor's office, psychiatrists and neurologists struggled with the burgeoning study of mental distress.⁵³ Medical professionals focused on hysteria, working to understand what caused irrational, emotional, and unexplained physical phenomena among patients.⁵⁴ Groundbreaking studies traced the onset of hysteria to a patient's prior trauma instead of attributing it to less scientific causes such as patient gender or "demonic possession states, witch-

Mitchell sued the defendant railroad company for an incident that occurred while she was waiting to board a train car. 45 N.E. at 354. When the plaintiff started boarding the car, a horse drawn carriage of the defendant nearly crashed into her but did not physically impact her. *Id.* The plaintiff claimed the incident caused her to faint, suffer a miscarriage, and spurred additional subsequent injuries. *Id.* Her testimony was supported by expert medical opinion. *Id.*

⁴⁹ 45 N.E. at 354.

⁵⁰ *Id.* at 354–55. Though the physical impact rule became the majority position in the United States, not all courts felt that the rule was necessary to prevent frivolous claims. *See* *Sloane v. S. Cal. Ry. Co.*, 44 P. 320, 323–24 (Cal. 1896) (holding in favor of permitting emotional distress damages even in the absence of physical injury because such damages resulted from the negligence of the defendant).

⁵¹ *See* VANDER KOLK, *supra* note 19, at 178–79 (providing an overview of the status of psychiatric medicine and trauma in the late nineteenth century).

⁵² *See, e.g., Spade*, 47 N.E. at 89 (evaluating emotional distress injury on a railroad); *Mitchell*, 45 N.E. at 354–55 (same).

⁵³ *See* VANDER KOLK, *supra* note 19, at 178 (characterizing the late nineteenth century as the period "when medicine first began the systematic study of mental problems").

⁵⁴ *Id.* at 179. Interestingly, researchers in France and England also studied and published articles about the trauma experienced in rail passengers after accidents, although that literature does not appear in the cases discussed previously. *See, e.g., Spade*, 47 N.E. at 89; *Mitchell*, 45 N.E. at 354–55; VANDER KOLK, *supra* note 19, at 178–79. Several prominent psychiatrists and neuroscientists worked to understand these newly recognized trauma impacts. *See* VANDER KOLK, *supra* note 19, at 179 (discussing the development of researchers' understanding of hysteria); *see also* Théodule Ribot, *Diseases of Memory: An Essay in the Positive Psychology*, in 41 THE INTERNATIONAL SCIENTIFIC SERIES 108–09 (William Huntington Smith trans., 1882) (finding that although mental status is not well understood, it can go through rapid changes that cause marked changes in personality due to underlying issues); *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume II (1893–1895): Studies on Hysteria, Translated from the German Under the General Editorship of James Strachey*, PSYCHOANALYTIC ELEC. PUBL'G, <https://www.pep-web.org/document.php?id=se.002.0000a> [<https://perma.cc/KJ6V-28XZ>] (translating Josef Breuer and Sigmund Freud's finding that hysteria, although it could appear suddenly, traced back to underlying prior traumas experienced by the patient).

craft, exorcism, and religious ecstasy.”⁵⁵ In particular, researchers focused on case studies of hysteria resulting from traumatic injuries.⁵⁶ In 1889, Jean-Martin Charcot released his study of a patient following an accident with a horse and buggy.⁵⁷ The patient was physically unharmed, yet he still experienced paralysis in his legs.⁵⁸ Charcot found that the last memory the patient had of the accident was seeing the cart’s wheels coming towards his legs and believing they would injure him.⁵⁹ The wheels missed him, but the experience so affected him that his mind substituted a physical manifestation of his trauma, paralysis, for the memory of the incident.⁶⁰ This study greatly influenced the early scientific understanding of trauma; however, interest in the topic decreased as researchers focused on other theories of emotional suffering, leaving contemporaneous courts without guidance in measuring victim’s emotional suffering absent physical injury.⁶¹

Although interest in studying trauma languished through the mid-twentieth century, the study of psychiatry and psychology became generally more rigorous, leading to the diagnostic standards set by the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders III* (DSM III).⁶² Published in 1980, this manual used decades of research to craft formal criteria for mental disorders.⁶³ This new, more thorough diagnostic approach aided courts’ understanding of emotional distress.⁶⁴ For example, in 1983, in *Bass v. Nooney Co.*, the Missouri Supreme Court revisited the state’s

⁵⁵ VAN DER KOLK, *supra* note 19, at 179; see *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, *supra* note 54, at 4.

⁵⁶ VAN DER KOLK, *supra* note 19, at 179. Charcot’s studies fell against the backdrop of political and religious upheaval in France, a time at which Charcot felt understanding behavior was crucial to installing a secular government. *Id.* Charcot knew that women were important to winning a secular majority and set out to research hysteria and how the conditions affected both men and women. *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 179–80. This research influenced the early study of trauma and resonates today with those that continue in the field. *Id.* at 180.

⁶¹ *Id.* at 186 (discussing Charcot’s death and Freud’s new interest in “inner conflicts, defenses, and instincts at the root of mental suffering”). Interest in the subject waxed and waned throughout the early part of the twentieth century. *Id.* at 186–90. The two great wars and the rise in “shell shock” drove brief interest in the 1920s and again in the 1940s. *Id.* at 187. Shell shock eventually became better known as post-traumatic stress disorder. *Id.* at 189. The abandonment of its study in the post-World War I period led to domestic issues with returning veterans, due to lack of mental and physical support for the trauma they suffered during the war. *Id.* at 187–88.

⁶² *Id.* at 139; see AM. PSYCHIATRIC ASS’N, *supra* note 19 (detailing novel diagnostic criteria).

⁶³ AM. PSYCHIATRIC ASS’N, *supra* note 19. The manual combines research by the World Health Organization, the American military, and the American Psychiatric Association. *Id.*

⁶⁴ See Timothy J. McCormally, Recent Development, *Torts—Mental Distress—Prince v. Pittston Co.*, 63 *F.R.D.* 28 (S.D.W. Va. 1974), 63 *GEO. L.J.* 1179, 1183–85 (1975) (discussing the then-status of court views regarding emotional distress injuries independent of physical injury and the development of psychiatric medicine that began to change court opinion).

physical impact requirement for emotional distress damages.⁶⁵ The court abrogated the physical impact rule, acknowledging overwhelming disdain for the rule in scholarly articles.⁶⁶ The *Bass* opinion cited increasingly absurd definitions of the term “physical impact” used by other courts to permit plaintiff recovery.⁶⁷ The court also relied on the development of psychiatric medicine as providing a reasonable basis for dropping the physical impact rule and instead relying on scientific evidence to establish the severity of emotional harm.⁶⁸ Finally, the opinion pointed to the fact that the majority of courts had already abandoned the physical impact rule, including the progenitor courts in Massachusetts and New York.⁶⁹ Today, only a few jurisdictions, including Indiana and Georgia, continue to adhere to the physical impact rule in negligence cases.⁷⁰

⁶⁵ 646 S.W.2d 765, 766 (Mo. 1983). The plaintiff sued the defendant building owner for emotional distress suffered when she became trapped in a malfunctioning elevator. *Id.* at 766–67. The plaintiff experienced symptoms of extreme anxiety after the incident, including passing out the next time she attempted to use the building’s elevator. *Id.* at 767. Prior to this opinion, Missouri had adopted the physical impact rule in the late nineteenth century, following the leads of Massachusetts and New York. *Id.* at 768 (referencing *Mitchell* and *Spade* as the generators of the physical impact rule in the United States).

⁶⁶ *See id.* at 769. The articles and criticism included a number of pieces written by Professor Prosser as well as other scholarly articles as far back as 1921. *Id.*; *see, e.g.*, William L. Prosser, *Insult and Outrage*, 44 CALIF.L. REV. 40, 42–43 (1956) (discussing the development of an independent tort for emotional distress and rejecting concerns about false claims); Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 267 (1921) (challenging the physical impact rule on the basis that “[a] shock to the nerves is not an affection of the mind, but of the body”).

⁶⁷ *See Bass*, 646 S.W.2d at 769; *see also Vance v. Vance*, 408 A.2d 728, 731–32 (Md. 1979) (noting the “rule was on occasion stretched to extreme limits to permit recovery for mental distress,” such as cases characterizing smoke inhalation and dust particles in the eye as physical impacts).

⁶⁸ *Bass*, 646 S.W.2d at 769–70. At the very least, the court felt that the scientific basis for emotional distress was strong enough to abandon a rule that denied plaintiffs the opportunity to plead their case to a jury. *Id.*

⁶⁹ *See id.* at 769 (first citing *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1299 (Mass. 1978); and then citing *Battalla v. State*, 176 N.E.2d 729, 730 (N.Y. 1961)). The Massachusetts and New York courts recognized that plaintiffs had stretched the definition of physical impact to fit within the rule and that legal scholarship generally advocated for removing the physical impact rule. *See Dziokonski*, 380 N.E.2d at 1298–99; *Battalla*, 176 N.E.2d at 731.

⁷⁰ *See Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 991 (Ind. 2006) (requiring plaintiff to demonstrate physical impact before allowing for recovery under a negligence theory); *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82, 86 (Ga. 2000) (acknowledging the shortfalls of the physical impact rule but finding that “a brighter line of liability” was more beneficial than any alternative); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 reporters’ note cmt. b (AM. L. INST. 2012). Indiana follows a “modified impact rule” that requires some physical touching but does not necessarily require a physical injury. *Cook*, 857 N.E.2d at 996. The court maintains this rule because without physical impact “mental anguish is speculative, subject to exaggeration, likely to lead to fictitious claims.” *Id.* at 995. In NIED cases, Indiana has a bystander exception that allows recovery without physical impact if the plaintiff directly observed the traumatic incident involving a close familial relation. *Id.* at 997.

B. Emotional Injury Manifesting Physical Symptoms

In the absence of the physical impact rule, the question becomes: how should jurisdictions assess the presence of emotional distress?⁷¹ In some states, the standard shifted from requiring evidence of physical impact immediately preceding the incident to requiring physical manifestation of the emotional distress soon afterward.⁷² The rationale echoes the nineteenth-century reasoning for the original physical impact rule: administrability.⁷³ For example, the Maryland Supreme Court set forth its physical manifestation requirement for NIED claims in *Bowman v. Williams* in 1933.⁷⁴ Maryland rejected the physical impact rule twenty-five years earlier but sought another way to measure emotional distress.⁷⁵ Today, the Maryland Supreme Court requires an objectively apparent physical manifestation of emotional distress to recover damages.⁷⁶

The Maryland Court of Appeals applied this physical manifestation requirement to emotional distress damages in fraud cases in 1979, in *Vance v. Vance*.⁷⁷ The plaintiff wife sued the defendant husband for negligent misrepresentation when he annulled their eighteen-year marriage because he was still married to his first wife at the time of his marriage to the plaintiff.⁷⁸ At the intermediate appellate level, the plaintiff wife sufficiently demonstrated emotional

⁷¹ See *Lee*, 533 S.E.2d at 85 (assessing the alternative standards of other jurisdictions that the court could adopt instead of the physical impact rule, including foreseeability and “zone of danger” requirements). Courts look to the requirements in IIED and NIED cases when crafting general damages standards. See *supra* notes 32–33 and accompanying text (noting similarities in the treatment of IIED and NIED claims and how courts address emotional distress as parasitic damages in fraud cases).

⁷² See, e.g., *Vance*, 408 A.2d at 732 (noting that Maryland rejected the physical impact rule in favor of the “modern rule” requiring a plaintiff to show resultant physical injury from the defendant’s action); *Dziokonski*, 380 N.E.2d at 1302 (overturning the physical impact rule and instead requiring evidence of “substantial” physical injury from the emotional harm and evidence that the injury flowed from the defendant’s negligence).

⁷³ See, e.g., *Vance*, 408 A.2d at 731–34 (discussing Maryland’s requirement for physical symptoms from emotional distress as a “sufficient guarantee of genuineness that would otherwise be absent in a claim for mental distress alone”); *Stellar v. Saucon Mut. Ins. Co.*, No. 2011-C-4714, 2012 Pa. Dist. & Cnty. Dec. LEXIS 702, at *20–21 (C.P. Ct. Lehigh Cty. 2012) (requiring both foreseeability of emotional injury and physical manifestation of emotional injury to limit these claims to a small subset of facts).

⁷⁴ 165 A. 182, 183–85 (Md. 1933). The plaintiff suffered emotional distress when a truck, driven by the defendant’s employee, skidded off the road and crashed into a part of his home where his children were playing. *Id.* at 182. The impact did not physically injure the plaintiff, but he sued to recover for the shock to his nervous system caused by concern for his children. *Id.* at 182–83.

⁷⁵ See *id.* at 184 (citing *Green v. T.A. Shoemaker & Co.*, 73 A. 688, 690–92 (Md. 1909)).

⁷⁶ *Id.*

⁷⁷ See 408 A.2d at 732–34. The plaintiff and defendant married in 1956 and divorced in 1974 when the defendant husband left the plaintiff wife for another woman. *Id.* at 729. The husband then tried to annul his marriage to the plaintiff because he was still married to his first wife at the time of the marriage to the plaintiff. *Id.* The plaintiff, unaware that the defendant was still married at the time of their union, sued for fraud and IIED following this disclosure. *Id.*

⁷⁸ *Id.* at 729.

distress to support a jury award for this injury.⁷⁹ On final appeal, the court expanded the definition of physical injury to permit recovery for emotional distress under the *Bowman* standard.⁸⁰ Thus, the court required some physical manifestation to provide objective confirmation of emotional distress but was willing to stretch the word “physical” to accommodate a broad range of claims.⁸¹

C. Assessing Distress in the Absence of Physical Symptoms

In contrast to jurisdictions that require physical manifestation of emotional injury to award distress damages in fraud cases, other courts look to the foreseeability or severity of the plaintiff’s emotional distress, or to medical expert corroboration of the emotional distress.⁸² Some states adopted one of these more subjective criteria upon abandoning the physical manifestation requirement.⁸³

One standard looks to the defendant’s ability to foresee the emotional injury.⁸⁴ The foreseeability test follows the tort law idea that, regardless of intent, defendants should compensate plaintiffs for all reasonably foreseeable damages caused by their tortious actions.⁸⁵ For example, in 1991 in *Kilduff v. Adams, Inc.*, the plaintiffs did not plead that the defendant intended to cause their emotional distress.⁸⁶ Nevertheless, the Supreme Court of Connecticut recognized

⁷⁹ *Id.* at 731.

⁸⁰ *Id.* at 733–34. The court held that the plaintiff sufficiently established emotional distress through evidence of emotional shock and “spontaneous crying” resulting from the annulment of the marriage. *Id.* at 734.

⁸¹ *See id.* (including depression, sleeplessness, and spontaneous crying in the definition of physical injury); *see also* Willis v. Gami Golden Glades, LLC, 967 So. 2d 846, 850 (Fla. 2007) (stating that the Florida rule for recovery of emotional distress in the absence of physical impact requires physical manifestation of emotional injury “‘within a short time’ of the incident”).

⁸² *See, e.g.*, Nelson v. Progressive Corp., 976 P.2d 859, 868 (Alaska 1999) (maintaining that severe emotional damages are necessary to sustain emotional distress damages in a fraud case to stay in line with the state’s IIED requirements); *Kilduff v. Adams, Inc.*, 593 A.2d 478, 484–85 (Conn. 1991) (permitting emotional distress damages in a fraud case because the distress was reasonably foreseeable); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (holding that the standard for NIED claims is a general negligence test and that recovery for emotional distress requires severe emotional distress supported by medical or expert opinion).

⁸³ *See Montinieri v. S. New Eng. Tel. Co.*, 398 A.2d 1180, 1183–84 (Conn. 1978) (abandoning the physical manifestation rule in NIED cases for a foreseeability standard); *Camper*, 915 S.W.2d at 443–44 (noting that Tennessee previously followed the physical manifestation rule but was inconsistent in its application before adopting the new general negligence standard).

⁸⁴ *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 921 (Cal. 1968) (expanding the application of emotional distress damages generally to plaintiffs that defendant could reasonably foresee would incur an emotional injury); *Kilduff*, 593 A.2d at 484–85 (implementing a reasonable foreseeability standard in a fraud case).

⁸⁵ *See Montinieri*, 398 A.2d at 1184 (holding that a reasonable foreseeability standard recognizes emotional distress in the absence of physical injury but also protects defendants from a deluge of frivolous suits).

⁸⁶ 593 A.2d at 485 n.11.

reasonable foreseeability as a basis for damages, aligning its standard for emotional distress damages in fraud cases with its standard for other torts.⁸⁷

California pioneered this approach in 1968, in *Dillon v. Legg*.⁸⁸ In *Dillon*, the California Supreme Court evaluated the foreseeability element of the defendant driver's duty to the bystander mother who witnessed the fatal accident that killed her child.⁸⁹ The court held that liability exists where a defendant could reasonably foresee the plaintiff's risk of harm.⁹⁰ The court listed factors for evaluating foreseeability and noted that, although their application might be fluid, potential administrability issues should not stand in the way of plaintiffs invoking this criteria.⁹¹ Foreseeability factors also protect defendants from frivolous claims by formally structuring which plaintiffs may bring such claims.⁹²

Tennessee requires medical expert corroboration of severe emotional distress to qualify for any corresponding damages.⁹³ In 1996, in *Camper v. Minor*, the Tennessee Supreme Court moved from a physical manifestation rule in emotional distress cases to a "general negligence" standard.⁹⁴ In abandoning a physical requirement, the court still wanted independent verification of severe emotional distress and held that the best way to ensure legitimacy is through a medical or scientific expert opinion.⁹⁵ The Illinois Supreme Court questioned this requirement in 2010 in *Thornton v. Garcini*.⁹⁶ The court held that although med-

⁸⁷ *Id.* at 485.

⁸⁸ 441 P.2d at 919–21; see *Camper*, 915 S.W.2d at 443 (noting California's lead in using a foreseeability analysis in emotional distress cases).

⁸⁹ *Dillon*, 441 P.2d at 914. The plaintiff brought one claim against the defendant for negligent driving that resulted in the death of her child and a second claim for the emotional distress she experienced witnessing the incident. *Id.*

⁹⁰ *Id.* at 919–20.

⁹¹ *Id.* at 920–21. The California Supreme Court considered (1) whether the bystander was in close physical proximity to the accident, (2) whether the emotional injury resulted from observations/feelings at the time of the accident, and (3) the nature of the relationship between the victim and the observer. *Id.* at 920.

⁹² *Id.* at 925. This standard raised concern in at least one other court due to its fact sensitive nature. See *Camper*, 915 S.W.2d at 443 (asserting that this standard did not provide "concrete guidelines for trial courts and juries to use in deciding how each case should be resolved").

⁹³ *Camper*, 915 S.W.2d at 446.

⁹⁴ *Id.* at 446. The plaintiff cement truck driver sued the defendant car driver after the defendant pulled in front of his truck. *Id.* at 439. The plaintiff claimed emotional distress after witnessing the defendant's dead body in the accident's wreckage. *Id.*

⁹⁵ *Id.* at 446. The court wanted to protect defendants from frivolous claims and thus permitted recovery in NIED cases only for severe emotional distress. *Id.* The court recognized this severity "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* (quoting *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970), *superseded by statute*, 1986 Haw. Sess. Laws 12–13, as recognized in *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997)).

⁹⁶ See 928 N.E.2d 804, 809 (Ill. 2010). The plaintiff in this case sued the defendant physician for NIED related to medical malpractice claims. *Id.* at 807.

ical expert testimony may be necessary to prove emotional distress in some cases, state law did not always require such testimony for plaintiff recovery.⁹⁷

Finally, some jurisdictions undertake a severity assessment to determine whether a plaintiff's claimed injury should qualify for emotional distress damages.⁹⁸ Plaintiffs support the severity of their emotional distress in these courts through medical expert testimony, evidence of a psychiatric condition or loss of consortium, and other such evidence.⁹⁹ The Utah Supreme Court approached this issue in 2001 in *Campbell v. State Farm Mutual Automobile Insurance Co.*¹⁰⁰ The plaintiff driver sued the defendant insurance company over fraudulent misrepresentations made during settlement talks following a fatal auto accident.¹⁰¹ The jury found in favor of the plaintiff; however, the trial judge refused to allow the jury to award emotional distress damages and limited the fraud damages to pecuniary loss.¹⁰² On appeal, the Utah Supreme Court overturned that decision and the prior state precedent that had set this limitation.¹⁰³ The court stated that emotional distress damages are available in fraud cases where emotional distress is the proximate result of the fraud and the plaintiff suffered severe distress.¹⁰⁴ This standard guards against frivolous suits for mere hurt feelings or minor distress.¹⁰⁵

The common theme in all these standards is that courts seek to award emotional distress damages to deserving plaintiffs but also want to provide safeguards to protect defendants against frivolous or minor claims.¹⁰⁶ State courts

⁹⁷ *Id.* at 809.

⁹⁸ *Nelson v. Progressive Corp.*, 976 P.2d 859, 868 (Alaska 1999); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, ¶¶ 102–06, 65 P.3d 1134, 1164–65, *rev'd on other grounds*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *see also* *Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 991 (Ind. 2006) (following the “modified physical impact” rule which requires severe emotional distress where physical impact is “slight”). This was also part of the *Camper* court's evaluation of NIED claims. 915 S.W.2d at 446 (requiring severe emotional distress supported by medical expert opinion).

⁹⁹ *See* *Leong v. Takasaki*, 520 P.2d 758, 767 (Haw. 1974) (immediate and long-term psychological impacts); *Camper*, 915 S.W.2d at 446 (medical expert testimony); *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 327–28 (Tex. 1993) (loss of consortium claim). Severity tests help to screen out “trivial or fraudulent actions.” *Camper*, 915 S.W.2d at 446.

¹⁰⁰ *See* 2001 UT 89, ¶¶ 102–04, 65 P.3d at 1164.

¹⁰¹ *Id.* ¶¶ 6–12, 1142–43.

¹⁰² *Id.* ¶¶ 102–106, 1164–65.

¹⁰³ *Id.* (overturning *Turner v. Gen. Adjustment Bureau, Inc.*, 832 P.2d 62 (Utah Ct. App. 1992)).

¹⁰⁴ *See id.* ¶¶ 102–06, 1164–65.

¹⁰⁵ *See* *Nelson v. Progressive Corp.*, 976 P.2d 859, 868 (Alaska 1999) (evidence of anger and aggravation did not support a finding of severe emotional distress damages); *Campbell*, 2001 UT 89, ¶¶ 102–06, 65 P.3d at 1164–65 (overturning a prohibition on emotional damages in fraud cases in favor of a severity standard).

¹⁰⁶ *See* *Nelson*, 976 P.2d at 868 (severity standard protects defendants); *Montinieri v. S. New Eng. Tel. Co.*, 398 A.2d 1180, 1184 (Conn. 1978) (foreseeability protects defendants); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (medical or scientific expert testimony protects defendants).

apply these varying standards unevenly in fraud cases, leading to varying levels of compensation for fraud victims.¹⁰⁷ As such, a consistent standard for emotional distress damages in fraud cases is necessary to promote equal justice.¹⁰⁸

II. PECUNIARY PARTICULARITY: JURISDICTIONAL DIVERGENCE AND CURRENT PSYCHIATRIC UNDERSTANDING OF EMOTIONAL DISTRESS

American courts have recognized emotional damages in tort for well over a century.¹⁰⁹ Scientific understanding of the underlying trauma associated with those emotional damages, however, is a relatively new phenomenon.¹¹⁰ Many courts that recognize emotional distress damages in fraud cases require physical manifestations of emotional distress or a showing of wanton or reckless conduct by the tortfeasor.¹¹¹ Other courts, however, recognize emotional distress without physical manifestation as a separately compensable injury.¹¹² Section A of this Part analyzes all fifty states' positions toward emotional distress damages in fraud cases.¹¹³ Section B discusses modern legal standards for emotional distress damages and our current understanding of trauma, particularly in the fraud context.¹¹⁴

¹⁰⁷ See, e.g., Merritt, *supra* note 11, at 2 (noting the split in American courts regarding emotional distress damages in fraud); *Financial Fraud Crime Victims*, *supra* note 30 (stating that fraud perpetrators target everyone regardless of age, race, or geography).

¹⁰⁸ See Merritt, *supra* note 11, at 3 (advocating for consistent recognition of emotional distress damages in fraud to fully compensate victims).

¹⁰⁹ See, e.g., Spade v. Lynn & Bos. Ry. Co., 47 N.E. 88, 89 (Mass. 1897) (disallowing recovery for fright or alarm in the absence of a physical injury), *abrogated by* Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Canning v. Williamstown, 55 Mass. (1 Cush.) 451, 452 (1848) (allowing recovery of emotional damages due to associated physical injury); Renner v. Canfield, 30 N.W. 435, 436 (Minn. 1886) (holding that awarding emotional damages requires physical injury).

¹¹⁰ See VAN DER KOLK, *supra* note 19, at 139 (stating that “[t]he first serious attempt to create a systematic manual of psychiatric diagnoses occurred in 1980”); *DSM History*, *supra* note 19.

¹¹¹ See, e.g., Vance v. Vance, 408 A.2d 728, 732 (Md. 1979) (discussing the “modern rule” permitting recovery when there is a physical injury arising from negligence); Sumler v. E. Ford, Inc., 2004-CA-01574-COA (¶ 26), 915 So. 2d 1081, 1089 (Miss. Ct. App. 2005) (requiring evidence that the defendant acted with malice, indifference or recklessness before awarding emotional distress damages in fraud).

¹¹² See, e.g., Rodrigues v. State, 472 P.2d 509, 519 (Haw. 1970) (holding that courts may evaluate independent claims for emotional distress without attendant physical injury), *superseded by statute*, 1986 Haw. Sess. Laws 12–13, *as recognized in* City of Tyler v. Likes, 962 S.W.2d 489 (Tex. 1997).

¹¹³ See *infra* notes 115–204 and accompanying text.

¹¹⁴ See *infra* notes 205–237 and accompanying text.

A. Fraud and the Recognition of Emotional Distress

Jurisdictional variance in the treatment of emotional damages in fraud cases creates a patchwork of state laws for plaintiffs.¹¹⁵ In many decisions denying emotional distress damages, courts left their reasons for allowing or barring damages unexplored, instead deferring to precedent or a treatise.¹¹⁶ This Section categorizes jurisdictions based on their decision (or refusal) to recognize emotional distress damages and further groups jurisdictions that recognize emotional distress damages by prevailing standards.¹¹⁷

1. No Recovery for Emotional Distress

At least seventeen (and as many as nineteen) states limit recovery in fraud cases to pecuniary damages, awarding monetary compensation only for measurable economic losses.¹¹⁸ Many of these states rely on the *Restatement (Sec-*

¹¹⁵ See *Hoffman v. Stamper*, 867 A.2d 276, 297–98 (Md. 2005) (discussing the split in recognition in other jurisdictions and their rationales). See generally Merritt, *supra* note 11, at 6–15 (discussing the varied treatment of emotional damages in fraud cases).

¹¹⁶ See, e.g., *Ma v. Cmty. Bank*, 686 F.2d 459, 469 (7th Cir. 1982) (applying Wisconsin law and holding that recovery for emotional damages in a fraud case requires four IIED-like elements); *Bates v. Allied Mut. Ins. Co.*, 467 N.W.2d 255, 260 (Iowa 1991) (relying on the RESTATEMENT (SECOND) OF TORTS § 549 (AM. L. INST. 1977) to support the proposition that even though the plaintiff may have experienced emotional distress, fraud is a purely “economic tort” and thus the plaintiff can only recover pecuniary damages).

¹¹⁷ See *infra* notes 118–204 and accompanying text. These categories are not necessarily exclusive, as some states will blend standards or have different standards in different appeals courts. Compare *Connell Chevrolet Co. v. Leak*, 967 S.W.2d 888, 891 (Tex. App. 3d Dist. 1998) (stating that damages were limited to pecuniary loss and did not include emotional damages in a car transaction case), with *Dillard’s Dep’t Stores, Inc. v. Strom*, 869 S.W.2d 654, 659–60 (Tex. App. 1994) (allowing damages for mental anguish in a fraud case between employee and employer). Additionally, states that disallow recovery for parasitic emotional distress damages in fraud cases will allow the fraud to serve as an underlying part of an independent cause of action such as IIED or NIED. Compare *Neurosurgery & Spine Surgery, S.C. v. Goldman*, 790 N.E.2d 925, 932 (Ill. App. Ct. 2003) (“[F]raudulent misrepresentation is purely an economic tort under which one may recover only monetary damages.”), with *McGrath v. Fahey*, 533 N.E.2d 806, 811 (Ill. 1988) (holding that defendant’s extreme and outrageous behavior in pursuit of the fraud scheme successfully established plaintiff’s IIED claim).

¹¹⁸ *Pecuniary Damages*, *supra* note 11; see *Murray v. Farmers Ins. Co.*, No. 2 CA-CV 2014-0123, 2016 Ariz. Ct. App. Unpub. LEXIS 1581, at *17–18 (2016) (disallowing emotional distress recovery when plaintiff experienced “purely economic” damages rather than damage to a personal interest); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 444–45 (Del. 1996) (en banc) (barring emotional distress damages in a contract case in absence of physical injury or IIED); *Ellis v. Crockett*, 451 P.2d 814, 820 (Haw. 1969) (“There may be no recovery for mental anguish and humiliation not intentionally inflicted.”); *Goldman*, 790 N.E.2d at 932 (limiting recovery to pecuniary damages in Illinois); *Bates*, 467 N.W.2d at 260 (noting, under Iowa law, that even though the plaintiff may have experienced emotional distress, fraud is a purely economic tort and thus the plaintiff can only recover pecuniary damages); *Sanders, Inc. v. Chesmotel Lodge, Inc.*, 300 S.W.2d 239, 241 (Ky. 1957) (finding that the proper recovery amount in fraud is pecuniary damages); *Oliver v. Hilliard*, No. 2010-CA-001479, 2013 WL 762593, at *3 (Ky. Ct. App. Mar. 1, 2013) (holding that a fraud action cannot support emotional distress damages); *Jourdain v. Dineen*, 527 A.2d 1304, 1307 (Me. 1987) (denying recovery for emotional distress in a fraud case); *Danca v. Taunton Sav. Bank*, 429 N.E.2d 1129, 1134

ond) of Torts section 549, which asserts that the measure of damages for fraudulent misrepresentation is the difference between the amount given by the victim and the amount received in return, plus any loss suffered due to dependence on the misrepresentation.¹¹⁹ Courts typically measure pecuniary damages based on out-of-pocket losses or benefit-of-the-bargain losses.¹²⁰ Out-of-pocket losses may be non-reimbursed medical expenses, including any medical expenses that stem from emotional harm from the fraud.¹²¹ In general, however, the plaintiff must present reimbursable treatment for mental anguish manifest by the time of trial, and may not just assert a suffering cost.¹²² Benefit-of-the-bargain losses compensate victims by subtracting the actual value of the

(Mass. 1982) (allowing pecuniary damages equal to out-of-pocket losses for plaintiff); *Zaniboni v. Seminatore*, No. 02-00652-A, 2005 Mass. Super. LEXIS 634, at *14–19 (Dec. 15, 2005) (permitting pecuniary damages only in separate fraud and negligent misrepresentation actions); *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 128–29 (Minn. Ct. App. 1992) (holding that the appropriate measure of fraud damages is either out-of-pocket losses or restoration of economic losses); *Tolliver v. Visiting Nurse Ass’n of the Midlands*, 771 N.W.2d 908, 915–16 (Neb. 2009) (“One who makes a fraudulent or negligent misrepresentation in a business transaction is normally liable only for the recipient’s pecuniary losses.”); *Crowley v. Glob. Realty*, 474 A.2d 1056, 1058 (N.H. 1984) (concluding that emotional distress damages are not recoverable in a negligent misrepresentation claim); *Williams v. Stewart*, 112 P.3d 281, 290–91 (N.M. Ct. App. 2005) (allowing only pecuniary damages in fraud cases); *Juman v. Louise Wise Servs.*, 663 N.Y.S.2d 483, 489 (App. Div. 1997) (“The damages recoverable for fraud do not include emotional distress.”); *Staley v. Taylor*, 994 P.2d 1220, 1225–26 (Or. Ct. App. 2000) (holding that the plaintiff’s claim did not fit within the state’s permitted categories for emotional distress recovery in absence of physical injury); *Sparrow v. Toyota of Florence, Inc.*, 396 S.E.2d 645, 648 (S.C. Ct. App. 1990) (“Mental suffering, emotional shock, inconvenience, or embarrassment are not elements of damage in a fraud case.”); *Poirier v. Blue Seal at Taft Corner, Inc.*, No. 332-3-13 Cncv, 2015 Vt. Super. LEXIS 23, at *4–5 (2015) (limiting fraud losses to pecuniary damages based on the “traditional rule”); *McKenney v. Pac. First Fed. Sav. Bank of Tacoma*, 887 P.2d 927, 935 (Wyo. 1994) (denying emotional distress damages in a contract fraud case). Nevada’s approach is somewhat less clear, because its highest court rejected a plaintiff’s argument for special damages and “limit[ed] any emotional distress damages to his recovery under his intentional infliction of emotional distress claim.” *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717, 739 n.16 (Nev. 2017), *rev’d on other grounds*, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019). Conversely, Nevada allowed emotional damages in another case that “sound[ed] in fraud” when the plaintiff manifested physical symptoms. *Betsinger v. D.R. Horton, Inc.*, 232 P.3d 433, 435–36 (Nev. 2010). The Tennessee Supreme Court let a lower court’s denial of emotional distress damages in a fraud case stand because the appellant did not challenge that denial on appeal. *Hodge v. Craig*, 382 S.W.3d 325, 336 (Tenn. 2012). *But see Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006) (assuming that emotional distress damages are available in an intentional misrepresentation case associated with plaintiff’s home).

¹¹⁹ See RESTATEMENT (SECOND) OF TORTS § 549; *Bates*, 467 N.W.2d at 260 (referencing RESTATEMENT (SECOND) OF TORTS § 549); *Jourdain*, 527 A.2d at 1307 (“This view, that pecuniary loss is the proper measure of damages in a fraud action, is consistent with that taken by the Restatement.”).

¹²⁰ *Ellis*, 451 P.2d at 820.

¹²¹ *Id.* at 820; *Connell Chevrolet Co.*, 967 S.W.2d at 891 (noting that “compensatory damages for pecuniary loss include[es] loss of bargained for value, consideration paid, out of pocket expenses and damage to one’s credit”).

¹²² See *Ellis*, 451 P.2d at 820 (holding that awarding pecuniary damages, such as lost wages and medical expenses, requires a specific loss assessment). Thus, for an accurate calculation, the medical expenses must be incurred by the time of trial to claim expenses. *See id.*

property at the time of the fraudulently induced sale from the tortfeasor's represented value at that time.¹²³

This purely economic characterization of fraud loss limits victim recovery in these courts.¹²⁴ For example, in 1991, in *Bates v. Allied Mutual Insurance Co.*, the plaintiff claimed that the defendant insurance company made fraudulent statements to induce a settlement after a car accident.¹²⁵ In reviewing the claim, the Iowa Supreme Court held that a plaintiff may recover only benefit-of-the-bargain losses and consequential damages, to put the plaintiff in the economic position they would have been in if the fraudulent statement was accurate.¹²⁶ In this case, the court could not award benefit-of-the-bargain damages because the defendant rescinded the original settlement amount, leaving only a claim for out-of-pocket costs.¹²⁷ The court then added that fraud is a purely economic tort and thus damages for emotional distress are not available.¹²⁸

Similarly, in 2000, in *Staley v. Taylor*, the Oregon Court of Appeals evaluated what damages were available in a fraud case.¹²⁹ In *Staley*, the plaintiff made a fraud claim against the defendant neighbor in a real estate dispute.¹³⁰ The court stated that only out-of-pocket damages were available in the fraud action to put the plaintiff back into the position that they would have been in had the fraudulent activity not occurred.¹³¹ The court stated that, in the absence of a physical injury, emotional distress damages were only available in certain circumstances involving intentional acts, privacy intrusions, or nuisance ac-

¹²³ *Id.*

¹²⁴ *Bates*, 467 N.W.2d at 260 (holding that fraud is an economic tort and plaintiffs can only claim pecuniary damages); *Jourdain*, 527 A.2d at 1307 (noting there was no reason to "depart from the well-established view" that fraud only results from economic losses).

¹²⁵ 467 N.W.2d at 257. The plaintiff, George Bates, sued over injuries incurred in an automobile accident with an Allied customer. *Id.* at 256. In the original suit, both the plaintiff and the defendant claimed they had a green light while approaching the intersection where the accident occurred. *Id.* During the trial, however, a key defense witness recanted earlier testimony and stated that the defendant entered the intersection with the red light, a fact the defendant confirmed upon confrontation by defense counsel. *Id.* at 257.

¹²⁶ *Id.* at 260. Consequential damages are the indirect losses suffered by the plaintiff, such as loss of goodwill and other types of intangible or somewhat speculative losses. *Consequential Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹²⁷ *Bates*, 467 N.W.2d at 260.

¹²⁸ *Id.*

¹²⁹ 994 P.2d 1220, 1225 (Or. Ct. App. 2000).

¹³⁰ *Id.* at 1221. The defendants in the case asked the plaintiffs for help in getting a variance approved from the city to build their house on a somewhat small neighboring lot. *Id.* at 1222. In exchange, the defendants promised the plaintiffs that they would not block the plaintiff's ocean view. *Id.* When the defendants completed construction, however, their new home partially obscured the plaintiff's ocean views. *Id.* The plaintiff sued for breach of contract and fraud. *Id.* at 1221.

¹³¹ *Id.* at 1225.

tions.¹³² The court found none of these exceptions applicable and refused to allow emotional distress damages.¹³³ The court made no further policy discussion but acknowledged that it did not address whether emotional distress had occurred as a result of the alleged fraud.¹³⁴

At least one state currently denying recovery for emotional distress has signaled its willingness to move away from this approach.¹³⁵ In 2005, in *Williams v. Stewart*, the New Mexico Court of Appeals contemplated the availability of a fraud action by class action plaintiffs against a defendant laboratory.¹³⁶ The majority, citing the *Restatement (Second) of Torts*, denied recovery of emotional distress damages because the state limited fraud action damages to pecuniary loss.¹³⁷ This opinion drew a strong dissent calling for recognition of emotional distress damages.¹³⁸ The dissent reasoned that although such recovery should have limits, it was inconsistent with general tort theory to deny emotional distress damages in every fraud and the more appropriate position is to align with other jurisdictions that permit recovery.¹³⁹ This rationale mirrors the one assumed over the last thirty years in other jurisdictions that have overturned precedent to recognize the availability of emotional distress damages in tort.¹⁴⁰

2. Recovery Through a Separate Cause of Action

Jurisdictions that do not allow recovery for emotional distress in fraud cases may still allow recovery through separate IIED or NIED claims.¹⁴¹ Even

¹³² *Id.* The listing of intentional torts did not include fraud but did include trespass, racial discrimination, and theft. *Id.* The court noted the plaintiff made the case for emotional damages under the nuisance category rather than the intentional tort category. *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1226. The court, although declining to determine whether a plaintiff could recover emotional distress damages under a fraud theory, denied the damages in this case because the claimed emotional distress arose from a fraud claim, not a nuisance claim. *Id.* at 1225–26.

¹³⁵ *Williams v. Stewart*, 112 P.3d 281, 291–92 (N.M. Ct. App. 2005) (Vigil, J., dissenting) (questioning the court's denial of emotional distress damages for fraud victims).

¹³⁶ *Id.* at 283–84 (majority opinion). The plaintiffs sued Los Alamos National Laboratory and Los Alamos Medical Center after the hospital provided body parts and tissue from deceased individuals to the laboratory without the informed consent of their families. *Id.*

¹³⁷ *Id.* at 290 (citing RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977)).

¹³⁸ *Id.* at 292 (Vigil, J., dissenting).

¹³⁹ *Id.* at 292–93. The dissent cited Professor Merritt's scholarship containing acceptable balancing approaches for recognizing emotional distress in fraud. *Id.* at 292 (citing Merritt, *supra* note 11).

¹⁴⁰ *See, e.g.,* *Nelson v. Progressive Corp.*, 976 P.2d 859, 867–68 (Alaska 1999) (recognizing emotional distress damages are available in fraud); *Kilduff v. Adams, Inc.*, 593 A.2d 478, 484 (Co nn. 1991) (overruling prior precedent to allow recovery of emotional distress damages); *Stellar v. Saunon Mut. Ins. Co.*, No. 2011-C-4714, 2012 Pa. Dist. & Cnty. Dec. LEXIS 702, at *16–18 (C.P. Ct. Lehigh Cnty. 2012) (recognizing emotional distress damages in a fraud case in Pennsylvania for the first time).

¹⁴¹ *See Ma v. Cmty. Bank*, 686 F.2d 459, 469 (7th Cir. 1982) (interpreting Wisconsin law to require the elements of IIED for plaintiff to prove the claim warranted emotional distress damages); *Goldsborough v. 397 Props., L.L.C.*, No. 98C-09-001, 2000 Del. Super. LEXIS 440, at *8–9 (2000)

without requiring an independent action, in 1982 the U.S. Court of Appeals for the Seventh Circuit, in *Ma v. Community Bank*, interpreted Wisconsin law to require plaintiffs seeking emotional damages in fraud cases to fulfill the requirements for IIED.¹⁴² The incident began with the theft of the plaintiff's deposit certificates by an unknown third party.¹⁴³ The plaintiff filed suit against the defendant bank after the bank refused to replace the stolen deposit certificates.¹⁴⁴ The plaintiff alleged emotional distress arising from his embarrassment and humiliation during the ordeal.¹⁴⁵ The court held that the plaintiff's suffering did not meet the IIED-like standards, and thus he could not recover for emotional distress.¹⁴⁶

One prominent IIED case in Illinois successfully arose out of a fraud suit.¹⁴⁷ In 1988, in *McGrath v. Fahey*, the plaintiff brought an IIED claim based on the defendants' efforts to deprive the plaintiff of financial instruments and property and their related harassment.¹⁴⁸ The Illinois Supreme Court held that the defendants' behavior was extreme and outrageous, and thus the plain-

(denying an IIED claim because plaintiffs did not allege distress beyond "what is inherent in fraud"); *McGrath v. Fahey*, 533 N.E.2d 806, 809 (Ill. 1988) (fraud underlying IIED cause of action); *Tempo, Inc. v. Rapid Elec. Sales & Serv., Inc.*, 347 N.W.2d 728, 734 (Mich. Ct. App. 1984) (stating that exemplary damages were not available in a fraud case unless there was proof of tortious conduct separate from the fraud). South Dakota appears to allow emotional distress damages as parasitic damages in fraud if the emotional distress would be severe enough to support an independent tort of IIED or NIED. *See Stabler v. First State Bank of Roscoe*, 2015 SD 44, ¶ 24, 865 N.W.2d 466, 479 (SD. 2015) (disallowing plaintiff's claim for emotional distress in a fraud case because they did not provide proof to support an IIED or NIED claim); *see also Dziadek v. Charter Oak Fire Ins. Co.*, 867 F.3d 1003, 1010 (8th Cir. 2017) (interpreting *Stabler* to hold that a "special showing" that supports an IIED or NIED claim is necessary to award emotional distress damages in fraud cases).

¹⁴² 686 F.2d at 469. IIED recovery under Wisconsin law required that: (1) "the defendant acted for the purpose of causing the plaintiff emotional distress"; (2) "the defendant's conduct was extreme and outrageous"; (3) that behavior was the "cause-in-fact of the injury"; and (4) "the plaintiff suffered an extreme disabling emotional response" as a result. *Id.*

¹⁴³ *Id.* at 461. The theft occurred in 1971 and the plaintiff filed the action in 1973, after the bank failed to pay the plaintiff the amount owed on the deposit certificates. *Id.* at 462–63.

¹⁴⁴ *Id.* at 463. The plaintiff alleged that bank officials told him at the time he purchased the deposit certificates that in the event of loss or theft the plaintiff could call the bank and they would issue him new certificates. *Id.* at 462. After the theft, the plaintiff called the defendant bank, but the bank refused to issue new certificates until the plaintiff purchased a Bond of Indemnity. *Id.* at 461. The plaintiff refused this requirement because of the earlier assurances made by bank officials. *Id.* at 461–62.

¹⁴⁵ *Id.* at 463.

¹⁴⁶ *Id.* at 469.

¹⁴⁷ *See McGrath v. Fahey*, 533 N.E.2d 806, 811 (Ill. 1988).

¹⁴⁸ *Id.* at 807–09. The defendants pressured the plaintiff to sign additional mortgages on property that would financially benefit the defendants by threatening the plaintiff and the plaintiff's medical practice. *Id.* at 812. This behavior continued even though the defendants knew that the plaintiff had a heart condition and continued still after the plaintiff had a heart attack. *Id.*

tiff could recover under an IIED theory after being targeted by fraud.¹⁴⁹ The court discussed the power dynamic between the two parties as a contributing factor to the outrageousness of the conduct, noting that successful Illinois IIED suits frequently involve a defendant holding authoritative power over the plaintiff.¹⁵⁰ The court approved of an IIED claim that had initially arisen out of fraud because the underlying behavior had no legal justification, and the authoritative defendants preyed on a vulnerable individual.¹⁵¹

3. Recovery for Emotional Distress through Punitive Damages

At least six jurisdictions allow emotional distress damages as part of punitive damages to dissuade future tortfeasors from engaging in fraud.¹⁵² These courts look for malicious, wanton, or reckless behavior by the defendant.¹⁵³ For example, in 1980, in *Food Fair v. Anderson*, the Florida Fifth District Court of Appeals reviewed a plaintiff employee's claims for IIED and fraud against the defendant employer.¹⁵⁴ After denying the IIED claim on the basis that the defendant's conduct did not meet the outrageousness standard, the court went on to consider whether the fraud case warranted damages.¹⁵⁵ The court stated that although pecuniary losses and specific damages would typically be available, future lost wages were too speculative for the court to calcu-

¹⁴⁹ *Id.* at 812. The court evaluated whether the defendants' behavior went beyond "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* at 809 (quoting RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1977)).

¹⁵⁰ *Id.* at 810; see, e.g., *Eckenrode v. Life of Am. Ins. Co.*, 470 F.2d 1, 4–5 (7th Cir. 1972) (concluding that defendant insurance company's bad-faith refusal to pay a claim was outrageous); *Milton v. Ill. Bell Tel. Co.*, 427 N.E.2d 829, 832–33 (Ill. App. Ct. 1981) (abuse of power by work supervisor).

¹⁵¹ *McGrath*, 533 N.E.2d at 812.

¹⁵² See *Moore Ford Co. v. Smith*, 604 S.W.2d 943, 948 (Ark. 1980) (awarding punitive damages in an automobile odometer fraud case to deter such actions in the future); *Food Fair, Inc. v. Anderson*, 382 So. 2d 150, 154–55 (Fla. Dist. Ct. App. 1980) (noting that although emotional distress damages are not generally available without physical injury, this case falls under an exception where malice of conduct justifies punitive damages); *Umphrey v. Sprinkel*, 682 P.2d 1247, 1257 (Idaho 1983) ("It is well established in this state that punitive damages may be awarded when the defendant has committed fraud."); *W-V Enters. v. Fed. Sav. & Loan Ins. Corp.*, 673 P.2d 1112, 1123–24 (Kan. 1983) (denying recovery for emotional distress but permitting recovery of punitive damages in same case); *Olson v. Fraase*, 421 N.W.2d 820, 828 (N.D. 1988) (holding that "exemplary damages" are available as punitive damages in cases where plaintiffs prove a fraud action); *Jeffers v. Nysse*, 297 N.W.2d 495, 498–99 (Wis. 1980) (holding that wanton and reckless conduct by the defendant in a fraud case supported the award of punitive damages).

¹⁵³ See *Moore Ford*, 604 S.W.2d at 948; *Food Fair*, 382 So. 2d at 154–55; *Jeffers*, 297 N.W.2d at 498–99.

¹⁵⁴ See 382 So. 2d at 151. The plaintiff employee claimed that her employer required her to take a polygraph test and forced her to confess to thefts from the defendant's store. *Id.* at 151–52. The plaintiff confessed after the defendant promised that she would be able to keep her job if she admitted to the thefts. *Id.* Nevertheless, the defendant fired the plaintiff based on her confession. *Id.* at 152.

¹⁵⁵ *Id.* at 153.

late specific damages, as it was unclear how long the defendant would continue to employ the plaintiff.¹⁵⁶ The court then considered whether the plaintiff employee's injury included the experience of emotional distress, and whether punitive damages were available in the absence of specific damages.¹⁵⁷ Although the court found that the defendant's actions did not rise to the level of outrage necessary to satisfy the requirements of IIED, the defendant's malicious fraud supported awarding punitive damages.¹⁵⁸

Similarly, the Kansas Supreme Court confronted the choice of emotional distress damages or punitive damages in the 1983 decision *W-V Enterprises v. Federal Savings & Loan Insurance Corp.*¹⁵⁹ The plaintiff business sued the defendant savings and loan over statements the defendant made that induced the plaintiff into investing in an (ultimately failed) project.¹⁶⁰ The trial court awarded emotional distress damages totaling \$200,000 and punitive damages totaling \$250,000.¹⁶¹ On appeal, the Kansas Supreme Court denied emotional distress damages because the plaintiff could not link their alleged distress to any specific acts by the defendant.¹⁶² Despite this, the court held that punitive damages remained available because the plaintiff established the independent tort of fraud.¹⁶³ Thus, the court upheld the full \$250,000 punitive damages award based on the defendant's fraudulent conduct.¹⁶⁴

4. Recovery for Emotional Distress in Fraud Cases

The remaining courts recognize emotional distress via parasitic damages (available from the host fraud cause of action), although states differ on what

¹⁵⁶ *Id.* at 153–54. The court explained that the plaintiffs did not submit any evidence showing the likelihood that the defendant would retain the employee for a certain period and thus could not recover those wage damages. *Id.*

¹⁵⁷ *Id.* at 154.

¹⁵⁸ *Id.* at 154–55. Typically, the court did not recognize pain and suffering damages in the absence of a physical injury. *Id.* An exception was available in the presence of malice, however, and the court pointed to the defendant's elicitation of a confession and subsequent firing of the employee based on that confession as malicious. *Id.*

¹⁵⁹ See 673 P.2d 1112, 1123–24 (Kan. 1983).

¹⁶⁰ *Id.* at 1115. The underlying project was the design and construction of apartments. *Id.* The defendant made certain promises regarding financing of the project that never materialized, leading to the plaintiff's financial insolvency. *Id.* at 1117–18. The defendants argued that it made contingent rather than firm offers and hence no liability existed. *Id.* at 1118–19.

¹⁶¹ *Id.* at 1123–24.

¹⁶² *Id.* at 1123. The court further held that “[t]o find otherwise would permit recovery for every individual who suffered emotional problems after a substantial financial loss.” *Id.* at 1123–24.

¹⁶³ *Id.* at 1124. The court stated that in a breach of contract case an independent tort was necessary for the award of punitive damages. *Id.* Thus, because the plaintiff proved fraud, punitive damages were appropriate. *Id.*

¹⁶⁴ *Id.*

types of behavior or injuries qualify for recovery in fraud cases.¹⁶⁵ In some jurisdictions, the standard for awarding parasitic damages in fraud cases for emotional distress mirrors the state's requirements for IIED and/or NIED claims.¹⁶⁶ State criteria fall into the following categories: damages for "severe" emotional distress;¹⁶⁷ damages when the defendant acted with intentional malfeasance or bad faith;¹⁶⁸ damages when the defendant could foresee the plaintiff's emotional distress;¹⁶⁹ damages for emotional distress available by statute;¹⁷⁰ and emotional distress damages if the plaintiff can show a "physical manifestation."¹⁷¹

First, some jurisdictions, including Alabama, Alaska, Montana, and Utah, recognize emotional distress damages in fraud cases when emotional distress is "severe."¹⁷² In 1985, in *Roberts v. United States Home Corp.*, the Texas Fourth

¹⁶⁵ See, e.g., *Nelson v. Progressive Corp.*, 976 P.2d 859, 868 (Alaska 1999) (permitting recovery for emotional distress for severe damages); *Jahn v. Brickey*, 214 Cal. Rptr. 119, 124 (Ct. App. 1985) (holding that emotional damages are available, even if the defendant's conduct was merely negligent, if their conduct contains "elements of intentional malfeasance or bad faith"); *Kilduff v. Adams, Inc.*, 593 A.2d 478, 484–85 (Conn. 1991) (allowing recovery of emotional distress damages in fraud cases, even when the defendant caused the distress unintentionally, if the resulting distress was foreseeable); *Pampattiar v. Hinson*, 756 S.E.2d 246, 252 (Ga. Ct. App. 2014) (allowing emotional distress damages if the plaintiff's entire injury was to their "peace, happiness, or feelings"); *Ditchar v. Stepanek*, 538 So. 2d 309, 314 (La. Ct. App. 1989) (noting the statutory availability of emotional distress damages in tort actions); *Hoffman v. Stamper*, 867 A.2d 276, 296–98 (Md. 2005) (holding that emotional distress damages are available in fraud cases with "physical" injury, and that Maryland law includes depression, loss of appetite, and upset stomachs in the category of physical injuries). West Virginia awards emotional distress damages in fraud cases, although the standard for such an award is unclear. See *Miller v. Miller*, 613 S.E.2d 87, 91 (W. Va. 2005) (deciding division of marital property in a divorce case and stating "that damages recoverable in fraud actions may include pain and suffering, punitive damages, and annoyance and inconvenience").

¹⁶⁶ See, e.g., *Nelson*, 976 P.2d at 868 (requiring severe damage to plaintiff's mental state before awarding compensation for emotional distress, in line with the state's IIED requirements); *Kilduff*, 593 A.2d at 484–85 (citing standards from an unintentional infliction of emotional distress case and applying those to emotional damages in a fraud cases); *Vance v. Vance*, 408 A.2d 728, 734 (Md. 1979) (applying a NIED standard requiring a physical manifestation of emotional injury to a fraud case).

¹⁶⁷ See *infra* notes 172–180 and accompanying text.

¹⁶⁸ See *infra* notes 181–187 and accompanying text.

¹⁶⁹ See *infra* notes 188–192 and accompanying text.

¹⁷⁰ See *infra* notes 193–196 and accompanying text.

¹⁷¹ See *infra* notes 197–204 and accompanying text.

¹⁷² See *Cochran v. Ward*, 935 So. 2d 1169, 1176–77 (Ala. 2006) (upholding emotional distress damages based on evidence of condition severity of condition); *Nelson v. Progressive Corp.*, 976 P.2d 859, 868 (Alaska 1999) (disallowing emotional distress damages because, although the plaintiff was upset and aggravated by the defendant insurance company, the level of distress was not severe); *Gumsey v. Conklin Co.*, 751 P.2d 151, 157 (Mont. 1988) (requiring the plaintiff to show "significant impact" when claiming emotional injury in fraud); *Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 136 (Tex. App. 1985) (stating the requirement for emotional damages implies a relatively high degree of mental pain and distress); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, ¶¶ 102–06, 65 P.3d 1134, 1164–65 (allowing emotional distress damages in fraud cases where plaintiff experienced severe distress as a proximate result of the fraud), *rev'd on other grounds*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

Court of Appeals confronted what level of mental anguish a plaintiff must demonstrate to qualify for severe emotional distress damages.¹⁷³ The *Roberts* plaintiff alleged fraudulent representation by the defendant owners of his home's subdivision regarding a signed promissory note.¹⁷⁴ The plaintiff alleged that the defendants' actions made him feel embarrassed and ashamed.¹⁷⁵ The court, however, denied emotional distress damages.¹⁷⁶ The court reasoned that recoverable emotional distress required evidence of mental pain and suffering from indignation, grief, public humiliation, or shame.¹⁷⁷ The Alaska Supreme Court adopted a similar standard in 1999 in *Nelson v. Progressive Corp.*, a case arising from a dispute between a plaintiff insured and a defendant insurance company.¹⁷⁸ The court held that feelings of aggravation or anger were insufficient to support emotional distress damages.¹⁷⁹ Although the court observed that the facts reflected some emotional distress, the plaintiff did not experience severe distress and, therefore, could not recover.¹⁸⁰

Second, an alternative standard allows emotional damages when the defendant acted with intentional malfeasance or bad faith, separate from punitive damage calculations.¹⁸¹ The Mississippi Court of Appeals addressed the ele-

¹⁷³ 694 S.W.2d at 136.

¹⁷⁴ *Id.* at 131. The plaintiff signed a promissory note as part of closing on his home in the subdivision. *Id.* The plaintiff claimed that the defendant's salesperson assured him that he would not have to pay on that note. *Id.* Nevertheless, the defendant later filed suit against the plaintiff to recover on the note. *Id.*

¹⁷⁵ *Id.* at 136. The plaintiff attributed these feelings to the defendants' violation of an earlier promise that he need not repay the promissory note, which defendants then sued to recover. *Id.* at 133.

¹⁷⁶ *Id.* at 136. The court stated emotional distress damages cannot come from "mere disappointment, anger, restraint or embarrassment." *Id.*

¹⁷⁷ *Id.* In the case cited in *Roberts*, the Texas Civil Appeals Court upheld emotional distress damages where the plaintiffs experienced loss of sleep, humiliation, and stomach aches. *Trevino v. Sw. Bell Tel. Co.*, 582 S.W.2d 582, 584 (Tex. Civ. App. 1979).

¹⁷⁸ See 976 P.2d 859, 862 (Alaska 1999). The plaintiff carried an auto insurance policy with uninsured motorist coverage from the insurer defendant. *Id.* After an auto accident with an uninsured drunk driver, the plaintiff filed an insurance claim for his physical injuries and property damages. *Id.* The defendant offered to settle for amounts ranging from \$10,000 to \$18,000, amounts the plaintiff rejected. *Id.* The plaintiff prevailed in arbitration and then filed suit based on the defendant's alleged bad faith actions in refusing to settle. *Id.* at 863.

¹⁷⁹ *Id.* at 868.

¹⁸⁰ *Id.* The court does not define severity in the opinion, however, it does state that the plaintiff's anger, anguish, and stated emotional distress in letters to the defendant did not meet the standard. *Id.* The *Nelson* court cites *Roberts* as support for recognizing severe emotional distress. *Id.* (citing *Roberts*, 694 S.W.2d at 136). In *Roberts*, severity required that "a plaintiff must show more than mere worry, anxiety, vexation, embarrassment, or anger." 694 S.W.2d at 136.

¹⁸¹ See *Emmons v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 532 F. Supp. 480, 485 (S.D. Ohio 1982) (applying Ohio law and holding that nonpecuniary damages for mental anguish were available for wanton or malicious fraudulent acts); *Jahn v. Brickey*, 214 Cal. Rptr. 119, 124 (Ct. App. 1985) (allowing emotional distress damages, even if the defendant's conduct was negligent, if that conduct contained elements of intentional wrongdoing or bad faith); *Mullen v. Cogdell*, 643 N.E.2d 390, 401-02 (Ind. Ct. App. 1994) (permitting emotional damages in intentional frauds); *T.G. Blackwell Chevrolet Co. v. Eshee*, 261 So. 2d 481, 485 (Miss. 1972) (noting that emotional distress damag-

ment of intent or bad faith in fraud in 2005 in *Sumler v. East Ford, Inc.*¹⁸² The plaintiff claimed emotional distress arising from an alleged fraudulent repossession by the defendant car dealership.¹⁸³ The court noted that the standard in Mississippi for emotional distress recovery is intentional, wanton, or reckless conduct by the defendant.¹⁸⁴ The plaintiff must prove such intentional or malicious conduct.¹⁸⁵ The court held that the plaintiff's testimony did not meet that burden and upheld a directed verdict in favor of the defendant.¹⁸⁶ California embraces a similar standard, requiring elements of intent or bad faith before awarding emotional distress damages in fraud cases, even if the larger case centers on negligent conduct.¹⁸⁷

Third, Connecticut and Virginia allow emotional distress damages if the defendant could reasonably foresee that their fraud would cause the plaintiff's emotional distress.¹⁸⁸ In 1991, in *Kilduff v. Adams, Inc.*, the Connecticut Su-

es are available in fraud cases when the defendant committed the fraud intentionally, wantonly, or recklessly); *Sumler v. E. Ford, Inc.*, 2004-CA-01574-COA (¶26), 915 So. 2d 1081, 1088–89 (Miss. Ct. App. 2005) (requiring plaintiff to show evidence of intentional or willful wrong); *Fetick v. Am. Cyanamid Co.*, 38 S.W.3d 415, 419 (Mo. 2001) (en banc) (disallowing mental suffering damages without a physical injury unless the defendant acted intentionally or maliciously and such distress must be medically diagnosable); *Morris v. MacNab*, 135 A.2d 657, 662 (N.J. 1957) (recognizing emotional distress damages that are the proximate cause of intentional fraudulent conduct); *Coble v. Bowers*, 809 P.2d 69, 73 (Okla. Civ. App. 1990) (discussing willful, actionable torts in fraud as a basis for emotional distress damages). North Carolina required wanton or malicious conduct to uphold emotional distress damages under a "conversion" theory. *Morrow v. Kings Dept Stores, Inc.*, 290 S.E.2d 732, 735–36 (N.C. Ct. App. 1982).

¹⁸² 2004-CA-01574-COA (¶26), 915 So. 2d at 1084.

¹⁸³ *Id.* The plaintiffs purchased a vehicle from the defendant car dealership and arranged financing through the defendant. *Id.* ¶ 10, 1084. The defendant's salesperson falsified the plaintiffs' information to make it appear that the plaintiff had more income to improve their creditworthiness. *Id.* ¶¶ 2–3, 1084–85. Eventually, the defendant discovered the employee's fraud and terminated him, however, after a series of assignments, plaintiffs stopped making payments on the vehicle because it was unclear to them who the payee was. *Id.* ¶¶ 3–9, 1085–86. Eventually, the defendant dealership repossessed the vehicle. *Id.* ¶ 10, 1086. The plaintiffs filed suit over this repossession and argued that the defendant employee's fraud and subsequent assignments of the note interfered with their ability to pay. *Id.* The repossession process caused the plaintiff to feel "stressed out and upset." *Id.* ¶ 30, 1089.

¹⁸⁴ *Id.* ¶ 26, 1089.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at ¶ 31, 1090. The court noted that the plaintiffs' claims, including embarrassment and humiliation, were mostly overlapping notions and did not provide separate support for the emotional distress claim. *Id.*

¹⁸⁷ See *Jahn v. Brickley*, 214 Cal. Rptr. 119, 124 (Ct. App. 1985) (recognizing emotional distress damages under a real estate statute for fraud that was negligent as a matter of law but also included evidence of intent or bad faith).

¹⁸⁸ See *Kilduff v. Adams, Inc.*, 593 A.2d 478, 485 (Conn. 1991) (holding that the defendant's fraud must be a proximate cause of the mental anguish and that the defendant could reasonably foresee that anguish); *Sea-Land Serv., Inc. v. O'Neal*, 297 S.E.2d 647, 653 (Va. 1982) (permitting emotional distress damages because the defendant acted intentionally and this malicious act caused foreseeable emotional harm). Colorado also appears to follow this standard in fraud cases, relying on the knowledge of the defendant in the case to predict emotional harm to the plaintiff. *McNeill v. Allen*, 534 P.2d 813, 818–19 (Colo. App. 1975).

preme Court permitted emotional distress damages in a suit alleging fraudulent misrepresentation that led to the loss of the plaintiff's home.¹⁸⁹ The defendant, relying on Connecticut precedent, claimed that such damages were not available in this fraud case.¹⁹⁰ The court looked to other jurisdictions to determine that emotional distress damages are available if the fraud proximately caused the emotional distress, and the defendant could reasonably foresee that distress.¹⁹¹ Applying this rule to the case facts, the court upheld the trial court's award of emotional damages resulting from the defendant's fraudulent misrepresentation.¹⁹²

Fourth, Georgia and Louisiana allow recovery of emotional distress damages by statute.¹⁹³ In 2014, in *Pampattiwar v. Hinson*, the Georgia Court of Appeals reviewed a fraud claim by a plaintiff attorney against their former client.¹⁹⁴ The plaintiff did not claim any pecuniary losses and claimed damages only for "wounded feelings," as allowed under the Georgia statute.¹⁹⁵ The appellate court upheld the damage award because the entire injury was to the plaintiff's "peace, happiness, or feelings," which the statute was designed to compensate.¹⁹⁶

Finally, several states, including Maryland, Pennsylvania, and Washington, require a physical manifestation of an emotional injury to recover emotional distress damages in fraud.¹⁹⁷ The Maryland Court of Appeals evaluated a

¹⁸⁹ 593 A.2d at 480.

¹⁹⁰ *Id.* at 484.

¹⁹¹ *Id.* The court went on to say this was consistent with rulings in similar contexts, including cases in the employment, unintentional infliction of emotional distress, and insurance contexts. *Id.* The court also concluded that this standard applies even in cases in which the tortfeasor unintentionally caused the emotional distress. *Id.* at 485.

¹⁹² *Id.*

¹⁹³ See GA. CODE ANN. § 51-12-6 (2020) (for civil wrong cases "in which the entire injury is to the peace, happiness, or feelings of the plaintiff" the only damages available are those assigned by a jury); LA. CIV. CODE ANN. art. 2315 (2020) (stating that "[e]very act whatever of man that causes damage to another" requires a defendant to compensate the plaintiff); *Pampattiwar v. Hinson*, 756 S.E.2d 246, 252 (Ga. Ct. App. 2014) (allowing recovery for emotional distress when the entire suffered injury was the plaintiff's "peace, happiness, or feelings" under Georgia statute § 51-12-6); *Ditcharo v. Stepanek*, 538 So. 2d 309, 314 (La. Ct. App. 1989) (finding mental anguish damages were available under tort claims under the Louisiana Civil Code article 2315).

¹⁹⁴ 756 S.E.2d at 249–50. The plaintiff attorney sued their former client defendant because the defendant had made misrepresentations to the attorney about prior proceedings in his divorce case and had been extremely confrontational about paying his legal bills. *Id.* at 249. After the plaintiff terminated her representation of the defendant, the former client wrote extremely negative online reviews about the attorney and accused her of being a crook and inflating legal bills. *Id.* The plaintiff sued based on the defendant's representations and online posting. *Id.* at 250.

¹⁹⁵ GA. CODE ANN. § 51-12-6; *Pampattiwar*, 756 S.E.2d at 250.

¹⁹⁶ GA. CODE ANN. § 51-12-6; *Pampattiwar*, 756 S.E.2d at 252.

¹⁹⁷ See *Hoffman v. Stamper*, 867 A.2d 276, 298 (Md. 2005) (recognizing emotional distress damages where the distress results in a "physical" injury such as depression, withdrawal from social interaction, and chest pains); *Stellar v. Saucon Mut. Ins. Co.*, No. 2011-C-4714, 2012 Pa. Dist. & Cnty. Dec. LEXIS 702, at *20–21 (C.P. Ct. Lehigh Cty. 2012) (requiring both foreseeability of emotional

claim for emotional distress by plaintiff real estate purchasers against defendant sellers in *Hoffman v. Stamper* in 2005.¹⁹⁸ The court stated that plaintiffs could recover emotional distress damages in a fraud case when there is an associated physical injury.¹⁹⁹ *Hoffman* did not present a physical injury in the traditional sense; instead, the court explained that Maryland law recognized any injuries that the court could objectively identify.²⁰⁰ Recoverable injuries included an inability to work, headaches, depression, nausea, and insomnia.²⁰¹ Applying the objective injury rule, the court overturned findings of emotional distress damages for all but one of the plaintiffs.²⁰² The plaintiff deemed deserving of such damages testified that he would experience headaches and vomiting when he thought about the underlying fraud matter.²⁰³ These symptoms were “objectively ascertainable” evidence of emotional distress that the court felt comfortable relying on to permit emotional damages in the absence of the classic immediate physical impact prerequisite.²⁰⁴

B. Emotional Damages in American Tort Law and the Impact of Trauma

Examining tort law broadly, American courts have long recognized emotional distress damages but initially allowed parasitic damages only when associated with physical injury.²⁰⁵ Over time, judges invoked breakthroughs in

injury and physical manifestation of emotional injury); *McRae v. Bolstad*, 646 P.2d 771, 775 (Wash. Ct. App. 1982) (“Mental suffering, to be compensable, must be manifested by objective symptoms though actual physical impact need not be shown.”); *see also Betsinger v. D.R. Horton, Inc.*, 232 P.3d 433, 435–36 (Nev. 2010) (holding in a deceptive trade practices case “that sound[ed] in fraud” that emotional distress damages required physical manifestation). Rhode Island’s standard is unclear, although in at least one case the Superior Court upheld emotional distress damages in fraud that manifested as suicidality and eventual loss of victim’s life. *See Sanzi v. Shetty*, No. PC 2000-4523, 2002 R.I. Super. LEXIS 79, at *37–39 (2002) (permitting fraud claim where emotional distress accompanied physical harm in addition to economic damages).

¹⁹⁸ 867 A.2d at 279. The plaintiffs claimed the defendants purchased the property and then found buyers with poor education and credit to buy the homes at prices way over their actual value. *Id.* at 281. The defendants promised to fix up the homes and helped arrange financing for the plaintiffs to pay the homes’ high price. *Id.* The defendants failed to make these repairs and many of the plaintiffs either lost their homes in foreclosure or could not occupy their homes because of their poor conditions. *Id.* All of the plaintiffs claimed emotional distress, but only one plaintiff made claims of associated physical symptoms. *Id.* at 295.

¹⁹⁹ *Id.* at 298.

²⁰⁰ *Id.* at 296.

²⁰¹ *Id.*

²⁰² *Id.* at 298.

²⁰³ *Id.* at 295.

²⁰⁴ *See id.* at 295, 298.

²⁰⁵ *See* RESTATEMENT (SECOND) OF TORTS § 456 (AM. L. INST. 1977); *Vance v. Vance*, 408 A.2d 728, 731 (Md. 1979) (noting that damages for emotional distress had a “parasitic status” and plaintiffs could recover only when there was an immediate physical injury); *Spade v. Lynn & Bos. Ry. Co.*, 47 N.E. 88, 89 (Mass. 1897) (disallowing recovery for fright or alarm in the absence of a physical injury), *abrogated by Dziokonski v. Babineau*, 380 N.E.2d 1295 (Mass. 1978); *Canning v. Williamstown*, 55 Mass. (1 Cush.) 451, 452 (1848) (allowing recovery of emotional damages due to

psychiatric diagnosis and screening to eschew the physical impact rule for modern standards. These courts applied a broader concept of injury to include emotional distress claims and began to recognize other tort theories—namely IIED and NIED—to compensate for emotional harm independently.²⁰⁶ The new prevailing rule permits emotional distress damages if any physical injury manifested as a result of the tort, but this reform has still been met with criticism.²⁰⁷

Proponents of the physical manifestation rule warn that removing this requirement will result in a tidal wave of potentially baseless emotional distress claims.²⁰⁸ For example, in 1993, the Supreme Judicial Court of Massachusetts in *Sullivan v. Boston Gas Co.* confronted the issue of emotional distress damages arising from a gas explosion that destroyed the plaintiffs' home.²⁰⁹ The defendants sought dismissal of the emotional distress claim because the plaintiffs did not sufficiently plead physical symptoms of their emotional distress.²¹⁰ The unanimous court disagreed, stating that although the state does require evidence of physical symptoms, the plaintiffs provided enough evidence to take the question of emotional distress to the jury.²¹¹

associated physical injury); *Renner v. Canfield*, 30 N.W. 435, 436 (Minn. 1886) (stating that awarding emotional damages requires a physical injury). The standard, though, began to stretch to embrace more attenuated definitions of "physical impact." *See, e.g., Morton v. Stack*, 170 N.E. 869, 869 (Ohio 1930) (allowing recovery of emotional damages because smoke inhalation satisfied immediate physical contact). Courts began to reject the physical impact rule completely when there were physical manifestations of the emotional trauma. *Towns v. Anderson*, 579 P.2d 1163, 1164–65 (Colo. 1978); *Dziokonski*, 380 N.E.2d at 1299 (abandoning the physical impact rule when the emotional distress was foreseeable at the time of the tort).

²⁰⁶ *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 47, 48 (AM. L. INST. 2012) (recognizing a separately cognizable claim when the defendant's negligent actions result in serious emotional harm); RESTATEMENT (SECOND) OF TORTS § 46 (listing requirements for recovery based on extreme and outrageous conduct); *Towns*, 579 P.2d at 1164 (discussing the abandonment of the physical impact rule paralleling the advancement of psychiatric diagnosis).

²⁰⁷ *See* RESTATEMENT (SECOND) OF TORTS § 456 (stating that a defendant's negligent action that results in a physical injury arising from emotional disturbance creates liability for that defendant); *Vance*, 408 A.2d at 732 (discussing the "modern rule" permitting recovery when there is a physical injury arising from negligence). The term "physical injury" is not limited to external injuries, and may include depression, headaches, loss of appetite, and insomnia. *See Espinosa v. Beverly Hosp.*, 249 P.2d 843, 844 (Cal. Dist. Ct. App. 1952) (mental disturbances as physical injury); *Hoffman*, 867 A.2d at 297 (physical manifestations of emotional harm include depression, loss of appetite, nightmares, and insomnia); *Toms v. McConnell*, 207 N.W.2d 140, 145 (Mich. Ct. App. 1973) (depression and withdrawal from socialization). The *Restatement (Third) of Torts* has abandoned a physical manifestation requirement and now states that emotional harm is compensable independent of the physical injury. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 47, 48.

²⁰⁸ *See Hoffman*, 867 A.2d at 298 (requiring physical manifestation because it is "objectively ascertainable"); *Johnson v. State*, 334 N.E.2d 590, 592 (N.Y. 1975) (noting that emotional harm is "easily counterfeited").

²⁰⁹ 605 N.E.2d 805, 805–06 (Mass. 1993). The plaintiffs sued the defendant natural gas company for their negligence in the explosion along with their emotional distress claim. *Id.*

²¹⁰ *Id.* at 806.

²¹¹ *Id.* at 810–11. One plaintiff provided evidence of distress manifesting as diarrhea for a year after the explosion, which the trial judge and Supreme Judicial Court agreed was physical evidence of

Conversely, other jurisdictions believe that judges and juries are competent to review distress claims even in the absence of a physical manifestation.²¹² The California Supreme Court abandoned the physical manifestation requirement in *Molien v. Kaiser Foundation Hospitals* in 1980.²¹³ The plaintiff in *Molien* sued the defendant hospital system after an incorrect diagnosis given to his wife led to the break-up of their marriage.²¹⁴ Previously, recovery under California law required physical injury either at the time of the incident or resulting from the emotional distress.²¹⁵ State case law also included decisions recognizing emotional distress damages in separate claims as long as the plaintiff demonstrated “substantial invasions of clearly protected interests.”²¹⁶ The court held that no physical injury was necessary for emotional damages; instead, the standard should rely on the evidence supporting the emotional distress and leave it to the jury to assess the severity of that distress.²¹⁷

This modern debate among state courts intertwines with the development of the understanding of emotional distress caused by traumatic experiences.²¹⁸ During the twentieth century, psychiatry developed from a somewhat unstructured art into a more rigorous diagnostic system, bolstering recognition for

emotional distress. *Id.* at 806, 810. The Supreme Judicial Court also held the second plaintiff, whose claim the trial court judge dismissed, demonstrated physical manifestations to provided evidence of emotional distress. *Id.* at 810. The second plaintiff submitted medical records attesting to tension headaches in addition to depositions claiming “that he had suffered from sleeplessness, gastrointestinal distress, upset stomach, nightmares, depression, feelings of despair, difficulty in driving and working, and an overall ‘lousy’ feeling allegedly resulting from the explosion.” *Id.* at 806.

²¹² See, e.g., *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 821 (Cal. 1980) (relying on the trier of fact’s experience, rather than a physical injury or manifestation test, to determine the presence of an emotional injury); *Rodriguez v. State*, 472 P.2d 509, 519–20 (Haw. 1970) (holding that courts can evaluate independent claims for emotional distress without attendant physical injury and that such a system will not result in an avalanche of fake suits), *superseded by statute*, 1986 Haw. Sess. Laws 12–13, *as recognized in* *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (dropping the physical manifestation requirement but instead requiring that the emotional injury be “‘serious’ or ‘severe’” and that the plaintiff must provide medical or scientific proof of the injury).

²¹³ See 616 P.2d at 821.

²¹⁴ *Id.* at 814–15. The defendant hospital’s physician misdiagnosed the plaintiff’s wife with syphilis. *Id.* at 814. Due to this misdiagnosis, concerns of infidelity arose in the marriage leading to their divorce. *Id.* at 814–15. The plaintiff sued for NIED and loss of consortium. *Id.* at 814.

²¹⁵ *Id.* at 819. The court noted prior decisions wanted evidence of physical injury or manifestation to assure “the validity of the claim.” *Id.*

²¹⁶ *Id.* (quoting *Crisci v. Sec. Ins. Co.*, 426 P.2d 173, 179 (Cal. 1967)). Earlier in the opinion the California court quoted the New York Court of Appeals’ pronouncement that “[f]reedom from mental disturbance is now a protected interest in this State.” *Id.* at 818 (quoting *Ferrara v. Galluchio*, 152 N.E.2d 249, 252 (N.Y. 1958)).

²¹⁷ *Id.* at 821. The court noted that the main issue is proof of distress rather than an “artificial and often arbitrary classification scheme.” *Id.*

²¹⁸ See *Bass v. Nooney Co.*, 646 S.W.2d 765, 769 (Mo. 1983) (crediting the development of psychiatric testing as assisting courts in measuring the existence and extent of emotional harm).

emotional distress in the legal realm and insurance industry.²¹⁹ Further, advanced psychiatric diagnostics discovered physical changes in the brains of individuals who experienced severe trauma.²²⁰ These lasting consequences impact behavior and quality of life for trauma victims.²²¹

In the unique fraud context, however, researchers have yet to study the full spectrum of non-economic victim consequences, so the details of such emotional distress come from other sources.²²² Media and trial accounts attest to fraud victims suffering from many of the same symptoms as other trauma victims, such as depression, loss of appetite, nightmares, insomnia, and other negative personal ramifications.²²³ Victims experiencing these feelings, in addition to feeling shame at being defrauded in the first place, may seek to hide their victimization from others.²²⁴ The Department of Justice estimates that only fifteen percent of victims report fraud, leaving many to deal with the issue alone.²²⁵

Claims of emotional distress associated with fraud cases tend to arise in deeply personal transactions, such as real estate, personal automobile, insurance, and employment deals.²²⁶ Affinity fraud, where the fraudster targets members of a specific group, also tends to engender emotional distress for victims.²²⁷ The Baptist Foundation of Arizona fraud of the late 1990s was one of

²¹⁹ VAN DER KOLK, *supra* note 19, at 139 (noting that insurance companies require an emotional distress diagnosis prior to patient reimbursement); *see, e.g., Bass*, 646 S.W.2d at 769 (“[T]he development of psychiatric tests and refinement of diagnostic techniques have enabled science to establish with reasonable medical certainty the existence and severity of psychic harm.”). The *Diagnostic and Statistical Manual of Mental Disorders* was the first major attempt to categorize and create diagnostic criteria for mental issues recognized by the American Psychiatric Association. VAN DER KOLK, *supra* note 19, at 139; *DSM History*, *supra* note 19.

²²⁰ VAN DER KOLK, *supra* note 19, at 82–85.

²²¹ *Id.*

²²² *See Search PubMed*, NAT’L CTR. FOR BIOTECHNOLOGY INFO., <https://www.ncbi.nlm.nih.gov/pubmed> [<https://perma.cc/2LT7-UJSC>] (various combinations of Fraud or Fraudulent or Financial or “White Collar” and Victim or Trauma or Traumatic or Emotion or Distress yielded few relevant results).

²²³ *See, e.g., Nelson v. Progressive Corp.*, 976 P.2d 859, 868 (Alaska 1999) (anger and stress disrupting life); *Hoffman v. Stamper*, 867 A.2d 276, 296 (Md. 2005) (depression, headaches, insomnia); *Cartwright*, *supra* note 1 (insomnia and distress).

²²⁴ *Financial Fraud Crime Victims*, *supra* note 30.

²²⁵ *Id.* The rationales for underreporting fraud also include belief that nothing will be done about it or that officials will not take the report seriously. *Id.*

²²⁶ *See, e.g., Nelson*, 976 P.2d at 862 (insurance recovery); *Food Fair, Inc. v. Anderson*, 382 So. 2d 150, 151 (Fla. Dist. Ct. App. 1980) (employer/employee fraud case); *Sumler v. E. Ford, Inc.*, 2004-CA-01574-COA (¶ 10), 915 So. 2d 1081, 1086 (Miss. Ct. App. 2005) (automobile repossession); *Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 129 (Tex. App. 1985) (real estate fraud); *Cartwright*, *supra* note 1 (retirement funds); Bob Sullivan, *The FBI’s Secret Weapon Against Lottery and Romance Scammers*, CNBC (Oct. 8, 2017), <https://www.cnn.com/2017/10/06/the-fbis-secret-weapon-against-lottery-and-romance-scammers.html> [<https://perma.cc/E99T-BUD9>] (romance scams).

²²⁷ *See Ganzini et al.*, *supra* note 21, at 56 (describing how the targeting of a specific affinity group by a Ponzi scheme engenders emotional distress because the fraudster tends to be a member of

the largest affinity fraud cases, in both total economic loss and number of victims, in American history.²²⁸ The foundation was a legitimate retirement savings vehicle, but when losses began to mount from failed investments, its leadership concealed the losses and defrauded investors.²²⁹ Many of these defrauded investors invested in the foundation upon invitation from their spiritual and social anchor—their church.²³⁰ The fraud’s revelation caused panic, insomnia, and lifelong financial stress for victims who lost their retirement savings.²³¹

Limited psychiatric research has captured the magnitude and prevalence of these devastating mental health consequences.²³² In a 1990 evaluation of senior citizens exploited by a similar Ponzi scheme, 29% of the victims had a major depressive episode within twenty months of the fraud, and 45% developed or exacerbated a generalized anxiety disorder.²³³ Depressive episodes persisted in these victims, supporting a conclusion that the initial financial losses led to turmoil elsewhere in victims’ lives, such as the loss of a home or an inability to pay debts, perpetuating further mental health ramifications.²³⁴

A preliminary 2017 study found that fraud victims who received no or little post-fraud financial compensation were more likely to self-report poor physical health than those who received greater financial remuneration.²³⁵ In a 2019 follow-up, those same researchers learned from survey respondents that victims of moderate to severe financial fraud had higher rates of mental health issues and poorer overall health than non-victims.²³⁶ These results evince the significant non-economic repercussions of fraud and support calls for the law to unanimously recognize emotional distress damages.²³⁷

the affinity group and thus betrays a greater trust than an outsider would ordinarily hold); *Affinity Fraud*, *supra* note 7 (defining affinity fraud as “investment scams that prey upon members of identifiable groups, such as religious or ethnic communities, the elderly, or professional groups”). These victims put their trust in a group or individual who then deceives them out of their money. *See* Ganzini et al., *supra* note 21, at 56.

²²⁸ Cartwright, *supra* note 1; Graff, *supra* note 5.

²²⁹ Cartwright, *supra* note 1.

²³⁰ *Id.* One investor thought it was the safest investment “[b]ecause we thought we were dealing with Christians and a real Christian doesn’t steal your money.” *Id.*

²³¹ Cartwright, *supra* note 1; Graff, *supra* note 5.

²³² *See* Ganzini et al., *supra* note 21, at 56. A Ponzi scheme, also called a pyramid scheme, seeks to enroll new sets of investors who must then recruit additional new investors to meet financial commitments to earlier investors, but generally these later investing individuals receive no return on their funds. *Ponzi Scheme*, BLACK’S LAW DICTIONARY (11th ed. 2019).

²³³ Ganzini et al., *supra* note 21, at 59.

²³⁴ *Id.* at 59–60.

²³⁵ Zunzunegui et al., *supra* note 21, at 317–18.

²³⁶ Sarriá et al., *supra* note 6, at 10. The researchers emphasized that their review of related literature in addition to their novel survey findings evidenced that fraud-induced stress connects to “depression, anxiety, and other mental illness.” *Id.* at 11.

²³⁷ *See infra* note 238 and accompanying text.

III. MAKING VICTIMS WHOLE: COURTS SHOULD EVALUATE EMOTIONAL DISTRESS IN FRAUD CASES BASED ON A SEVERITY STANDARD

Pecuniary damages do not make all plaintiffs whole, and thus all jurisdictions should allow emotional distress damages in fraud cases.²³⁸ Psychiatric diagnostic advancements have shifted courts from a strict physical impact rule to today's various standards.²³⁹ Significant developments in trauma treatment should spur American courts beyond formalistic physical manifestation and independent diagnosis requirements to more flexible standards for jury evaluation.²⁴⁰ Section A of this Part addresses the jurisdictions that still deny emotional distress damages based on a formalistic adherence to outdated treatises.²⁴¹ Section B argues that jurisdictions updating their approach to allow jury evaluation of emotional distress damages should adopt a flexible severity standard.²⁴² Finally, Section C discusses why alternative standards fail to recognize emotional distress damages in fraud appropriately.²⁴³

A. All Jurisdictions Should Recognize Emotional Distress Damages in Fraud

Emotional distress in fraud cases is prevalent in psychiatric research, media accounts, and case law, and thus barring recovery is incongruous with tort law principles of victim restitution.²⁴⁴ Despite a reluctance to recognize them in fraud cases, jurisdictions that bar fraud emotional distress damages do allow them in other tort contexts.²⁴⁵ For example, the New York Court of Appeals recognized emotional distress damages independent of other injuries in a medical malpractice case in *Ferrara v. Galluchio* in 1958.²⁴⁶ Yet, when a plaintiff

²³⁸ See Merritt, *supra* note 11, at 3 (calling for recognition of emotional distress damages in fraud cases).

²³⁹ *Towns v. Anderson*, 579 P.2d 1163, 1164 (Colo. 1978) (dropping the physical impact requirement based on advances in psychiatry and psychology); *Bass v. Nooney Co.*, 646 S.W.2d 765, 769 (Mo. 1983) (same). These new state standards for emotional distress damages focus on physical manifestation of symptoms, foreseeability, expert corroboration, and severity. See *supra* notes 71–105 and accompanying text.

²⁴⁰ See *infra* notes 259–280 and accompanying text.

²⁴¹ See *infra* notes 244–258 and accompanying text.

²⁴² See *infra* notes 259–266 and accompanying text.

²⁴³ See *infra* notes 267–280 and accompanying text.

²⁴⁴ See, e.g., *Kilduff v. Adams, Inc.*, 593 A.2d 478, 485 (Conn. 1991) (emotional distress at loss of home); *Hoffman v. Stamper*, 867 A.2d 276, 295 (Md. 2005) (depression, loss of appetite, and upset stomachs in fraud case); *Ganzini et al.*, *supra* note 21, at 59 (demonstrating emotional distress in affinity fraud victims); *Cartwright*, *supra* note 1 (sleeplessness and distress at loss of retirement savings).

²⁴⁵ Compare *Juman v. Louise Wise Servs.*, 663 N.Y.S.2d 483, 489 (App. Div. 1997) (denying recovery of emotional distress damages in a fraud case), with *Ferrara v. Galluchio*, 152 N.E.2d 249, 252 (N.Y. 1958) (holding that “[f]reedom from mental disturbance is now a protected interest in this State” in a malpractice action).

²⁴⁶ 152 N.E.2d at 252.

brought a fraud case against a hospital, claiming emotional distress on similar facts, the state denied those damages because the plaintiff could only recover pecuniary losses.²⁴⁷ Likewise, Iowa courts recognize emotional distress damages in NIED cases when there is supporting medical testimony and a subsequent physical manifestation of that distress.²⁴⁸ As such, the state recognizes emotional distress upon sufficient medical diagnostic evidence.²⁴⁹ In fraud cases, however, Iowa courts still adhere to a formalistic reliance on treatises and precedent to prevent recovery for emotional distress.²⁵⁰

Jurisdictions that still deny emotional distress damages draw support from treatises, notably the *Restatement (Second) of Torts*.²⁵¹ Reliance on the *Restatement*, however, is questionable as its text and illustrations provide exceptions that allow emotional distress damages in fraud.²⁵² There is, at the very least, a live debate about the propriety of denying emotional distress damages in fraud cases based on the *Restatement (Second) of Torts*.²⁵³

²⁴⁷ *Rivera v. Wyckoff Heights Hosp.*, 584 N.Y.S.2d 648, 650 (App. Div. 1992); *see also Juman*, 663 N.Y.S.2d at 489 (“The damages recoverable for fraud do not include emotional distress.”).

²⁴⁸ *Roling v. Daily*, 596 N.W.2d 72, 75–76 (Iowa 1999).

²⁴⁹ *See id.* at 76 (relying on medical testimony to establish the existence and magnitude of emotional distress).

²⁵⁰ *See Bates v. Allied Mut. Ins. Co.*, 467 N.W.2d 255, 260 (Iowa 1991) (denying emotional distress in a fraud case based on the *Restatement (Second) of Torts* and *Cornell v. Wunschel*, 408 N.W.2d 369, 382 (Iowa 1987)); *see also Cornell*, 408 N.W.2d at 382 (disallowing emotional distress damages in fraud cases based on the *Dobbs on Remedies* treatise).

²⁵¹ *See, e.g., Ellis v. Crockett*, 451 P.2d 814, 820 (Haw. 1969) (relying on *Restatement (Second) of Torts* § 549 to deny emotional distress damages in a fraud case); *Stich v. Oakdale Dental Ctr., P.C.*, 501 N.Y.S.2d 529, 531 (App. Div. 1986) (denying recovery of emotional distress in a fraud case based on *Restatement (Second) of Torts* § 549); *Bates*, 467 N.W.2d at 260 (relying on *Restatement (Second) of Torts*); *Cornell*, 408 N.W.2d at 382 (relying on the *Dobbs on Remedies* treatise).

²⁵² *See* RESTATEMENT (SECOND) OF TORTS § 310 (AM. L. INST. 1977) (“An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation”); *id.* § 557A (“One who by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person . . . is subject to liability”); *Stellar v. Saucon Mut. Ins. Co.*, No. 2011-C-4714, 2012 Pa. Dist. & Cnty. Dec. LEXIS 702, at *18 (C.P. Ct. Lehigh Cty. 2012) (noting that *Restatement (Second) of Torts* § 310 and § 557A allow recovery of emotional distress in fraud when it causes physical harm).

²⁵³ *See, e.g., Tolliver v. Visiting Nurse Ass’n of the Midlands*, 771 N.W.2d 908, 917 (Neb. 2009) (denying emotional distress claims for plaintiff estate when defendant’s fraud led to physical and emotional suffering during decedent’s hospice care). In contrast to *Stellar*, the Supreme Court of Nebraska read *Restatement (Second) of Torts* § 557A as excluding nonpecuniary losses. *Compare Tolliver*, 771 N.W.2d at 915 (holding that § 557A contains “scant support” for emotional distress damages), with *Stellar*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 702, at *18 (citing to *Restatement (Second) of Torts* § 557A to support the proposition that “where the misrepresentation itself results in physical harm . . . recovery for all resulting for all resulting injuries is appropriate”). As such, there is disagreement about the reading of § 557A, but the *Stellar* court’s holding recognizes that just because a “cause of action sounded in deceit” does not mean courts should bar “the natural and proximate harm” of the claim, including emotional distress. 2012 Pa. Dist. & Cnty. Dec. LEXIS 702, at *18.

Applying IIED or NIED theories to emotional distress, instead of allowing straightforward parasitic damages, sets the bar too high for meaningful recovery.²⁵⁴ In IIED claims, the behavior must be extreme and outrageous to qualify for recovery.²⁵⁵ IIED should be invoked as a separate tort to capture claims that would otherwise fall outside available causes of action, not as a means to access damages in a fraud cause of action.²⁵⁶ Similarly, NIED claims cannot appropriately substitute for parasitic damages because that tort's purpose is to provide an independent remedy.²⁵⁷ Fraud alone presents a potentially complete inquiry, and thus courts, for reasons of judicial efficiency, should widen the scope of fraud actions to include emotional distress damages instead of requiring a plaintiff to prove the separate elements of NIED.²⁵⁸

B. Severity Should Determine Emotional Distress Damages

In contrast to other methods, the severity standard is sufficiently flexible to evaluate emotional distress damages in fraud cases.²⁵⁹ This standard is inclusive of the varied ways in which people experience trauma by allowing plaintiffs to demonstrate the severity of their harm through medical or scientific expert reports, physical manifestations of emotional distress, or evidence of the fraud's malicious nature.²⁶⁰ In doing so, this standard preserves the best

²⁵⁴ See, e.g., *McGrath v. Fahey*, 533 N.E.2d 806, 809 (Ill. 1988) (discussing Illinois' high standards before a claim can be extreme and outrageous). This high bar is set with purpose as judges want to avoid turning trivial incidents or "mere bad manners" from becoming causes of action. Merritt, *supra* note 11, at 20. Conversely, parasitic damages are available when the plaintiff demonstrates the burden for the "host" cause of action. *Sacco v. High Country Indep. Press*, 896 P.2d 411, 418 (Mont. 1995).

²⁵⁵ See *McGrath*, 533 N.E.2d at 809–12 (considering power dynamics, defendant's knowledge of the victim's susceptibility, and the legitimacy of defendant's purpose to determine what qualifies as extreme and outrageous conduct).

²⁵⁶ See Merritt, *supra* note 11, at 20–21.

²⁵⁷ See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 (AM. L. INST. 2012) (discussing the elements of NIED); *Bowman v. Williams*, 165 A. 182, 184–85 (Md. 1933) (allowing NIED damages when plaintiff is a close relative of victim and in close proximity to injurious act); Merritt, *supra* note 11, at 23 ("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.").

²⁵⁸ See Merritt, *supra* note 11, at 23 (arguing the policy rationales underlying NIED and IIED, such as preventing claims for "petty antisocial conduct," do not apply to fraud victims for mental anguish).

²⁵⁹ See, e.g., *Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 136 (Tex. App. 1985) (going beyond mere embarrassment but recognizing indignation, shame and public humiliation).

²⁶⁰ See *Cochran v. Ward*, 935 So. 2d 1169, 1176–77 (Ala. 2006) (recognizing an anxiety condition resulting from fraud that required medication); *Nelson v. Progressive Corp.*, 976 P.2d 859, 868 (Alaska 1999) (requiring more evidence to support a threshold showing of severity before allowing a jury to determine emotional distress damages); *Gurnsey v. Conklin Co.*, 751 P.2d 151, 157 (Mont. 1988) (requiring a finding of severe emotional distress that aggravated a previous physical injury); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (including a medical expert opinion requirement to support a severity standard in a NIED case).

aspects of its alternatives (namely the foreseeability, intent or malice, medical opinion, and physical manifestation tests) without imposing formalistic requirements or focusing too heavily on the defendant's subjective mindset.²⁶¹ Furthermore, the severity standard recognizes that the scientific literature on trauma continues to develop and avoids a rigid standard that may one day become as anachronistic as the physical impact rule.²⁶²

One concern with this standard is that judges will set the threshold so high to avoid summary judgment on these damages as to prevent most juries from hearing this evidence.²⁶³ Nevertheless, this plaintiff-focused standard's flexibility is preferable to alternatives that focus on the defendant's ability to foresee the distress or require overly formalistic documentation.²⁶⁴ Judges should trust jurors to evaluate the evidence for themselves to determine whether the defrauded plaintiff's experience amounts to a severe emotional injury.²⁶⁵ Under this standard, plaintiffs get a fair shot at just compensation, and defendants remain protected against frivolous claims.²⁶⁶

²⁶¹ See, e.g., *Camper*, 915 S.W.2d at 446 (approving a "general negligence approach" in NIED cases and allowing damages where a severe injury is such that a reasonable person could not handle the emotional distress caused by the situation). This standard still provides protection for defendants against "trivial" or fake claims. *Id.*

²⁶² See *Towns v. Anderson*, 579 P.2d 1163, 1164 (Colo. 1978) (holding that psychiatric advancements support overturning the physical impact requirement); *Bass v. Nooney Co.*, 646 S.W.2d 765, 769 (Mo. 1983) (same); see also *VAN DER KOLK*, *supra* note 19, at 329–30 (discussing developments in the neuroscience area of neurofeedback and the questions of the mind remaining to be answered); *Search PubMed*, *supra* note 222 (various combinations of Fraud or Fraudulent or Financial or "White Collar" and Victim or Trauma or Traumatic OR Emotion or Distress produced few results, indicating lack of current medical research on the topic).

²⁶³ See *Dziadek v. Charter Oak Fire Ins. Co.*, 867 F.3d 1003, 1010 (8th Cir. 2017) (interpreting *Stabler v. First State Bank of Roscoe*, 2015 SD 44, ¶ 24, 865 N.W.2d 466, 479 (S.D. 2015) to require plaintiffs to demonstrate elements of IIED or NIED before awarding emotional distress damages in fraud); *Nelson*, 976 P.2d at 868 (preventing the jury from hearing evidence of emotional distress because the case facts did not meet an IIED severity standard, even though the court recognized the plaintiff likely suffered emotionally); see also *Ganzini et al.*, *supra* note 21, at 59 (detailing varying manifestations of trauma experienced by affinity fraud victims).

²⁶⁴ See *infra* notes 267–279 and accompanying text.

²⁶⁵ See *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 821 (Cal. 1980) ("[T]he jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience."); *Camper*, 915 S.W.2d at 446 (adopting a reasonable person standard as the threshold inquiry for emotional distress damages in an NIED case). Based on the prevalence of fraud in America, jury members likely have an idea of reasonable reactions to fraud based on personal or familial experience. See *ASS'N OF CERTIFIED FRAUD EXAM'RS*, *supra* note 6, at 4 (explaining that pervasive losses by businesses provide a number of individuals with experience dealing with fraud in their workplace); *Aitken*, *supra* note 6 (jurors may also deal with fraud through their credit card); *Daly*, *supra* note 6 (hundreds of thousands of people put their lives back together after identity theft).

²⁶⁶ See *Merritt*, *supra* note 11, at 24 (concluding that fraud goes beyond economic harm and that emotional distress damages are necessary to make the plaintiff whole). A severity standard likewise removes the risk that plaintiffs will raise emotional distress damages in all fraud cases with the hope

C. Foreseeability, Intent, or Physical Manifestation Should Not Determine Emotional Distress Damages

Jurisdictions recognizing emotional distress damages in fraud should employ one administrable, just standard: the severity approach.²⁶⁷ This standard provides the best avenue for plaintiff recovery, although still preserving defendant safeguards against frivolous claims.²⁶⁸ This Section will demonstrate the nonviability of alternative methods.²⁶⁹

First, the physical manifestation rule suffers from the same pitfalls as the physical impact rule.²⁷⁰ Jurisdictions rejected the physical impact rule because courts stretched the meaning of “physical” to fit absurd circumstances, yet, those same jurisdictions now stretch the definition of physical manifestation to fit cases into the new rule.²⁷¹ Further, this rule requires plaintiffs to manifest physical symptoms within a short period after the fraud, even though the trauma may not manifest outward symptoms for some time after an incident.²⁷² Maintaining such a rule to prevent frivolous claims only promotes the same fiction of the physical impact rule that most courts now reject.²⁷³

Second, the foreseeability requirement and the intentional and malicious conduct requirement both fail to recognize that emotional distress is always a reasonably foreseeable consequence of fraud, regardless of the defendant’s intent or malice.²⁷⁴ By negligently or intentionally making a misrepresentation

of getting increased damages regardless of their actual emotional experience. *See id.* at 27–28 (severity standard reduces claims to only severe injuries).

²⁶⁷ *See, e.g., Nelson*, 976 P.2d at 868 (evaluating emotional distress in fraud through a severity standard); *Gurnsey v. Conklin Co.*, 751 P.2d 151, 157 (Mont. 1988) (requiring “significant impact upon the person of the plaintiff”); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, ¶¶ 102–06, 65 P.3d 1134, 1164–65 (requiring severe injury foreseeable by defendant), *rev’d on other grounds*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

²⁶⁸ *See Nelson*, 976 P.2d at 868 (mere aggravation and frustration do not meet the severity standard).

²⁶⁹ *See infra* notes 270–279 and accompanying text.

²⁷⁰ *See Bass v. Nooney Co.*, 646 S.W.2d 765, 771 (Mo. 1983) (rejecting replacing the physical impact rule with the physical manifestation rule because “the requirement of physical injury resulting from the emotional distress merely meant the replacement of one arbitrary, artificial rule with another which was only somewhat less restrictive”).

²⁷¹ *See Hoffman v. Stamper*, 867 A.2d 276, 295–96 (Md. 2005) (in a physical manifestation jurisdiction, noting that the physical impact rule stretched the definition of physical to avoid arbitrary results but then discussing the “elastic” definition of “physical” under the physical manifestation rule).

²⁷² *See VAN DER KOLK*, *supra* note 19, at 7–11 (discussing how the mind may initially repress traumatic memories but triggers may cause issues to manifest months or years later).

²⁷³ *See Bass*, 646 S.W.2d at 772 (observing that, over time, many courts rejected the physical injury requirement for emotional distress damages).

²⁷⁴ *See Kilduff v. Adams, Inc.*, 593 A.2d 478, 485 (Conn. 1991) (awarding emotional distress damages in a fraud case because the defendant could foresee the distress); *Fetick v. Am. Cyanamid Co.*, 38 S.W.3d 415, 419 (Mo. 2001) (requiring the defendant to act with intent or malice before awarding emotional distress damages in fraud cases). A defendant with the ability to defraud the plaintiff likely held a place of financial trust or power over the plaintiff, and their tortious misstate-

sufficient to sustain a fraud claim under the *Restatement*, the defendant must compensate for all damages that flow from that tort.²⁷⁵ The plaintiff's emotional distress, particularly in the realm of personal frauds that tends to generate such damages, is a foreseeable consequence of the defendant's actions.²⁷⁶ As such, a foreseeability-centric standard leaves defendants open to potentially unsubstantiated emotional distress claims and thus disrupts the balance of interests between the parties.²⁷⁷

Finally, a medical or scientific expert opinion requirement attaches an unnecessarily formalistic requirement to recovery.²⁷⁸ Although a medical report may strengthen a plaintiff's case for emotional distress, requiring one adds to plaintiff costs and may unnecessarily waste the court's time.²⁷⁹ As such, it is in the best interest of plaintiffs, defendants, and courts to follow a flexible severity standard to evaluate emotional distress claims in fraud.²⁸⁰

ments can foreseeably distress plaintiffs. See *Emmons v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 532 F. Supp. 480, 481 (S.D. Ohio 1982) (defendant stockbroker); *Jahn v. Brickey*, 214 Cal. Rptr. 119, 120 (Ct. App. 1985) (defendant real estate agent); *T. G. Blackwell Chevrolet Co. v. Eshee*, 261 So. 2d 481, 482 (Miss. 1972) (defendant auto dealer); *Fetick*, 38 S.W.3d at 417 (defendant drug manufacturer and plaintiff prescribing physician). Plaintiffs, regardless of the intent of the defendant, may still experience emotional distress as a result of the fraud. See *Kilduff*, 593 A.2d at 485 (recovery in fraud for unintentional emotional distress); *Vance v. Vance*, 408 A.2d 728, 733–34 (Md. 1979) (sustaining emotional distress damages in negligent misrepresentation case where plaintiff demonstrated shock, spontaneous crying, and emotional detachment).

²⁷⁵ See *Kilduff*, 593 A.2d at 484 (allowing “emotional [distress] damages that are the natural and proximate result” of the tort).

²⁷⁶ See *supra* note 274 and accompanying text; see also *Camper v. Minor*, 915 S.W.2d 437, 443 (Tenn. 1996) (the foreseeability standard lacks “concrete guidelines” for courts and juries). Academic research advocating for the foreseeability standard in fraud cases acknowledges that the “plaintiff’s distress is easily foreseen.” Merritt, *supra* note 11, at 26.

²⁷⁷ See Merritt, *supra* note 11, at 27–28 (arguing for a foreseeability standard, but recognizing a requirement for serious distress might be necessary to “winnow out false claims and discourage plaintiffs from seeking recovery for trivial injuries”). This important distinction aligns with the Tennessee Supreme Court’s approach to NIED claims and supports application of the severity standard, focusing on the plaintiff’s injury, rather than the foreseeability standard focusing on the defendant. See *Camper*, 915 S.W.2d at 446.

²⁷⁸ See *Thornton v. Garcini*, 928 N.E.2d 804, 809 (Ill. 2010) (holding that, although expert testimony may aid the jury, it is not necessary to sustain an NIED claim); *Camper*, 915 S.W.2d at 446 (overhauling Tennessee NIED requirements to a “general negligence” standard but still requiring expert scientific or medical evidence to corroborate the claim).

²⁷⁹ See *Thornton*, 928 N.E.2d at 809–10 (reasoning that plaintiff’s case did not require support of medical testimony because the jury could find emotional distress based on personal experience alone). In fact, the case cited in *Camper* to support requiring medical or scientific evidence merely states that courts should allow plaintiffs to submit such evidence to prove emotional distress; it does not state that it is a requirement. See *Leong v. Takasaki*, 520 P.2d 758, 767 (Haw. 1974); *Camper*, 915 S.W.2d at 446.

²⁸⁰ See *supra* notes 259–266 and accompanying text.

CONCLUSION

Fraud creates emotional distress in its victims that the law should compensate as a real injury. The ever-developing psychiatric understanding of trauma now reflects fraud's true impact, both immediate and latent, on victims' physical and mental well-being. Fraud victims still need further study, but court filings and media accounts already reflect clear parallels to the distress experienced by victims of physical trauma. The jurisdictions that still deny emotional distress recovery in fraud cases rely on formalistic adherence to treatises and precedents that do not conform to a modern understanding of trauma. Recognizing emotional distress damages in fraud cases is not a significant change. Most jurisdictions already recognize emotional distress damages in other tort contexts and could merely extend them to fraud cases. Upon extension of emotional distress damages, proper award assessment should rely on evidence of the severity of the distress. Physical manifestations, independent medical and scientific data, and evidence of malice by the defendant can all reliably inform jurors as to the level of severity. An alternative dependence on the physical manifestation of the emotional injury harkens back to the abandoned physical impact rule and invokes administrative convenience to the detriment of aggrieved plaintiffs. In the end, courts should trust jurors to evaluate the severity of emotional distress based on this evidence and their own experiences. In doing so, jurors in all jurisdictions could finally make fraud victims genuinely whole.

JONATHAN G. LESTER